The Complete Lawyer's Quick Answer Book

Volume I



Minnesota Continuing Legal Education
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Criminal Law and DUI

Chapter 1

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1. What should I do if I have been pulled over and I may have had too much to drink?

Answer

You do not need to tell the officer whether or not you have been drinking, or answer any other questions from the officer. It is important that you do not admit to having been speeding or violating any other traffic law.

You do need to provide the officer with your driver's license and proof of insurance.

If the officer has reason to suspect that you may be intoxicated he will typically ask you to take the standardized roadside sobriety tests, which includes standing on one foot, following a pencil with your eyes, and a nine-step walk and turn.

Depending on what happens on the field sobriety tests, the officer may also ask you to take a pre-arrest breath test. If you take the pre-arrest breath test and the reading is at or above .08, the officer will arrest you for DWI. If the pre-arrest breath test is below .08, the officer will probably let you go (although if it is close to .08 they may arrest you anyway).

If the officer does arrest you, you will be taken to the station and given a breath, blood, or urine test. If the test comes back greater than .08, you will be charged with DWI and your driver's license suspended.

Authorities

- US Const. amend. V.
- Minn. Stat. § 169.792.
- Minn. Stat. §§ 169A.20 subd. 2, 169A.24–169A.27, 169A.40 & 16A.41.

Further Reading

- Minnesota DWI Deskbook, 3rd ed. (Minnesota CLE 2013, updated 2016).

Notes

2. What do you do when a client calls you from jail?

Answer

Tell them not to give a statement to police.

Tell them that their telephone calls and meetings with visitors can be recorded and used against them at trial. However, communications between them and their attorneys may not be used against them.

Authorities

- US Const. amend V. (right against self-incrimination).
- *Lanza v. New York,* 370 U.S. 139 (1962) (government may surreptitiously record meetings in jail visiting room).
- *Jensen v. Klecker,* 648 F.2d 1179 (8th Cir. 1981) (prisoners have a constitutional right against infringement on attorney-client privileged communication).

Comment

Most defense lawyers will limit their conversation to what the charges are and will not discuss the facts of the case over the phone due to the concern that the phone calls are monitored and/or recorded.

Further Reading

- Minnesota DWI Deskbook, 3rd ed. (Minnesota CLE 2013, updated 2016).

Notes

3. When can an officer search someone?

Answer

Ordinarily, a search requires a warrant.

Numerous exceptions to the warrant requirement exist. These include:

- consent;
- exigent circumstances (i.e., someone's life or safety is in immediate danger, police are in hot pursuit of a suspect);
- stop and frisk (must have reasonable articulable suspicion of criminal activity, and that suspect is armed and dangerous);
- automobile exception (must have probable cause to believe vehicle contains evidence of criminal activity); and
- inventory search (i.e., when a car or other item is lawfully impounded).

Authorities

- U.S. Const. amend IV.
- *State v. Powell,* 357 N.W.2d 146 (Minn. Ct. App. 1984) (consent).
- *State v. Lohnes,* 344 N.W.2d 605 (Minn. 1984) (exigent circumstances).
- *United States v. Robinson,* 414 U.S. 218 (1973) (search incident to arrest).
- *Terry v. Ohio,* 392 U.S. 1 (1968) (stop and frisk).
- *State v. Bauman,* 586 N.W.2d 416 (Minn. Ct. App. 1998) (automobile exception).
- *South Dakota v. Opperman,* 428 U.S. 364 (1976) (inventory searches).

Further Reading

- Kirwin on Search and Seizure, 2d ed. (Minnesota CLE 2010).
- Minnesota DWI Deskbook, 3rd ed. (Minnesota CLE 2013, updated 2016).
- *Searches and Seizures,* Minnesota Judges Criminal Benchbook, 7th ed., ch. 1 (Minnesota CLE 2016).

Notes

4. Is there a way that I can clear my record?

Answer

Statutory Expungement

Depending on the offense and the outcome of the case, you may be entitled to an expungement under Minnesota's Expungement Statute. A statutory expungement includes court records as well as records held by other government agencies such as the Bureau of Criminal Apprehension (BCA). You may petition the Court for a statutory expungement if:

1. The proceeding was resolved in your favor. The test for whether or not the proceedings were resolved in your favor is whether or not there was a conviction or you entered a plea of guilty. An example of proceedings resolved in your favor is an outright dismissal, an acquittal by jury, or a continuance for dismissal; or

2. You pleaded guilty, but were placed in a diversion program or given a stay of adjudication, successfully completed the terms of the diversion program or stay of adjudication, and have not been charged with a new crime for at least one year since completion of the diversion program or stay of adjudication; or

3. You were convicted of or received a stayed sentence for a petty misdemeanor or misdemeanor and have not been convicted of a new crime for at least two years since the discharge of the sentence for the crime; or

4. You were convicted of or received a stayed sentence for a gross misdemeanor and have not been convicted of a new crime for at least four years since discharge of the sentence for the crime; or

5. You were convicted of or received a stayed sentence for certain **enumerated** felony violations and have not been convicted of a new crime for at least five years since discharge of the sentence for the crime. Please note that this provision only allows expungement of certain felonies specifically enumerated in the statute.

EXCEPTIONS: Statutory expungement is not allowed for offenses that require predatory offender registration.

Inherent Authority Expungement

If statutory expungement does not apply, you can seek expungement under the court's inherent authority. Such an expungement extends only to court records, and not to records held by executive branch agencies such as the BCA.

Standard for Expungement

In deciding whether or not to grant an expungement under either the statute or its inherent authority, the court balances the benefit to the petitioner against the disadvantage to the public. Where the proceedings were resolved in the defendant's favor or there was a successful diversion program or stay of adjudication, the burden of defeating an expungement petition is on the State. In all other cases, the burden is on the petitioner to establish that an expungement is warranted.

Authorities

- Minn. Stat. § 609A.03.
- *State v. C.P.H.*, 707 N.W.2d 699 (Minn. Ct. App. 2006).
- *State v. S.L.H.*, 755 N.W.2d 271 (Minn. 2008).

Comment

Consider providing the judge with a proposed order which includes language that the judge "recommends" that the BCA expunge their records.

Further Reading

- Minnesota Judges Criminal Benchbook, 7th ed. (Minnesota CLE 2016).

Notes

5. What if client calls you before making a decision on whether to test for DWI?

Answer

Tell them that you cannot answer their question and give them the phone number of a criminal lawyer. DWI laws change frequently and unless you practice in this area you may be giving advice that is already outdated.

One thing you cannot do is tell them *not* to take the test. The constitutionality of Minnesota's statute criminalizing test refusal is currently under review by the United States Supreme Court. *Bernard v. Minnesota*, Court File No. 14-1470, 2015 U.S. LEXIS 7872, *cert. granted* (U.S. Dec. 11, 2015).

Authorities

- Minn. Stat. §§ 169A.20 subd. 2 & 169A.24–169A.27.

Comment

Defense lawyers disagree whether it is better to take the blood or urine test when that choice is offered.

Further Reading

- Minnesota DWI Deskbook, 3rd ed. (Minnesota CLE 2013, updated 2016).

Notes

6. What if a client calls and law enforcement is at the client's office (or house) with search warrant?

Answer

Allow the officers to conduct the search. If the warrant was invalid or if the officers go beyond the scope of the warrant, the fruits of the search can be suppressed later.

Do not give a statement to the officers.

Authorities

- U.S. Const. amend. IV (searches and seizures).
- *Mapp v. Ohio,* 367 U.S. 643, 655 (1961) (exclusion of evidence obtained in an unconstitutional search or seizure).
- U.S. Const. amend. V (right against self-incrimination).

Comment

When the search warrant is executed at a workplace, consider sending the employees home.

Further Reading

- Kirwin on Search and Seizure, 2d ed. (Minnesota CLE 2010).
- *Searches and Seizures,* Minnesota Judges Criminal Benchbook, 7th ed., ch. 1 (Minnesota CLE 2016).

Notes

7. Can law enforcement detain someone without arresting them?

Answer

Yes, but only for a brief period of time necessary to conduct an investigation when there is a reasonable articulable suspicion of criminal activity.

Authorities

- *Terry v. Ohio,* 392 U.S. 1 (1968).

Comment

"The test for determining whether a suspect was in custody is whether a reasonable person in the suspect's situation would have understood that he was in custody." *State v. Heden*, 719 N.W.2d 689, 695 (Minn. 2006). "Custody occurs either upon formal arrest or under any other circumstances where the suspect is deprived of his freedom of action in any significant way." *U.S. v. Griffin*, 922 F.2d 1343, 1347 (8th Cir. 1990). "The formality of an arrest is not a prerequisite to a finding of custodial interrogation." *Id.*

To determine whether an interrogation is custodial, the Eighth Circuit focuses on six non-exhaustive indicia of custody. *Id*. These are: (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong-arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; or (6) whether the suspect was placed under arrest at the termination of the questioning. *Id. at* 1349. Another relevant factor is the location of the interrogation. Interrogation is more likely to be custodial when the interrogation takes place at the scene of a recent alleged crime. *Heden*, 719 N.W.2d at 696.

Further Reading

- Kirwin on Search and Seizure, 2d ed. (Minnesota CLE 2010).
- *Searches and Seizures,* Minnesota Judges Criminal Benchbook, 7th ed., ch. 1 (Minnesota CLE 2016).

Notes

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8. What is a citizen's arrest?

Answer

A private person may arrest another person for a misdemeanor committed in their presence, or for a felony regardless of whether or not it is committed in the arrestor's presence. A good acronym is "FIP, FOP, MIP, but not MOP." (Felony in presence, felony outside of presence, misdeameanor in presence, but not misdemeanor outside of presence.) A shopkeeper can also detain someone whom the shopkeeper reasonably believes is shoplifting.

Before making the arrest, the private person has to disclose to the offender the reason for the arrest and ask the offender to submit to the arrest.

After making the arrest, the arrestor must take the arrested person to a peace officer without unnecessary delay.

Any force used to effectuate the citizen's arrest must be reasonable.

Authorities

- Minn. Stat. §§ 629.30 & 629.37–629.39.
- *Altman v. Knox Lumber Co.*, 381 N.W.2d 858 (Minn. Ct. App. 1986).

Further Reading

- Minnesota Judges Criminal Benchbook, 7th ed. (Minnesota CLE 2016).

Notes

9. How is bail determined?

Answer

Both the United States Constitution and the Minnesota Constitution prohibit "excessive" bail. Excessive bail is any amount that is higher than reasonably necessary to ensure that the defendant will appear in court, stand trial, and submit to a sentence if found guilty.

The Minnesota Constitution also provides that all defendants in non-capital cases are entitled to bail. Because there is no longer any capital cases in Minnesota, that means that every defendant charged in Minnesota state court has a right to post bail (there is no such thing as a "hold without bail" in Minnesota state court).

There are two ways of posting bail: with cash (the defendant's own money) or through a surety (the defendant pays a bail bondsman to post bail for them). The Minnesota Constitution requires the court to give the defendant both options.

The Minnesota Rules of Criminal Procedure require the court to set "money only bail"; in other words, an amount of bail the defendant can post under which the defendant will not have any other conditions of release. The court can also give the defendant the option of posting a lower amount of money and having additional non-monetary conditions of release.

A defendant's right to bail in federal court is much more limited than in state court. A federal court can even hold a defendant without bail under certain circumstances.

Authorities

- US Const. amend. VIII.
- Minn. Const. art. I, § 5.
- *State v. Brooks*, 604 N.W.2d 345 (Minn. 2000).
- Minn. R. Crim. P. 6.02, subd. 1.
- 18 U.S.C. § 3141 *et seq.*

Comment

A caution about cash bail: Cash bail becomes the property of the defendant regardless of who provided it. If the defendant pleads or is found guilty, a judge may order fines and restitution to be taken out of the bail money before it is returned to defendant. Such is not the case when the defendant posts bail through a bail bond company.

Further Reading

- *Bail & Other Conditions of Release*, Minnesota Judges Criminal Benchbook, 7th ed. (Minnesota CLE 2016).

Family Law

Chapter 2

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Exhibit A 2-23

1. How much alimony (a/k/a spousal maintenance) will I have to pay?

Answer

The amount of spousal maintenance that a party has to pay is determined on a number of factors, which make it very difficult for a family law practitioner to determine. Accordingly, the answer is, "It depends."

Pursuant Minnesota Statutes section 518.552, subdivision 1, the family law practitioner first looks at whether there are grounds for maintenance, specifically:

> the court may grant a maintenance order for either spouse if it finds that the spouse seeking maintenance:
>
> > (a) lacks sufficient property, including marital property apportioned to the spouse, to provide for reasonable needs of the spouse considering the standard of living established during the marriage, especially, but not limited to, a period of training or education, or
> >
> > (b) is unable to provide adequate self-support, after considering the standard of living established during the marriage and all relevant circumstances, through appropriate employment, or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

Then, the family law practitioner looks at the amount and duration of spousal maintenance, pursuant to Minnesota Statutes section 518.552, subdivision 2:

> The maintenance order shall be in amounts and durations for periods of time, either temporary or permanent, as the court deems just, without regard to marital misconduct, and after considering all relevant factors including:
>
> > (a) the financial resources of the party seeking maintenance, including marital property, apportioned to the party, and the party's ability to meet needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as a custodian;
> >
> > (b) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment, and the probability, given the party's age and skills, of completing education or training and becoming fully or partially self-supporting;
> >
> > (c) the standard of living establish during the marriage;
> >
> > (d) the duration of the marriage and, in the case of a homemaker, the length of absence from employment and the extent to which any education, skills, or experience have become outmoded and earning capacity has become permanently diminished;
> >
> > (e) the loss of earnings, seniority, retirement benefits, and other employment opportunities forgone by the spouse seeking spousal maintenance;

> (f) the age, and the physical and emotional condition of the spouse seeking maintenance;
>
> (g) the ability of the spouse from whom maintenance is sought to meet needs while meeting those of the spouse seeking maintenance; and
>
> (h) the contribution of each party in the acquisition, preservation, depreciation, or appreciation in the amount or value of the marital property, as well as the contribution of a spouse as a homemaker or in the furtherance of the other party's employment or business.

Finally, the family law practitioner looks at whether spousal maintenance will be temporary or permanent. Pursuant to Minnesota Statutes section 518.552, subdivision 3, "[n]othing in this section shall be construed to favor a temporary award of maintenance over a permanent award, where the factors under subdivision 2 justify a permanent award."

Where there is some uncertainty as to the necessity of a permanent award, the court shall order a permanent award leaving its order open for later modification.

The case law cited below addresses the determination of the amount of spousal maintenance, some of which is the same as that which addresses the duration of the spousal maintenance. This demonstrates the complexity of spousal maintenance and the difficulty of advising a client the amount of spousal maintenance that may be paid.

Authorities

- Minn. Stat. § 518.552, subds. 1, 2 & 3 (maintenance; grounds, amount; duration, and permanency of award).
- *O'Brien v. O'Brien*, 343 N.W.2d 850 (Minn. Ct. App. 1984).
- *Krick v. Krick*, 349 N.W.2d 350 (Minn. Ct. App. 1984).
- *Perlstein v. Perlstein*, 356 N.W.2d 383 (Minn. Ct. App. 1984).
- *Zeimer v. Zeimer*, 386 N.W.2d 348 (Minn. Ct. App. 1987).
- *Musielewicz v. Musielewicz*, 400 N.W.2d 100 (Minn. Ct. App. 1987).
- *Weikle v. Weikle*, 403 N.W.2d 682 (Minn. Ct. App. 1987).
- *Roth v. Roth*, 406 N.W.2d 77 (Minn. Ct. App. 1987).
- *Lynch v. Lynch*, 411 N.W.2d 263 (Minn. Ct. App. 1987).
- *McColloch v. McColloch*, 435 N.W.2d 564 (Minn. Ct. App. 1989).
- *Schreck v. Schreck*, 445 N.W.2d 861 (Minn. Ct. App. 1989).
- *Rask v. Rask*, 445 N.W.2d 849 (Minn. Ct. App. 1989).
- *Aaker v. Aaker*, 447 N.W.2d 607 (Minn. Ct. App. 1989).
- *Maeder v. Maeder*, 480 N.W.2d 677 (Minn. Ct. App. 1992).
- *Bourassa v. Bourassa*, 481 N.W.2d 113 (Minn. Ct. App. 1992).
- *Walker v. Walker*, 553 N.W.2d 90 (Minn. Ct. App. 1996).
- *Gales v. Gales*, 553 N.W.2d 416 (Minn. 1996).
- *Dobrin v. Dobrin*, 569 N.W.2d 199 (Minn. 1997).
- *Crosby v. Crosby*, 587 N.W.2d 292 (Minn. Ct. App. 1998).
- *Chamberlain v. Chamberlain*, 615 N.W.2d 405 (Minn. Ct. App. 2000).
- *Peterka v. Peterka*, 675 N.W.2d 353 (Minn. Ct. App. 2004).

- *Rauenhorst v. Rauenhorst*, 724 N.W.2d 541 (Minn. Ct. App. 2006).
- *Melius v. Melius*, 765 N.W.2d 411 (Minn. Ct. App. 2009).

Comment

I have been asked this question in an initial consultation and the only way that I have been able to answer it is to advise the client of the different types of spousal maintenance, temporary or permanent, and the numerous factors that will be considered in determining the amount of spousal maintenance. In addition, I advise clients that one household with one income is ultimately going to be split between two households with one income, or in many cases one household with two incomes will ultimately be split between two households. The standard of living established during the marriage, to which the parties have a right to enjoy post-decree, will be compromised. Finally, I advise my clients about cash-flow and may provide them with a preliminary analysis, which is always subject to change as we go through the dissolution process.

Further Reading

- Family Law Financial Deskbook, 2d ed. (Minnesota CLE 2014, updated 2016).

Notes

2. How much child support will I have to pay?

Answer

The amount of child support that a party has to pay is determined on the incomes of both parties, the parenting expense adjustment, the child care support obligation, and medical and dental support obligations which make it very difficult for a family law practitioner to determine. In other words, "It depends."

The Minnesota Child Support Guidelines, found under Minnesota Statutes chapter 518A, provide the computation of child support under sections 518A.27 through 518A.43, as follows:

1. Child support is based on the gross income of both parties, which includes:
    a. monthly income received;
    b. child(ren)'s Social Security/veteran's benefits;
    c. potential income;
    d. spousal maintenance orders obligated to be paid;
    e. child support order(s) obligated to be paid for nonjoint children; and
    f. monthly gross income = 1.a+1.b+1.c+1.d+1.e.
2. Determine whether there are any adjustments, such as:
    a. number of nonjoint children in the home (maximum of two); and
    b. deduction for nonjoint child(ren) in the home.
3. After determining the gross income of both parties, and determining the adjustment (see above), if any, the calculation remaining is the parental income for determine child support (PICS).
4. From PICS, each party's percentage share of the combined PICS (which is both party's PICS added together) is determined.
5. Based upon the combined PICS, we look to the statute for the combined basic support obligation.
6. Then, we determine the pro rata basic support obligation.
7. Finally, after application of the parenting expense adjustment (which is based on each party's percentage of parenting time), we are left with the basic support obligation.

Next, we determine:

8. The child care support obligation for joint children.

Then, we determine the medical support obligation:

9. Based on the appropriate coverage available:

    a. first, we determine the monthly cost of health care coverage for joint child(ren);

    b. then, we determine the pro rata share of health care coverage costs (which is based on each party's percentage share of the combined PICS);

    c. this leaves us with each party's contribution to health care coverage.

    d. Next, we determine the monthly cost of dental coverage for joint child(ren);

    e. then, we determine the pro rata share of dental coverage costs;

    f. this leaves us with each party's contribution to dental coverage.

If there is no appropriate coverage available, then:

10. Determine the medical support obligation for public coverage (if applicable).

In addition to medical and dental care coverage, we determine each party's:

11. Share of uninsured and/or unreimbursed medical expenses, which is typically based on each party's percentage share of the combined PICS.

Finally, we have the following calculation for each party:

12. Net child support obligation.

Additional adjustments may include:

13. Benefits adjustment, such as Social Security or veteran's benefits;

14. Ability to pay calculation;

15. Child support adjustment for reductions to:

    a. medial support;

    b. child care support; and

    c. basic support.

Or, there may be a presumptive minimum order (which is basic support only) for an individual whose gross income is less than 120 percent of the federal poverty guidelines for one person.

Authorities

- Minn. Stat. ch. 518A: child support (specifically Minn. Stat. §§ 518A.27–518A.43).

Comment

When I have a client ask me how much child support they will have to pay or how much they may receive, I provide them with a short tutorial on the child support calculations pursuant to the guidelines. I will draft a sample Child Support Guidelines Worksheet ("Worksheet") and review each line of the Worksheet with the client so that they understand the effect each entry on the Worksheet has on the final outcome of the Net Support Obligation. I am never able to determine child support without income and the child care, medical, or dental-related information of the parties.

Further Reading

- Minnesota Child Support Guidelines Worksheet, see *infra* Exhibit A.
- Family Law Financial Deskbook, 2d ed. (Minnesota CLE 2014, updated 2016).
- *Child Support Calculation Guide* (Minnesota CLE 2015).
- Minnesota Child Custody Deskbook, 2d ed. (Minnesota CLE 2011, updated 2015).

Notes

3. Why do mothers always get custody of the children?

Answer

The answer to this question does not assume the parents are married. Mothers do not always get custody of the children.

The truth of the matter is, pursuant to Minnesota Statutes section 257.541, subdivision 1, "[t]he biological mother of a child born to a mother who was not married to the child's father when the child was born and was not married to the child's father when the child was conceived has sole custody of the child until paternity has been established or until custody is determined in a separate proceeding."

The key language is: "until paternity has been established or until custody is determined."

Minnesota Statutes sections 257.541, subdivisions 2 and 3, 518.003, subdivisions 3 and 5, and 518.17 address a father's right to parenting time and custody.

Authorities

- Minn. Stat. § 257.541, subds. 1, 2 & 3 (custody and parenting time with children born outside of marriage; mother's right to custody, father's right to parenting time and custody, and father's right to parenting time and custody; recognition of paternity).
- Minn. Stat. § 518.003, subds. 3 & 5
- Minn. Stat. § 518.17

Comment

It may be true that the burden to establish paternity or custody is placed on a father, however, the intention of the statute is to secure a child's relationship its mother. There are too many situations where a father may be absent, through no fault of his own, and biological parentage is not as easily determined. Whereas it is very clear that a woman who has just given birth to a child is the biological parent of the child.

Further Reading

- Minnesota Child Custody Deskbook, 2d ed. (Minnesota CLE 2011, updated 2015).

Notes

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4. I bought a cabin before we got married. Do I get to keep it?

Answer

If you have maintained the nonmarital character of the cabin, then you may be able to keep it. In other words, "It depends."

Pursuant Minnesota Statutes section 518.003, subdivision 3b:

> "Nonmarital property" means property real or personal, acquired by either spouse before, during, or after the existence of their marriage, which
>
> (a) is acquired as a gift, bequest, devise or inheritance made by a third party to one but not to the other spouse;
>
> (b) is acquired before the marriage;
>
> (c) is acquired in exchange for or is the increase in value of property which is described in clauses (a), (b), (d), and (e);
>
> (d) is acquired by a spouse after the valuation date; or
>
> (e) is excluded by a valid antenuptial agreement.

Authorities

- Minn. Stat. § 518.003, subd. 3b (definitions; marital property; exceptions).
- Minn. Stat. § 518.58 (division of marital property).

Comment

Nonmarital tracing is challenging and subject to not only the definition in the statute, but numerous case laws that further define its characterization as nonmarital.

Further Reading

- *Nardini v. Nardini*, 414 N.W.2d 184 (Minn. 1987).
- *Schmitz v. Schmitz*, 309 N.W.2d 748 (Minn. 1981).
- *Antone v. Antone*, 645 N.W.2d 96 (Minn. 2002).
- *Aaron v. Aaron*, 281 N.W.2d 150 (Minn. 1979).
- Family Law Financial Deskbook, 2d ed. (Minnesota CLE 2014, updated 2016).

5. What happens when a parent wants to move with the child out of state?

Answer

A parent is not permitted to move with the child out of state unless there is an order from the court permitting the move or the other parent, who has parenting time pursuant to a court order, consents to the move.

Pursuant to Minnesota Statutes section 518.175, subdivision 3(a):

> The parent with whom the child resides shall not move the residence of the child to another state except upon order of the court or with the consent of the other parent, if the other parent has been given parenting time by the decree. If the purpose of the move is to interfere with parenting time given to the other parent by the decree, the court shall not permit the child's residence to be moved to another state.

Authorities

- Minn. Stat. § 518.175, subd. 3 (parenting time; move to another state).
- *Auge v. Auge*, 334 N.W.2d 393 (Minn. 1983).
- *Gordon v. Gordon*, 339 N.W.2d 269 (Minn. 1983).
- *Meyer v. Meyer*, 346 N.W.2d 369 (Minn. Ct. App. 1984).
- *Clark v. Clark*, 346 N.W.2d 383 (Minn. Ct. App. 1984).
- *Madgett v. Madgett*, 360 N.W.2d 411 (Minn. Ct. App. 1985).
- *Sefkow v. Sefkow*, 427 N.W.2d 203 (Minn. 1988).
- *Geiger v. Geiger*, 470 N.W.2d 704 (Minn. Ct. App. 1991).
- *Silbaugh v. Silbaugh*, 543 N.W.2d 639 (Minn. 1996).
- *Dailey v. Chermak*, 709 N.W.2d 626 (Minn. Ct. App. 2006).
- *Goldman v. Greenwood*, 748 N.W.2d 279 (Minn. 2008).

Comment

The important issue to note in this statute is the absence of the parent who has not been given parenting time by a court order. If a parent wants to move with the child out of state and the other parent has not been given parenting time, the moving parent may not be required to obtain a court order or consent of the other parent.

Further Reading

- Minnesota Child Custody Deskbook, 2d ed. (Minnesota CLE 2011, updated 2015).

6. What's the difference between legal custody and physical custody?

Answer

Pursuant to Minnesota Statutes section 518.003, subdivision 3(a), "legal custody" means "the right to determine the child's upbringing including education, health care and religious training." Physical custody, which in Minnesota law is actually called "physical custody and residence," and means "the routine daily care and control of the residence of the child."

Authorities

- Minn. Stat. § 518.003, subd. 3(a) & (c) (definitions; custody).
- Minn. Stat. § 518.176, subd. 1 (judicial supervision; limits on parent's authority; hearing).
- Minn. Stat. § 518.17, subd. 3.

Comment

Both forms of custody may be "joint" or "sole," however, the statute only provides a clear definition for "joint legal custody" and "joint physical custody." The statute does not provide a definition for "joint" physical custody and residence, "sole" legal custody, or "sole" physical custody and residence. However, Minnesota Statutes section 518.176, subdivision 1 states, "the parent with whom the child resides may determine the upbringing, including education, health care and religious training..."; in other words, the "physical" custodial parent has the right to determine the child's upbringing. This statute has been interpreted to mean that a parent with sole legal custody has the sole authority to make education, health care, and religious training decisions on behalf of a child without any input whatsoever from the other parent. Many practitioners also interpret the statute to mean that a parent (mom or dad) who has the primary care of a child during his or her parenting time also has the right to legal decisions on behalf of the child without the involvement of the other parent. These decisions usually involve minor day-to-day issues, such as bedtime, homework schedule, or sporting activities. However, it may involve minor medical decisions. For example, if the child falls down and requires stitches, and the parent with primary care during his or her parenting time may decide to permit the doctor to stitch the child.

Further Reading

- Minnesota Child Custody Deskbook, 2d ed. (Minnesota CLE 2011, updated 2015).

Notes

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7. If we get divorced, does my wife have to give the engagement and wedding ring back?

Answer

A wife could have a claim that the engagement and wedding rings are her nonmarital property.

Pursuant to Minnesota Statutes section 518.003, subdivision 3b:

> "Nonmarital property" means property real or personal, acquired by either spouse before, during or after the existence of their marriage, which
>
> (a) is acquired as a gift, bequest, devise or inheritance made by a third party to one but not to the other spouse;
>
> (b) is acquired before the marriage;
>
> (c) is acquired in exchange for or is the increase in value of property which is described in clauses (a), (b), (d), and (e);
>
> (d) is acquired by a spouse after the valuation date; or
>
> (e) is excluded by valid antenuptial contract.

In the case of an engagement and wedding ring, it is deemed a conditional gift (the condition being that of the marriage). *Benassi v. Back & Neck Pain Clinic, Inc.*, 629 N.W.2d 475, 483–84 (Minn. Ct. App. 2001). Pursuant to *Benassi*, "an engagement ring is a conditional gift given in contemplation of marriage." *Id.* at 484.

Authorities

- Minn. Stat. § 518.003, subd. 3b (definitions; marital property; exceptions).
- Minn. Stat. § 519.11 (antenuptial and postnuptial contracts).
- *Benassi v. Back & Neck Pain Clinic, Inc.*, 629 N.W.2d 475 (Minn. Ct. App. 2001).

Comment

What if the engagement or wedding rings are a family heirloom? We refer to Minnesota Statutes section 518.003, subdivision 3b, to determine whether the engagement or wedding rings are nonmarital property.

What if the diamonds in the engagement or wedding rings are a family heirloom? We still refer to section 518.003, subdivision 3b, to determine whether the diamonds are nonmarital property.

Further Reading

- Family Law Financial Deskbook, 2d ed. (Minnesota CLE 2014, updated 2016).

Notes

8. Can the court require my wife to get a job after we divorce?

Answer

Maybe.

The issue of whether a spouse will be required to work after a divorce is determined by case law and not by statute, although Minnesota Statutes section 518.552 addresses the issue of "appropriate employment" in subdivisions 1 and 2. It is not likely that a court will require a party to get a job after a divorce. However, the court may impute income based on a party's ability to earn income regardless of whether that party is employed for purposes of establishing spousal maintenance. If a spouse worked part-time or not at all during the marriage, and continues to work part-time or not at all, then that spouse may be considered appropriately employed and accordingly, the court may not require an ex-spouse to get a job after a divorce.

The case law cited below addresses the duration and amount of spousal maintenance. Some of the case law is the same as that used to determine the amount of spousal maintenance.

Authorities

- Minn. Stat. § 518.552 (maintenance).
- *McMahon v. McMahon*, 339 N.W.2d 898 (Minn. Ct. App. 1983).
- *Griepp v. Griepp*, 381 N.W.2d 865 (Minn. Ct. App. 1986).
- *Nardini v. Nardini*, 414 N.W.2d 184 (Minn. 1987).
- *Garcia v. Garcia*, 415 N.W.2d 702 (Minn. Ct. App. 1987).
- *Carrick v. Carrick*, 560 N.W.2d 407 (Minn. Ct. App. 1987).
- *Reif v. Reif*, 426 N.W.2d 227 (Minn. Ct. App. 1988).
- *Lyon v. Lyon*, 439 N.W.2d 18 (Minn. 1989).
- *Reinke v. Reinke*, 464 N.W.2d 513 (Minn. Ct. App. 1990).
- *Bourassa v. Bourassa*, 481 N.W.2d 113 (Minn. Ct. App. 1992).
- *Hecker v. Hecker*, 568 N.W.2d 705 (Minn. 1997).
- *Dobrin v. Dobrin*, 569 N.W.2d 199 (Minn. 1997).
- *Maurer v. Maurer*, 623 N.W.2d 604 (Minn. 2001).
- *Rauenhorst v. Rauenhorst*, 724 N.W.2d 541 (Minn. Ct. App. 2006).

Further Reading

- Family Law Financial Deskbook, 2d ed. (Minnesota CLE 2014, updated 2016).

9. If I have joint physical custody, does that mean I get the children half the time?

Answer

Joint physical custody does not necessarily award you half the time with the children.

Pursuant to Minnesota Statutes section 518.003, subdivision 3(d), "'[j]oint physical custody' means that the routine daily care and control and residence of the child is structured between the parties." Accordingly, the statute does not award "half the time" to a joint physical custodial parent. Instead, it is up to the parties to structure the routine daily care and control and residence of the child. The statute does not define "joint physical custody" as "equal parenting time" or "half the parenting time."

Authorities

- Minn. Stat. § 518.003, subd. 3(d) (definitions; custody).
- Minn. Stat. § 518.17, subds. 1 & 2.
- Minn. Stat. § 518.175, subds. 1 & 5.
- *Lutzi v. Lutzi*, 485 N.W.2d 311 (Minn. Ct. App. 1992).
- *Rosenfeld v. Rosenfeld*, 529 N.W.2d 724 (Minn. Ct. App. 1995).

Comment

Based on my experience, most parties who are awarded joint physical custody of their child will equally divide parenting time. However, I have had one case where the father, whom I represented, was seeking the label "joint physical custody" subject to a parenting time plan of every other weekend and one evening visit during the week (in other words, a "traditional" parental access schedule of every other weekend and one night per week). My client felt that the designation of "sole physical custody" to the other party meant that he was not as important or equal in his status as a parent to the children. Most practitioners recognize that the parenting time schedule is subject to change as the child matures, and will advise their clients accordingly.

Further Reading

- Minnesota Child Custody Deskbook, 2d ed. (Minnesota CLE 2011, updated 2015).

Notes

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10. If I have joint legal custody, does that mean my ex-spouse and I have to make all decisions regarding the children together?

Answer

If you have joint legal custody, that does not necessarily mean that you and your ex-spouse have to make all decisions regarding the children together.

Pursuant to Minnesota Statutes section 518.003, subdivision 3(b), "joint legal custody" means "that both parents have equal rights and responsibilities, including the right to participate in major decisions determining the child's upbringing, including education, health care, and religious training." However, there is no indication in the statute that the parties must make legal decisions together.

Authorities

- Minn. Stat. § 518.17, subds. 2 & 3 (definitions; custody).
- Minn. Stat. § 518.17, subd. 2 (custody and support of children on judgment; factors when joint custody is sought).
- Minn. Stat. § 518.176, subd. 1 (judicial supervision; limits on parent's authority; hearing).

Comment

Many parents and practitioners of family law interpret joint legal custody to mean that the parents must make all decisions regarding a child together. In other words, that neither parent may make a decision regarding the education, health care, and religious training of a child independent of the other parent. I do not agree with this interpretation. I have interpreted joint legal custody to mean that each parent has the right to make education, health care, and religious training decisions regarding a child, when that child is in the primary care of her (mom) or him (dad) pursuant to both Minnesota Statutes section 518.003, subdivision 3(b) and section 518.175, subdivision 1. Basically, the parent with whom the child resides, decides.

Not all decisions require joint participation within the necessary timeframe. What if a child falls down and requires stitches, but the other parent cannot be located? Should a parent delay the health care decision pending the availability of both parents to make a joint decision?

There is a statutory rebuttable presumption that it is in the best interests of a child for his or her parents to be awarded joint legal custody. Minn. Stat. § 518.17, subd. 2. However, joint legal custody is not appropriate and will not be rebuttably presumed to be in the best interest of a child in cases involving domestic violence, which may be an issue for another day.

Further Reading

- Minnesota Child Custody Deskbook, 2d ed. (Minnesota CLE 2011, updated 2015).

Notes

11. If my ex-spouse dies soon after our divorce, can I get my money or property back from her estate?

Answer

No, unless you have maintained an interest in the money or property that is part of her estate.

Pursuant to Minnesota Statutes section 518.58, subdivision 1, "the court shall make a just and equitable division of marital property of the parties…." Typically, each party will be awarded his or her all right, title and interest in and to said marital property free and clear of any claim on behalf of the other party. Accordingly, each party will have waived his or her right to any claim to marital property and will then be prohibited from bringing a claim to the former marital property upon the death of an ex-spouse.

Authorities

- Minn. Stat. § 518.58 (division of marital property).
- *Risk ex rel. Miller v. Stark*, 787 N.W.2d 690 (Minn. Ct. App. 2010).

Comment

Case law is rich with information regarding the death of the spouse and the court's jurisdiction over the dissolution let alone property agreements that may not have been finalized (e.g., *Risk ex rel. Miller v. Stark*, 787 N.W.2d 690 (Minn. Ct. App. 2010)); however, I have not come across a case that addresses the issue of whether a party can get back money or property that was awarded to a spouse who subsequently dies after the entry of the judgment and decree.

Further Reading

- Family Law Financial Deskbook, 2d ed. (Minnesota CLE 2014, updated 2016).

Notes

12. I suspect my ex-spouse is improperly using funds from the children's bank accounts. What can I do?

Answer

If the terms of the findings of fact, conclusions of law, order for judgment, and judgment and decree address the issue of children's bank accounts, then the court may have jurisdiction over the matter.

Pursuant Minnesota Statutes section 518.003, subdivision 3b, "[a]ll property acquired by either party subsequent to the marriage and before the valuation date is presumed to be marital property…." Accordingly, the court has jurisdiction to make a just and equitable division of the marital property pursuant to Minnesota Statutes section 518.58.

Authorities

- Minn. Stat. § 518.003 (definitions).
- Minn. Stat. § 518.58 (division of marital property).
- Minn. Gen. R. Prac. 309.01 (contempt initiation).

Comment

If the judgment and decree includes provisions regarding children's bank accounts (which were acquired subsequent to the marriage and before the valuation date), such as, "the parties shall maintain the bank accounts of the minor children for the benefit of the minor children," that language may be sufficient to establish a fiduciary duty between the parties and their children. Accordingly, any action, such as improper use of funds from children's bank accounts, is subject to the court's jurisdiction. I would recommend that a party attempt to resolve the issue directly with the other party. If the issue remains unresolved, I would recommend that a party request mediation (which is a typical provision in judgments and decrees) before setting the matter on for a motion for contempt of court order pursuant to the other party's failure to abide by the terms of the judgment and decree. If the other party does not respond to the request for mediation, I would set the matter on for contempt for failure to abide by the terms of the Order. Although, the jurisdiction of the Court and the remedies available may be limited.

Further Reading

- Family Law Financial Deskbook, 2d ed. (Minnesota CLE 2014, updated 2016).

Notes

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13. If I receive an inheritance during the marriage, do I get to keep all of it after the divorce?

Answer

Property acquired during the marriage is presumed to be "marital property." However, there may be "nonmarital property", which is property acquired by either spouse before, during or after the marriage, such as an inheritance. Whether a party gets to keep all of an inheritance depends on whether they maintained the nonmarital character of the same.

Family law practitioners are well-acquainted with Minnesota Stautes section 518.003. subdivision 3b., wherein

> [a]ll property acquired by either spouse subsequent to the marriage and before the valuation date is presumed to be marital property, regardless of whether title is held individually or by the spouses in a form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, or community property. Each spouse shall be deemed to have a common ownership in marital property that vest not later than the time of the entry of the decree in a proceeding for dissolution or annulment.

Pursuant to Minnesota Statutes section 518.003. subdivision 3b

> "[n]onmarital property" means, property real or personal, acquired by either spouse before, during or after the existence of their marriage, which
>
> (a) is acquired as a gift, bequest, devise or inheritance made by a third party to on e but not to the other spouse;
>
> (b) is acquired before the marriage;
>
> (c) is acquired in exchange for or is the increase in value of property which is described in clauses (a), (b), (d), and (e);
>
> (d) is acquired by a spouse after the valuation date; or
>
> (e) is excluded by a valid antenuptial contract.

The burden of proof rests with the party asserting a nonmarital claim.

Where there is some uncertainty as to the marital or nonmarital character of an inheritance, the party asserting a nonmarital claim will have to prove by a preponderance of the evidence that the inheritance is from a recognized nonmarital source.

The case law cited below addresses the burden of proof and problems of proofs.

Authorities

- Minn. Stat. § 518.003 (definitions), subd. 3b (marital property; exceptions).
- *Wopata v. Wopata*, 498 N.W. 2d 478 (Minn. Ct. App. 1993).
- *Freking v. Freking*, 479 N.W. 2d 736 (Minn. Ct. App. 1992).
- *Olsen v. Olsen*, 562 N.W. 2d 797 (Minn. 1997).
- *Doering v. Doering*, 385 N.W. 2d 387 (Minn. Ct. App. 1986).
- *Carrick v. Carrick*, 560 N.W. 2d 407 (Minn. Ct. App. 1997).
- *Griffith v. Griffith*, 415 N.W. 2d 763 (Minn. Ct. App. 1987).

Comment

I have been asked this question in an initial consultation and I advise my clients that if the inheritance has not been commingled with any other marital property, then it is more likely than not the property will be awarded to them free and clear of any claim by or on behalf of the other party.

Be aware of Minnesota Statutes section 518.58 subdivision 2, which states,

> [i]f the court find that either spouse's resources or property, including the spouse's portion of the marital property as defined in section 518.003, subdivision 3b, are so inadequate as to work an unfair hardship, considering all the relevant circumstances, the court may, in addition to the marital property, apportion up to one-half of the property otherwise excluded under section 518.003, subdivision 3b, clauses (a) to (d), to prevent unfair hardship.

Further Reading

- Family Law Financial Deskbook, 2d ed. (Minnesota CLE 2014, updated 2016).

Notes

14. When does a child get to decide whether they live with mom or dad after a divorce?

Answer

Never. The court would not place the burden on a child to choose between two parents. In addition, a child never decides the outcome of residency that is the responsibility of the court.

The family law practitioner should advise the client about the "best interests of the child" factors as set forth in Minnesota Statutes section 518.17 subdivision 1 paying particular attention to (a)(2).

> (a) "[t]he best interests of the child" means all relevant factors to be considered and evaluated by the court including:
>
> (1) the wishes of the child's parent or parents as to custody;
>
> (2) the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference;
>
> (3) the child's primary caretaker;
>
> (4) the intimacy of the relationship between each parent and the child;
>
> (5) the interaction and interrelationship of the child with a parent or parents, siblings, and any other person who may significantly affect the child's best interests;
>
> (6) the child's adjustment to home, school, and community;
>
> (7) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;
>
> (8) the permanence, as a family unit, of the existing or proposed custodial home;
>
> (9) the mental and physical health of all individuals involved; except that a disability, as defined in section 363A.03, of a proposed custodian or the child shall not be determinative of the custody of the child, unless the proposed custodial arrangement is not in the best interest of the child;
>
> (10) the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture and religion or creed, if any;
>
> (11) the child's cultural background;
>
> (12) the effect on the child of the actions of an abuser, if related to domestic abuse, as defined in section 518B.01, that has occurred between the parents or between a parent and another individual, whether or not the individual alleged to have committed domestic abuse is or ever was a family or household member of the parent; and

(13) except in cases in which a finding of domestic abuse as defined in section 518B.01 has been made, the disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child.

In addition, in cases where joint custody is sought the family law practitioner will review and discuss subdivision 2 of Minnesota Statutes section 518.17, specifically:

(a) the ability of parents to cooperate in the rearing of their children;

(b) methods for resolving disputes regarding any major decision concerning the life of the child, and the parents' willingness to use those methods;

(c) whether it would be detrimental to the child if one parent were to have sole authority over the child's upbringing; and

(d) whether domestic abuse, as defined in section 518B.01, has occurred between the parents.

Authorities

- Minn. Stat. § 518.17.

Comment

When I have a client ask me when their child gets to decide with which parent they want to live with, I advise them exactly as the answer set forth above and I ask the client to imagine what it would be like for the child to be placed on the witness stand in front their parents answering questions from an attorney about their residency preference. Most clients cannot stand the thought of their child testifying for or against either parent.

Further Reading

- Minnesota Child Custody Deskbook, 2d ed. (Minnesota CLE 2011, updated 2015).

Notes

Exhibit A

Minnesota Child Support Guidelines Worksheet

Parent A: IV-D Case Number: Number of joint children:
Parent B: Court File Number: Begin Date:

Income	Parent A	Parent B	Combined
1a. Monthly Income Received			
1b. Child(ren)'s Social Security/Veterans' Benefits Derived from a Parent's Eligibility			
1c. Potential Income			
1d. Spousal Maintenance Orders Obliged to be Paid			
1e. Child Support Order(s) Obliged to be Paid for Nonjoint Child(ren)			
1f. Monthly Gross Income 1a+1b+1c-1d-1e)			
Adjustments			
2a. Number of Nonjoint Children in the Home (Maximum of 2)			
2b. Deduction for Nonjoint Child(ren) in the Home			
3. Parental Income for Determining Child Support (PICS)			
4. Percentage Share of Combined PICS			
5. Combined Basic Support Obligation			
6. Pro Rata Basic Support Obligation			
Basic Support Obligation:			
7. Basic Support Obligation after Parenting Expense Adjustment			
Child Care Support Obligation:			
8. Child Care Support Obligation for Joint Children			
Medical Support Obligation:			
Appropriate Coverage Available:			
9a. Monthly Cost of Health Care Coverage for Joint Child(ren)			
9b. Pro Rata Share of Health Care Coverage Costs			
9c. Contribution to Health Care Coverage			
9d. Monthly Cost of Dental Coverage for Joint Child(ren)			
9e. Pro Rata Share of Dental Coverage Costs			
9f. Contribution to Dental Coverage			
9g. Medical Support Obligation – Appropriate Coverage Available			
No Appropriate Coverage Available:			
10. Medical Support Obligation for Public Coverage			

Uninsured and/or Unreimbursed Medical Expenses:			
11. Share of Uninsured and/or Unreimbursed Medical Expenses			
12. Net Child Support Obligation			
	Parent A	**Parent B**	**Combined**
13. Child(ren)'s Social Security/Veterans' Benefits Derived from Parent's Eligibility			
Computing a Final Obligation			
14. Total Child Support Obligation			
15a. Monthly Gross Income			
Ability to Pay Calculation:			
15b. Income Available for Support			
16. Monthly Child Support Obligation – No Adjustment Necessary			
17. Amount of Reduction			
Child Support Obligation Adjustment:			
18. Medical Support Original Obligation Amount of Reduction New Obligation			
19. Child Care Support Original Obligation Amount of Reduction New Obligation			
20. Basic Support Original Obligation Amount of Reduction New Obligation			
21. Monthly Child Support Obligation After Adjustment			
Presumptive Minimum Order (Basic Support Only):			
22a. Presumptive Minimum Order for 1 or 2 Joint Children			
22b. Presumptive Minimum Order for 3 or 4 Joint Children			
22c. Presumptive Minimum Order for 5 or More Joint Children			

Bankruptcy Law

Chapter 3

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Exhibit A 3-15

1. Should I choose Chapter 7 or Chapter 13 bankruptcy?

Answer

Chapter 7 is a straight liquidation where the discharge of debt is quickly granted. Chapter 13 is a payment plan whereby debts are paid from disposable income in monthly installments over a three- to five-year period followed by the discharge.

First, you need to recognize that you may not have a choice. If your income exceeds the median income for a family of your size, you are subject to the "means" test under 11 U.S.C. § 707(a)(2) and (3). The median income in Minnesota for a single person is $51,199, $68,515 for family of two, $80,804 for family of three, $98,447 for family of four, and $8,100 for each individual in excess of four. The "means test" is a complicated test comparing income to expenses (and what expenses "should be," not just what they are). If the means test indicates you have sufficient disposable income to pay creditors, the Chapter 7 case may be dismissed. The means test only applies if the debts are primarily consumer debts.

Since well over 90 percent of bankruptcies filed are by those with income below the median, Chapter 7 is the preferable option for most debtors. Most debtors have no nonexempt assets and, therefore, will lose nothing in the Chapter 7 bankruptcy. The discharge is typically granted within 100 days of the filing, completing the bankruptcy from the debtor's perspective.

A Chapter 13 is feasible only if the debtor generated enough income to finance a payment plan over three to five years. 11 U.S.C. § 1322(d). Further, secured debts cannot exceed $1,184,200, and unsecured debts cannot exceed $394,725. *See* 11 U.S.C. § 109. An advantage to Chapter 13 is that it does allow the debtor to retain nonexempt assets as long as the creditors receive more than in a Chapter 7 liquidation. 11 U.S.C. § 1325(a)(4). It also allows a debtor to pay accumulated home mortgage arrearages over (typically) one year (11 U.S.C. § 1307(b)), re-amortize car loans (if the loan is over 910 days old under 11 U.S.C. § 1325(a)(5)), reduce the loan (if over 910 days old) to the value of the car if less than the loan, and allows a debtor to voluntarily dismiss the case without leave of court (11 U.S.C. § 1307(b)). Furthermore, a recent Eighth Circuit Bankruptcy Appellate Panel decision allows the debtor to eliminate a second mortgage on the home if the value of the home covers none of the second mortgage. In other words, the second mortgage is wholly unsecured. *See In re Fisette*, 455 B.R. 157 (B.A.P. 8th Cir. 2011).

Authorities

- 11 U.S.C. § 707(b) (covers the means test).
- 11 U.S.C. § 1307(b) (allows a debtor to voluntarily dismiss a case).
- 11 U.S.C. § 1325 (covers the requirement for confirmation of a plan which has not been converted from a Chapter 7).
- 11 U.S.C. § 1322 (covers the required contents of a Chapter 13 plan).
- *In re Fisette*, (B.A.P. 8th Cir. 2011).

Comment

The decision to choose Chapter 7 or 13 is an important one and the vast majority of debtors will opt for Chapter 7. A debtor may convert from one to the other, and often even those who are unsure if they will "pass" the means test will start in Chapter 7.

Further Reading

- Bankruptcy Practice in Minnesota Deskbook, 1st ed. (Minnesota CLE 2012, updated 2014).

Notes

2. Are all my debts dischargeable in bankruptcy?

Answer

No. The following (among other less significant debts) are not discharged:

- Taxes assessed more than three years prior to filing. 11 U.S.C. § 523(a)(1).
- Debts arising from fraud if the creditor can prove fraud in a lawsuit. 11 U.S.C. § 523(a)(2).
- Debts owed to creditors who did not receive notice of the case if there are, in fact, assets available to pay creditors. 11 U.S.C. § 523(a)(3).
- Debts arising from defalcation while acting in a fiduciary capacity (for example, trustee of a trust taking funds), embezzlement, or larceny if those can be proven in a lawsuit. 11 U.S.C. § 523(a)(4).
- Debts for spousal support or child support or debt incurred in a divorce proceeding. 11 U.S.C. § 523(a)(5) & (15).
- Debts arising from a willful and malicious injury, if it can be proven in lawsuit. 11 U.S.C. § 523(a)(6).
- Fines and penalties owed to a governmental unit. 11 U.S.C. § 523(a)(7).
- Student loans, unless the debtor can prove in a lawsuit such loans are an undue hardship. 11 U.S.C. § 523(a)(8).
- Debts for injury or death caused by operating a motor vehicle, vessel, or aircraft while intoxicated. 11 U.S.C. § 523(a)(9).
- Debts arising from restitution in a federal criminal case. 11 U.S.C. § 523(a)(13).
- Condominium association fees coming due post-bankruptcy. 11 U.S.C. § 523(a)(16).
- Loans to a pension plan (such as a loan from one's own 401(k) plan). 11 U.S.C. § 523(a)(18).

Further, under 11 U.S.C. § 727, all of the debts are not discharged if certain conditions are met.

- If the debtor transfers property within one year with the intent to hinder, delay, or defraud a creditor, all debts are not discharged. 11 U.S.C. § 727(a)(2)(A).
- If the debtor keeps property from the estate with the intent to hinder or delay the trustee, all debts are not discharged. 11 U.S.C. § 727(a)(2)(B).

- If the debtor conceals or destroys records, all debts are not discharged. 11 U.S.C. § 727(a)(3).
- If the debtor lies under oath (such as on the bankruptcy schedules), all debts are not discharged. 11 U.S.C. § 727(a)(4).
- If the debtor fails to explain a loss of assets, all debts are not discharged. 11 U.S.C. § 727(a)(5).
- If the debtor receives a discharge under Chapter 7 within eight years (or six years under Chapter 13) of the bankruptcy, all debts are not discharged. 11 U.S.C. § 727(a)(8) & (9).
- If the debtor fails to take personal financial management classes after the case is commenced, all debts are not discharged. 11 U.S.C. § 727(a)(11).

Authorities

- 11 U.S.C. § 523 (lists all debts that are not discharged).
- 11 U.S.C. § 727 (lists when all debts will not be discharged).

Comment

Attorneys should discuss the debts that will not be discharged with a client so the debtor will not be surprised after the case is over. Further, attorneys should warn clients about transfers during the year prior to bankruptcy with the intent to hinder, delay or defraud creditors, and about lying on the schedules and transferring assets that belong to the estate. The penalties are severe—potential criminal action and no discharge.

Further Reading

- Bankruptcy Practice in Minnesota Deskbook, 1st ed. (Minnesota CLE 2012, updated 2014).

Notes

3. How often can I file bankruptcy?

Answer

The simple answer generally is that there is no technical limit. But, a Chapter 7 discharge can only be granted every eight years. 11 U.S.C. § 727(a)(8). The debtor may not receive a discharge less than six years after a Chapter 13 discharge (unless unsecured creditors were paid in full, or 70 percent if the debtor used "best efforts"). 11 U.S.C. § 727(a)(9). Thus, it is usually pointless to file within the eight years (or six in Chapter 13) if a discharge is the goal of the debtor. Nonetheless, many debtors file a Chapter 7 followed by a Chapter 13 which pays 100 percent of the non-dischargeable and 100 percent of post-bankruptcy debt over time.

There are also provisions meant to discourage "serial filers" who try to delay creditors. For example, 11 U.S.C. § 362(c)(3) limits the stay in bankruptcy to 30 days for a case in which the debtor had another case dismissed in the last year (unless the court decides otherwise after notice and hearing). Under 11 U.S.C. § 362(c)(4), the stay does not apply if two cases were dismissed in the past year (unless the court finds otherwise after notice and hearing). Finally, under 11 U.S.C. § 109(g), a debtor may not file a case at all if during the preceding 180 days a case by the debtor was dismissed for failure to abide orders of the court, or a case was voluntarily dismissed following a request by a creditor for relief from the stay.

Authorities

- 11 U.S.C. § 109(a) (covers the qualification for filing a case).
- 11 U.S.C. § 727(a)(8) & (9) (covers the exception to discharge which includes the eight-year/six-year requirements above).
- 11 U.S.C. § 362(c)(3) & (4) (covers the stay; section (c) goes into detail on the lack of stay protection for multiple files).

Comment

A debtor's attorney should search the debtor's name to ensure he or she has not filed within the last eight years. The attorney should be very wary of filing for anyone who has filed in the last year.

Further Reading

- Bankruptcy Practice in Minnesota Deskbook, 1st ed. (Minnesota CLE 2012, updated 2014).

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4. What does it cost to file bankruptcy and how can I pay my lawyer?

Answer

The court filing fee for a Chapter 7 is $335. A Chapter 13 is $310. Under extreme circumstances, the debtor can apply for in forma pauperis waiver of these fees.

Most attorneys charge $1,500 for a Chapter 7, which must be paid in advance. Some charge less. A Chapter 13 case typically costs $3,000-$3,500, but the attorney can be paid through the Chapter 13 plan.

Comment

A potential debtor can shop for lower rates, but generally, the good experienced attorneys charge in the $1,500 range for a Chapter 7 case and $3,000-$3,500 for a Chapter 13 case.

Further Reading

- Bankruptcy Practice in Minnesota Deskbook, 1st ed. (Minnesota CLE 2012, updated 2014).

Notes

5. What if I run up a lot of credit card debt right before I file bankruptcy?

Answer

Be careful! Running up debt with no intention to repay is fraud, and debt arising from fraud is not discharged. In fact, 11 U.S.C. § 523(a)(2)(C)(I) and (II) provide that it is presumed that consumer debts aggregated more than $650 for luxury items incurred within 90 days before bankruptcy or cash advances of more than $925 under an open credit card plan within 70 days of bankruptcy are non-dischargeable. Note that this is a presumption that can be rebutted. But, also note that this does not mean expenditures on luxury items more than 90 days (or even non-luxury items) before filing are "safe." The creditor can still prove that the debtor knew he or she would not pay it back and the credit was fraudulently obtained. In either case, the creditor must commence a lawsuit (adversary proceeding) under 11 U.S.C. § 523(c) and prevail.

Authorities

- 11 U.S.C. § 523 (on non-dischargeable debts).

Comment

Tell clients not to use their credit cards once they consider filing bankruptcy and, if necessary, delay filing to avoid the 90-day presumption if it is an issue.

Further Reading

- Bankruptcy Practice in Minnesota Deskbook, 1st ed. (Minnesota CLE 2012, updated 2014).

Notes

6. Are student loans dischargeable in bankruptcy?

Answer

Generally, no. Student loans (whether private or government) are not dischargeable unless the debt is an "undue hardship" to the debtor. 11 U.S.C. § 523(a)(8).

First, in order to get a student loan discharged as an undue hardship, the debtor must commence a lawsuit (adversary proceeding) against the lender in the Bankruptcy Court. The burden of proving the undue hardship is on the debtor. The Eighth Circuit has established "totality of the circumstances" test to determine if there is an undue hardship. This means the Bankruptcy Court can examine all factors. Among the factors courts will consider are the health of the debtor, the household income, potential income, the amount of the debt, the age of the debtor, attempts to pay the debts, expenses and lifestyle of the debtor, efforts at employment, and the availability of other federal programs such as the Income Contingent Repayment Plan (which allows the debtor to pay what he or she can afford over 25 years using guidelines). This list is not exclusive.

In other words, there is no set rule as to what constitutes an undue hardship. But the burden is on the debtor, and it is generally a tough burden for a young, healthy debtor to overcome.

Authorities

- 11 U.S.C. § 523(a)(8).
- *Educ. Credit Mgmt. Corp. v. Jesperson*, 571 F.3d 775 (8th Cir. 2009).
- *In re Reynolds*, 425 F.3d 526 (8th Cir. 2005).
- *In re Long*, 322 F.3d 549 (8th Cir. 2003).

Comment

It is difficult to get student loans discharged. Because it requires an expensive lawsuit, debtors are mostly forced to get pro bono help or proceed pro se. Ironically, if an attorney can be paid, the creditor may argue that if a debtor can pay an attorney, the debtor can pay the loans.

Further Reading

- Bankruptcy Practice in Minnesota Deskbook, 1st ed. (Minnesota CLE 2012, updated 2014).

Notes

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7. What do I get to keep in a bankruptcy?

Answer

In Minnesota, a bankruptcy debtor can choose between the federal exemptions in 11 U.S.C. § 522 or the Minnesota exemptions, mostly found in Minnesota Statutes section 550.37 and chapter 510. A debtor must choose all of the federal exemptions or all of the Minnesota exemptions—he or she cannot pick from each. The choice usually comes down to whether the debtor has equity in their home.

The Minnesota exemptions allow $390,000 of equity (value above the mortgage) in a home to be exempt (and $975,000 for farm land), $10,350 in household goods and clothing to be exempt, and $4,600 of equity in a car to be exempt, among other exemptions.

The federal exemption allows $23,675 per debtor (double that number in a joint case) for a homestead. The federal exemption also allows for $12,625 for household goods and furnishings and $3,775 for a car. The federal exemption allows up to $11,850 (per debtor) of the unused homestead exemption in anything the debtor likes under 11 U.S.C. § 522(d)(5) (the "wild card exemption").

No matter which is chosen, the debtor can claim $1,283,025 in IRAs and unlimited exemptions in 401(k)s and similar qualified plans. (Ironically, if a Minnesota resident does not file for bankruptcy, only $69,000 in IRAs can be exempt.)

The advantage to the federal scheme is that a debtor can choose to exempt up to $11,850 (per debtor) in the wild card exemption. A renter or a person with little or no equity in a home (as is so common these days) can then exempt items not normally totally exempt, such as tax refunds, boats, snowmobiles, sporting goods, or cash under the wild card exemption. The debtor will lose those nonexempt items under the Minnesota exemption. The advantage of the Minnesota exemption is clearly the large homestead exemption for debtors with significant equity in their home.

In fact, both exemption schemes are generous enough that well over 90 percent of all individual consumer cases filed in Minnesota have no assets that are not exempt, leaving creditors to receive nothing.

Authorities

- 11 U.S.C. § 522.
- Minn. Stat. § 550.37.
- Minn. Stat. ch. 510.

Comment

The list of federal and Minnesota exemptions should be reviewed very carefully. Numerous exemptions are not discussed in this question and answer. See *infra*, Exhibit A for a more complete list.

Further Reading

- Bankruptcy Practice in Minnesota Deskbook, 1st ed. (Minnesota CLE 2012, updated 2014).

Notes

8. Do my creditors have to stop harassing me if I file for bankruptcy?

Answer

Yes. The moment a case is filed, the automatic stay under 11 U.S.C. § 362 goes into effect, barring practically every type of collection activity relating to debts incurred pre-bankruptcy, including phone calls, lawsuits, foreclosures, and garnishments. And, under 11 U.S.C. § 362(k), a creditor who violates this stay is subject to paying damages (including punitive damages) and attorneys' fees. Once the debtor receives the discharge under 11 U.S.C. § 524(c), the stay expires but a discharge injunction goes into effect still barring collection activities relating to pre-bankruptcy debts. But, it is narrower and allows a creditor to proceed "in rem" against property of the debtor that is collateral for the debtor's debt (such as car repossessions and home foreclosure). The creditor may not seek a deficiency judgment. Further, the discharge does not bar the collection of non-discharged debts such as student loans and taxes.

Authorities

- 11 U.S.C. § 362 (covers the stay).
- 11 U.S.C. § 524 (covers the discharge).

Further Reading

- Bankruptcy Practice in Minnesota Deskbook, 1st ed. (Minnesota CLE 2012, updated 2014).

Notes

9. What happens at a Chapter 7 341 meeting?

Answer

A "341 meeting," so called because it is required under 11 U.S.C. § 341, and often referred to as a "first meeting of creditors," is a chance for the trustee and any creditors to ask questions of the debtor. It typically occurs within 40 days of the filing.

First, debtors should bring their driver's license (or other government issued photo ID), proof of Social Security number (issued by the government), most recent paycheck, and bank statement showing the bank balance on the date of filing.

The trustee will then ask a series of questions that may include the following:

- Are the bankruptcy schedules accurate?
- Were there any transfers of assets within 90 days of the bankruptcy? (Debts paid within 90 days may be recoverable by the trustee as a "preference" under 11 U.S.C. § 547.)
- Were there any transfers of assets within two years of the bankruptcy? (Transfers made without receiving reasonably equivalent value or with the intent to hinder, delay or defraud creditors may be recoverable by the trustee as a fraudulent transfer under 11 U.S.C. § 548.)
- Were there any transfers of assets to friends or family members within six years of the bankruptcy? (The trustee can use Minnesota fraudulent transfer law to recover transfers made within six years under 11 U.S.C. § 544.)
- Will you receive a tax refund (property or income)? (The refund attributable to pre-petition wages are property of the bankruptcy estate unless exempted by the debtor.)
- Is there any pending litigation? (The trustee owns nonexempt lawsuits of the debtor against other.)
- Do you have claims against anyone else?

The trustee will often remind the debtor to inform the trustee if he or she inherits money or is the beneficiary of any life insurance within six months after filing, as such proceeds may belong to the trustee. This is because inheritance and the right to insurance proceeds within six months after the bankruptcy filing belong to the estate. 11 U.S.C. § 541(a)(5).

Comment

Attorneys should be prepared for questions from disgruntled creditors. Most typically, ex-spouses appear with knowledge about assets that might be left off the schedules. Of course, the attorney should warn the debtor that leaving anything off the schedules can result in denial of discharge and possible criminal prosecution. Also, opposing litigants in lawsuits may appear and ask questions. But normally no creditors appear.

Further Reading

- Bankruptcy Practice in Minnesota Deskbook, 1st ed. (Minnesota CLE 2012, updated 2014).

Notes

Exhibit A

EXHIBIT A

EXEMPT PROPERTY: COMPARISON OF EXEMPTIONS AVAILABLE UNDER BANKRUPTCY CODE AND MINNESOTA LAW

PROPERTY	BANKRUPTCY CODE	MINNESOTA LAW
1. Homestead	The debtor's aggregate interest not to exceed $23,675 in value in real or personal property that the debtor or the dependent of the debtor uses as a residence.	Up to $390,000 of value of real property owned and occupied by the debtor, whether the exemption is claimed individually or jointly. Exemption of $975,000 for land used primarily for agricultural purposes. MINN. STAT. § 510.01. A manufactured home that is actually inhabited as a home by the debtor is also exempt. MINN. STAT. § 550.37, SUBD. 12. In addition, the proceeds of a homestead are exempt for up to one year. MINN. STAT. § 510.07. No creditor can execute on homestead if a non-debtor is a joint owner.
2. Family Bible, Library, and Musical Instruments	No comparable exemption.	MINN. STAT. § 550.37, SUBD. 2 (the exemption for musical instruments was held unconstitutional in *In re Hilary*, 76 B.R. 683 (Bankr. D. Minn. 1987)).
3. Burial Plot	Included within part of the homestead exemption.	One lot in any burial ground. MINN. STAT. § 550.37, SUBD. 3.
4. Motor Vehicle	$3,775 in one motor vehicle.	$4,600 in one motor vehicle, or $46,000 for a vehicle that has been modified, at a cost of not less than $3,450 to accommodate a physical disability. MINN. STAT. § 550.37, SUBD. 12a (measured by the debtor's equity, not the total value).

5.	Wearing Apparel, One Watch, Utensils, Foodstuffs, Household Furniture, Household Appliances, Phonographs, Radio, and Television	$600 per item, limit of $12,625 aggregate value.	$10,350 total value, except that clothing, utensils, foodstuffs and one watch are not included in the dollar amount. MINN. STAT. § 550.37, SUBD. 4(b). Jewelry is not wearing apparel.
6.	Jewelry	$1,600 total value.	One watch. MINN. STAT. § 550.37, SUBD. 4(a)
7.	Any Property	The Bankruptcy Code provides an exemption of $1,250 plus the unused portion of the homestead exemption, not to exceed $11,850. This exemption can be used by the debtor to apply to any property.	No comparable exemption.
8.	Implements, Professional Books, Office Furniture, Tools, and Library	$2,375	$11,500 (specifically excludes farm equipment). MINN. STAT. § 550.37, SUBD. 6.
9.	Farm Machines and Implements	Included in tools of the trade.	$13,000 in farm machines and implements used by a debtor engaged principally in farming, livestock, farm produce, and standing crops. MINN. STAT. § 550.37, SUBD. 5. The total value of property selected pursuant to subdivisions 5 and 6 cannot exceed $13,000. MINN. STAT. § 550.37, SUBD. 7.
10.	Insurance Benefits Received by or Payable to a Surviving Spouse or Child at the Death of a Spouse or Parent	Amount necessary for support of debtor and dependents of debtor.	$46,000 plus $11,500 for each dependent. MINN. STAT. § 550.37, SUBD.10.
11.	Loan Value or Accrued Dividend Under an Unmatured Life Insurance Contract	$12,625 less property of the estate used to pay post-petition premiums.	Exempt up to $9,200. MINN. STAT. § 550.37, SUBD. 23.

12. Professionally Prescribed Health Aids	Entirely exempt.	No comparable exemption.
13. Earnings	Post-petition earnings are not property of the bankruptcy estate, except under chapter 12 or 13	The greater of 75 percent of disposal earnings or 40 times minimum hourly wage per week of pay period. MINN. STAT. §§ 550.37, SUBD. 13 & 571.922.
14. Social Security Benefits, Unemployment Compensation, or Local Public Assistance Benefits	Entirely exempt.	Social Security benefits are exempt under 42 U.S.C. § 407. Unemployment compensation is exempt under Minnesota Statutes section 268.17. Relief based on need is exempt under Minnesota Statutes section 550.37, subdivision 14.
15. Veteran's Benefits	Entirely exempt.	Exempt for a period of one year after receipt under Minnesota Statutes section 550.38.
16. Disability, Illness, or Unemployment Benefits	Entirely exempt.	Under Minnesota Statutes section 550.39, payments from accident or disability insurance are exempt. Unemployment benefits are exempt under Minnesota Statutes section 268.17.
17. Alimony, Support, or Maintenance	Exempt to the extent reasonably necessary for the support of the debtor and the debtor's dependents.	No comparable exemption.

18.	Stock Bonus, Pension, Profit Sharing or Similar Employee Benefits	Most provision plans are exempt from claims of creditors, IRAs are exempt up to $1,283,025.	Under Minnesota Statutes section 550.37, subdivision 24, the debtor's right to receive present or future payments, or payments received by the debtor, under a stock bonus, pension, profit-sharing, annuity, individual retirement account, Roth IRA, individual retirement annuity, simplified employee pension, or similar plan or contract on account of illness, disability, death, age, or length of service is exempt to the extent of $69,000 plus additional amounts to the extent reasonably necessary for the support of the debtor and any spouse or dependent of the debtor.
19.	Award Under a Crime Victim's Reparation Law	Entirely exempt.	No comparable exemption.
20.	Payment on Account of Wrongful Death	Exempt to the extent reasonably necessary for the support of the debtor and debtor's dependents.	Entirely exempt under Minnesota Statutes section 550.37, subdivision 22.
21.	Payment on Account of Personal Bodily Injury	$23,675 on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent.	Rights of action for injuries to the person of the debtor or a relative, whether or not resulting in death, are exempt under Minnesota Statutes section 550.37, subdivision 22. Punitive damages are not exempt. *In re Cook*, 138 B.R. 943 (Bankr. D. Minn. 1992).

Wills and Trusts

Chapter 4

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1. Do I have to hire an attorney to do my estate plan?

Answer

Caveat: This answer is the author's personal opinion.

No, you do not have to hire an attorney to do your estate planning. In fact, I often encourage people to try to do it themselves because, if they do so, they'll end up paying somebody like me four or five times as much in probate costs as they would if they would have just hired me to do their estate planning in the first place!

There are services online, like LegalZoom, etc., that will draft wills for individuals for a flat fee, which is often much less than a client would have to pay an attorney to prepare estate planning documents. Some of these services prepare a good document; many of these services are rife with errors and omissions and are not state-specific. I am a firm believer that when it comes to estate planning, you get what you pay for. I have been involved with many estates where we have had people who have either prepared their will themselves or have used one of these services, and there are almost always issues with the estate administration.

Preparing a will is not necessarily rocket science, but there are a lot of issues to consider, things to think about, and choices to make. If the client is not aware of all these choices and has not carefully thought about each one of them, the client can end up with an estate plan and an estate administration that is unduly burdensome and costly.

Further Reading

- Drafting Wills and Trust Agreements, 7th ed. (Minnesota CLE 2014, revised 2015).

Notes

2. What are the technical requirements for a valid will?

Answer

Each state has its own statute on what is required in order to have a valid will. In Minnesota, in order to have a valid will there must be a document that is signed by the testator (a mark or a signature by another person directed by the testator also works), is dated, and is witnessed by at least two individuals.

The testator also must have testamentary capacity, which means that he or she needs to know the extent and size of his or her estate, who his or her heirs are, what he or she is doing in the proposed will, and have the ability to hold these three things together while he or she signing the will. If a person lacks capacity, he or she does not have a valid will.

The person also has to be free from undue influence, duress, or fraud. All of these concepts essentially mean that the will must be the testator's own plan and not something they were coerced into, forced into, or unduly influenced to do.

Minnesota does not recognize "holographic" wills. A holographic will is a will that is in the testator's own handwriting and was signed and dated by the testator. Minnesota is in the minority in this regard in that holographic wills are recognized in around 30 of the 50 states.

Other states have additional requirements for having a valid will, but as long as the will meets the requirements in the state in which it's signed, it will be considered a valid will in every state.

Authorities

- Minn. Stat. §§ 524.2-501–524.2-505 (requirements for wills in Minnesota).
- Mark B. Dunnell, *Testamentary Capacity Dunnell Minnesota Digest*, Decedents' Estates § 22 (2001).
- Mark B. Dunnell, *Undue Influence see Dunnell Minnesota Digest*, Decedents' Estates § 24 (2001).

Further Reading

- Drafting Wills and Trust Agreements, 7th ed. (Minnesota CLE 2014, revised 2015).

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3. What is the difference between a probate asset and a nonprobate asset?

Answer

A probate asset is an asset that is in a person's name alone. When the person dies, there is not a contract document or other arrangement that would direct where the asset goes. Probate assets are either controlled by a person's will or, in the absence of a will, by the intestacy statutes.

A nonprobate asset is an asset that is not a probate asset; in other words, there is an agreement, contract, or other arrangement that directs where it goes at the decedent's death. The most common types of nonprobate assets are assets that have a beneficiary designation associated with them (such as a life insurance policy, IRA, 401(k), 403(b), etc.); jointly held assets; assets with a pay on death (POD) or transfer on death (TOD) designation; and assets held by a trust.

Beneficiary designation pass pursuant to the beneficiary designation associated with the asset. It is essentially a contract between the owner and the provider. Assets that have a beneficiary designation associated with them are not affected by a will or a revocable trust. It is important that when people do their estate plan that they consider these beneficiary designation assets, because they frequently contain large chunks of a person's net worth.

Jointly held assets pass by operation of law upon the death of one of the joint tenants. Typically both spouses will hold their home as joint tenants with rights of survivorship. The property is held as joint tenants with rights of survivorship, then it passes to the surviving joint tenant by operation of law.

TOD and POD assets pass pursuant to the designation associated with the account. Many bank accounts and brokerage accounts will have the ability to make a POD or a TOD designation.

The other major type of nonprobate assets is assets that are held in trusts, particularly revocable trusts. Property held by the trust passes pursuant to the provisions of the trust.

There have been many studies that looked at this issue and the conclusion is that the vast majority of assets in the United States are no longer probate assets, but instead are nonprobate.

Authorities

- John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108 (1984).

Further Reading

- Minnesota Estate Administration Deskbook, 4th ed. (Minnesota CLE 2012, updated 2016).

4. Is there more to estate planning than wills and trusts?

Answer

There is much more to estate planning than wills and trusts. Frequently, as part of the estate planning process, estate planners will draft health care directives and powers of attorney for clients. Also, coordinating nonprobate property is essential to having an effective estate plan.

A power of attorney allows a person to appoint somebody to make financial decisions on behalf of the principal during life. A validly executed power of attorney generally avoids the need to establish a conservatorship if the person becomes incapacitated later on.

A health care directive is a document that allows somebody to do two things: (1) appoint a health care agent, and (2) give that agent instructions on how they would like health care administered and other things. In Minnesota, the health care power of attorney and the living will have been combined into one comprehensive document.

In addition to these documents, making sure that the beneficiary designations on life insurance policies, IRAs, 401(k)s, and other retirement assets are coordinated with the plan that has been established in the will or revocable trust is critical. Most people have a good chunk of their net worth tied up in assets that have a beneficiary designation associated with them. If one only does a will and trust, and they establish in the will or trust a testamentary trust to hold assets for their children, but you they a $500,000 life insurance policy payable to their children, they have not done their estate planning properly.

In addition to lifetime planning documents and beneficiary designations, it's also very important to make sure that assets do not have a POD or TOD that is inconsistent with the disposition in the will or trust.

Also, many estate planners assist clients with asset protection planning and titling assets to make sure that things are passed in a tax efficient manner. There is much, much, much more to estate planning than wills and trusts.

Authorities

- Minn. Stat. ch. 523 (power of attorney).
- Minn. Stat. ch. 145C (healthcare directives statute).

Further Reading

- Drafting Wills and Trust Agreements, 7th ed. (Minnesota CLE 2014, revised 2015).

Notes

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5. Can I disinherit my spouse or children?

Answer

In Minnesota, a person cannot completely disinherit a spouse. A spouse is entitled to a number of things that one cannot get around. First, the spouse is entitled to the decedent's homestead. If there are no children, the spouse is entitled to the homestead outright, free of creditor claims (Note: this is not free of a lien against the property, such as a mortgage). If there are children, then the spouse is entitled to a life estate in the homestead and the children are entitled to the remainder.

A surviving spouse is also entitled to maintenance of $1,500 a month for a period of 18 months if the estate is solvent. If the estate is insolvent, the surviving spouse is entitled to $1,500 a month for a period of 12 months. The surviving spouse is also entitled to one vehicle regardless of value along with up to $10,000 in household furniture, furnishings, appliances, and personal effects. All of the above-mentioned assets pass to the surviving spouse free of creditor claims.

In addition to the statutory allowances, a surviving spouse is also entitled to a percentage of the estate that is based upon years of marriage and the amount of assets the surviving spouse has. The percentage that the spouse is entitled to starts at three percent at one year of marriage and goes all the way up to 50 percent after 15 years of marriage. This is not 50 percent of the decedent's assets, but rather 50 percent of the "augmented estate." The augmented estate is calculated by taking all of the decedent's probate and non-probate assets and adding all of the surviving spouse's assets. The surviving spouse is entitled to 50 percent of that number, so if the surviving spouse has more assets than the decedent had, he or she will only be entitled to the statutory allowances and will not have an elective share claim. If, on the other hand, the surviving spouse has fewer assets than the decedent, then he or she will be entitled to up to 50 percent of the decedent's assets.

Unlike a surviving spouse, generally a person does not have to provide for children under Minnesota law. That is, there is no statutory right to an inheritance built in to the Minnesota Probate Code. If there is a surviving spouse, the decedent's descendants are entitled to the remainder of the homestead. Children are entitled to $10,000 in household furniture, furnishings, appliances, and personal effects and to one automobile. If there are multiple children, they will split these benefits equally and they only get these if there is no evidence that they were intentionally omitted by the decedent. Children are also entitled to a family allowance if they are minors or they were in fact being supported by the decedent. The family allowance is the same as it would be available to the surviving spouse; $1,500 per month for 18 months if the estate is solvent, or $1,500 for 12 months if the estate is insolvent.

Other than these specific exemptions, a child is not entitled to inherit from his or her parent. All that being said, courts generally disfavor disinheritance without a valid reason. People should be mindful that courts and juries bend over backwards to avoid a complete disinheritance. An approach that is often taken is giving a child that the individual would like to disinherit a sum of money that is significant enough so that they will not be enticed to contest the will.

Authorities

- Minn. Stat. § 524.2-402 (homestead).
- Minn. Stat. § 524.2-403 (exempt property).
- Minn. Stat. § 524.2-404 (family allowance).
- Minn. Stat. §§ 524.2-201–524.2-215 (elective share).

Further Reading

- Drafting Wills and Trust Agreements, 7th ed. (Minnesota CLE 2014, revised 2015).

Notes

6. Do I need a will?

Answer

A person needs a will if the person:

- has property that is probate property and the person would like it to go to somebody other than the people who would be entitled to it under intestacy;
- has minor children who would receive property under intestacy;
- is at all charitably inclined;
- would like to appoint a guardian and conservator for minor children;
- would like to dictate who has control of his or her financial affairs after he or she dies;
- would like to establish trusts; or
- wants to have some testamentary control of how his or her estate is distributed.

A will is a document executed during life that disposes of property at death. The testamentary formalities that are required to have a valid will are that it is signed, dated, and witnessed by at least two witnesses. In addition to disposing of property at death, a will is frequently used to appoint a guardian and conservator for a minor child and to nominate a personal representative (executor) to administer your estate.

A will only controls the disposition of a person's probate assets. Probate assets consist of assets that are in the decedent's name alone, so things like life insurance policies, IRAs, 401(k)s, and jointly-held real estate are not affected by a will. If a person does not sign a will, then the person's assets are disposed of pursuant to the intestacy statutes.

The intestacy statutes provide for a disposition of property that depends upon a number of factors. If there is a surviving spouse, in Minnesota the surviving spouse will receive a portion of the estate. How large the portion depends upon whether there are children from a prior relationship. If there are children from a prior relationship, the surviving spouse gets the first $150,000 plus half of the assets above and beyond the $150,000. If all of the children are from the union, then the surviving spouse gets all of the probate assets. If there is no surviving spouse, the property is divided into equal shares and distributed to children. If the children happen to be minors, rather than receiving the property it will be held for the benefit of that minor as a minor conservatorship.

If there are no children, then the property is passed pursuant to the rest of the intestacy statutes and it would go as follows: to parents, if parents are living; if no parents are living, it would go to brothers and sisters; if no brothers and sisters are living, it would go to nieces and nephews; if there are no living siblings, parents, or nieces and nephews (or grand-nieces and grand-nephews), then the property would be distributed to grandparents; if none, aunts and uncles; if none, cousins; if none, first cousins once removed, and so on and so forth. The Minnesota intestacy statutes stop at descendants of grandparents and if there is nobody closer than the descendants of a grandparent, then the property escheats to the state.

Authorities

- Minn. Stat. §§ 524.2-101–524.2-103 (intestacy).
- Minn. Stat. § 524.2-502 (formalities to execute a will).
- Minn. Stat. § 524.5-202 (appointment of guardian and conservator).
- Minn. Stat. § 524.3-203 (appointment of personal representatives).

Further Reading

- Drafting Wills and Trust Agreements, 7th ed. (Minnesota CLE 2014, revised 2015).

Notes

7. Do I need a trust?

Answer

There are many types of trusts and it is a matter of personal preference whether a person uses trusts in his or her estate planning. First, there are testamentary trusts and inter vivos trusts. Testamentary trusts are trusts that are established at death and are usually done in either a will or a revocable trust. Inter vivos trusts are trusts that are established during lifetime. Second, there are revocable and irrevocable trusts. An irrevocable trust is a trust that is established that cannot be changed or altered by anybody. A revocable trust is a trust that is established and can be changed by either the person establishing the trust or someone else.

Frequently, clients will use an inter vivos revocable trust to help plan for and administer their estate. If a person sets up a revocable trust and titles all of his or her assets into this trust, the assets can pass without going through a probate proceeding. This revocable trust could also contain testamentary trusts that are used to do estate tax planning and to ensure that minor children are not receiving assets before the age of 18 (testamentary trusts for tax planning and to ensure children do not receive assets before 18 could also be set up and established in a will).

Some practitioners use a revocable trust plan for any person because they want to avoid a probate proceeding. In some states, such as California, where probate costs are extremely expensive and filing fees are based on a percentage of the assets, it is advisable to avoid a probate proceeding. In other states such as Minnesota, where there is an informal probate system and it is relatively simple to navigate probate, not every person needs a revocable trust. Revocable trusts have an advantage over a will because they often will provide for speedier distributions; they allow for greater privacy because they avoid the probate proceeding, which is a matter of public record; and they are likely to decrease administrative costs. A revocable trust is something that many clients should consider —especially those with assets in multiple states and those with a desire for privacy.

The vast majority of people that do estate planning will use some sort of trust, whether it's inter vivos or testamentary, as part of their estate plan.

Authorities

- Minn. Stat. ch. 501B (charitable trusts).
- Minn. Stat. ch. 501C (Minn. Trust Code).
- Minn. Stat. §§ 524.3-301–524.3-311 (informal probate).

Further Reading

- Drafting Wills and Trust Agreements, 7th ed. (Minnesota CLE 2014, revised 2015).

Notes

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8. How can I avoid probate and should I?

Answer

Probate is a process which passes the decedent's assets from his or her name alone to devisees under a will or heirs under the intestacy statutes. Probate is a court process and usually begins with either a petition or an application that is filed with the probate court. A person or entity is appointed as personal representative to act on behalf of the estate. That person or entity collects the decedent's assets, pays the debts, and then distributes the property pursuant to the will or intestacy statutes.

In some states, such as Minnesota, there is an informal probate process that can generally be done without having lengthy and costly court appearances. In other states, the probate process will require a number of hearings by attorneys, and the filing fees are based on a percentage of the assets. In Minnesota, the filing fee is currently $322, whether it's a $50,000 estate or a $500,000,000 estate.

Because probate is a part of the district court, all documents found in the probate are a matter of public record. Obviously, this means that anybody could go down to the courthouse, pull the file, and see the decedent's will, how the assets are disposed of, and get an idea of what the decedent's assets were. Also, the probate process has a creditor period, which means that the estate cannot be fully administered and distributed for at least four months after the decedent dies.

Probate has very negative connotation for a variety of reasons, some of which are with merit and others without. In Minnesota, a probate can be accomplished fairly quickly and inexpensively when compared to other states. Despite this, many people will put together their estate plan to avoid a probate proceeding. You need to do a probate proceeding in each state where one owns real estate; whereas, intangible assets—such as interests in companies, stocks, bonds, etc.—are passed pursuant to the probate where one is domiciled, whereas property real estate requires a probate in the state where the real estate is located. Those people with assets in multiple states should consider using a revocable trust to avoid multiple probate proceedings

In order to completely avoid probate, one will either need to have a revocable trust and transfer all of their assets to the revocable trust, or use the other nonprobate transfer methods, such as TOD, PODs, beneficiary designations, or jointly held assets.

Authorities

- *See generally* Minn. Stat. ch. 524.3 (probate).
- Minn. Stat. §§ 524.3-301–524.3-311 (informal probate).
- Minn. Stat. §§ 524.3-801–524.3-817 (creditor claims).

Further Reading

- Minnesota Estate Administration Deskbook, 4th ed. (Minnesota CLE 2012, updated 2016).

9. Will the government get everything if I do not plan properly?

Answer

The only way the government gets everything is if one dies intestate and has no descendants and no heirs that are lineal descendants of grandparents. In that case and in that situation alone, the government will literally get all of the assets.

Another situation where the government could get a majority of one's assets or a good chunk of one's assets is if the individual were on Medical Assistance before death. Pursuant to the Medical Assistance rules, an individual can keep their homestead if it is reasonable that they will return or if they have a surviving spouse, but when the individual dies, the government will have a lien against their real estate equal to the amount of governmental benefits that the individual received.

Absent these two situations, the government will not get everything even if an individual failed to properly plan their estate. There are estate taxes, both at the state and federal level. In Minnesota, there is an estate tax on assets that exceed $1,600,000. The estate tax starts off at around 10 percent, and goes up to 16%. The Minnesota exemption will be $1,800,000 in 2017, and $2,000,000 in 2018 and beyond. The federal estate tax is a tax on assets that exceed $5,000,000 (indexed for inflation). For 2016, the federal estate exemption is $5,450,000 and the tax rate is 40 percent, so assets exceeding $5,450,000 are subject to a 40-percent estate tax. The tax is calculated based on a decedent's net worth, or any asset that they have an incident of ownership, dominion, or control over. Things like real estate, the death benefit of a life insurance policy, stocks and bonds, LLC interests, and jointly held real estate are all included in the gross estate and subject to estate tax.

There are two important exceptions to the estate tax. One is that assets that pass directly to a surviving spouse are not subject to estate tax. There is an unlimited marital deduction. In addition, one can pass an unlimited amount of property to a charity. There is an unlimited charitable deduction. Any assets that are not passing to a surviving spouse or charity are subject to estate tax, but the vast majority of people will not have to pay estate tax because their estates are lower than the federal exemption amount of $5,450,000 and even the Minnesota exemption amount of $1,600,000.

Authorities

- Minn. Stat. § 524.2-105 (intestacy).
- Laurie Hanson & Cathryn D. Reher, *Medical Assistance Programs, Services and Eligibility*, Elder Law Handbook (Minnesota CLE 2012, updated 2014).
- 26 U.S.C. §§ 2001–2058 (federal estate taxes).
- Minn. Stat. ch. 289A (Minnesota estate taxes).

Further Reading

- Elder Law Handbook, 3d ed. (Minnesota CLE 2012, updated 2015).
- Minnesota Estate Administration Deskbook, 4th ed. (Minnesota CLE 2012, updated 2016).

10. How can I avoid paying estate taxes?

Answer

There are many different estate tax savings strategies that estate planners use to avoid paying estate taxes.

There is an estate tax imposed on assets that pass to someone other than a surviving spouse or charity. Estate taxes are levied upon all of the assets in a decedent's estate, such as real estate, stocks and bonds, bank accounts, promissory notes, other debt instruments to the decedent, death benefits of life insurance policies, any retirement assets such as 401(k)s, IRAs, a portion of any jointly held property, and any other assets that the decedent transferred during his or her life but retained an interest to control the enjoyment of property. The taxes are actually imposed upon the estate and are paid before distributions are made to the beneficiaries.

The easiest way to avoid paying estate taxes is to make sure that the estate is below the exemption amounts when one dies—either $1,600,000 at the Minnesota level, or $5,450,000 (currently) at the federal level. Another easy way to avoid paying estate taxes is if the individual is married, leave all of the assets to the surviving spouse, and then when the surviving spouse dies, have the surviving spouse leave all of his or her assets to a charity. If neither of those plans are appropriate, then people might need to do some estate tax planning.

The main way that people do estate tax planning is making sure that each spouse's exemption is fully utilized. Each person has an exemption amount that they can shelter from estate taxes—$1,600,000 at the Minnesota level, or $5,450,000 at the federal level. If one is married and they die, their assets pass to the surviving spouse free of any estate tax. And when the surviving spouse dies, the spouse has an exemption that he or she can pass tax-free.

On the first spouse's death, if the decedent passes all assets to the surviving spouse, the decedent does not use the estate tax exemption. This is a waste of an exemption, because one either uses it or loses it. Attorneys have come up with a method to utilize that exemption. The main way that attorneys utilize that exemption is by transferring the exemption amount to a credit shelter trust, family trust, or some other trust for the benefit of the surviving spouse and maybe children. The balance of the assets usually pass to the surviving spouse. This way, the attorney is using the first spouse's exemption amount without depriving the surviving spouse of the ability to use the assets.

Under federal law, there is also a concept called portability, which allows a surviving spouse to use a predeceased spouse's unused estate tax exemption simply by electing to use it by filing a federal estate tax return. This is a law that came into effect for 2011 and in 2013, it was made permanent. There is no portability in Minnesota, so Minnesota residents will still need to do estate tax planning if they want to take advantage of the Minnesota estate tax exemption.

Authorities

- 26 U.S.C. §§ 2001–2058 (federal estate taxes).
- Minn. Stat. ch. 289A (Minnesota estate taxes).

Further Reading

- Minnesota Estate Administration Deskbook, 4th ed. (Minnesota CLE 2012, updated 2016).

Elder Law

Chapter 5

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Edina

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1. What is the difference between Medicare and Medicaid?

Answer

Medicare and Medicaid are both health care benefit programs under the umbrella of the Social Security Administration. In the state of Minnesota, we call the Medicaid program Medical Assistance.

Medicare is a health insurance program administered through the federal government. Medicare provides health insurance coverage for those over the age 65; those who are suffering from kidney failure or kidney disease, regardless of their age; or those who are permanently disabled and unable to work.

Medical Assistance is a state/county administered program receiving funding through the federal government. Medical Assistance provides health care coverage for individuals who are pregnant, blind, disabled, under the age of 19, or who need nursing home or in-home care and meet asset and income requirements.

Authorities

- Medicare is covered by Title XVIII of the Social Security Act and is administered by the Centers for Medicare and Medicaid Services. Title XVIII appears in the United States Code as 42 U.S.C. §§ 1395–1395ccc. Regulations of the Secretary of Health and Human Services relating to Title XVIII are contained in chapter IV, Title 42, and in subtitle A, Title 45, Code of Federal Regulations.
- Minnesota Medical Assistance laws are contained in Minnesota Statutes chapter 256B. *See also* the Minnesota Department of Human Services Health Care Programs Manual, *available at* <http://hcopub.dhs.state.mn.us/hcpmsrc>.

Comment

Many people are confused about the difference between Medicare and Medical Assistance—particularly children who are trying to assist aging parents. One important point to stress is that Medicare does not pay for nursing home care, except in limited cases. One example would be if a parent breaks a hip, spends time in the hospital, and then is transferred to a nursing facility for rehabilitation. In this case, Medicare will pay for the nursing facility for 20 days. Medicare may also pay for an additional 80 days but only under certain circumstances.

Further Reading

- The Centers for Medicare and Medicaid Services publishes an annual handbook entitled "Medicare & You," which contains updated information about health and prescription drug plans, Medicare coverage and Medicare costs. Significant information is also available online at <www.medicare.gov>.

2. How does someone access Medicare benefits?

Answer

If an individual has signed up for Social Security retirement benefits at age 62, they will automatically receive a Medicare card in the mail three months before they turn 65. Included with the card will be information about choices related to the Medicare coverage.

In the event that the individual wishing to access Medicare benefits is someone who is approaching the age of 65 and has not started collecting Social Security retirement benefits, the individual will receive information in the mail from the Social Security Administration regarding Medicare benefits.

To determine the answers to the choices presented, I suggest that individuals read the information provided online by the Social Security Administration, contact the Senior Linkage line, or work with an insurance agent.

If an individual has an accident or a medical crisis resulting in a permanent or long-term disability, the first step to receiving Medicare coverage is to apply for Social Security disability benefits. If the Social Security Administration determines that the individual is disabled according to the criteria established by the SSA, the individual will begin to receive a monthly disability benefit. The individual will receive a Medicare card three months prior to the 25th month of their disability anniversary date.

Authorities

- <www.medicare.gov>.
- Senior Linkage Line at <www.MinnesotaHelp.info> or 1-800-333-2433.

Comment

The Social Security disability programs provide monthly income for individuals determined to be disabled by the Social Security Administration. Supplemental security income (SSI) provides monthly income for those who have never been able to work at substantial gainful employment or for those who have minimal work history. Retirement, survivors and disability insurance (RSDI), also known as Social Security disability insurance (SSDI) provides monthly income for those individuals who have sufficient prior work history. You can find additional information on these programs at <http://www.ssa.gov/disability>.

Further Reading

- Elder Law Handbook, 3rd ed. (Minnesota CLE 2012, updated 2015).

3. How does someone access Medical Assistance benefits?

Answer

Because Medical Assistance is a need-based program, an application to the program is necessary to initiate Medical Assistance benefits. The requirements for each program (e.g., in-home care, nursing home care, medical care for pregnant women, children, or those with traumatic brain injuries) are different.

My focus is on Medical Assistance for long-term care at home, in assisted living, a community care home, or in a nursing facility. In the case of Medical Assistance for long-term care, the applicant and his or her spouse must report their assets and income. As an example, if a married individual is applying for Medical Assistance, the individual and his or her spouse will report the value of all of their bank accounts, certificates of deposit, retirement accounts, investment accounts, life insurance policies, and any other assets. Some assets are exempt, such as a home, a vehicle or household goods. The applicant is allowed to keep no more than $3,000 in his or her own name. In 2016, the applicant's spouse is allowed to keep between $33,851 and $119,220 in nonexempt assets. The amount is determined through a calculation imputing half of the value of all assets, regardless of how the assets are titled, to the applicant and half to the applicant's spouse.

As part of the application process, an applicant's income is also reviewed. In general, all of an applicant's income, except for $97 set aside for personal care needs such as haircuts and personal expenditures, must be used to pay for the individual's care. The only exception is if the applicant's spouse still living in the community does not have sufficient income to meet the minimum income levels set by the Medical Assistance program. An applicant's spouse living in the community must have a minimum of $1,992 in income per month. If the applicant's spouse does not meet the minimum through their own income, he or she will be allowed to use some of the applicant's income to reach the minimum amount.

Authorities

- Minnesota Statutes chapter 256B.
- Minnesota Department of Human Services Health Care Programs Manual, <hcopub.dhs.state.mn.us/hcpmsrc>.

Comment

The Medical Assistance eligibility rules are complicated. I always recommend that families anticipating the need for a Medical Assistance application for a loved one seek the assistance of an elder law attorney. It is not a county worker's job to advocate for an applicant. The only way a family can be assured that someone is advocating for their loved one in the Medical Assistance application process is to retain a knowledgeable elder law attorney.

Further Reading

- Elder Law Handbook, 3rd ed. (Minnesota CLE 2012, updated 2014).

Notes

4. I have heard that there is a "look back" period. What does that mean?

Answer

The "look back" period is part of the eligibility requirements for the Medical Assistance program. From the date of application, the county will "look back" for 60 months to determine if the applicant or the applicant's spouse has transferred or gifted assets to someone and not received a fair market value asset in return.

Obviously, a gift of cash to a child is a disqualifying transfer if the gift is made within 60 months of the date of the Medical Assistance application. But, a disqualifying transfer can also occur if the applicant sells a vehicle worth $10,000 to a grandchild for $3,000. In this case, if the "sale" of the vehicle occurs during the "look back" period, this is a disqualifying transfer in the amount of $7,000. The actual length of the ineligibility period is determined by dividing the amount of the transfer by a number set every year by the State of Minnesota Department of Human Services. Currently, that number is $6,141. A disqualifying transfer of $7,000 divided by $6,141 equals 1.14, resulting in 1.1 months of ineligibility.

Authorities

- Minnesota Statutes chapter 256B.
- Minnesota Department of Human Services Health Care Programs Manual, <hcopub.dhs.state.mn.us/hcpmsrc>.

Comment

Many people know that there is a law allowing them to gift $14,000 per year to anyone including a child. It is frequently confusing to parents to learn that one part of the law allows them to gift to a child and another part penalizes them for that gift if the gift is within 60 months of an application for Medical Assistance benefits.

Further Reading

- Elder Law Handbook, 3rd ed. (Minnesota CLE 2012, updated 2015).

Notes

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5. Are there any transfers during a "look back" period that are exempt transfers?

Answer

There are some transfers considered to be exempt even though they took place during the "look back" period. Here are some examples of exempt transfers:

- Transfer to a medical assistance applicant's child if the following requirements are met:

  (1) the child lived in the home with the applicant and provided services to the applicant for two full years before the applicant moved to a long-term-care facility or began receiving home and community-based services; and

  (2) a physician's statement is provided asserting that without the care provided by the child, the applicant would have entered a long-term-care facility or received home and community based services through a waiver program such as Elderly Waiver.

  In this situation, it is helpful to draft two affidavits. The first affidavit is signed by the child providing the services outlining the start date for the services, the applicant's specific care needs and/or diagnosis, the specific services provided by the child, and a statement that the applicant would not have been able to remain at home without the services the child provided. The second affidavit is signed by the physician stating that the physician is licensed and where the physician is employed, the contact the physician has had with the applicant, the applicant's diagnosis and care needs, and that the physician has read and agrees with the child's affidavit and believes that the applicant would have received long-term care in a facility or home and community-based services sooner if the child had not provided care to the applicant.

- Transfers to a Medical Assistance applicant's child or the applicant's spouse's child if the child is blind or has a disability certified by the Social Security Administration (receiving Supplemental Security Income [SSI] or Retirement, Survivors or Disability Insurance [RSDI]), or has been certified as disabled by a State Medical Review Team Disability Determination (SMRT), or has a physician's determination of disability and a confirmation of that disability.

- Transfers by the applicant to any individual if that transfer is made into a trust established for the sole benefit of the individual and that individual has been determined to have a disability under the Social Security Administration criteria or the SMRT criteria.

Authorities

- Minn. Stat. § 256B.0595: Prohibitions on Transfers; Exceptions
- Minnesota Department of Human Services Health Care Programs Manual, 19.40.20, Transfer Exceptions, <hcopub.dhs.state.mn.us/>.

Further Reading

- Stuart Schmitz, Asse*t Transfers and Reduction of Assets, in* Elder Law Handbook, 3rd ed., ch. 16 (Minnesota CLE 2012, updated 2015).

Notes

6. My dad was recently diagnosed with [any number of debilitating illnesses ... Alzheimer's disease, Parkinson's disease, ALS, MS, etc.]. Should my mother divorce him to protect her assets?

Answer

There is no simple answer to this question. Divorce is only one option a well spouse might consider in determining how to best care for an ill spouse. It is an option that should be considered very carefully when trying to determine how to best provide care for an ill spouse. Here are some issues/concerns to consider:

What are the total available assets held by the applicant and the community spouse? How much will the community spouse be able to retain under the Medical Assistance rules? The Medical Assistance rules provide for a healthy spouse living in the community to retain between $33,851 and $119,220 (in 2016) in available assets held by the applicant and the community spouse.

In a marriage dissolution, the family law court looks for an "equitable" division of assets. What could be considered an equitable division of assets? What is the comparison between the "equitable" division of assets and the amount of assets a community spouse will be allowed to keep under the Medical Assistance rules?

What is the life expectancy of the ill spouse? What type of care might the ill spouse need during his or her life time?

Many well spouses find the idea of divorcing an ill spouse very distressing emotionally. Any conversations regarding the use of divorce to protect assets must also address the emotional ramifications.

Comment

There are many instances where married couples are separated, living in different residences, and conducting separate lives for multiple years. When one spouse becomes ill, the length of time of the separation is irrelevant. Under Medical Assistance rules, these individuals are still married and both spouses will be responsible for the costs of medical care for the ill spouse. When determining the amount of available assets, the assets owned by both spouses will be considered.

Further Reading

- Elder Law Handbook, 3rd ed. (Minnesota CLE 2012, updated 2015).
- Minnesota Department of Human Services Healthcare Programs Manual.

7. My parents are getting older and their health is declining. I'm worried about what the future might bring. What can I do to prepare?

Answer

A child looking out for aging parents should address legal, financial, health care, and social issues with his or her parents. Here are some topics for conversation with parents.

Do you have legal documents such as a will or trust, a power of attorney, or health care directive? If something happens to you—a fall, an illness, an accident—where would I find these documents?

Assuming the parents have executed documents, does the person you have named on a power of attorney or as a successor trustee know about your wish that they will manage your financial affairs if you are unable to do so? Does this individual know where your assets are located and how to pay your usual expenditures?

Assuming the parents have executed a health care directive, does the person named as a health care agent know the parent's wishes related to health care if there is a health crisis?

If one or both of the parents are veterans, have they investigated potential benefits available to them including compensation for service-connected disabilities, pensions for low-income veterans, or home health care programs when one or both of the parents need additional assistance?

Frequently, the child or children live in a different state than the parents. In addition to discussing the above questions, children and parents can investigate services available in the parent's community. For example, suppose that one parent has cognitive issues and the other parent pays the bills, prepares the meals, provides the transportation to church and medical appointments and generally cares for the parent with cognitive issues. Now suppose that the *healthier parent* has a medical crisis, such as a stroke, and all the children live out of state. If the parents and children had previously investigated the services of a geriatric care manager or a home health care agency and selected someone to work with in the event of a crisis, a great deal of stress is relieved. The children could notify the geriatric care manager or home health care agency of the crisis and someone could be immediately dispatched to help the parent with cognitive issues.

Authorities

- To find a geriatric care manager in Minnesota or other states, see <http://www.caremanager.org>.

Comment

If parents are reluctant to take steps to plan for future crises, children should at least encourage the parents to execute a power of attorney. Without this document, family members will have no option but to go to court seeking the appointment of a guardian or conservator to make decisions on behalf of the parent.

Further Reading

- Elder Law Handbook, 3rd ed. (Minnesota CLE 2012, updated 2015).

Notes

8. I have a sibling with a disability who has always lived with my parents. Is there anything I should make sure they have done to prepare for the time when my parents are gone?

Answer

If the sibling has a cognitive impairment, the parents should have sought a guardianship or conservatorship for the sibling as soon as the sibling turned 18. A guardian has the authority to make medical decisions, determine where the individual will live, and oversee what types of activities the individual will pursue. If there is no conservator appointed for the sibling, a guardian can also apply for public benefits. A conservator manages financial affairs, including paying all bills, collecting all debts, or managing all real estate.

A cognitively impaired or physically impaired sibling would potentially be eligible for Social Security disability benefits or other public benefits such as Medical Assistance or Medicare for health care coverage. The parents should have investigated Social Security benefits to determine what might be available for the sibling with a disability. To protect these benefits, parents should include provisions for a supplemental needs trust within their will or trust. Supplemental needs trusts supplement public benefits, providing the cognitively impaired or physically impaired sibling with additional funds to be used for travel, specialized equipment, care attendants not covered under public benefit programs, etc.

Perhaps most important as parents are aging is conversations between the parents and other family members about the expectations for future care of the sibling with a disability. If the sibling has always lived with the parents, where will the sibling live if the parents are both deceased or if the parents become incapacitated? Who will succeed the parents as the guardian or conservator? Have the parents considered withdrawing as guardian and conservator and seeking the appointment of another family member while the parents are still living? This would avoid a gap period when no one has the authority to act as the individual's guardian and conservator.

Authorities

- Minn. Stat. ch. 524.5 (guardianship and conservatorship statutes).
- Minn. Stat. § 501C.1205 (supplemental and special needs trusts statutes).

Comment

If parents do not take steps to execute a will or trust containing a supplemental needs trust for the sibling with a disability, a special needs trust can be established by the probate court after the parent's death. One major difference between a special needs trust and a supplemental needs trust is the distribution of the funds upon the beneficiary's death. Remaining funds in a special needs trust will be used to reimburse the county for Medical Assistance benefits provided. Reimbursement is not required in a supplemental needs trust.

Further Reading

- Elder Law Handbook, 3rd ed. (Minnesota CLE 2012, updated 2015).
- Drafting Wills and Trust Agreements, 7th ed. (Minnesota CLE 2014, Revised 2015).
- Guardianship and Conservatorship Law Handbook, 2d ed. (Minnesota CLE 2013, updated 2014).
- Information regarding supplemental needs trusts or special needs trusts can be found in various Minnesota CLE materials, including *Drafting Wills and Trust Agreements, Elder Law Handbook, Supplemental and Special Needs Trusts*.

Notes

9. Are there signs I should be looking for to indicate that my parents might need help?

Answer

Children should review the following issues to determine if it is time to seek changes such as extra help in the home, assistance with grocery shopping, changes in transportation arrangements, etc.

- Is the parent's clothing clean and presentable or does it appear it has been worn for an extended period of time?
- Does it appear that the parent is bathing on a regular basis or is it apparent that the parent has dirty hair or body odor?
- Is the living environment clean, including counters, appliances, the bathroom, and floors?
- Is there food in the cupboards and refrigerator?
- Is there evidence that the parent has forgotten what they were doing, such as burners left burning on the stove or food left in the microwave?
- Has the parent lost weight?
- Does it appear they are unable to manage their medications?
- Does the parent have unexplained bruises or injuries?
- Has incontinence become a problem?
- Are there stacks of unpaid bills? Notices of utilities shut off? Phone calls from debt collectors?
- Have they relayed stories about getting lost on the way to locations that are common destinations such as church, the beauty shop, the bank, or the grocery store?
- Are there multiple dents in their vehicle?
- Has the parent stopped participating in social activities that were previously enjoyable?
- Has the parent expressed anxiety about the presence of particular people?
- Is the parent anxious to have more cash available in the home?

- Does the parent receive frequent deliveries of items of the type that are advertised on television?
- Is there a significant increase in magazine or other publication subscriptions?

Some of these situations can indicate that a parent is unable to make good cognitive decisions or that they are having memory or judgment issues. The parent could be subjected to financial exploitation. If a child sees these types of issues, it is time to investigate and to start talking about additional assistance for the parents. This could be assistance in bill-paying or a home health care agency assisting with transportation, household cleaning, or shopping. Meals on Wheels could provide lunch time meals for the parents.

Further Reading

- Elder Law Handbook, 3rd ed. (Minnesota CLE 2012, updated 2015).

Notes

10. I think my sister is taking money from my dad and I'm not sure he can afford it. What should I do?

Answer

This is a difficult situation. We all have the right to make bad decisions—including dad. However, if dad's assets are limited, transfers of funds to a child can interfere with future eligibility for Medical Assistance benefits. If dad is cognitively impaired, this could be a case of financial exploitation by a family member.

The first step is to try to discuss the issue with dad to determine what is happening. Several things could be happening:

1. Dad could be cognitively able to understand what he is doing and is simply making a bad decision. In this case, assisting dad to understand potential consequences of transferring money to the sister might be enough to solve the problem.

2. Dad could be unable to cognitively understand the ramifications of his actions and sister could be taking advantage of the situation. This may be a situation where someone else needs to take over dad's financial affairs. If dad previously executed a power of attorney, the individual named on the document could potentially start managing dad's assets. If it's the sister who is named on the power of attorney, family members may need to seek a conservatorship for dad.

3. In some cases, it is clear that the family member is deliberately and maliciously taking advantage of dad. In this case, family members sometimes try to handle the situation themselves—requesting that the sibling return all the funds or negotiating some type of payback plan. If this does not work, it may be time to call the local police or the county adult protection and to seek the appointment of a conservator.

Authorities

- Minn. Stat. §§ 609.232 & 609.2335 (vulnerable adult statutes).

Comment

Despite the vulnerable adult statutes, county adult protection, and an increasing awareness of the problem of financial exploitation of our seniors, this problem is still difficult to address. The best solution is prevention. Conversations with a parent prior to the loss of cognitive abilities can help prevent problems. Appointment of trusted individuals who have good financial histories to assist parents in the management of their financial affairs goes a long way toward preventing financial exploitation.

Further Reading

- Elder Law Handbook, 3rd ed. (Minnesota CLE 2012, updated 2015).

Notes

11. My dad is a veteran. Are there veteran's benefits available to help him remain at home? How does he qualify?

Answer

The Veteran's Administration has many programs to help support senior veterans. The pension program supplements income for low-income seniors and helps senior veterans and their spouses to remain in their homes and receive in home care.

The first requirement is that the veteran has 90 days of active duty, one day beginning or ending during a "period of war." The dates for a "period of war" have been set by Congress. As an example, the "period of war" for World War II is December 7, 1941, through December 31, 1946, inclusive. If the veteran was in service on December 31, 1946, continuous service before July 26, 1947, is considered World War II service.

The second requirement is to have assets and income meeting the program requirements. Generally, a homestead, vehicle, and personal property are exempt assets. If the countable assets total less than $80,000, the veteran and spouse may be eligible for the pension program.

The pension program also has income requirements. This portion of the requirements requires an analysis of the household income and expenditures for medical expenses. If the household income less the deduction for medical expenses results in income below certain levels, the veteran's household will receive additional pension funds through the veteran's administration.

Authorities

- Veteran's Administration, <www.vba.va.gov>.

Comment

Veterans *and their spouses* can also receive long-term nursing home care at veteran's facilities such as the Minneapolis Veteran's Home. The veteran must have 181 days of active service in order to qualify for this program. Assets must be transferred out of the applicant's name so that the applicant has $3,000 or less in assets. *There is no asset limitation* for the community spouse. In addition, the look-back period is only 12 months.

Veterans may also be eligible for a "compensation" program similar to worker's compensation if the veteran has suffered a service-connected disability. A commonly approved disability is hearing loss.

These programs may receive changes to eligibility rules in the next year.

Further Reading

- Elder Law Handbook, 3rd ed. (Minnesota CLE 2012, updated 2015).

Notes

Workplace Law: Plaintiff and Defense Perspectives

Chapter 6

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1. Are non-compete agreements enforceable? If so, should an employee notify the "new" employer about the non-compete before accepting the position?

Answer

Whether a non-compete agreement is enforceable depends upon which state's law applies. In Minnesota, non-compete agreements can be enforceable. To be enforceable, a non-compete agreement must be necessary to safeguard an employer's protectable interests. In addition, the time period during which the employee is restricted from competing, and the geographic scope within which the employee may not compete, must be reasonable. There is no blanket rule to determine whether a non-compete agreement is reasonable. Note that customer restrictions are now often being used to substitute for, or complement, the geographic scope of non-compete agreements.

To be enforceable, a non-compete agreement also must be supported by consideration. In Minnesota, the job itself can be sufficient consideration if the employee entered into the non-compete agreement at the inception of the employment relationship. Once employment begins, ordinarily the job itself is no longer sufficient consideration. Instead, the employer must provide the employee with separate, independent consideration.

Generally, an employee should notify a prospective employer about a non-compete agreement before accepting the position. It is better to determine whether there is an issue at that point, rather than down the road when the former employer brings a claim against the employee and, potentially, the new employer.

Authorities

- *Bennett v. Storz Broad. Co.*, 270 Minn. 525, 134 N.W.2d 892 (1965).
- *Dean Van Horn Consulting Assocs. v. Wold*, 395 N.W.2d 405 (Minn. Ct. App. 1986).
- *Klick v. Crosstown State Bank of Ham Lake, Inc.*, 372 N.W.2d 85 (Minn. Ct. App. 1985).
- *Overholt Crop Ins. Serv. Co.* v. *Bredeson,* 437 N.W.2d 698 (Minn. Ct. App. 1989).
- *Satellite Indus. Inc. v. Keeling*, 396 N.W.2d 635 (Minn. Ct. App. 1986), *review denied* (Jan. 21, 1987).
- *IDS Life Ins. Co. v. SunAmerica, Inc.*, 958 F. Supp. 1258, 1273 (N.D. Ill. 1997), *rev'd on other grounds*, 136 F.3d 537 (7th Cir. 1998) (applying Minnesota law).
- *Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127 (Minn. 1980).
- *National Recruiters. Inc. v. Cashman*, 323 N.W.2d 736 (Minn. 1982).
- *Sanborn Mfg. Co. v. Currie*, 500 N.W.2d 161 (Minn. Ct. App. 1993).
- *Midwest Sports Mktg., Inc. v. Hillerich & Bradsby of Can., Ltd.*, 552 N.W.2d 254, 265 (Minn. Ct. App. 1996), *review denied* (Sept. 20, 1998).

Comment

The best practice for employers is to provide a job applicant they wish to hire with a written job offer conditioned upon the applicant signing the non-compete agreement, which agreement should be provided at the time of the offer letter, and have the applicant sign the non-compete agreement *prior* to the applicant's anticipated first day of work. By engaging in this practice, consideration (at least in Minnesota) should not be an issue. Other issues, of course, may remain (such as reasonableness and whether the employer was safeguarding a protectable interest).

Further Reading

- Discipline and Discharge Handbook, 2d ed. (Minnesota CLE 2014).

Notes

2. They let a bunch of us older workers go. Can they do that?

Answer

The short answer is no if the decision to terminate was because of the age of the workers. Federal law provides a cause of action for age discrimination in the workplace for individuals who are 40 years of age or older. Minnesota law provides a cause of action as well, but there is no minimum age threshold. Though such claims exist, from an employee's perspective, age discrimination cases are very difficult to prove.

Absent direct evidence of age discrimination (e.g., discriminatory statements revealing age based bias uttered by the employer's decision-makers), a case is considered under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this framework, the plaintiff-employee must establish a four-part prima facie case of age discrimination: (1) he is over 40 years old; (2) he met the applicable job qualifications; (3) he suffered an adverse employment action; and (4) there is some additional evidence that age was a factor in the employer's termination decision. *Ward v. Int'l Paper Co.*, 509 F.3d 457, 460 (8th Cir. 2007). If met, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for termination. *Id.* Assuming the employer makes such a showing, the burden returns to the employee to show that the employer's stated reason for termination is a pretext for discrimination. *Id.* At all times, the employee retains the burden of persuasion to prove that age was the "but-for" cause of the termination. *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2351 (2009).

Authorities

- 29 U.S.C. §§ 623(a)(1) & 631(a): Age Discrimination in Employment Act (ADEA).
- Minn. Stat. § 363A.08, subd. 2: Minnesota Human Rights Act (MHRA).
- *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343 (2009).

Comment

If an employee believes he or she is being discriminated against in the workplace because of age, a reporting of such belief to the employer's human resources department or to a supervisor is a necessary step. Not only will an investigation hopefully begin, but if an adverse employment action is taken subsequent to that reporting, the employee may have additional protections under applicable whistleblower laws. From a plaintiff's lawyer's perspective, things to consider when deciding to take such a case include: length of employment; job performance history; whether the employee was replaced and, if so, the age of the replacement employee; and whether evidence exists of comments that suggest age motivated the termination decision. In addition, filing a charge with the EEOC is a prerequisite to commencing an action under the ADEA.

Further Reading

- Discipline and Discharge Handbook, 2d ed. (Minnesota CLE 2014).

3. My company fired me to keep me from getting a big sales commission. Can they do that?

Answer

It depends. Generally speaking, an employer can terminate an employee for any reason or no reason as long as it is not discriminatory or retaliatory. The real question is whether the employee is entitled to a commission even if the termination itself is lawful. To determine the answer, one must look to the language of the controlling documents. If there is an employment agreement or commission policy that describes how and when commissions are earned and will be paid, generally speaking such documents will govern the dispute. Assuming the language supports the position you are maintaining, then you can assert a breach of contract claim and seek to recover the unpaid commissions. If, for whatever reason, one cannot maintain a breach of contract claim, one may be able to pursue a claim for tortious interference with prospective economic advantage. *Holman v. CPT Corp.*, 457 N.W.2d 740, 744 (Minn. Ct. App. 1990). If no remedies at law exist, consider an equitable claim for the commissions under a quantum meruit or unjust enrichment theory. *See, e.g., Roaderick v. Lull Eng'g Co., Inc.*, 208 N.W.2d 761, 763 (Minn. 1973). In addition, Minnesota law requires employers to make payment of earned commissions to a discharged employee within 24 hours of demand for payment. Minn. Stat. § 181.13. Of course, this statute only applies if the employee can show the commissions were earned.

Authorities

- Minn. Stat. §§ 181.13, 181.14 & 181.145.
- *Brozo v. Oracle Corp.*, 324 F.3d 661 (8th Cir. 2003).
- Minn. Stat. § 325E.37 (for certain independent contractor sales representatives).

Comment

If an employee believes he or she is entitled to commissions, make sure you possess all of the pertinent documents associated with how and when commissions are earned and paid, and that you are comfortable the language contained in such documents supports the reasons for payment of commissions. The *Brozo* case is listed as suggested reading because it is a frightening example of how employers can avoid commission payment obligations based on the language of the controlling documents.

Further Reading

- Wage and Hour Handbook: Federal and Minnesota (Minnesota CLE 2011).

4. I have a health condition that prevents me from working full-time. My doctor tells me with certain medication and treatments, I should be able to work full-time in six months. What do I tell my employer? What rights, if any, do I have? (ADA Response)

Answer

Your rights largely stem from the Americans with Disabilities Act (ADA), and the amendments to the ADA that took effect on January 1, 2009 (ADAAA). The ADA applies to employers with 15 or more employees. Generally speaking, the ADA prohibits employers from discriminating against qualified individuals with disabilities. The Minnesota Human Rights Act (MHRA) has similar prohibitions. For instance, both the ADA and MHRA require employers to embark on an interactive process with a qualified individual with a disability to determine if a reasonable accommodation can be provided.

To squarely address the question above, assuming the health condition is considered a "disability" under the ADA (meaning, for example, that an individual has a physical or mental impairment that substantially limits a major life activity), the law requires covered employers to provide a reasonable accommodation to the disabled employee that would allow the employee to perform the essential functions of his or her job, unless doing so would impose an undue hardship. Reasonable accommodations can include such things as job restructuring, modification of work schedules, reassignment to vacant positions, and acquisitions of equipment. The employee in the scenario above should engage in a discussion with the employer and request accommodation—assuming one is available that would allow the disabled employee to capably perform the essential job duties.

Authorities

- Minn. Stat. §§ 363A.03, subds. 12 & 36; 363A.08, subds. 2 & 6: Minnesota Human Rights Act (MHRA).
- 42 U.S.C. § 12101; 29 C.F.R. § 1630 *et seq.*: Americans with Disabilities Act (ADA).

Comment

Before the ADAAA, disability discrimination cases largely focused on whether the employee was disabled as a matter of law. Now, however, the focus is on the question of reasonable accommodation and the alleged discriminatory conduct. In other words, the definition of "disability" is broadly construed so that courts should be less focused on whether the employee is disabled and more focused on compliance and discrimination in the workplace.

The MHRA's anti-discrimination provisions apply to all employers (unlike the ADA, which only covers employers with 15 or more employees). The MHRA's reasonable accommodation requirements, however, only apply to employers with 15 or more employees.

For the FMLA response to this question, see Question 5.

Further Reading

- Wage and Hour Handbook: Federal and Minnesota (Minnesota CLE 2011).

Notes

5. I have a health condition that prevents me from working full-time. My doctor tells me with certain medication and treatments, I should be able to work full-time in six months. What do I tell my employer? What rights, if any, do I have? (FMLA Response)

Answer

The Family and Medical Leave Act (FMLA) may apply.

Under the FMLA, eligible employees are entitled to take up to 12 workweeks of unpaid leave within a 12-month period for: (1) the birth of a child or to care for a newborn child, for the adoption of a child, or for the placement of a child with the employee for foster care; (2) for the employee's own serious health condition that makes the employee unable to perform the functions of his or her position; (3) to care for a parent, spouse or child with a serious health condition; and (4) for certain military-related leaves (qualifying exigency and military caregiver leave). 29 C.F.R. §§ 825.100(a) & 825.112–825.127. For military caregiver leave, an employee can take up to 26 workweeks of FMLA leave within the 12-month period during which the employee takes military caregiver leave. 29 C.F.R. §§ 825.200 & 825.127(e)(1).

A covered private sector employer is one that, either alone or as an integrated employer with another entity, employs 50 or more employees in 20 or more calendar workweeks during the current or preceding calendar year. 29 C.F.R. §§ 825.104(a) & 825.105.

An eligible employee is generally one who: (1) has worked for a covered employer for at least 12 months (does not need to be consecutive) as of the date when the FMLA leave begins; (2) has worked for the covered employer for at least 1,250 hours during the 12-month period immediately preceding the beginning of the FMLA leave; and (3) works at a site where the employer has 50 or more employees within a 75-mile radius (measured by surface miles) as of the date the employee gives notice of the need for FMLA leave. 29 C.F.R. §§ 825.110 & 825.111.

FMLA leave taken due to a serious health condition may be taken on an intermittent or reduced leave schedule/part-time basis if there is a medical need that can best be accommodated through an intermittent or reduced work schedule. 29 C.F.R. § 825.202. An employer may require a medical certification of the medical need for the intermittent or part-time schedule. 29 C.F.R. § 825.202(b). An employee who needs leave on an intermittent basis or to work a reduced schedule due to planned medical treatments must make a reasonable effort to schedule such treatments so as not to disrupt unduly the employer's operations. 29 C.F.R. § 825.203.

In response to the question posed, the employee should inform his or her employer that he or she has a health condition and will need time off from work. While not technically required to invoke the FMLA, it would be wise for the employee to specifically mention the FMLA. It also would be prudent for the employee to put the notice in writing.

Authorities

- 29 U.S.C. §2601 *et seq*.
- 29 C.F.R. Part 825.

Comment

If an employee exhausts his or her FMLA allotment but is not ready to return to work without restrictions, or is not ready to return to work at all, employers need to be mindful of the Americans with Disabilities Act, the Minnesota Human Rights Act, and other laws that may still apply. In so doing, employers should conduct a reasonable accommodation analysis, which may include allowing the employee to continue the leave of absence for a period of time beyond the FMLA leave. *See* 29 C.F.R. § 825.702.

Both employees and employers should carefully review the FMLA regulations, which are quite complex, to ensure compliance. Among others, pay attention to exceptions to the general rules, and be sure to comply with any and all notice requirements.

The FMLA provides four possible 12-month periods during which the 12 weeks of FMLA leave must be taken, with a special 12-month period for military caregiver leave. If an employer does not specify the 12-month period it uses, then the period that is most beneficial to an eligible employee will be used. The four possible 12-month periods are: (1) the calendar year; (2) any fixed 12-month period, such as a fiscal year or a year starting on the employee's anniversary date; (3) the 12-month period measured forward from the date an employee's first FMLA leave begins; or (4) a rolling 12-month period measured backward from the date an employee uses FMLA leave. For military caregiver leave, the 12-month period begins on the first day of the leave and ends 12 months from that date, regardless of the 12-month period normally used by the employer to calculate FMLA leave. 29 C.F.R. § 825.200 & 825.127(e)(1).

For the ADA response to this question, see Question 4.

Further Reading

- Wage and Hour Handbook: Federal and Minnesota (Minnesota CLE 2011).

Notes

6. I think the company I work for is violating the law. Am I protected if I get fired for reporting this?

Answer

You will be protected if you can satisfy the elements necessary to establish that you were a whistleblower or the victim of retaliation. Many statutes, including those prohibiting discrimination in employment, prohibit retaliation against an individual who complains about a violation of the law. In addition, some states, including Minnesota, have a general statute that protects whistleblowers.

To implicate the Minnesota whistleblower protection statute (Minn. Stat. § 181.932), which was significantly revised in 2013, an employee must: (1) in good faith, report a violation, suspected violation, or planned violation of any federal or state law or common law (or a rule adopted pursuant to law) to an employer, a governmental body, or a law enforcement official; (2) be requested by a public body or office to participate in an investigation, hearing, or inquiry; or (3) refuse an employer's order to perform an action that the employee has an objective basis in fact to believe violates any law (or rule or regulation adopted pursuant to law), and the employee informs the employer that the order is being refused for that reason.

In addition to those stated above, there are additional provisions contained in Minnesota Statutes section 181.932 that apply to public employees and health care organizations.

Authorities

- 42 U.S.C. § 2000-3(a) (Title VII); *see also Crawford v. Metro. Gov't of Nashville and Davidson County*, 555 U.S. 271 (2009) (statements made during an employer's internal investigation may be protected by Title VII's anti-retaliation prohibition).
- 18 U.S.C. § 1514A(a)
- Minn. Stat. § 363A.15: Minnesota Human Rights Act.
- Minn. Stat. § 181.932.

Comment

Whistleblower/retaliation protection does not extend to complaints that do not concern a violation of law. So, for example, complaining that an employer miscalculated the amount of paid time off an employee had accrued would not be grounds for a retaliation/whistleblower action.

7. My boss is an absolute jerk. What can I do?

Answer

The simple answer is there isn't a whole lot you can do. It is not unlawful to be a jerk. If your boss is affecting conditions or privileges of employment based on your race or sex, for example, then you may have a claim under federal or state discrimination laws. Or, if your boss is acting like a jerk because you reported unlawful conduct in the workplace, you may have a retaliation claim. But if the problem is simply that your boss is rude, or that the two of you have a personality conflict, you can complain to the human resources department but, from a legal perspective, there is really nothing you can do.

Aside from the discrimination and retaliation laws, one possible theory of recovery in such a scenario is tortious interference with prospective economic advantage under Minnesota law. To establish such a claim, a plaintiff-employee must prove: (1) the existence of a reasonable expectation of economic advantage belonging to the plaintiff, (2) the defendant's knowledge of that expectation, (3) the defendant's wrongful interference with that expectation, (4) a reasonable probability that the plaintiff would have realized the expectation absent the defendant's conduct, and (5) damages. *See e.g.*, *Benfield, Inc. v. Moline*, Civ. No. 04-3513, 2006 WL 452903, at *11 (D. Minn. 2006) (citing *Harbor Broad., Inc. v. Boundary Waters Broad., Inc.*, 636 N.W.2d 560, 569 (Minn. Ct. App. 2001)). If your boss has terminated or demoted you out of personal spite or animus as opposed to some legitimate business reason, this is a plausible, albeit difficult, claim for relief.

Comment

An overwhelming number of calls plaintiff's lawyers receive include questions like the one above. It is very important, as difficult as it may seem at times, to make sure the analysis about whether the employee can use your assistance is based on the law. Employment cases are difficult. Courts regularly dismiss claims on summary judgment, so it is important to determine that the conduct being complained about is actually unlawful.

Further Reading

- Minnesota Business Litigation: Claims and Remedies, 2nd ed. (Minnesota CLE 2015).

Notes

8. I have a mandatory arbitration provision in my employment agreement—does this mean I can never go to court if I have a problem with my employer?

Answer

It depends. Employers can require employees to sign employment agreements that contain arbitration provisions. To determine whether arbitration is mandatory, however, one must review the provision's language. In some instances, employers may limit arbitration to certain claims, and allow for employees to pursue other claims in district court. While in other instances, employers may wish to have any and all claims subject to arbitration.

Section 2 of the Federal Arbitration Act (FAA) provides that a written arbitration agreement, in a "contract evidencing a transaction involving commerce ... shall be valid, irrevocable, and enforceable ...." 9 U.S.C. § 2. Section 3 directs federal courts, "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement," to stay proceedings until the issue is resolved by arbitration. 9 U.S.C. § 3. In addition, the FAA allows a party to compel arbitration when the opposing party has failed, neglected, or refused to comply with an arbitration agreement. 9 U.S.C. § 4. There is a strong federal policy in favor of enforcing arbitration agreements. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

There is a two-part analysis to determine whether a provision is subject to arbitration. First, courts must determine whether a valid agreement to arbitrate exists between the parties. *Daisy Mfg. Co. v. NCR Corp.*, 29 F.3d 389, 392 (8th Cir. 1994). If that element is met, courts must decide whether the specific dispute, or disputes, fall within the scope of that agreement. *Id.* In that regard, courts apply the "ordinary state law contract principles to decide whether parties have agreed to arbitrate a particular matter." *Keymer v. Mgmt. Recruiters Int'l, Inc.*, 161 F.3d 1154, 1156 (8th Cir.1998) (opinion vacated on other grounds).

Authorities

- 9 U.S.C. §§ 1–16 (general provisions of Federal Arbitration Act).
- *Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010) (parties cannot be compelled to class-wide arbitration when there is no express provision indicating such intention).
- *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (overruling California's rule barring class action waivers in arbitration by finding that such rule was preempted by the FAA).
- *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013) (overruling NLRB's decision that employer violated the National Labor Relations Act by requiring its employees to sign an arbitration agreement that, among other things, prohibited an employee from pursuing claims in a collective or class action).

Comment

At first blush, there may be very attractive reasons for employers to choose arbitration as the preferred method of dispute resolution. But as a practical matter, arbitration often is more expensive for the employer than litigating in state or federal court. The American Arbitration Association, for instance, requires employers to bear the burden of most of the expenses of arbitration—sometimes including the cost for the arbitrator's time. And our experience is that claims are less likely to be disposed of by way of motion in arbitration as compared to cases in district court.

The cases listed *supra* in the Authorities section are interesting cases that deal with the recent "hot topic" of whether class or collective actions are arbitration eligible.

Further Reading

- Wage and Hour Handbook: Federal and Minnesota (Minnesota CLE 2011).
- ADR Handbook (Minnesota CLE 2011).

Notes

9. Can my employer require me to take a drug or alcohol test? Can I be fired if the test is positive?

Answer

Yes, your employer can require you to take a drug or alcohol test if it complies with the Minnesota Drug and Alcohol Testing in the Workplace Act (Minn. Stat. § 181.950 *et seq.*) (MDATWA). Among others, MDATWA requires that a testing policy be in writing, that an individual be informed of the right to refuse to be tested and the consequences of doing so, and that the policy state the circumstances under which testing may be required. Those circumstances include, among others: (1) testing of a job applicant after giving a conditional job offer, (2) random testing for employees in a safety sensitive position, (3) testing based on a reasonable suspicion that an individual is under the influence of drugs or alcohol, (4) testing as part of a routine physical examination, and (5) treatment program testing.

You cannot be fired if this is your *first* positive result on a test requested by the employer, *unless* you have been given an opportunity to participate in a counseling or rehabilitation program and you refused or failed to successfully complete the program. Minn. Stat. § 181.953, subd. 10. For an applicant, a job offer can be revoked. *See* Minn. Stat. § 181.953, subd. 11. Note that this discussion assumes that an initial screening test has been verified by a confirmatory test.

This answer is limited to the Minnesota Drug and Alcohol Testing in the Workplace Act. You also may need to consider, by way of example, federal Department of Transportation drug and alcohol testing regulations, and statutes such as the Americans with Disabilities Act. For example, an alcohol test is considered a medical examination under the ADA.

Authorities

- Minn. Stat. § 181.950 *et seq.*
- EEOC Enforcement Guidance: Disability - Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act.

Comment

The Minnesota statute is perhaps the most detailed drug and alcohol testing statute of any state. Despite that detail, it has many gaps and ambiguities that can create problems for even the most well-intentioned employers. If an employer is going to test applicants or employees, it should be very careful to comply with all requirements set forth in the statute.

Further Reading

- Discipline and Discharge Handbook, 2d ed. (Minnesota CLE 2014).

10. Can my employer fire me for criticizing my boss on Facebook?

Answer

Maybe, maybe not. This is an area of the law that is still developing. What is clear is that an employer cannot terminate an employee for engaging in protected, concerted activity without violating the National Labor Relations Act (NLRA). Among others, the NLRA protects the rights of employees to form or join a labor union and to engage in concerted activities for the purpose of mutual aid and protection.

According to the National Labor Relations Board, if an employee's posting was for the purpose of organizing a union, concerned the terms and conditions of employment, or concerned a dispute between employees and the employer, then termination of the employee could arguably be an unfair labor practice. The concern is that disciplining or terminating an employee for social media postings tends to chill employees in the exercise of their right to discuss wages, working conditions, and unionization.

Disciplining an employee for asserting an individual gripe, on the other hand, likely would not violate the NLRA. When an employee only expresses the employee's individual dispute and is not acting on behalf of other employees or seeking to induce coworkers to engage in group action, the employee is not engaged in concerted activity.

Whether, or when, a social media posting will constitute protected concerted activity is not well defined. Employers should exercise caution when drafting a social media policy and when terminating or disciplining an employee based on Internet postings.

Authorities

- 29 U.S.C. §§ 157–158.
- Reports of the NLRB Acting General Counsel, most recently Memorandum OM 12-59.
- Report of the General Counsel Concerning Employer Rules, Memorandum GC 15-04 (3/18/15).

Comment

The NLRA covers most, but not all, private-sector employees. It applies to union *and* non-union workforces, a point that is often overlooked. Employers should be careful when drafting a social media policy not to make it so broad that it interferes with the rights of employees under the NLRA.

Further Reading

- Discipline and Discharge Handbook, 2d ed. (Minnesota CLE 2014).

11. My former employer still has not paid me my last paycheck and it has been one month. Can it do that?

Answer

Were you an employee or an independent contractor?

For employees, a private sector Minnesota employer generally must:

- Pay a terminated employee immediately upon demand of the employee. Failure to do so within 24 hours of the demand subjects the employer to penalties.

- Pay an employee who resigns on the first payday following the last day of employment. If the first payday is within five days of the last day of employment, then payment must be made on the next payday as long as it is not more than 20 days after the employee's last day of employment. Failure to pay as required by Minnesota law subjects the employer to penalties.

- Pay an employee who works on a transitory project (as defined in Minnesota Statutes section 181.10) within 24 hours of termination, without regard to who initiates the termination or whether the termination is due to the completion of the work. Failure to do so exposes the employer to additional expenses and penalty wages.

Commissioned salespersons who were independent contractors must be paid their commissions promptly. If a salesperson was terminated, or resigned with at least five days' written notice, the salesperson's commissions earned through the last day of employment must be paid on demand no later than three working days after the salesperson's last day of work. If the salesperson resigned without giving at least five days' written notice, commissions earned through the last day of employment must be paid on demand no later than six working days after the salesperson's last day of work.

If an individual initiates a civil action as a result of a company's failure to pay as required by Minnesota law, the employee may recover attorneys' fees and other costs, in addition to penalties and compensatory damages.

The requirements are somewhat different for employees who were entrusted with the collection, disbursement, or handling of money or property. Minn. Stat. §§ 181.14, subd. 4 & 181.145, subd. 2(d).

Authorities

- Minn. Stat. §§ 181.11, 181.13, 181.14, 181.145, 181.171 & 181.79.
- Minn. Stat. § 325E.37 (for certain independent contractor sales representatives).

Comment

Be sure to comply with the requirements for payment of final wages. When terminating an employee, it is usually best to have the final paycheck in hand and give it to the employee at the time the employee is informed of the termination. In accordance with Minnesota Statutes section 181.79, do not deduct from an employee's wages any amount for lost or stolen property, damage to property, or to recover any debt the employee may owe to the employer, unless the employee, *after* the loss has occurred or the debt has arisen, voluntarily authorizes the employer in writing to do so, or unless an exception as set forth in section 181.79 applies.

Further Reading

- Wage and Hour Handbook: Federal and Minnesota (Minnesota CLE 2011).

Notes

12. An employee who is paid by salary is complaining about not getting paid overtime for working 45 hours in the previous work week. Does the employer have an obligation to pay overtime to this employee?

Answer

This question implicates the Fair Labor Standards Act (FLSA) and, potentially, the Minnesota Fair Labor Standards Act (MFLSA). And like most hypotheticals in the law, the answer is: it depends.

If the employee is paid a sufficiently high enough salary, as defined by state and federal law, then the employer has likely deemed the employee "exempt" from the requirements of the FLSA and the MFLSA to pay overtime. There are a host of exemptions to these overtime laws. The Department of Labor website discusses these exemptions in some detail and would be a logical place to begin when deciding whether an employer has properly classified an individual or group of employees. *See* United States Dep't of Labor, Fair Labor Standards Act Advisor, Exemptions, <www.dol.gov/elaws/esa/flsa/screen75.asp>. Most exemptions focus on the nature of the main job duties as well as whether the position at issue requires any particular education or training.

Assuming you conclude that an exemption does not apply, you must be sure to examine whether the employer is liable under both the FLSA and the MFLSA. While there are similarities to the laws, there are important differences as well. Unlike the FLSA, which requires most employers engaged in interstate commerce to pay overtime to employees working more than 40 hours in a workweek, the MFLSA requires employers to pay overtime to employees working more than 48 hours in a workweek. *See* Minn. Stat. § 177.25, subd. 1. Therefore, the MFLSA does not obligate the employer to pay overtime in the above-referenced scenario even if the employee is improperly classified.

Authorities

- 29 U.S.C. § 201 *et seq*. Fair Labor Standards Act.
- Minn. Stat. § 177.21 *et seq*. Minnesota Fair Labor Standards Act.
- www.dol.gov/whd/overtime/nprm2015/factsheet.htm (regarding proposed changes to FLSA regulations).

Comment

Although plenty of attorneys pursue one-person FLSA overtime claims, the law allows for cases to be pursued as "collective actions" on behalf of groups of similarly situated employees. 29 U.S.C. § 216(b). The collective action is similar to a class action under Rule 23 of the Federal Rules of Civil Procedure in that a representative plaintiff can pursue claims on behalf of a group of employees. There are, however, some unique differences between class and collective actions. Unlike class actions, for example, collective actions require putative class members to affirmatively opt into the case. This is typically done after the court "conditionally certifies" the collective for notice and discovery. *See Burch v. Qwest Communications Intern, Inc.*, 500 F. Supp. 2d 1181, 1186 (D. Minn.2007). After conditional certification and the parties complete discovery, courts typically engage in a more rigorous analysis of whether the representative plaintiff is "similarly situated" to the collective for purposes of trial. *Ahle v. Veracity Research Co.*, 2009 WL 3103852, *3 (D. Minn. Sept. 23, 2009).

Wage and hour litigation continues to be a very "hot" area of employment law. There are many nuances to the FLSA, however, so be sure to carefully research the law and issues before taking on one of these cases.

Further Reading

- Wage and Hour Handbook: Federal and Minnesota (Minnesota CLE 2011).
- United States Department of Labor Fact Sheets (www.dol.gov/whd/fact-sheets-index.htm).

Notes

Motor Vehicle Accidents and Insurance

Chapter 7

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1. What are no-fault benefits and when do they apply?

Answer

No-fault benefits are non-fault-based benefits that are triggered when an injury arises out of the maintenance or use of a motor vehicle as described in the no-fault statute.

The no-fault benefits include medical expense benefits, which include medical, surgical, optical, dental, chiropractic, and rehabilitative services, including drugs, prosthetic devices, transportation expenses, and sign- and language-interpreting services.

The statute also provides for disability and income-loss benefits for someone who is physically unable to work due to accident-related injuries. The compensation is paid at 85 percent of the injured person's loss of income, up to a maximum of $500 per week.

There are also replacement services for injured people, or people who have been killed in motor vehicle crashes. These benefits are provided to compensate injured people for losses they suffer from their inability to do their usual and necessary services around the home. The benefits are limited to $200 per week for injured people, and $500 per week for families of people who have been killed.

Funeral expense benefits are also available in death claims—$5,000.

Authorities

- Minn. Stat. § 65B.44.

Comment

In replacement services claims, injured victims can be paid the reasonable value of the services performed if the victim is the primary homemaker yet has not incurred any out-of-pocket expenses.

Further Reading

- Paul McEllistrem, *No-Fault Benefits: An Overview, in* Minnesota Motor Vehicle Accident Deskbook, 5th ed., ch. 23 (Minnesota CLE 2014, updated 2016).

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2. What happens when a health insurance policy pays bills on behalf of an injured person with a bodily injury claim?

Answer

The health insurer normally has a subrogation right that can be asserted with respect to the injured person's personal injury/bodily injury claim. The subrogation claim permits the health insurer to stand in the shoes of the injured person.

Different insurance policies or programs have different subrogation or reimbursement rights. Policies written pursuant to the Employee Retirement Income Security Act (ERISA) can have subrogation/reimbursement provisions that provide them with a first right of recovery and need not comply with Minnesota's subrogation statute (Minn. Stat. § 62A.095). Minnesota's subrogation statute requires that the victim be made whole before the subrogation interest can invade the victim's recovery.

Authorities

- Minn. Stat. § 62A.095.
- 29 U.S.C. § 1144.
- *U.S. Airways v. McCutchen*, 133 S. Ct. 1537 (2013).

Comment

Determining the extent of a health insurance company's subrogation rights before concluding a personal injury claim is extremely important. Many cases arise in which there is a significant dispute concerning the nature and extent of subrogation rights and whether, and to what extent they will be enforced.

Further Reading

- Paul McEllistrem & Andrew Rorvig, *Collateral Sources: Swenson v. Brewster – Ending the Gap, in* Uninsured, Underinsured & No-Fault Insurance and Bodily Injury Update (Minnesota CLE Jan. 2011).

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3. Can an injured person collect workers' compensation benefits and also make a claim for bodily injury from the same car crash?

Answer

An injured person who is working at the time may be eligible for both workers' compensation and no-fault benefits. Workers' compensation benefits are primarily for payment of claims arising out of the accident.

Under those circumstances, an injured person who is not the primarily at-fault person may also seek compensation through a bodily injury claim. However, Minnesota law provides the workers' compensation carrier a statutory subrogation right against the injured person's bodily injury claim. Therefore, the workers' compensation carrier, having paid benefits, will likely receive some amount of those benefits back through its subrogation rights.

Authorities

- Minn. Stat. § 65B.61.
- Minn. Stat. § 176.061.

Comment

There are numerous options available for resolving the workers' compensation subrogation interest. This can be done with the workers' compensation carrier's permission, or against their wishes, as long as they have been provided with sufficient legal notice. Minnesota law permits injured claimants to settle only those parts of the claims that do not include the subrogation interests.

Further Reading

- Wilbur Fluegel, *Workers' Compensation and Motor Vehicle Accident Claims, in* Minnesota Motor Vehicle Accident Deskbook, 5th ed., ch. 17 (Minnesota CLE 2014, updated 2016).

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4. When is a person eligible for underinsured motorist benefits if they have been injured in a car crash?

Answer

Underinsured motorist benefits are available to the injured person when the bodily injury limits on the at-fault driver are insufficient to compensate the injured person for the injured person's actual damages.

In order to obtain these benefits, the injured person has to establish that, after deducting no-fault benefits, the amount of the damages recoverable exceeds the policy limits. It is not determinative in Minnesota what the injured person settled the bodily injury claims for—rather what the actual damages recoverable would be in comparison to the liability limits. The underinsured motorist claim is not ripe until the injured person has resolved the bodily injury claim against the at-fault motorist.

Authorities

- Minn. Stat. § 65B.43, subds. 17 & 19.

Comment

It is imperative that the underinsured motorist carrier be provided with sufficient legal notice of the injured person's intent to settle the bodily injury claim against the at-fault driver *before* the settlement is made. The reason for this is that the underinsured motorist carrier has subrogation rights which would be extinguished before they have ripened. Therefore, they must be provided with notice in advance of the settlement or the victim's rights may be compromised.

Further Reading

- Michael Fargione & Uyen Campbell, *Uninsured/Underinsured Motorist Coverage, in* Minnesota Motor Vehicle Accident Deskbook, 5th ed., ch. 22 (Minnesota CLE 2014, updated 2016).

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5. How does Minnesota's no-fault system work?

Answer

The no-fault system was designed to give motor vehicle accident victims immediate access to compensation needed to get medical treatment and wage losses paid without regard to fault. It was also enacted to prevent over-compensation of individuals with minor injuries and to ease the burden of litigation on the courts of Minnesota.

Minnesota's no-fault system is designed to create a limit on the types of cases that can yield a recovery in a personal injury action to cases in which the injuries are considered serious. Fault is still relevant in Minnesota because the bodily injury claims involve fault determinations with regard to the bodily injury coverage—which covers losses not paid under no-fault.

In a typical case, no-fault payments are made on behalf of the victim promptly after the crash as losses are incurred. The bodily injury claim can be pursued at any time after the collision without regard to the status of the no-fault claim—subject to the statute of limitations and threshold requirement.

Authorities

- Minn. Stat. § 65B.42.
- Minn. Stat. § 65B.51, subds. 2 & 3.

Comment

Minnesota's no-fault system does work very well in most circumstances. There are still some abuses—especially recently. However, most of the legislative purposes are met. The laws have not been significantly changed since the No-Fault Act took effect in 1975.

Further Reading

- Paul McEllistrem, *No-Fault Benefits: An Overview, in* Minnesota Motor Vehicle Accident Deskbook, 5th ed., ch. 23 (Minnesota CLE 2014, updated 2016).

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6. The person who hit my car has no insurance. What happens now?

Answer

The uninsured motorist is still legally responsible for the injuries and damages caused. However, the victim has the right to get property damage claims paid by his or her own carrier, if the victim has collision coverage.

The injured person can collect uninsured motorist benefits for bodily injuries and damages from an insurance policy insuring him or her. The uninsured motorist benefits provide the compensation the injured person would have recovered from the at-fault driver's insurance company—had they had insurance.

The insurance company paying the uninsured motorist benefits has a subrogation right to pursue the at-fault driver for the benefits paid to the victim.

Authorities

- Minn. Stat. § 65B.43, subds. 16 & 18.
- *Michael Fargione, Uninsured/Underinsured Motorist Coverage, in* Minnesota Motor Vehicle Accident Deskbook, 5th ed., ch. 22 (Minnesota CLE 2014, updated 2016).

Comment

The uninsured motorist carrier effectively stands in the shoes of the uninsured tortfeasor and has any defenses available to the uninsured motorist in defending the claim.

The claimant has a strong argument that a tort threshold need not be met in an uninsured motorist case because the uninsured tortfeasor is not similarly entitled to this.

Further Reading

- Michael Fargione & Uyen Campbell, *Uninsured/Underinsured Motorist Coverage, in* Minnesota Motor Vehicle Accident Deskbook, 5th ed., ch. 22 (Minnesota CLE 2014, updated 2016).

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7. What is a bodily injury claim, and how can I be compensated for one?

Answer

A bodily injury claim can include bodily and/or mental harm caused by the negligence of another driver. The no-fault coverage is designed to compensate the injured person for medical treatment and wage loss. However, a standard no-fault policy has only $20,000 in medical expense benefits. There are also $20,000 available in income loss benefits and they are payable only at 85 percent of a person's gross weekly wage subject to a cap of $500 per week.

If the bodily injury was caused by another driver's negligence, additional compensation for wage loss and medical expense benefits can be recovered out of the bodily injury/liability coverage for the at-fault driver. In addition, the bodily injury/liability claim includes general damages such as pain, suffering, emotional distress, or wrongful death damages.

The bodily injury claim can include emotional distress damages which are not easily compensated from the no-fault coverage. The no-fault system is designed so that the at-fault driver does not pay for things that have already been paid by the no-fault insurance company prior to trial. This system uses post-trial motions to sort out deductions from the jury's award of damages.

Authorities

- Minn. Stat. § 65B.44.
- Minn. Stat. § 548.251.

Comment

The no-fault system is designed so that between no-fault benefits and liability coverage, an innocent victim of a motor vehicle crash gets fully compensated but not over-compensated.

Further Reading

- Sheila Donnelly-Coyne, *Damages in Automobile Accident Cases, in* Minnesota Motor Vehicle Accident Deskbook, 5th ed., ch. 14 (Minnesota CLE 2014, updated 2016).

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8. How do I know when, or whether to settle a bodily injury case, or to try the case in court?

Answer

The decision whether or not to settle a personal injury case is usually subjective and fairly complicated. Having collected, organized, and shared all of the relevant liability and damages information with the appropriate liability representatives well before any final decision is made is important. Most practitioners specializing in this area agree that juries are fairly conservative and unpredictable. Therefore, most people who are risk averse ultimately prefer to settle the bodily injury case.

Authorities

- Jan Gunderson & Jeffrey Mulder, *Special Verdict Forms and Jury Instructions, in* Minnesota Motor Vehicle Accident Deskbook, 5th ed., ch. 19 (Minnesota CLE 2014, updated 2015).

Comment

The practitioner who first figures this out will have a happy successful career.

Further Reading

- Minnesota Motor Vehicle Accident Deskbook, 5th ed. (Minnesota CLE 2014, updated 2016).

Notes

9. What happens when a minor is injured in a motor vehicle accident?

Answer

A case involving a minor who is injured in a motor vehicle accident is handled much in the same way as a case involving an adult. The key difference occurs following a settlement or jury award.

The Minnesota General Rules of Practice require all personal injury settlements and jury awards, including those that occur in a motor vehicle accident, be approved by a district court judge. In the case of a settlement, a petition for approval is filed with the court. The petition is normally filed by the parent or natural guardian of the minor and contains information on the accident, the injury, the size of the settlement, and what will happen with the settlement proceeds. A judge will issue an order approving or denying the proposed settlement following a hearing involving the petitioner and the injured minor.

The Minnesota General Rules of Practice specifically require that the settlement proceeds not be accessed or modified until the minor reaches the age of majority. The money must be placed in a CD or in an annuity with an A+ Best rating or better.

Authorities

- Minn. Gen. R. Prac. 145.
- Minn. Stat. § 540.08.

Comment

The hearing is a very simple procedure that serves several very important purposes, not the least of which is keeping it out of the hands of deadbeat parents. The conservative nature of the investment oftentimes frustrates financial advisors, but is necessary to ensure the money is there when the minor reaches the age of majority.

Further Reading

Minnesota Motor Vehicle Accident Deskbook, 5th ed (Minnesota CLE 2014, updated 2016).

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10. What happens if I am injured by someone that is under the influence of alcohol?

Answer

Cases involving a defendant driver that is legally intoxicated at the time of the accident present several claims that may not be present in an accident that occurred while the defendant driver was sober. First, Minnesota law allows a jury to consider an award for punitive damages where there is evidence that the defendant driver had a .08 blood alcohol level. Criminal prosecution is not required for the civil plaintiff to pursue this remedy. This deviates from the Minnesota General Rule, which requires clear and convincing evidence that the defendant acted with deliberate disregard for the rights and safety of others before a jury may consider an award for punitive damages.

The injured plaintiff may have a cause of action against the individual or entity that provided the intoxicated driver with the alcohol, more commonly referred to as a dram shop action. If the lawyer believes that his or her client may have a dram shop case it is important to provide sufficient notice to the entity that made the illegal sale immediately, as notice must be given within 240 days of entry into the attorney-client relationship.

Authorities

- Minn. Stat. § 169A.76.
- Minn. Stat. § 549.20.
- Minn. Stat. § 340A.502.

Comment

In addition to the threat of punitive damages and criminal prosecution, the intoxicated defendant driver may not be able to declare bankruptcy to discharge a resulting judgment. Don't drink and drive!

Further Reading

- Joseph Nilan & Emeric Dwyer, *Accidents Caused By Alcohol and Vehicular Crimes, in* Minnesota Motor Vehicle Accident Deskbook, 5th ed., ch. 12 (Minnesota CLE 2014, updated 2016).

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Starting a Business

Chapter 8

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1. When does it make sense to form a business entity if I am a sole proprietor? Can I protect my house from business creditors if I do this?

Answer

While it is true that operating a business in a legal entity (such as a corporation or an LLC) can create what is called a "liability shield" that protects the owners of the entity for liabilities associated with the business operated in the entity, there are a number of limitations, particularly for a sole owner or any owner that is an active participant in the business.

An individual cannot avoid liability for the things they do themselves. So, for example, if an owner makes a call to a customer and runs someone over in the parking lot, the owner will still be personally liable for it, in addition to the owner's business being responsible because the incident occurred in the course of performing business duties. If it were an employee of the business, however, the liability shield might be able to protect the owner personally. In addition, if an owner signs a personal guaranty, say for a lease or a bank loan, the fact that the loan or lease is to the business entity will not protect the owner from your personal obligations under the guaranty.

As a sole proprietor, the factors that one should look at to assess whether it will be worth the effort and expense to form an entity include:

- will the business be hiring employees or contractors?
- does the business have a lot of contracts that do not include personal guaranties?
- does the sole proprietor plan to bring in additional owners?

Another important item to keep in mind is that there is a principle often called "piercing the corporate veil" under which an owner loses their liability shield in certain circumstances. The principal factors considered primarily revolve around whether or not an owner has respected the existence of the legal entity, including keeping the entity financially separate from the owner's personal finances and adequately capitalized. Businesses with a single owner have a particular challenge, becauses the sole owner is, in fact, the ultimate beneficial owner of the business and its assets, so it is easy to forget to follow the appropriate formalities for the entity.

Further Reading

- Corporations: Minnesota Business Law Series, 1st ed. (Minnesota CLE 2010, updated 2016)
- LLCs: Minnesota Business Law Series, 1st ed. (Minnesota CLE 2016).

2. What is the difference between an LLC and a corporation? Does it ever make sense to use an S corporation?

Answer

An LLC (or limited liability company) grew out of the desire to have a form of entity that permitted the flexibility in allocating profits and losses provided by a limited partnership but also providing the owner is active in the business with liability protection, but without the limitations imposed on corporations electing to be S corporations (more on that below). States began adopting LLC statutes, some that made LLCs look a lot like corporations (e.g., Minnesota) and some that made LLCs look more like partnerships (e.g., Delaware).

Consequently, an LLC can provide more structuring options than would typically be available in a corporation. Under the Minnesota LLC statute, there is a board of governors that is the corollary to the board of directors in a corporation. In addition the entity is required to have a chief manager and a chief financial manager, which correspond to the offices of chief executive officer and treasurer in the corporation. In the governing documents, the business can also adopt corporate style titles (e.g., president and treasurer) if the client is more comfortable with them.

Minnesota has adopted a new LLC act that will be effective August 1, 2015 for all LLCs formed after that date. The new act moves toward the partnership model in effect in most states, so additional consideration needs to be given to choice of entity at this stage.

One added benefit of an LLC is that a single-member LLC is a disregarded entity for tax purposes. This means that earnings can continue to be reported on the owner's individual return on Schedule C, in the same way as a sole proprietorship. This is less expensive than a corporation (including an S corporation), which is a "pass-through" entity, but for which the business needs an entity-level tax return. Some accountants will encourage use of an S corporation for this reason or because of a lack of experience with an LLC. An individual is entitled to an above-the-line deduction for one-half of the self-employment taxes payable in that tax year. This deduction can reduce the impact of self-employment taxes on the individual. LLCs with more than one owner are treated as partnerships for tax purposes

While the LLC eliminates many of the restrictions of an S corporation, which is a corporation that has elected to be taxed under subchapter S of the Internal Revenue Code, there are some circumstances that can provide an advantage. The primary structuring advantage arises when the owners will actively work in the business. A rule of thumb is that the entity has to generate in excess of approximately $200,000 for the benefits of the S corporation to start outweighing the added costs.

Under the partnership rules (including LLCs), a partner's distributive share will be fully subject to self-employment tax. Both C and S corporations avoid this problem because dividends paid by the corporations are not subject to self employment tax. Shareholders who provide services to the corporation are treated as employees and the wages paid to the shareholder/employee will be subject to employment taxes. This creates a structuring advantage; however, one has to be reasonable in setting the salary. Some practitioners advise their clients to form S corporations, to pay the owners of the business no, or very little, salaries and to take the majority of the cash

out of the business in the form of dividends, but the IRS has successfully challenged overly aggressive allocations. If the IRS is successful in challenging the below-reasonable compensation, the taxpayer may have to pay self-employment tax on the entire amount of the dividend and may be subject to substantial interest and penalties.

Remember that one can now "check the box" so that regardless of the legal form of the entity, one can choose the tax treatment of another form. There are some limits on doing so, however, and there are circumstances that might create adverse tax consequences for changing after an entity has been operating for some time, so make sure to consult with a tax adviser before proceeding.

Further Reading

- Corporations: Minnesota Business Law Series, 1st ed. (Minnesota CLE 2010, updated 2016)
- LLCs: Minnesota Business Law Series, 1st ed. (Minnesota CLE 2016).
- Minn. Stat. ch. 322C (New LLC Act)

Notes

3. I own a majority interest in the business. Do I need a shareholder agreement?

Answer

Although as a majority owner one will control many of the important business decisions, there are a number of areas that may come into play where one may need an agreement from the minority owner(s) or they may end up with some unexpected "veto" power that prevents one from acting. Minnesota law gives many protections to minority owners and a shareholder agreement can help maximize the position of the majority owner.

Absent an agreement to the contrary:

- an ownership interest is freely transferable;
- the minority owner is not required to sell an ownership interest (although the entity may be able to sell assets or complete a merger);
- the minority owner will retain ownership even if employment or other active involvement is terminated (voluntarily or involuntarily); and
- the minority owner may have appraisal rights to challenge the consideration received upon the occurrence of certain events, such as a merger or sale of substantially all assets.

Consequently, it is generally a good idea even when one controls a majority of the voting interests of an entity to have an agreement with the minority owners.

Further Reading

- Corporations: Minnesota Business Law Series, 1st ed. (Minnesota CLE 2010, updated 2016)
- LLCs: Minnesota Business Law Series, 1st ed. (Minnesota CLE 2016).

Notes

4. Are there any problems with my partner and I each owning 50 percent of our business?

Answer

The biggest risk in a 50/50 ownership situation is deadlock, because actions will effectively require unanimity. To avoid this risk, it is best to establish the "rules of the road" for a deadlock situation in the beginning, before disagreements arise. Absent an agreement, the only recourse in the event of deadlock is to seek court-ordered equitable remedies, which generally mean a court-ordered dissolution (section 751 of the Minnesota Business Corporation Act or section 833 of the Minnesota Limited Liability Company Act). This provides an extreme remedy and one that is not likely to result in a good outcome for either owner.

The owners should enter into an agreement as to how deadlock is to be resolved. One of the owners can be given an extra vote to break deadlock, which obviously shifts the balance of power. Another mechanism is the "shoot out," under which one of the owners presents a price and the other owner has the right to either buy or sell at that price. The price could also be set by appraisal. Buy-out options may not be appropriate (depending on who one is representing) if one of the owners has the ability to finance the buy-out but the other does not.

Authorities

- Minn. Stat. § 302A.751.
- Minn. Stat. § 322B.833.

Further Reading

- Corporations: Minnesota Business Law Series, 1st ed. (Minnesota CLE 2010, updated 2016)
- LLCs: Minnesota Business Law Series, 1st ed. (Minnesota CLE 2016).

Notes

5. I have a prospective customer coming for an inspection. How do I protect my trade secrets and confidential information?

Answer

Whenever one will be disclosing confidential or proprietary information, it is a good idea to have a confidentiality agreement (often called a "non-disclosure agreement" or "NDA") signed. If there is a business entity involved, the entity can sign the agreement, but one may also want the individual receiving the information to sign individually, as well.

The typical NDA requires the receiver to maintain the confidentiality of the information and also restricts the use of the information to advancing the purpose of the visit (e.g., evaluating or negotiating a prospective business transaction).

As a practical matter, one often cannot adequately protect ideas, so one should use some judgment in restricting access to the most sensitive trade secrets and business information.

Further Reading

- Minnesota Business Litigation: Claims and Remedies, 2nd ed. (Minnesota CLE 2015).

Notes

6. How do I keep my employee from starting a competitive business?

Answer

Employers can have employees sign an agreement not to compete. Most states, including Minnesota, have specific requirements and limitations for a non-compete to be enforceable. As a general rule, courts do not like restricting people from being able to earn a living. In California, for example, non-competes for employees generally are not enforceable.

For employees in Minnesota, employers should be sure to tell candidates that signing a non-compete is a condition to hiring them and make sure they sign the agreement no later than the first day of work. If the employee is already working, the employer will need to give additional compensation for the signing of the non-compete. This could include making a promotion conditioned upon signing or paying a bonus for signing. The amount of consideration can impact the court's view of how enforceable the terms of the non-compete are.

In addition, the agreement needs to be reasonable in scope and duration. Scope includes the definition of the activities the employer wants them to refrain from and the geographic area covered by the restriction. For example, if all of the employer's customers are in Minnesota, having a non-compete that covers the entire United States is likely not enforceable. Duration is the length of time the restriction lasts. Determining the reasonableness of the covenant is fact intensive, but as a general matter it is unlikely that a period of more than two years would be enforceable in Minnesota. Paying some form of compensation during the period makes the likelihood of enforceability greater. In a sale of a business by an owner, courts will generally permit much longer periods of time—it is not uncommon to see non-competes in this context running at least five years.

It is important to try to be as specific as possible in crafting the non-compete to address the harm that the employee can do and creating a provision that creates reasonable protections from that harm.

An employer can also protect their business by requiring the employee to sign a confidentiality agreement. Often, the employee cannot compete without using information gained from the business (e.g., customer lists, marketing plans, etc.), so the confidentiality provisions may go a long way in providing protection, even without a non-compete. Confidentiality agreements are not frowned upon and will generally be enforceable. The hardest part may be finding out about the misappropriation of information.

Further Reading

- Minnesota Business Litigation: Claims and Remedies, 2nd ed. (Minnesota CLE 2015).

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7. I am thinking of selling my business. Should I use a business broker?

Answer

A business broker can add a lot of value to a transaction if the seller chooses the right one for their business. Even if the business is not large, there are business brokers who specialize in smaller transactions. The seller will pay the broker a commission, so it is important to get connected to someone who will add more value than the seller will pay them. The way a broker can add value is by finding more potential buyers and creating a bidding scenario that maximizes the purchase price. A broker will also be familiar with the pricing multiples and other market conditions that are influencing price. Similar to a real estate agent, they can also help the seller clean up and package the business to help realize the best value. While the seller might be able to do much of this on their own, it takes time, which distracts from operating the business and keeping it performing at a time when the seller wants it to be performing well to induce the potential buyers to come to the table.

Further Reading

- Corporations: Minnesota Business Law Series, 1st ed. (Minnesota CLE 2010, updated 2016)
- LLCs: Minnesota Business Law Series, 1st ed. (Minnesota CLE 2016).

Notes

8. I am getting a loan for my business. The bank is asking for a personal guaranty. Is this normal?

Answer

In this day and age, most lenders will also require a personal guaranty by the owners. Loan programs, such as U.S. Department of Housing and Urban Development or Small Business Administration loans require guaranties. Signing a personal guaranty, which is also commonly required by landlords for leases, creates significant personal risk for the owner, but the requirement is quite common. The owner may be able to negotiate some limitations.

Not all guaranties are created equal, however, and it is very important to get legal counsel before signing a guaranty. For example, if there are multiple guarantors, the liability may be joint and several, so each guarantor could be liable individually for the entire debt, or you may be able to negotiate caps, so that each guarantor is only exposed for a portion of the debt. In addition, the definition of the obligation to be secured may be so broad as to encompass much more than the specific loan, leaving the guarantor exposed for the future, even if the current loan is repaid.

Further Reading

- Debtor-Creditor Handbook, 11th ed. (Minnesota CLE 2014, updated 2016).

Notes

9. I am hiring my first employee. How do I handle payroll?

Answer

An employer does not want to fail to properly satisfy its withholding obligations. The best way to handle payroll, unless the employer is absolutely sure they know what they are doing, is to outsource to either a payroll processing company (like ADP) or an accounting firm that provides payroll services. Even with only one employee, it is generally a good idea to outsource payroll processing.

Further Reading

- How to Start & Build a Successful Law Practice (Minnesota CLE 2011).

Notes

10. If I do not sign anything, I do not have a contract, right?

Answer

Actually, there may be a contract, even if one does not sign anything, because contracts can arise in a number of ways that do not require physical signatures. To have a contract, there must be an offer, an acceptance, and consideration. Once these elements are established, there is a contract. While a signature is one way to evidence acceptance, this can be done in other ways.

Purchase orders (for products or services) may have terms and conditions on the reverse side that are contract terms. Accepting a purchase order without rejecting the terms and conditions attached will can result in being bound by them. If an order is made online, one may have to check a box or click through an acceptance screen, which also can create an acceptance of the terms and conditions of the seller.

Contracts can be created verbally (except for some types of contracts covered by the statute of frauds). In addition, beginning performance may create an acceptance of an offer that also is sufficient to create a contract. Even a chain of emails may be enough to create a contract.

Many terms and conditions are extremely one-sided and unreasonable in favor of the party who created them, so it is important to pay attention to the small print!

Further Reading

- Minnesota Contracts Deskbook, 3d ed. (Minnesota CLE 2016).
- Corporations: Minnesota Business Law Series, 1st ed. (Minnesota CLE 2010, updated 2016)
- LLCs: Minnesota Business Law Series, 1st ed. (Minnesota CLE 2016).

Notes

11. I want to give a key employee a stake in my business. How do I do this?

Answer

This question comes up frequently. In part, it stems from the practice at publicly-traded companies of granting employees stock options as part of their compensation. During the dot-com boom it was used by companies without revenues to pay compensation and had a big payoff for some, but became worthless for others.

A small enterprise does not have a ready market for the sale of shares (or other ownership interest), so it is not as useful a tool and comes with a lot of challenges. The reason for providing ownership generally is to give the employee an added incentive for performance and to improve the likelihood of retaining the employee.

The down side of giving an equity interest to an employee is that they become a minority owner. Minority owners are entitled to certain statutory protections. See *infra* Question 7 for a brief overview. If an owner is determined to provide the interest, the owner will want to require the employee to enter into a shareholder or other form of agreement to make sure they have some protections in place.

An alternative approach is to create a phantom plan that creates a mechanism to pay bonuses that are intended to approximate the increase in equity value over the designated time frame. While this can work well, sometimes the employee may not understand how this works and, without a regular trading market, it is not as easy to establish the value, so alternate formulas need to be used.

Further Reading

- Corporations: Minnesota Business Law Series, 1st ed. (Minnesota CLE 2010, updated 2016)
- LLCs: Minnesota Business Law Series, 1st ed. (Minnesota CLE 2016).

Notes

12. One of the owners of our business wants out. Do we need an appraisal?

Answer

For companies that are not publicly traded, appraisals are a generally accepted mechanism for assessing the value of a business. It is quite common for a member control agreement to specify a process for determining value that starts with an appraisal and then provides for additional appraisals if the outcome of the appraisal is disputed by the other party. This can create an expensive and burdensome process for a smaller business. In addition, some businesses may be more difficult to appraise than others, particularly if there are not good comparable businesses available for comparison.

There are some alternative approaches that can be considered. First, the parties can always negotiate an agreed upon value. Even if there is a member control agreement with appraisal or some other approach identified, the parties can always supersede that approach by coming to an agreement on value.

Another approach is to approach a business broker and get an evaluation of what the broker thinks the value of the company would be if offered for sale. Some will do this as a courtesy in contemplation of potentially getting the listing; some may offer for a fee that is generally less than an appraisal cost (although it does not come with a report that can be relied on, as an appraisal would).

One of the formulas that is most commonly used is to look at the "seller's discretionary earnings" or SDE. This formula assesses the profitability of a business to approximate what a market buyer would pay to acquire the business. SDE is generally determined by taking the historical net profits of the business and adding back the Members' compensation and benefits, other discretionary, non-operating, or non-recurring income or expense, depreciation, interest, and taxes. Items added back include the owner's salary, personal insurance premiums, personal expenses paid for through the business, which may include vehicles, medical bills, cell phones, significant one time expenditures for equipment, uninsured losses, major repairs or real property build outs and prepaid expenses, as well as interest paid on long term notes. A historical average is determined (generally two to three years) and multiplied by a multiple appropriate to the industry to get to an approximate market value. There are many factors that may influence the appropriate multiple, which makes this calculation subject to judgment and variation.

Before engaging an appraiser, it is recommended that the owners do their own calculation of SDE to get a rough valuation on their own and see if this enables them to come to a negotiated agreement.

Notes

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13. What is a "DBA"?

Answer

"DBA" stands for "doing business as" and represents a name under which business is conducted that is different than the person or entity's legal name. If one wants to do business under a name other than one's own, one must file a certificate of assumed name with the Minnesota Secretary of State. In addition, one must publish the certificate of assumed name with a qualified legal newspaper for two consecutive issues in the county where the principal place of business is located. After publication, the newspaper will return an affidavit of publication which should be retained by the business. Failure to publish may render the filing invalid.

An annual renewal is required once each calendar year. There is no charge for filing the annual renewal unless the assumed name is expired for failure to file an annual renewal, in which case there is a reinstatement fee.

It is important to note that the Secretary of State does not regulate the filing of assumed names, so multiple businesses can end up with the same name. One should use the assumed name in conjunction with the legal name or an entity to protect the liability shield (e.g., ABC, Inc. d/b/a XYZ). It is also important to consider trademark and related intellectual property issues so the name used is not infringing and to avoid confusion in the marketplace.

Authorities

- Minn. Stat. ch. 333.

Notes

14. I understand there is a new limited liability company statute. Are LLCs formed under the old statute affected?

Answer

All LLCs formed after August 15, 2015 are governed by the Minnesota Revised Uniform Limited Liability Company Act, Minnesota Statutes chapter 322C. LLCs formed prior to that date remain subject to the old act, Minnesota Statutes chapter 322B, for now, but have the option to elect to be covered by the new statute. As of January 1, 2018 all LLCs remaining under chapter 322B will automatically be converted.

The new act requires an LLC to choose whether it is member-managed, manager-managed or board-managed. All LLCs under the old act were board-managed. In converting, the LLC may retain its board structure, but the documentation, terminology and default rules are very different under the new act, so the LLC governance documents may need some work, even if the LLC still wants to be board-managed. For example, the default structure is member-managed and voting and distribution rights are per capita, not ownership percentage.

There are plenty of resources to learn more about the new LLC act, including seminars and written materials. It is important to understand the new act before proceeding to form or convert an LLC under the new act.

Further Reading

- LLCs: Minnesota Business Law Series, 1st ed. (Minnesota CLE 2016).

Notes

Notes

Workers' Compensation Law

Chapter 9

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1. What types of injuries are covered and not covered by workers' compensation?

Answer

In order for an injury to be compensable under the Minnesota Workers' Compensation Act, the following elements must exist:

1. the employee must sustain a personal injury or occupational disease;
2. the personal injury or occupational disease must arise out of the employment; and
3. the personal injury or occupational disease must occur in the course of the employment.

"Personal injury," is defined by Minnesota Statutes section 176.011, subdivision 16 as follows:

> "Personal injury" means injury arising out of and in the course of employment and includes personal injury caused by occupational disease; but does not cover an employee except while engaged in, on, or about the premises where the employee's services require the employee's presence as a part of such service at the time of the injury and during the hours of such service. Where the employer regularly furnished transportation to employees to and from the place of employment such employees are subject to this chapter while being so transported, but shall not include an injury caused by the act of a third person or fellow employee intended to injure the employee because of personal reasons, and not directed against the employee as an employee, or because of the employment.

A couple of important points: Injuries can be specific injuries, such as "I bent over, picked up a box, and had a sharp pain in my back." Injuries can also be caused by repetitive or cumulative trauma (also known as a *Gillette* injury, after a Minnesota Supreme Court case). An example is an employee who repetitively uses vibratory tools on the job and develops carpal tunnel syndrome. Also, an injury can be considered work-related even if an employee has a personal or pre-existing condition. The question becomes whether the work injury or work activity is a "substantial contributing cause" to the ongoing need for benefits. A work injury is a substantial contributing cause if it causes, accelerates, or aggravates an underlying condition.

Authorities

- Minn. Stat. § 176.011, subd. 16.

Further Reading

- Minnesota Workers' Compensation Deskbook, 5th ed. (Minnesota CLE 2012, updated 2015).

2. What benefits can I get if I am hurt at work?

Answer

When an employee is injured at work, workers' compensation benefits are primary, meaning that the workers' compensation insurer is looked to first for payment of benefits. Workers' compensation benefits fall into four main categories: medical, wage loss, vocational rehabilitation, and permanent partial disability.

It is important to note that all employees are entitled to the same benefits, regardless of fault.

Further Reading

- Minnesota Workers' Compensation Deskbook, 5th ed. (Minnesota CLE 2012, updated 2015).

Notes

3. What happens if the insurance company refuses to pay my benefits?

Answer

If the insurance company denies primary liability for an injury, an employee must file a claim petition with the Department of Labor and Industry (DOLI) for all benefits claimed. If the injury is admitted but specific medical benefits are denied, an employee can file a medical request with DOLI to have just the medical issue determined. Likewise, if an insurer is denying specific vocational rehabilitation benefits, an employee can file a rehabilitation request with DOLI seeking payment of certain benefits. The procedures for medical and rehabilitation requests are set forth in Minnesota Statutes sections 176.106 and 176.102, respectively.

If an insurance company is paying wage loss benefits and those benefits are subsequently discontinued, an employee can object to the discontinuance by calling or writing to the Office of Administrative Hearings. If the objection is made timely, a conference addressing the discontinuance of wage loss benefits will be scheduled within a few short weeks. Procedures for addressing discontinuances of wage loss benefits are set forth in Minnesota Statutes sections 176.238 and 176.239.

Authorities

- Minn. Stat. §§ 176.106, 176.102, 176.238 & 176.239.

Further Reading

- Minnesota Workers' Compensation Deskbook, 5th ed. (Minnesota CLE 2012, updated 2015).

Notes

4. My employer says I cannot work here with my injuries. What can I do?

Answer

An employer is *not* required to accommodate an employee's restrictions. If they do not, however, they may be liable for wage loss benefits and vocational rehabilitation benefits. If an employee's restrictions are temporary, such as "one-armed work" while an arm is in a sling, most employers are able to either find temporary light duty or to simply have an employee be off of work for defined time period and collect wage loss benefits.

If, however, restrictions are permanent and there is no chance of returning to the date-of-injury employer, an employee can take advantage of vocational rehabilitation services. These include a spectrum of benefits, ranging such things as resume writing, job leads, GEDs, certifications, and formal retraining plans.

Further Reading

- Minnesota Workers' Compensation Deskbook, 5th ed. (Minnesota CLE 2012, updated 2015).

Notes

5. How is the compensation determined for my injury?

Answer

An employee's average weekly wage (AWW) determines the amount of wage loss benefits to which they are entitled. The AWW is, in most cases, determined by averaging an employee's wages for the 26 weeks prior to the date of injury. There are certain employments which utilize different calculation methods, such as construction workers, seasonal workers, apprentices, and volunteers.

Once the AWW is determined, one can calculate the compensation rate. The compensation rate is the amount of total disability benefits that an employee will receive each week they are totally disabled. The compensation rate is two-thirds of the AWW, and the maximum compensation rate is $850 per week (less for dates of injury prior to October 1, 2009). The maximum number of weeks an employee can collect temporary total disability (TTD) is 104.

If an employee is injured but is able to work at a wage loss, they are entitled to temporary partial disability benefits (TPD). That is calculated by taking the AWW, subtracting the gross weekly current earnings, and multiplying by two-thirds. The maximum number of weeks an employee can collect TPD is 225.

All wage loss benefits are tax free!

Further Reading

- Minnesota Workers' Compensation Deskbook, 5th ed. (Minnesota CLE 2012, updated 2015).

Notes

6. If I am injured while I am "on the clock" or on the employer's premises, is it automatically considered work-related?

Answer

No. In order for an injury to be compensable, it has to "arise out of and in the course and scope of" employment.

The "arising out of" requirement is a "legal causation" test. For an injury to arise out of employment there must be a "causal connection between the employment and the injury." *Lange v. Minneapolis-St. Paul Airports Comm'n*, 99 N.W.2d 915, 917 (Minn. 1959); *Courtney by Higdem v. City of Orono*, 424 N.W.2d 295 (Minn. 1988). Following the majority of jurisdictions, Minnesota courts have generally required an employee to satisfy the increased risk test. Under the increased risk test, the claimant must show that the injury was caused by an increased risk to which claimant, distinct from the general public, was subjected to by his or her employment.

There are many injuries that may happen "at work" or while "on the clock," but are not work-related, such as injuries caused by acts of God, injuries while traveling to and from work, injuries sustained while engaged in a prohibited act, and injuries caused by third persons or co-employees.

A common area of litigation is whether an injury arises out of employment if it is idiopathic. An idiopathic injury is one that is caused by a personal condition, an unknown cause, or which occurs spontaneously under circumstances no different than normal activities at home.

To be compensable, an injury must not only arise out of employment but it also must have occurred in the course and scope of employment. An injury is said to arise during the course of the employment when it takes place within the period of the employment, at a place where the employee reasonably may be and while he or she is fulfilling his or her duties or engaged in doing something incidental thereto. Thus, the phrase "in the course of" refers to the time, place, and circumstance of the accident causing the injury.

Commonly litigated "course and scope" cases involve traveling employees, employees in employer-furnished transportation, injuries sustained during business travel, and injuries sustained while on a special errand for the employer.

There are employee conduct issues that can also determine whether an injury arose out of and in the course and scope of employment, such as prohibited acts, horseplay, the personal comfort doctrine, acts to help third parties, intoxication, recreational activities and social events, injuries during breaks, and injuries sustained at home but while doing "work."

Authorities

- *Lange v. Minneapolis-St. Paul Airports Comm'n*, 99 N.W.2d 915, 917 (Minn. 1959).
- *Courtney by Higdem v. City of Orono*, 424 N.W.2d 295 (Minn. 1988).

Further Reading

- Minnesota Workers' Compensation Deskbook, 5th ed. (Minnesota CLE 2012, updated 2015).

Notes

7. Can I get pain and suffering damages from my employer if I am hurt at work and it is not my fault?

Answer

No. Not from your employer.

> In general, the exclusive remedy of an employee injured in the workplace is recovery of benefits under the Minnesota Workers' Compensation Act. The Workers' Compensation Act represents a trade-off of sorts for the employee: the employee receives compensation for any employment-related injury regardless of fault, but the nature and extent of benefits is limited to that provided by the act. The employee has given up his right to tort damages against a negligent employer in exchange for a "lesser" recovery in cases where the employer is not at fault.
>
> The Workers' Compensation Act also represents a similar trade-off for employers: the employer is liable for some benefits in nearly every case of workplace injury, but this liability is limited, even in cases of employer fault, to the nature and extent of benefits provided by the Act. Minn. Stat. § 176.021(1) (2006). The risk of workplace injury therefore becomes a cost of doing business.

Mark Fellman & Barbara Heck, *Compensable Claims/Covered Employees,* Minnesota Workers' Compensation Deskbook, 5th ed. (Minnesota CLE 2012, updated 2014).

It is important to note that although workers' compensation is the exclusive remedy for work injuries, an employer may still be liable for civil damages under Minnesota Statutes section 176.82 for retaliatory discharge. Also, an employer is still subject to other state and federal employment laws, such as the Americans with Disabilities Act and the Family Medical Leave Act.

Also, if a third party is at fault, an employee may be able to pursue the third party for pain and suffering damages, and other damages not provided for under the Workers' Compensation Act. An example of third-party liability would be an employee involved in a work-related car accident (in which they were not at fault), or an employee injured on the job as a result of a faulty design of or maintenance of a machine.

Authorities

- Minn. Stat. §§ 176.021(1) & 176.82.

Further Reading

- Minnesota Workers' Compensation Deskbook, 5th ed. (Minnesota CLE 2012, updated 2015).

8. Can my employer fire me after I have a work injury?

Answer

Yes. But, if they fire you *because of* the work injury, they may have to pay damages for retaliatory discharge.

Having a work injury does not guarantee lifelong employment with the date-of-injury employer.

Further Reading

- Minnesota Workers' Compensation Deskbook, 5th ed. (Minnesota CLE 2012, updated 2015).

Notes

9. Is my employer or the insurance company allowed to talk to my doctors or send a nurse to attend my doctor appointments?

Answer

No, unless the employee signs an authorization allowing them to talk to the employee's medical provider or meet with the employee's doctor.

The employer and insurer do have a right, however, to obtain relevant medical records, past and present, and to make certain inquiries to the employee's doctor. They can do that without the employee's authorization, provided that they do it in writing, and provide the employee and the employee's attorney with a copy of what is being sent to the medical provider.

Some employers and insurers will assign a nurse case manager to a case, and those nurses do like to attend doctor appointments and chat with medical providers. Again, they can do so only with the employee's authorization. If the employee does not authorize them to be at appointments or to talk to medical providers, they are limited to only gathering relevant medical records and making written inquiries to the employee's doctor, with the employee being copied on the request.

Further Reading

- Minnesota Workers' Compensation Deskbook, 5th ed. (Minnesota CLE 2012, updated 2015).

Notes

10. Am I being followed?

Answer

Yes.

It is very common for insurers to do some amount of surveillance on injured workers. This is allowed, provided they do not trespass or burglarize. They will also talk to friends and neighbors, especially ones that are doing outdoor projects or having a garage sale. They are most likely to follow injured workers after a known appointment, like a medical appointment, or they will do spot checks on snow days or warm spring days hoping to catch injured workers in their yard with a shovel!

Further Reading

- Minnesota Workers' Compensation Deskbook, 5th ed. (Minnesota CLE 2012, updated 2015).

Notes

11. Are mental health injuries covered by workers' compensation?

Answer

Historically, no. Only physical injuries have been covered by the Minnesota Workers' Compensation Act. However, there are a few exceptions. If a physical injury causes a mental injury, then it is covered. For example, if chronic pain from a work injury causes depression, the depression is covered. In contrast, mental injuries caused by stress related to the work injury, such as job security, finances, or litigation, are not covered. Rule of thumb—the mental health issue needs to be related to the pain from the injury.

In 2013 the Minnesota Legislature passed a law that, for the first time, allows for compensation for a mental health injury without a physical injury, but only in a very narrow circumstance. Minnesota Statutes section 176.011, subdivision 15, which defines a "personal injury" covered by the Workers' Compensation Act, now includes "mental impairment," defined as:

> For the purposes of this chapter, "mental impairment" means a diagnosis of post-traumatic stress disorder by a licensed psychiatrist or psychologist. For the purposes of this chapter, "post-traumatic stress disorder" means the condition as described in the most recently published edition of the Diagnostic and Statistical Manual of Mental Disorders by the American Psychiatric Association.

So, although the exception to the rule that no mental health claims are covered is very narrow, many see this as the first step in allowing for coverage of mental health injuries.

Notes

Consumer Law

Chapter 10

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The author would like to thank Dan Bryden, John Albanese and David Carrier of Nichols Kaster for their assistance in preparing the chapter.

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1. I bought a used car and it's a "lemon." What can I do in Minnesota?

Answer

Determine if the car is covered by the used motor vehicle statute and proceed accordingly. Minn. Stat. § 325F.662.

In General

Used car dealers must provide basic warranty coverage for most used cars and small trucks. Minn. Stat. § 325F.662, subd. 2.

- The statute only provides protection for cars purchased primarily for personal, family, or household purposes. Minn. Stat. § 325F.662, subd. 1(a).
- The statute only applies if you buy from a used car dealer, licensed or unlicensed. Minn. Stat. § 325F.662, subd. 1(b).
    - The statute does not apply if a used car is bought from a relative, friend, or from a private party. *Id.*
- If a dealer fails to give the express warranty (written), the dealer is still considered to have given the express warranty and the statute applies. Minn. Stat. § 325F.662, subd. 5.

I Bought My Used Car From a Dealer and it Wasn't Sold "As Is." Is it Covered?

A consumer may only waive the express warranty coverage for a certain part if:

(1) the dealer discloses in a clear and conspicuous typed or printed statement on the front of the buyer's guide that the waived part contains a malfunction, defect, or repair problem; and

(2) the consumer circles this typed or printed statement and signs the buyers guide next to the circled statement.

Minn. Stat. § 325F.662, subd. 4(1)–(2).

In the absence of such a waiver, the dealer must provide a written warranty with the following minimum provisions:

- For cars with fewer than 36,000 miles:
    - The warranty applies for 60 days or 2,500 miles, whichever comes first.
    - The warranty, at minimum, for these vehicles must cover the specific parts listed. Minn. Stat. § 325F.662, subd. 2(c)(1)–(9).
- For cars with between 36,000 and 75,000 miles:

- The warranty applies for 30 days or 1,000 miles, whichever comes first.
- For cars in this mileage range, the same parts are covered as those with fewer than 36,000 miles, with the exception of the rack, radiator, alternator, generator, and starter. Minn. Stat. § 325F.662, subd. 2(d)(1)–(7).

Parts are not covered under the used car warranty law if they are not specifically in the statute. Minn. Stat. § 325F.662, subd. 2(a)

What the Dealer Must Do if the Vehicle is Covered

If a malfunction, defect, or failure in a covered part occurs during the warranty period, the dealer must repair or replace the part at no charge to the car buyer. Minn. Stat. § 325F.662, subd. 2(b).

However, to protect rights under the warranty, the consumer must promptly notify the dealer of the problem within the warranty period and must arrange to have the vehicle taken to the dealer for inspection and repair. Minn. Stat. § 325F.662, subd. 2(e)(1).

If the dealer does not have a repair facility, the dealer will tell the consumer where to take the vehicle for inspection and repair under the warranty. If it is impossible or unreasonable to return the vehicle to the dealer, the repairs may be done somewhere else after the dealer's consent is obtained. Minn. Stat. § 325F.662, subd. 2(e)(2)–(4).

Repair or Refund

A dealer can decide to refund the purchase price of the car, instead of repairing or replacing a warranty part. If the dealer gives a refund, the consumer must return the vehicle to the dealer. The refund must include all the charges the consumer paid, including towing expenses, minus a reasonable deduction for use of the vehicle. Minn. Stat. § 325F.662, subds. 2(b) & 8(a).

- The dealer has the choice of correcting the warranty problem or giving the consumer a refund; the consumer cannot demand one or the other.

Lawsuits

If a used car dealer fails to comply with the warranty law, the consumer can bring a lawsuit against the dealer. However, it must be brought within a year after the warranty expires. Minn. Stat. § 325F.662, subds. 9–10.

Authorities

- Minn. Stat. § 325F.662.
- Minnesota Attorney General, Used Car Warranty Law, <www.ag.state.mn.us/consumer/cars/mncarlaws/MNCarLaws_2.asp>.

Comment

Minnesota has one of the strongest used car warranty laws in the country.

Vehicles that are specifically excluded from the statute (the dealer still may choose to offer a warranty, however) include:

- cars with 75,000 miles or more;
- cars sold for less than $3,000;
- custom-built cars, or cars modified for show or racing;
- cars that are eight years of age or older;
- cars purchased primarily for business or agricultural use;
- vehicles with gross vehicle weight above 9,000 pounds;
- vehicles manufactured in limited quantities;
- vehicles not manufactured in accordance with federal emission standards;
- diesel engine cars; and
- salvaged vehicles.

Minn. Stat. § 325F.662, subd. 3(1)–(9).

Further Reading

- Consumer Fraud and Deceptive Trade Practice Regulation in Minnesota, 2d ed. (Minnesota CLE 2009).

Notes

2. I just noticed a new/increased fee on my monthly bank statement. Is that legal?

Answer

Yes, if they gave you the required disclosures.

What Regulations Apply?

It depends on what the new fee pertains to.

- If it's an increased fee related to an electronic fund transfer service, regulation E will apply the rules under the Electronic Fund Transfer Act (EFTA). 12 C.F.R. § 205.1 *et seq.*
- If it's a new or increased fee related to other fees (paper checking or the like), regulation DD will apply the rules under the Truth in Savings Act (TISA). 12 C.F.R. § 205.1 *et seq.*
- If it pertains to a loan, the Truth in Lending Act will apply (TILA). 15 U.S.C. § 1601 *et seq.*

Disclosure Requirements Under EFTA

The EFTA (15 U.S.C. § 1693 *et seq.*), implemented by regulation E (12 C.F.R. § 205.1 *et seq.*), establishes the basic rights of consumers who use electronic fund transfer services.

The act defines "electronic fund transfer" as including but not limited to (1) point of sale transfers; (2) ATM transactions; (3) direct deposits or withdrawal of funds; (4) transfers initiated by telephone; and (5) transfers resulting from debit card transactions, whether or not initiated from an electronic terminal. 12 C.F.R. § 205.3(b). This does not include: (1) paper checks, (2) wire transfers, (3) security transfers, (4) automatic transfers pre-agreed to, (5) preauthorized transfers to or from an account if the assets of the account-holding financial institution were $100 million or less in a given year, and (6) telephone-initiated transfers that did not take place under a telephone bill-payment or other written plan where periodic or recurring transfers are contemplated. 12 C.F.R. § 205.3(c).

EFTA requires financial institutions to make a number of initial disclosures (at the time a consumer contracts for the service or before the first electronic fund transfer is made using the consumer's account), among them any fees imposed for electronic fund transfers and the right to do so. 12 C.F.R. § 205.7(b)(5).

After the initial disclosure, the financial institution has an ongoing duty to inform the consumer of any changes in their terms by mailing or delivering a written notice 21 days prior to the effective date. 12 C.F.R. § 205.8(a)(1). This includes increased fees, as well as: (1) increased liability for the consumer, (2) fewer types of available electronic fund transfers, or (3) stricter limitations on the frequency or dollar amount of transfers. 12 C.F.R. § 205.8(a)(1)(i)–(iv).

There is a private right of action under the EFTA. 15 U.S.C. § 1693m. One can sue as an individual or class action and, if successful, the company is liable for any actual damage sustained by the consumers as well as: (1) not less than $100 or greater than $1,000 for individual actions; and (2) such amount as the court may

allow for class actions, without minimum recovery to each member, and not more than $500,000 for a class action or one percent of the net worth of the defendant, whichever is less.

Disclosure Requirements Under TISA

The TISA (15 U.S.C. § 3201 *et seq.*), implemented by regulation DD (12 C.F.R. § 230.1 *et seq.*), requires depository institutions (i.e., banks, not credit unions) to make certain initial disclosures to a customer before the account is opened or a service is provided, including the amount of any fee that may be imposed in connection with an account and the conditions under which such fees are imposed. 12 C.F.R. § 230.4(a) & (b)(4).

After the account is created, the bank is required to give 30 days' advanced disclosure, by mail or delivery, of any change in a term contained in the initial disclosure that adversely affects the consumer or reduces their annual percentage yield. 12 C.F.R. § 230.5(a)(1). This includes all changes to the amount of any fee that may be imposed in connection with the account. 12 C.F.R. § 230.4(b)(4).

No notice is required for changes in check printing fees, accounts with maturities of one month or less, or variable-rate changes. 12 C.F.R. § 230.5(a)(2)(i)–(iii).

There is no private right of action here; only federal agencies can enforce.

Authorities

- 15 U.S.C. § 1693 *et seq.*: Electronic Funds Transfer Act.
- 12 C.F.R. § 205.1 *et seq.*: Regulation E.
- 12 U.S.C. § 3201 *et seq.*: Truth in Savings Act.
- 12 C.F.R. § 230.1 *et seq.*: Regulation DD.

Further Reading

- A report to the chairwoman of the subcommittee on financial institutions of the house, regarding bank fees and how federal regulators could better ensure consumers have required disclosure documents prior to opening accounts.

Notes

3. There is something inaccurate on my credit report. What can I do?

Answer

Contact the credit reporting agency and get the inaccuracy corrected.

The Fair Credit Reporting Act holds both the reporting agency and the consumer responsible for correcting inaccurate information. 15 U.S.C. § 1681i.

There are two steps that need to be taken:

1. Inform the credit reporting agency, in writing, of the information you believe is inaccurate. Provide your name and address along with copies of documents that support your contention. State your position, why you are disputing the information, and request that it be removed/corrected. Send the letter by certified mail, in order to document when the credit reporting agency received the letter.

2. Inform the creditor (or any other information provider), in writing, that you are disputing a disclosure. Include copies of documents that support your contention. If the provider reports the disputed item to a credit reporting agency, it must also include notice of your dispute. If the information is found to be inaccurate, the information provider cannot report it again.

General Requirements of a Credit Reporting Agency and Information Provider

- Credit reporting agencies have 30 days to investigate your dispute, unless they consider it frivolous. 15 U.S.C. § 1681i(a)(1)(A) & (a)(3)(A).

- They must forward all relevant data that you provided about the inaccuracy to the organization that provided the information. 15 U.S.C. § 1681i(a)(2)(A).

- After the information provider receives notice of a dispute from the credit reporting company, it also must investigate, review the information, and report the results to the credit reporting agency. 15 U.S.C. § 1681i(f)(2).

- The credit reporting agency must give you the results it finds within five business days of the investigation's completion. 15 U.S.C. § 1681i(a)(6)(A).

- If the reporting agency corrects or deletes information that is found to be inaccurate, you may request that the agency send notices of any corrections to anyone who received your report for any reason in the past six months, and anyone who received your report for employment purposes in the past two years. 15 U.S.C. § 1681i(d).

Private right of action

- Any agency that willfully violates these requirements is liable to the consumer for actual damages sustained, in an amount no less than $100 and no more than $1,000, and punitive damages, and the consumer may recover their attorney's fees and costs. Minn. Stat. § 1681n.
- Any agency that negligently fails to comply with these requirements is liable to the consumer for actual damages, and the consumer can recover attorney's fees and costs. Minn. Stat. § 1681o.

Statute of Limitations

- Any such action must be brought within two years after the plaintiff discovers the violation, or within five years after the date on which the violation occurred. 15 U.S.C. § 1681p.

Authorities

- 15 U.S.C. § 1681 *et seq.*: Fair Credit Reporting Act.
- Federal Trade Commission, Fair Credit Reporting Act, <http://www.ftc.gov/os/statutes/031224fcra.pdf>.
- Federal Trade Commission, Consumer Information, Disputing Errors on Credit Reports, <www.ftc.gov/bcp/edu/pubs/consumer/credit/cre21.shtm#sample>.

Comment

Consumer advocates and financial advisors suggest that you view your credit report periodically to ensure the information contained in it is accurate, complete, and up to date. This is especially true if you plan to apply for a loan for a major purchase, are planning on a major insurance purchase, or even plan to apply to for a job.

For a sample of a dispute letter to a reporting agency, see the following link:

- <www.ftc.gov/bcp/edu/pubs/consumer/credit/cre21.shtm#sample>

Further Reading

- Federal Trade Commission, Consumer Information, Disputing Errors on Credit Reports, <www.ftc.gov/bcp/edu/pubs/consumer/credit/cre21.shtm#sample>.

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4. I can't afford to pay my mortgage anymore. What should I do?

Answer

There are a number of options depending on your situation. Given the potential gravity of your situation and some of the many pitfalls, it is worth your time to consult with a lawyer and, at a minimum, spend time researching various government programs for which you may qualify.

The Basic Options

1. Contact your lender and talk about your situation.

2. Carefully consider if it makes sense to make partial payments on the mortgage.

    - Mortgage servicers have the right under the mortgage documents to keep partial payments in a "suspense account" until there are sufficient funds in the suspense account to pay off the delinquent amount

    - It may make more sense for a homeowner who cannot afford their mortgage to stop making payments and save money for a security deposit and first month's rent on an apartment, or possibly a down payment on another property. The homeowner could save this money while the foreclosure process unfolds, which can take a year or longer.

    - Perhaps the worst case scenario for a borrower is to make partial payments that are very financially burdensome to him or her, but then still lose the house to foreclosure because they are still in default. In many cases, it makes more sense for the borrower to hunker down and save all their money and wait for the foreclosure process to be completed.

3. Homeowners can also request a loan modification to make the monthly payments more affordable. According to recent regulations issued by the CFPB, mortgage servicers can no longer "dual track" their consideration of a request for a loan modification with foreclosure—the foreclosure process must cease while the mortgage servicer considers loan modification, which can take months (or longer).

4. Some relevant government programs:

    - The Minnesota Attorney General's Office has a very good mediation program for borrowers seeking a loan modification.

    - Home Affordable Modification Program (HAMP)

        - Allows non-delinquent, eligible homeowners to refinance at a lower rate or delinquent, eligible homeowners to get loan modification.

- To apply for a modification under HAMP, you must:
  - be the owner-occupant of a one- to four-unit home;
  - have an unpaid balance that is equal to or less than:
    - 1 Unit: $729,750
    - 2 Units: $934,200
    - 3 Units: $1,129,250
    - 4 Units: $ 1,403,400
  - have a first lien mortgage that was originated on or before January 1, 2009;
  - have a monthly mortgage payment (including taxes, insurance, and home owner association dues) greater than 31 percent of your monthly gross income; and
- have a mortgage payment that is not affordable due to financial hardship that can be documented.
- Participating servicers may not refer a loan for foreclosure sale or proceed with a foreclosure sale on an eligible loan until the homeowner has been evaluated for HAMP and, if eligible, a trial modification offer has been made.

5. Sales

   - Short Sale
     - This is where the homeowner receives the lender's permission to sell the house for less than the balance due on the mortgage. Sometimes the lender will settle for the sale price and wipe out the debt.
       - The homeowner is the one that usually has to find a buyer that is willing to purchase home at a price to be approved by the lender.
     - In other cases, they will still expect payment on part or all of the difference. If this option is considered, it would be wise to speak with an attorney to make sure you to get a complete release of liability from the lender.
   - Deed in Lieu of Foreclosure
     - The homeowner gives the deed to the home back to the lender with their approval, with the lender forgiving the remaining balance on the loan. The homeowner still loses the home.

6. Bankruptcy

    - A helpful tool for foreclosure defense. Important when a homeowner gets sued for foreclosure, but an attorney is almost always needed.

    - This avenue is helpful because it can gain the homeowner a considerable amount of time to bargain with the lender and get them to the negotiation table. It also keeps the homeowner in possession, during the chapter 13 process, as long as the "automatic stay" is in place and the homeowner is under the protection of federal bankruptcy laws.

7. Foreclosure

    - This takes place when the homeowner defaults on their property and the lender claims ownership of it. One missed payment is enough, but it usually takes more additional missed payments before banks foreclose and sell the house at a public auction.

Authorities

- Making Home Affordable, <www.makinghomeaffordable.gov>.
- U.S. Department of Housing and Urban Development, <www.hud.gov>.
- U.S. Department of Housing and Urban Development, Avoiding Foreclosure, <portal.hud.gov/hudportal/HUD?src=/topics/avoiding_foreclosure>.

Further Reading

- 2013 Real Estate Institute Manual (Minnesota CLE 2013).

Notes

5. The bank is saying I don't have enough hazard or flood insurance on my property and is requiring me to purchase more insurance. Can they do that?

Answer

It depends on the terms of your mortgage and, potentially, on the manner in which you have been notified of the insurance requirements.

Most mortgages are form documents that are adopted and modified by banks. Mortgages are frequently bundled and sold to subsequent banks, so the bank that owns and services your mortgage may be different than the bank that originated your loan. Many banks are unaware of, and do not track, specific mortgage language in determining how much insurance to require of their borrowers. Instead of imposing requirements based on the mortgage agreements, banks impose a "one size fits all" policy.

Many mortgages contain a requirement that the borrower obtain and maintain hazard and/or flood insurance. Mortgage language varies as the *amount* of insurance that is required. Some mortgages require insurance only in the amount of the loan, while others may require replacement cost coverage or some other amount. Some mortgages don't require any insurance at all. Some mortgages allow the lender to change the insurance requirements during the life of the loan, while other mortgages do not.

When a lender imposes a blanket insurance requirement on all of its borrowers, there is a good chance that it is violating many of its mortgage contracts because the mortgage contracts are all different. Many lenders do not look at specific mortgage language when deciding how much insurance to require.

Lenders' conduct with regard to hazard and flood insurance is governed by the Truth in Lending Act (TILA), the Real Estate Settlement Procedures Act (RESPA), and state law trade practices and contract principles. As a general rule, lenders cannot change their insurance requirements mid-loan unless they have specific contractual authority to do so. They also cannot require more insurance than is specified in the loan agreement.

When a bank believes its borrower does not have sufficient insurance, often the bank will send a letter to the borrower notifying the borrower of the alleged deficiency and requesting that the borrower procure additional coverage and/or send proof of current coverage to the bank. Sometimes these letters result from the bank simply lacking proof of current insurance. In this situation, simply sending a copy of your current declarations page to your lender can solve the problem.

Other times, your bank wants more insurance than you currently have. If you don't buy it on your own, the bank may "force place" insurance on you, meaning it will buy a policy for you and add the cost of the policy to your loan balance (or withdraw the funds from your escrow account).

Many banks have been sued for abusive loan-servicing practices with regard to their force-place insurance requirements. Many banks earn a commission when they force place insurance, and therefore have an incentive to impose excessive insurance requirements and to aggressively force place policies. Banks have also been accused

of improperly backdating force-placed policies in order to earn commissions. Force-place policies are often four or five times as expensive as policies available from private insurers, and the costs of these policies have driven homeowners into foreclosure.

If you receive a letter indicating there is a deficiency in the amount of insurance you have, you should review your loan documents, send your bank proof of current insurance, and contact an attorney.

Authorities

- 15 U.S.C. § 1601 *et seq.*: TILA.
- 12 U.S.C. § 2601 *et seq.*: RESPA.
- 42 U.S.C. § 4012a(b)(1): NFIA Guidelines.
- Loans in Areas Having Special Flood Hazards; Interagency Questions & Answers Regarding Flood Insurance ("Interagency Q&As"), 74 Fed. Reg. 35 (July 21, 2009).
- FEMA Mandatory Purchase of Flood Insurance Guidelines, <http://www.fema.gov/library/viewRecord.do?id=2954>.

Further Reading

- Jeff Horwitz, *Ties to Insurers Could Land Mortgage Servicers in More Trouble*, American Banker (Nov. 9, 2010), *available at* <www.americanbanker.com/issues/175_216/ties-to-insurers-servicers-in-trouble-1028474-1.html?zkPrintable=1&nopagination=1>.
- *Attorneys General Draw a Bead on Banks' Forced-Placed Insurance Practices,* American Banker (Mar. 10, 2010), *available at* <www.americanbanker.com/issues/176_48/ags-force-placed-insurance-1034213-1.html>.
- Nichols Caster, Investigations, Force Placed Insurance, <www.nka.com/investigation/forced-placed-insurance/>.
- Dean Calbreath, '*Forced' Insurance Adds to Home Woes: Hidden Practice of Imposing Coverage Adds Burden to Those at Risk of Foreclosure*, San Diego Union-Tribune (Aug. 10, 2011), *available at* <www.signonsandiego.com/news/2011/aug/20/forced-insurance-adds-to-home-woes>.

Notes

6. An elderly relative was the victim of a scam that wasted a lot of her life savings. What can I do to help?

Answer

Report the scam to the appropriate authorities as soon as possible.

Minnesota has three statutes that protect the elderly: the Vulnerable Adults Act; the Financial Exploitation of a Vulnerable Adult Act; and the Deceptive or Unfair Trade Practices, Elderly or Handicapped Victims Act.

Each of these penalizes people who target the elderly in any kind of a scam or unfair practice. The attorney general and prosecuting authorities have concurrent jurisdiction over the criminal aspects of some of these statutes, so you should both call the police *and* make a report to the attorney general's office.

Many elderly people are taken advantage of by people or institutions upon whom they are dependent for their care. Counselors and law enforcement officers who learn of such a situation are "mandatory reporters" and are required to report such abuse. For example, a violation of the Vulnerable Adults Act's mandatory reporting requirement is a misdemeanor and may serve as evidence of negligence. Individuals who are not "mandatory reporters" may also make a report to the appropriate agency. Upon such a report being made, an investigation will ensue, and the state will endeavor to provide appropriate resources and assistance. You may report mistreatment of a vulnerable adult to the appropriate "common entry point," which can be found at <www.mnaging.org/advisor/cepd.htm>.

Many elderly adults are embarrassed to have been victims of a scam, and may believe that the perpetrators are a fly-by-night operation that cannot be stopped. Many large-scale crimes are perpetrated against multiple elderly individuals, and it is important that such activity be promptly reported. Both private law firms and the Minnesota Board on Aging are good resources for elderly adults who have been victimized.

Authorities

- <www.mnaging.org/about.htm>
- Minn. Stat. § 626.557: Vulnerable Adults Act.
- Minn. Stat. § 609.2335: Financial Exploitation of a Vulnerable Adult Act.
- Minn. Stat. § 609.2336: Deceptive or Unfair Trade Practices, Elderly or Handicapped Victims Act.
- Minn. Stat. § 325F.71: Senior Citizens and Handicapped Persons; Additional Civil Penalty for Deceptive Acts.

Further Reading

- Terry Lewis, *Fifty Ways to Exploit Your Grandmother: The Status of Financial Abuse of the Elderly in Minnesota*, 28 Wm. Mitchell L. Rev. 911 (2001).

7. I just noticed on my credit card statement that my membership in ACME was automatically renewed. Is that legal?

Answer

It depends on whether and how the renewal was authorized, and on the state where you live.

The general rule is that auto-renewal provisions in contracts are enforceable. However, some states limit the manner in which these provisions must be written, and some federal statutes govern the manner in which the auto-renewals may be conducted. In Minnesota, there is no specific law governing auto-renewal; however, Minnesota's general consumer protection laws apply.

Minnesota's Unfair and Deceptive Trade Practices Act (UDTPA): Minn. Stat. § 325D.44

- The statute states, "A person engages in a deceptive trade practice when, in the course of business, vocation, or occupation, the person ... engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding." Minn. Stat. § 325D.44, subd. 1(13).

- Only injunctive relief is available directly under this act. "A person likely to be damaged by a deceptive trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable." Minn. Stat. § 325D.45.

- If a party can show a public benefit, relief may be available under the Private Attorney General Act (PAGA) *PCS Prof'l Claim Serv., LLC v. Brambilla's, Inc.*, No. 06-4540, 2007 WL 3313661 (D. Minn. Nov. 6, 2007) (holding there is relief available under PAGA but that the public benefit test was not satisfied in this case).

Minnesota's Prevention of Consumer Fraud Act (MCFA): Minn. Stat. § 325F.69

- "The act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is enjoinable as provided in section 325F.70." Minn. Stat. § 325F.69, subd. 1.
    - "'Merchandise' means any objects, wares, goods, commodities, intangibles, real estate, loans, or services." Minn. Stat. § 325F.68, subd. 2.
- This section does not provide a private right of action, but grants only the attorney general a right of action for an injunction prohibiting any violation of the act. Minn. Stat. § 325F.70.

- However, a claimant may bring a claim for violation of the MCFA under the Minnesota private attorney general statute. Minn. Stat. § 8.31, subd. 3a ("In addition to the remedies otherwise provided by law, any person injured by a violation of any of the laws referred to in subdivision 1 may bring a civil action and recover damages, together with costs and disbursements, including costs of investigation and reasonable attorneys' fees, and receive other equitable relief and determined by the court."); *see also Cummings v. Paramount Partners*, 715 F. Supp. 2d 880, 909 (D. Minn. 2010); *Wehner v. Linvatech Corp.*, No. 06-CV-1709, 2008 WL 495525, at *3 (D. Minn. Feb. 20, 2008) (explaining that such a claim must be for the "public benefit").

Automatic Renewals in Minnesota Case Law

- *Minnesota ex. rel. Hatch v. Fleet Mortg. Corp.*, 158 F. Supp. 2d 962, 968 (D. Minn. 2001) involved alleged deceptive and misleading conduct under the UDTPA and MCFA based on the defendant's sale and telemarketing of its membership programs. Specifically, the plaintiff alleged that the defendant promoted a trial program as free, which "obscures the fact that accepting the free trial means that inaction will cause automatic monthly charges for the membership program to the Customer's mortgage account without the need for the customer's signature." The court concluded that "these allegations are not non-deceptive as a matter of law." *Id.*

States with Specific Auto-Renewal Statutes

- California (Cal. Bus. & Prof. Code § 17601), Connecticut (Conn. Gen. Stat. § 42-126b), Florida (Fla. Stat. § 501.165), Illinois (815 Ill. Comp. Stat. 601/1 § 1), New Mexico (N.M. Code R. 12.2.11), North Carolina (N.C. Gen. Stat. § 75-41), and Utah (Utah Code Ann. § 15-10-201).

Automatic Renewal Statutes Specific to the Health Club Industry

- Connecticut (Conn. Gen. Stat. § 21a-219), Hawaii (Haw. Rev. Stat. § 486N-8), Iowa (Iowa Code § 552.8), Maryland (Md. Code, Commercial Law § 14-12B-06), Nevada (Nev. Rev. Stat. § 598.948), New Hampshire (N.H. Rev. Stat. Ann. § 358-I-5), Pennsylvania (73 Pa. Cons. Stat. § 2164), and South Carolina (S.C. Code Ann. 1976 § 44-79-60).

Specific to Credit Card Registration Services

- New York (N.Y. Gen. Bus. Law § 521-b).

Specific to Credit Card Protection Services

- New York (N.Y. Gen. Bus. Law § 393-b).

Specific to Contracts for Service, Maintenance, or Repair to Any Real Property or Personal Property

- New York (N.Y. Gen. Bus. Law § 5-903).

Specific to Travel Discount Programs

- California (Cal. Bus. & Prof. Code § 17550.27).

Specific to Alarm Systems/Home Security Contracts

- Arkansas (Ark. Code Ann. § 4-86-106) and Tennessee (Tenn. Code Ann. § 62-32-325).

Specific to Home/Personal Use Internet Service Providers and Internet Game Service Providers

- Illinois (815 Ill. Comp. Stat. 505/2UU; 815 Ill. Comp. Stat. 505/2CCC).

Specific to Martial Arts Schools

- New Hampshire (N.H. Rev. Stat. Ann. § 358-S:5).

Specific to "Buyers Clubs"

- Tennessee (Tenn. Code Ann. § 47-18-505) and Missouri (Mo. Ann. Stat. § 407.675).

Specific to Wireless Telephone Service Providers

- Louisiana (La. Rev. Stat. Ann. § 45:844.6).

Specific to Telecommunications Contracts

- South Dakota (S.D. Codified Laws § 49-31-116).

Specific to Business Customers and Telephone Public Utilities

- West Virginia (W. Va. Code § 24-2E-2).

Specific to "Small Containerized Waste Hauling Services"

- Maine (Me. Rev. Stat. 38 § 2112).

Specific to "Certain Business Contracts"

- Wisconsin (Wis. Stat. § 134.49).

Further Reading

- Consumer Fraud and Deceptive Trade Practice Regulation in Minnesota, 2d ed. (Minnesota CLE 2009).
- *Summary Guide to Fraud, Misrepresentation & Deceptive Trade Practices* (Minnesota CLE 2011).

8. I noticed an error on my credit card bill. What can I do to make sure it gets corrected?

Answer

Contact the creditor and make sure the error gets corrected.

Congress amended the Truth in Lending Act (TILA) in 1986 and added the Fair Credit Billing Act (FCBA) to TILA's provisions. This act applies to open-ended credit accounts, like credit cards, but not loans or extensions of credit paid on a fixed schedule.

Errors that are covered (15 U.S.C. § 1666(b)):

- unauthorized charges;
- charges for goods or services you did not accept or were not delivered as agreed;
- charges with the wrong date listed;
- charges with the wrong amount listed;
- failure to post payments and other credits, e.g., returns;
- arithmetic errors;
- failures to send bills to your current address, if the creditor received a change of address within at least 20 days before the billing period ends; and
- charges for which you ask for a written explanation of proof of purchase along with a claimed error or request for clarification.

The creditor may be liable for up to $50 for any charge that a consumer reports to them and which is erroneous for one of the above reasons.

If you notice an error, you will need to do a couple things:

- Write a letter to the creditor. Use the address the creditor lists for billing disputes and inquires. Include your address, account number, name, and a description of the error. 15 U.S.C. § 1666(a).
- Make sure the letter is sent so that it reaches the creditor within 60 days after the first bill that contained the alleged error was mailed to you. 15 U.S.C. § 1666(a).
- Send the letter by certified mail, so you have proof of when the creditor received the letter. Include copies of receipts or any other documents (not originals) that support your contention.

Now that the creditor has received notice, the creditor is required to *address* your inquiry, in writing, within 30 days of receiving it, unless the problem was resolved by some other means. 15 U.S.C. § 1666(a)(A). The creditor is also required to *resolve* the dispute within two billing cycles (but not more than 90 days) after receipt of the letter. 15 U.S.C. § 1666(a)(B).

If the bill was incorrect the creditor must explain, in writing, the corrections that will be made to your account and remove all finance charges, late fees, and other charges in connection with the error. 15 U.S.C. § 1666(a)(B)(i).

If the bill was correct the creditor still must tell you, in writing, how much you owe and why. 15 U.S.C. § 1666(a)(B)(ii). You will then owe the disputed amount, plus any finance charges incurred during the dispute.

Disputing Creditor's Conclusion

If you disagree with the conclusion of the creditor's investigation, you may write to the creditor, but you must act within ten days after receiving the explanation, and you may indicate that you refuse to pay the disputed amount. 15 U.S.C. § 1666a(a), (b).

If you inform the creditor that you still dispute the charge within ten days of receiving the results of their investigation, a creditor may not report the disputed delinquent payments to a credit agency unless that report specifically states that you don't think you owe the money. The creditor must tell you who gets these reports. 15 U.S.C. § 1666a(b)(3).

Proof of the Legitimacy of the Charge

Sufficient notice to the creditor is always required, in writing. The FTC encourages consumers to supplement all their letters with documentation supporting their claims.

To be sufficient, the notice sent to the creditor "must meet the following requirements: (1) the debtor identifies her name and account number, (2) the debtor 'indicates her belief that the statement contains a billing error and the amount of such billing error,' and (3) the debtor explains her belief that the statement contains a billing error." *Burnstein v. Saks Fifth Ave. & Co*. 208 F. Supp. 2d 765, 776 (E.D. Mich. 2002) (quoting 15 U.S.C. § 1666(a)).

There are a lot of consumers (in cases) who fail to do this and thus have their claims dismissed. There needs to be written notice. *Greisz v. Household Bank*, 8 F. Supp. 2d 1031, 1042 (N.D. Ill. 1998).

Creditor's Failure to Follow the Required Procedures

Any creditor who fails to follow the settlement procedure may not collect the amount in dispute or any related finance charges, up to $50, even if the bill turns out to be correct. 15 U.S.C. § 1666(e). This also applies if they threaten to report or improperly report your failure to pay during the dispute period under 15 U.S.C. § 1666a(a). 15 U.S.C. § 1666(e).

Additionally, a private right of action exists, whereby a consumer can bring a claim against the creditor for its failure to comply with the requirements set forth in the FCBA, so long as such claim is brought within one year of the date on which the claim arose. 15 U.S.C. § 1640(a). *See Burnstein v. Saks Fifth Ave. & Co*. 208 F. Supp. 2d 765, 776 (E.D. Mich. 2002).

Authorities

- 15 U.S.C. § 1666 *et seq.*: Fair Credit Billing Act.
- Federal Trade Commission, Consumer Information, Disputing Credit Card Charges, <www.ftc.gov/bcp/edu/pubs/consumer/credit/cre16.shtm>.

Comment

Creditors may not threaten your credit rating or report you as delinquent while your bill is in dispute. However, they can report that you are challenging your bill. Creditors are also prohibited from discriminating against applicants exercising their rights under FCBA in good faith under the Equal Credit Opportunity Act, 12 C.F.R. § 202.1(b).

Further Reading

- Mark Ireland, *Truth in Lending Act Basics, in* 2008 Bankruptcy Institute Manual (Minnesota CLE 2008).

Notes

9. A potential or current employer ran a credit check on me. Is that legal?

Answer

Yes, but only if you consented to it.

The Fair Credit Reporting Act specifies the circumstances under which a current or potential employer may review your credit report. Businesses must have a permissible purpose under the act to obtain your report. In general, permissible purposes include: evaluating applications for credit, use for collection purposes, and underwriting insurance.

Employers are limited in their ability to obtain background and credit reports on employees and job applicants. The Fair Credit Reporting Act imposes two basic limitations on employers:

1. Employers must get proper permission to conduct a background check on job applicants or employees, and must disclose that they are going to procure such a check. The disclosure form must be in a stand-alone document which is *separate* from the job application, and must not ask employees to release any claims or waive any rights. The law is very specific about the form of the disclosure and authorization that are required, and many employers do not obtain proper authorization.

2. Employers must provide job applicants or employees with a copy of the credit report or background check *before* taking adverse action, such as not hiring someone, demoting someone, or firing someone. This requirement ensures that the employee has the ability to challenge inaccuracies in the report.

Even if employers follow all of these basic rules, they may still violate federal and state civil rights laws by *automatically* denying jobs to persons with criminal records or low credit scores, regardless of their individual circumstances and other qualifications.

If employers willfully violate any of these rules, they are liable for actual damages, punitive damages, and statutory penalties of up to $1,000 per violation.

Authorities

- 15 U.S.C. § 1681 *et seq*.: Fair Credit Reporting Act.

Comment

If you do not want a prospective employer to obtain a copy of your credit report, you should be careful when signing documents during the application process. Critics point out that it can be difficult to refuse to sign a consent form for a background check because such a refusal may result in the application being denied further consideration.

Further Reading

- Judith B. Langevin, *Basic Employment Law and Practice, in* 2010 Upper Midwest Employment Law Institute Manual (Minnesota CLE 2010).

Notes

10. I got cheated in a relatively small way by a corporation. I don't think it's worth filing a lawsuit but I am ticked off and want to do something. What should I do?

Answer

Report the business to the Better Business Bureau (BBB) and the Minnesota Attorney General, and consider talking with an attorney.

It is frustrating to get cheated, even in a small way.

Most legitimate businesses are sensitive to complaints with the BBB, particularly if the "cheating" is the result of a single employee doing a bad job or not properly providing the service the company offered. The BBB accepts complaints online and rates businesses publicly based on how responsive they are to complaints. Often, this can lead to you getting your money back. Some companies, however, will not be responsive to these kinds of complaints, and there are many kinds of complaints that the BBB will not handle, such as contractual disputes.

The Minnesota Attorney General's Office also accepts consumer complaints and may pursue an action.

Finally, even though you may consider your claims "not worth" litigating, you might want to reconsider. Many plaintiffs' firms will accept cases on a contingent fee basis, and some statutes provide for statutory penalties that can turn a small claim into something that is financially worthwhile. Moreover, if many people have been victimized in the same way that you have, pursuing litigation may be a good way to get the offending corporation to change its practices and pay for its wrongs. No company is too big to play fair, and sometimes good lawyers can help teach that lesson.

Authorities

- Better Business Bureau in Minnesota and North Dakota, <www.bbb.org/minnesota>.
- Minnesota Attorney General, Consumer Complaints <www.ag.state.mn.us/consumer/complaint.asp>.

Further Reading

- Consumer Fraud and Deceptive Trade Practice Regulation in Minnesota, 2d ed. (Minnesota CLE 2009).

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11. I took out an online payday loan and cannot afford to keep making payments. What can I do?

Answer

Most online payday loans are illegal. You should consider immediately contacting your bank both orally and in writing stating that you revoke any authorization given to the payday lender to take money out of your account, and consider contacting the appropriate authorities and a lawyer.

Online payday lending is a notorious industry that is coming under increased scrutiny from federal and state authorities. Both the Minnesota Attorney General and the Minnesota Department of Commerce have brought actions against online payday lenders for flagrantly violating Minnesota law. If you took out a loan from an online payday lender, there is a good chance that the payday loan you took out was illegal.

Minnesota's payday lending laws have strict caps on the amount of interest and fees that can be charged by payday lenders. Many online lenders charge interest and fees that far exceed what is permissible under the law.

Further, Minnesota law restricts payday lenders from rolling over or "churning" payday loans by accepting interest only payments, or by paying off the old loan with a new loan. If your lender is rolling over your loan, you could be paying an extravagant amount of interest that is many times the amount you originally borrowed.

Minnesota law also requires that payday lenders be licensed with the Minnesota Department of Commerce. A list of licensed lenders is available at the Department's website, <www.mn.gov/commerce/>.

As part of your loan agreement, you may have authorized the payday lender to electronically access your bank account to deposit and withdraw money. This is known as an "ACH authorization." The payday lender will continue to withdraw or attempt to withdraw money from your account even if you lack sufficient funds. Assuming your loan is illegal, you should notify your bank immediately both orally and in writing that you are revoking your ACH authorization for the payday lender. You may also want to consider closing your account and opening a new account. If you do this, you should also attempt to notify your lender that you are revoking the ACH authorization. Online payday lenders can be difficult to contact and may not honor your revocation.

If your loan is illegal or the lender is unlicensed, you should consider contacting the Minnesota Attorney General and the Minnesota Department of Commerce. The Minnesota payday loan statute also provides a private right of action that would allow you to sue the lender. Many lenders, however, may be difficult to sue as they purport to be located overseas or affiliated with a Native American tribe and thus entitled to tribal sovereign immunity. If the loan was arranged by a major entity, however, you may have better luck suing that entity, as opposed to suing the lender directly.

The payday lender may also try to contact you to collect the loan. If the contact becomes harassing, contact the appropriate authorities or a lawyer. The payday lender may also decide to engage a debt collector to collect on the loan. Both federal and state law restrict how debt collectors can contact you. If you feel that you are being hounded by a debt collector, contact an attorney as you may have a claim under the Fair Debt Collection Practices Act.

Lastly, if you discover that the payday lender or debt collector has sued you to collect on the loan, contact a lawyer.

Authorities

- Minn. Stat. §§ 47.60 & 47.601.
- Electronic Funds Transfer Act, 15 U.S.C. § 1693 *et seq.* (2011).
- Regulation E, 12 C.F.R. § 205.1 *et seq.* (2011).
- Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p.

Further Reading

- Minnesota Attorney General, Beware of Internet Loans, <www.ag.state.mn.us/Consumer/Publications/PayDayLoans.asp>.

- Consumer Financial Protection Bureau, Payday Loans and Deposit Advance Products (Apr. 24, 2013), <files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf>.

Notes

12. I just got a notice from a store where I shop saying that my credit card data may have been part of a data breach. What should I do?

Answer

Receiving such a notice does not necessarily mean that you are an identity theft victim, but you may be at risk. You therefore should monitor your financial accounts and, if necessary, take action to protect them.

Minnesota is among the majority of states that have a mandatory notification law triggered by a breach of personal electronic data. After receiving notice that your personal information may have been part of a data breach, you should:

- Read the notice carefully to learn what information may have been exposed and how. (Keep the notice in case you ever need to prove that your data was compromised through no fault of your own.)
- If you're offered a year of free credit monitoring from the party that sends you the notice, take advantage of the offer. You should not have to provide your credit card information to take advantage of the offer. However, be aware that these services are imperfect, and you should still be responsible for monitoring your own credit.
- Pay extra attention to your account and billing statements. Check for charges that aren't yours. Immediately contact your bank, financial institution, and the creditor if you discover any unexplained activity.
- After about 30 days (long enough for fraudulent activity to show up), log on to <www.annualcreditreport.com> to get a free copy of your credit report from one of the three major credit bureaus. Look for any unusual activity. You may repeat this process once per year per credit bureau in order to obtain a free copy of your report.
- Consider calling the three major credit bureaus and place a one-call fraud alert on your credit report:
    - Equifax: Call 800-525-6285, and write P.O. Box 105069, Atlanta, GA 30348-5069
    - Experian: Call 888-397-3742, and write P.O. Box 9532, Allen, TX 75013
    - TransUnion: Call 800-680-7289, and write Fraud Victim Assistance Division, P.O. Box 6790 Fullerton, CA 92834-6790

You only need to call one of the three credit bureaus. The bureau you contact is required to contact the other two. This one-call fraud alert will remain in your credit file for at least 90 days. The fraud alert requires creditors to contact you before opening any new accounts or increasing credit limits on your existing accounts. When you place a fraud alert on your credit report, you are entitled to one free credit report from each of the three credit bureaus upon request.

If you do not obtain a copy of your credit report by placing a fraud alert on your file, you should order a free copy of your credit report and look for unauthorized activity. The Fair Credit Reporting Act (FCRA) allows consumers to obtain a free copy of their credit report each year from the three major credit bureaus. The credit bureaus have established a centralized website, toll-free telephone number, and mailing address for consumers to order their reports. Annual reports may be requested by:

- Logging on to <www.AnnualCreditReport.com>
- Calling: 877-322-8228
- Writing: Annual Credit Report Request Service at P.O. Box 105281, Atlanta GA 30348-5281

You will need to provide your full name, current address, Social Security number, date of birth, and past addresses (if you have moved in the past two years) to obtain your free credit report. Consumers should be on guard against other resources claiming to provide "free credit reports," which may actually charge fees or require the purchase of goods or services. Annual Credit Report is the only truly free way to obtain your credit report.

If you believe that your personal data has been used in fraudulent activity, you may wish to consider placing a security freeze on your credit reports. Under state law, Minnesota consumers can place a security freeze on their credit reports. In most instances, the freeze prohibits a credit reporting agency from releasing any information from your credit report without your written authorization. (Placing a security freeze on your credit report may delay, interfere with, or prevent the timely approval of any requests for new loans, credit mortgages, employment, housing, or other lines of credit). If you have been a victim of identity theft and you provide the credit reporting agency with a valid police report, it cannot charge you to place, lift, or remove a security freeze. Otherwise, a credit reporting agency may charge you a $5 fee for each placing, temporary lifting, or removing of a security freeze. To place a security freeze on your credit report, you should send a written request to each of the three nationwide consumer reporting agencies:

- Equifax Security Freeze : Call 800-685-1111, P.O. Box 105788, Atlanta, GA 30348, <www.freeze.equifax.com/Freeze/jsp/SFF_PersonalIDInfo.jsp>
- Experian: Call 888-397-3742, P.O. Box 9554, Allen, TX 75013, <www.experian.com/consumer/security_freeze.html>
- TransUnion: Call 888-909-8872, P.O. Box 2000 Chester, PA 19022, <www.transunion.com/personal-credit/credit-disputes/credit-freezes.page>

Authorities

- Minn. Stat. § 325E.61, subd. 1(a) Data Warehouses; Notice Required for Certain Disclosures.

Further Reading

- Minnesota Attorney General Consumer Alert: What to Do When Your Personal Information is Breached, <www.ag.state.mn.us/Brochures/pubConsumerAlert_WhatToDo.pdf>.
- Federal Trade Commission Topics, Privacy & Identity, <www.consumer.ftc.gov/topics/privacy-identity>.
- Federal Trade Commission Consumer Information, Data breaches: What's a person to do?, <www.consumer.ftc.gov/blog/data-breaches-whats-person-do>.
- Federal Trade Commission Consumer Information, An Unfortunate Fact About Shopping, <www.consumer.ftc.gov/blog/unfortunate-fact-about-shopping>.

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