LEGISLATIVE AND CASE LAW UPDATE: DECISIONS IMPACTING PUBLIC EMPLOYMENT AND WHAT MIGHT BE COMING NEXT

April 20, 2017

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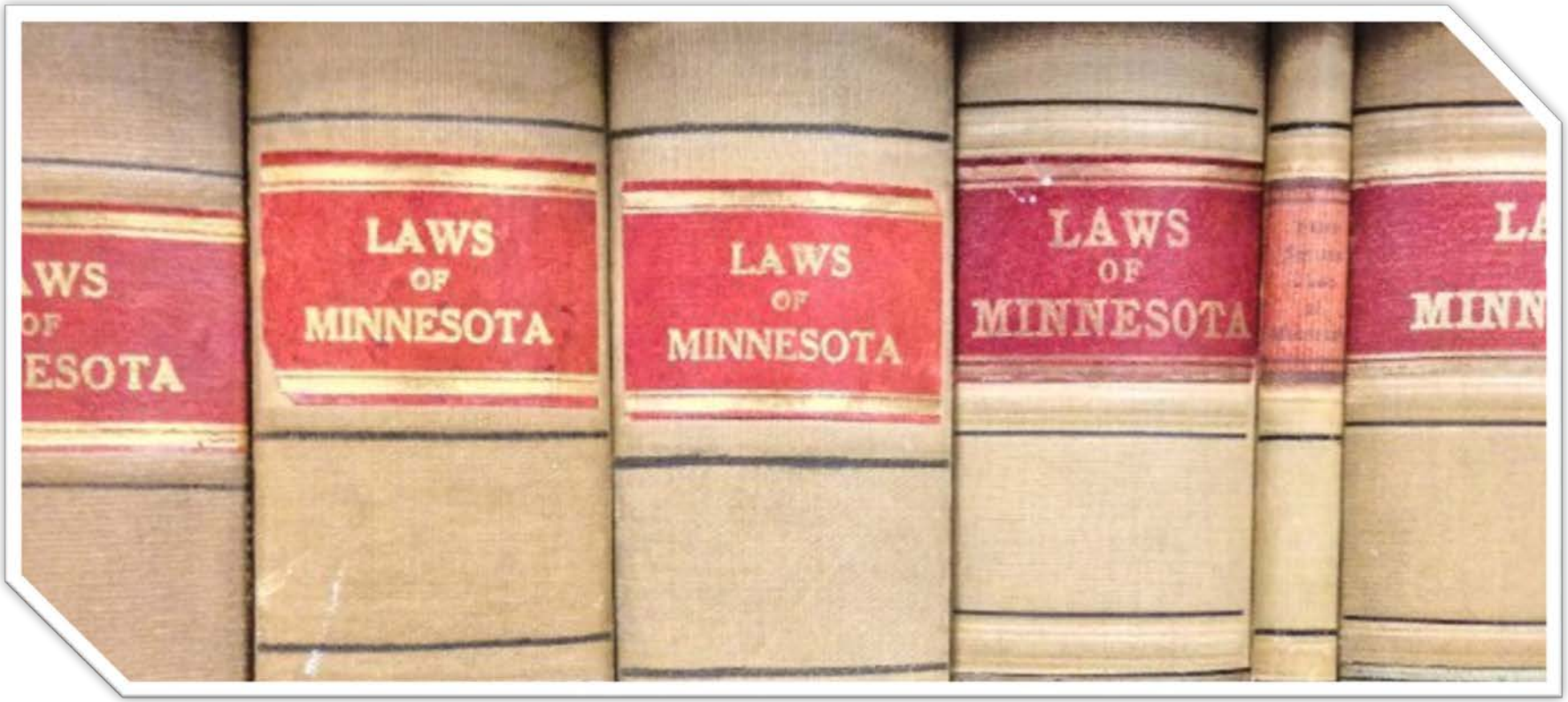


CHANGES IN STATE LAW

Veterans' Preference Act Modified (2016 changes)

Probationary Period Now Allowed

- Veterans' Preference Act now allows a District employer to require a veteran to complete "an initial hiring probationary period."

Shortened Time to Request a Hearing

- **Veteran's responses to a notice of intent to discharge has been shortened from 60 to 30 days.**

Hearing Conducted by Arbitrators

Police Body Cameras Legislation (2016 changes)

Policy Required

- The law now requires a law enforcement agency using "a portable recording system" to adopt a policy to govern the use of the system and the resulting data prior to using a body camera system. Minn. Stat. §§ 13.825, subd. 5, 626.8473, subd. 3

Inventory of Probable Recording System

- The total number of recording devices owned or maintained by the agency;
- A daily record of the total number of recording devices actually deployed and used by officers and, if applicable, the precincts in which they were used;
- The policies and procedures required by Section 626.8473; and
- The total amount of recorded audio and video data collected by the portable recording system and maintained by the agency, the agency's retention schedule for the data, and the agency's procedures for destruction of the data.

Data Practices

(1) the discharge of firearm by a peace officer in the course of duty (in certain cases); or

(2) the use of force by a peace officer that results in substantial bodily harm, are deemed public data.

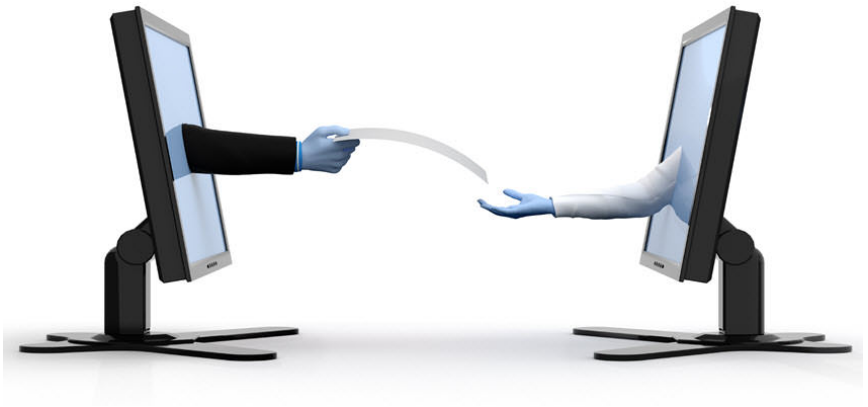
Subjects of the Data

- The law provides that an individual who is the subject of the data has access to the data, including data on other individuals who are the subject of the recording (subject to redaction).

Sharing Data with Other Law Enforcement Agencies

Implication

- Any agency considering the use of body cameras should consult with legal counsel and have their policies reviewed to ensure compliance with these new requirements



Preemption of Local Authority Regarding Employment Standards (SF 580)

- **Application**
  - This bill applies to ordinaires and polices adopted on or after January 1, 2016.
- **Prohibition**
  - requires an employer to pay an employee a higher wage than the state minimum wage;
  - regulates the hours of scheduling or work time that an employer provides to an employee (local rule may still regulate the hours a business may operate); and
  - requires an employer to provide an employee a particular benefit, term of employment, or working condition.
- **Excluded from Prohibition**
  - provided to an employee of a local government;
  - agreed to in a contract for goods or services provided to a local government; or
  - agreed to in a contract for goods and services funded in whole or in part by financial assistance from a local government.

Public Employment Relations Board ("PERB") (HF 564)

- filing date of unfair labor practice charges;
- names and job classifications of parties;
- the provisions of law alleged to have been violated;
- the full and complete record of an evidentiary hearing before a hearing officer; and
- decisions issued by the board.

Open Meeting Law

- Section 3 of this bill excludes PERB meetings from the Open Meeting Law when the Board is deliberating an unfair labor practice charge, reviewing a recommendation by a hearing officer, reviewing BMS commissioner decisions relating to unfair labor practices, and lastly, when it is exercising its hiring authority.

Data Practices and Recordings (HF 1316)

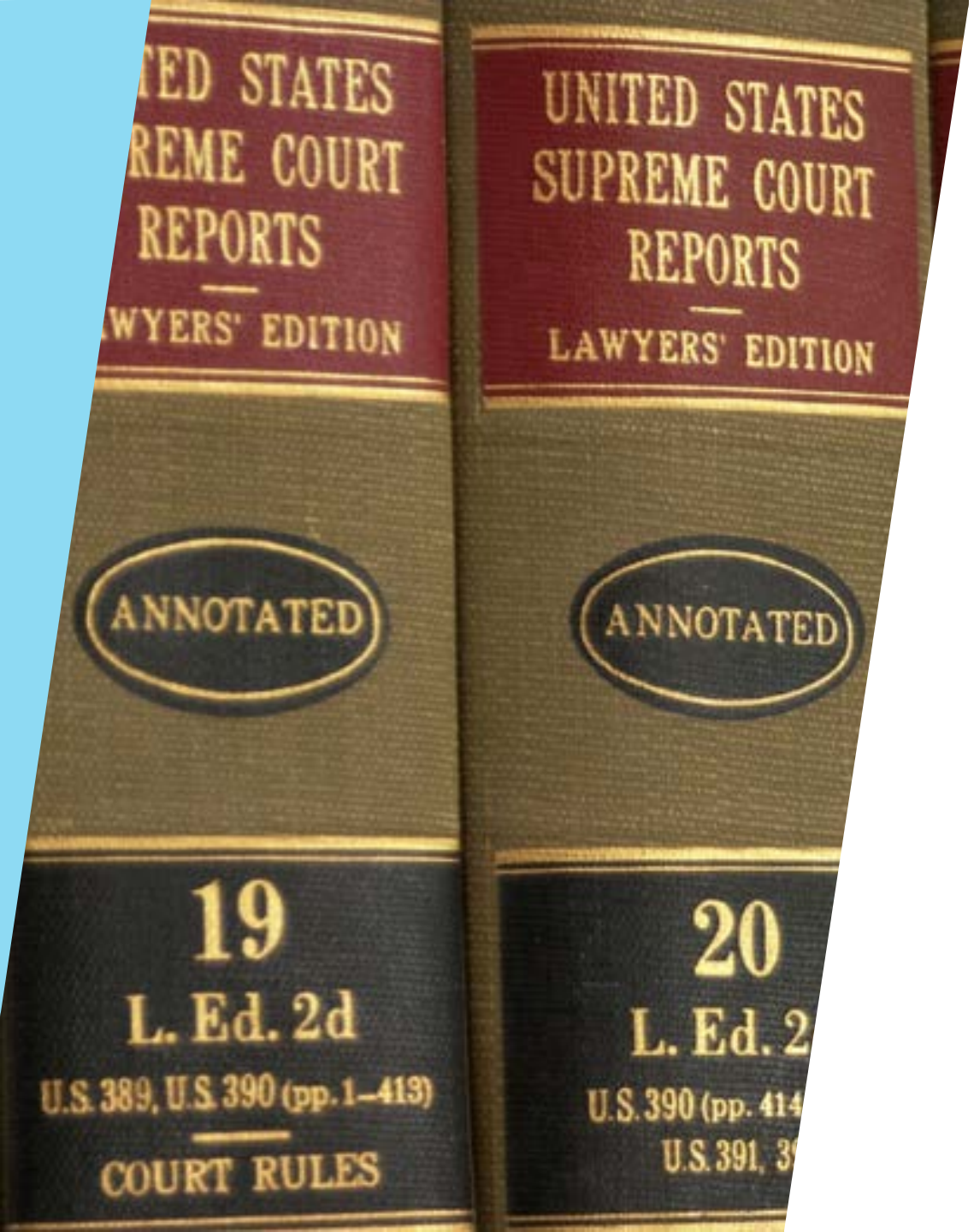
Recordings of Government Employees

- This bill amends Minnesota Statutes Section 13.43, subdivision 2, to include video, audio, or other recordings of government employees, independent contractors, or volunteers to be public unless classified otherwise under a different statute.

Records Retention (HF 1316)

Definition of Correspondence

- The Records Retention Act and requires entities to keep correspondence for three years.



CHANGES IN FEDERAL LAW

Fair Labor Standards Act ("FLSA")

FLSA generally requires that employers pay overtime for every hour an employee works in excess of 40 hours in a single workweek.

Who is exempt?

- Salary Basis Test
- Executive Exemption Test
- Administrative Exemption Test
- Professional Exemption Test

Proposed Higher Minimum Salaries for Exempt Employees

CASE LAW UPDATE

CAN AN EMPLOYER VIOLATE THE FIRST AMENDMENT BY MISTAKE?

Heffernan v. City of Paterson, N.J., 136 S. Ct. 1412 (2016)

Background. In 2005, Jeffrey Heffernan was a police officer in Paterson, New Jersey. At the time, Lawrence Spagnola, a close friend of Heffernan, was running against the incumbent mayor who appointed the current police chief and other police department leadership. At the request of his bedridden mother, Heffernan picked up a large Spagnola yard sign from the campaign headquarters to be put out in front of her house. While there, other police officers saw Heffernan with the sign and the following day, Heffernan's supervisors demoted him. They did so to punish him for participating in Spagnola's campaign, even though, in fact, he was only retrieving the sign for his mother and was not involved in the campaign.

DO FAIR SHARE FEES VIOLATE THE FOURTH AMENDMENT? *Friedrichs v. California Teachers Association, 136 S. Ct. 1083 (2016)*

Background. In California, a union is allowed to become the exclusive bargaining representative for teachers, and once it does so, the union may establish an "agency shop" arrangement with the district such that if the employees wish to continue employment with the district, they must either join the union or pay a fair share service fee, typically equivalent to the amount of union dues. The teachers who brought the claim had resigned their union membership and objected to paying any fair share fee.

MAY A VIDEO THAT CONTAINS PRIVATE PERSONNEL DATA AND DATA ON ANOTHER INDIVIDUAL WHO IS THE SUBJECT OF THE DATA BE RELEASED TO THE SUBJECT OF THE DATA? *Burks v. Metropolitan Council, 884 N.W.2d 338 (Minn. 2016)*

Background. Burks, who is blind, requested video footage of an exchange that occurred between him and a Metro Transit bus driver. In his complaint, Burks and the bus driver engaged in an argument when Burks had difficulty boarding a bus due to objects in his way. The bus driver called for assistance and Burks was escorted off the bus. After a brief delay, the officers permitted Burks to board the next bus. Burks subsequently requested the video footage taken on the bus of the incident. Met Council refused to release the video to him because it deemed the footage to be "private personnel data on the driver," which may not be released under the Minnesota Government Data Practices Act.

IS SURVEILLANCE FOOTAGE PRIVATE OR PUBLIC DATA? *KTSP-TV v. Metropolitan Council, 884 N.W.2d 342 (Minn. 2016)*

Background. KTSP requested surveillance footage showing a bus crash and a hostile interaction between a bus driver and a cyclist. Metropolitan Council refused to release the videos citing data practices restrictions.

WHAT IS THE STATUTE OF LIMITATIONS FOR A WRONGFUL DISCHARGE CLAIM BROUGHT UNDER THE MINNESOTA WHISTLEBLOWER ACT? *Ford v. Minneapolis Public Schools, 874 N.W.2d 231 (Minn. 2016)*

Background. A former school district employee brought a federal action asserting retaliation in violation of the Minnesota Whistleblower Act (MWA). Her case was dismissed on the ground that the statute of limitations had expired.

DOES DATA REMAIN PUBLIC EVEN IF THE DATA DUPLICATES OTHER DATA CLASSIFIED AS CONFIDENTIAL FOR OTHER PURPOSES? *Harlow v. State Dep't of Human Servs., 883 N.W.2d 561 (Minn. 2016)*

Background. A psychiatrist was fired after an incident with a vulnerable adult patient at the St. Peter Minnesota Security Hospital in St. Peter, Minnesota. The Department of Human Services ("DHS") conducted a maltreatment investigation and found that the psychiatrist's responsibility for the alleged maltreatment was "inconclusive." Minnesota Public Radio ("MPR") subsequently published a story which included statements about why the psychiatrist was fired made by the Administrator at the hospital and a Deputy Commissioner of DHS who were speaking on behalf of the agency.

Questions

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Minnesota Counties Human Resource Management Association
Spring Conference
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LEGISLATIVE UPDATE

I. CHANGES IN STATE LAW

A. *Veterans' Preference Act Modified (2016 changes)*

1. **Probationary Period Now Allowed.** The Veterans' Preference Act now allows a District employer to require a veteran to complete "an initial hiring probationary period." During the probationary period, there is no presumption of continued employment. Minn. Stat. § 197.46(a).

2. **Shortened Time to Request a Hearing.** The time for a veteran to respond to a notice of intent to discharge has been shortened from 60 to 30 days. Minn. Stat. § 197.46(b).

3. **Hearing Conducted by Arbitrators.** Except for entities having a civil service board or commission or merit system authority, removal proceedings now take place before a BMS arbitrator, rather than before a three-person panel. Minn. Stat. § 197.46(c).

B. ***Police Body Cameras Legislation (2016 changes)***

1. **Policy Required.** The law now requires a law enforcement agency using "a portable recording system" to adopt a policy to govern the use of the system and the resulting data prior to using a body camera system. Minn. Stat. §§ 13.825, subd. 5; 626.8473, subd. 3.

   a. The policy must incorporate the following elements:

      i. The requirements of Section 13.825, and other data classifications, access procedures, retention policies, and data security safeguards that, at a minimum, meet the requirements of Chapter 13 and other applicable law;

      ii. Procedures for testing the portable recording system to ensure adequate functioning;

      iii. Procedures to address system malfunction or failure, including requirements for documentation by the officer using the system at the time of malfunction or failure;

      iv. Circumstances under which recording is mandatory, prohibited, or at the discretion of the officer using the system;

      v. Circumstances under which a data subject must be given notice of a recording;

      vi. Circumstances under which a recording may be ended while an investigation, response, or incident is ongoing;

      vii. Procedures for the secure storage of portable recording system data and the creation of backup copies of the data; and

viii. Procedures to ensure compliance and address violations of the policy, which must include, at a minimum, supervisory or internal audits and reviews, and the employee discipline standards for unauthorized access to data contained in Section 13.09.

Minn. Stat. § 626.8473, subd. 3.

2. **Inventory of Probable Recording Systems.** Law enforcement agencies using portable recording systems must maintain the following information, which is classified as public:

a. The total number of recording devices owned or maintained by the agency;

b. A daily record of the total number of recording devices actually deployed and used by officers and, if applicable, the precincts in which they were used;

c. The policies and procedures required by Section 626.8473; and

d. The total amount of recorded audio and video data collected by the portable recording system and maintained by the agency, the agency's retention schedule for the data, and the agency's procedures for destruction of the data.

Minn. Stat. § 13.825, subd. 5.

3. **Data Practices.** Under the law, data collected by body cameras worn by a peace officer are private data on individuals or nonpublic data. However, data documenting: (1) the discharge of firearm by a peace officer in the course of duty (in certain cases); or (2) the use of force by a peace officer that results in substantial bodily harm, are deemed public data. Subject to certain redaction requirements, data can also be classified as public where the subject of the data requests that it be made accessible to the public. Both active and inactive criminal investigative data are governed by the statute. Additional conditions include the following:

a. Tennessen Notices are not applicable to the collection of this type of data because Minnesota Statutes 13.04, subdivision 2 does not apply to data collected by a portable recording system pursuant to

Minnesota Statues Section 13.824, subdivision 2 (*See* Section 13.825, subd. 2(c));

b. Portable recording system data that constitute public personnel data under Section 13.43, subd. 2(5) are public (*See* Minn. Stat. § 13.824, subd. 2(a)(4));

c. Law enforcement agencies may redact or withhold access to portions of data that are public under the law if those portions of data are "clearly offensive to common sensibilities" (*See* Minn. Stat. § 13.824, subd. 2(b)); and

d. A court may order that certain data be released to the public or to an individual (*See* Minn. Stat. § 13.824, subd. 2(d)).

Minn. Stat. § 13.825, subd. 2.

4. **Data Retention.** Data that are not active or inactive criminal investigative data must be maintained for at least 90 days and destroyed in accordance with the agency's records retention schedule. Minn. Stat. § 13.825, Subd. 3(a). However, if: (1) the data documents the discharge of a firearm by a peace officer in the course of duty (in certain cases), or the use of force by a peace officer which results in substantial bodily harm; or (2) a formal complaint is made against a peace officer related to the incident, then the data must be maintained for at least one year and destroyed in accordance with the agency's records retention schedule. Minn. Stat. § 13.825, Subd. 3(b). If a subject of the data submits a written request to the law enforcement agency to retain the recording beyond the applicable retention period for possible evidentiary or exculpatory use related to the circumstances under which the data were collected, the law requires that the law enforcement agency retain the recording for an additional time period requested by the subject of up to 180 days and notify the requester that the recording will then be destroyed unless a new request is made. Minn. Stat. § 13.825, Subd. 3(c). Finally, a government entity may retain a recording for as long as reasonably necessary for possible evidentiary or exculpatory use related to the incident with respect to which the data were collected. Minn. Stat. § 13.825, Subd. 3(d).

5. **Subjects of the Data.** The law provides that an individual who is the subject of the data (this can be the peace officer who collected the data, and any other individual or entity, including any other peace officer, regardless of whether the officer is or can be identified by the recording, whose image or voice is documented in the data) has access to the data,

including data on other individuals who are the subject of the recording (subject to redaction). The identity of an on-duty police officer engaged in an investigation, or response to emergency, incident, or service request cannot be redacted unless failure to do so would identify an undercover law enforcement officer. Minn. Stat. § 13.825, subd. 4.

6. **Sharing Data with Other Law Enforcement Agencies.** This law limits the sharing of data with or dissemination of data to another law enforcement agency. Minn. Stat. § 13.825, subd. 8.

7. **Implication.** This is an extensive new law with many requirements. Any agency considering the use of body cameras should consult with legal counsel and have their policies reviewed to ensure compliance with these new requirements.

C. *Preemption of Local Authority Regarding Employment Standards (SF 580)*

1. **Application.** This bill applies to ordinances and polices adopted on or after January 1, 2016.

2. **Prohibition.** This bill prohibits local governments from adopting or enforcing a local ordinance or policy that:

   a. requires an employer to pay an employee a higher wage than the state minimum wage;

   b. regulates the hours of scheduling or work time that an employer provides to an employee (local rule may still regulate the hours a business may operate); and

   c. requires an employer to provide an employee a particular benefit, term of employment, or working condition.

3. **Excluded from Prohibition.** The bill explicitly states it does not regulate wages, benefits, terms of employment, working conditions, or attendance policies:

   a. provided to an employee of a local government;

   b. agreed to in a contract for goods or services provided to a local government; or

c. agreed to in a contract for goods and services funded in whole or in part by financial assistance from a local government.

4. **Current Status.** The Senate passed the companion bill (HF 600) on March 2, 2017. It substituted the S884enate language and deleted HF 600 language. The Senate is now considering HF 600 (which uses SF 580 language). The second reading took place on March 7, 2017.

D. ***Public Employment Relations Board ("PERB") (HF 564)***

1. **Data Practices.** Section 1 of this bill amends Minnesota Statutes Section 13.43, subdivision 6, to include BMS and PERB as entities to which personnel data bay be released if deemed necessary to conduct elections, fair share fee assessments, and to implement chapters 179 and 179A. It also grants PERB the power to order the release of personnel data. Section 2 designates all data maintained by the PERB about a charge or complaint of unfair labor practices and certain appeals to be classified as protected nonpublic or confidential data. This data becomes public when admitted into evidence at a hearing. Certain data is classified as public, however. Public data includes (not an exhaustive list):

   a. filing date of unfair labor practice charges;

   b. names and job classifications of parties;

   c. the provisions of law alleged to have been violated;

   d. the full and complete record of an evidentiary hearing before a hearing officer; and

   e. decisions issued by the board.

2. **Open Meeting Law.** Section 3 of this bill excludes PERB meetings from the Open Meeting Law when the Board is deliberating an unfair labor practice charge, reviewing a recommendation by a hearing officer, reviewing BMS commissioner decisions relating to unfair labor practices, and lastly, when it is exercising its hiring authority.

3. **Current Status.** This bill is dead for now. There has been no hearing and the bill did not meet the deadline for favorable action. The Senate companion bill did not have a hearing either. However, the content of this bill may still be offered as an amendment to the Data Practices Omnibus Bill or as a floor amendment.

E. ***Data Practices and Recordings (HF 1316)***

1. **Recordings of Government Employees.** This bill amends Minnesota Statutes Section 13.43, subdivision 2, to include video, audio, or other recordings of government employees, independent contractors, or volunteers to be public unless classified otherwise under a different statute.

2. **Current Status.** This bill is currently dead, but has been laid over for possible inclusion in the Data Practices Omnibus Bill.

F. ***Records Retention (HF 1185)***

1. **Definition of Correspondence.** This bill adds a broad definition to the word "correspondence" to the Records Retention Act and requires entities to keep correspondence for three years.

2. **Current Status.** This bill has been re-referred to the State Government Finance Committee.

II. CHANGES IN FEDERAL LAW

A. Fair Labor Standards Act ("FLSA")

1. **Background.** The FLSA generally requires that employers pay overtime for every hour an employee works in excess of 40 hours in a single workweek. This standard is applicable to all employees, regardless of whether the employee is classified as "part-time" or "full-time."

   The FLSA and its regulations exempt certain employees from receiving overtime pay. One of these exempt groups includes the executive, administrative, or professional employees. 29 U.S.C. §213. This exemption is known as the "white collar" exemption.

2. **Exemptions**. In order for these employees to remain exempt from overtime pay, they must perform executive, administrative, or professional duties and collect a minimum weekly salary.

   a. The Salary Basis Test:

      i. An employee is paid on a salary basis if, under his or her employment arrangement, he or she regularly receives each

pay period a predetermined amount constituting all or part of his compensation. This amount is not subject to reduction because of variations of the quantity or quality of the work performed. 29 C.F.R. § 541.602(a).

ii. The salary basis test is not met if an actual practice of taking disciplinary or other deductions exists or the employer's personnel policy creates a significant likelihood of such deductions. *Auer v. Robbins*, 519 U.S. 452 (1997).

iii. However, deductions from pay of exempt employees may be made for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules. Such suspensions must be imposed pursuant to a written policy applicable to all employees. 29 C.F.R. § 541.602(b)(5).

iv. An exempt employee's earnings may be computed on an hourly, daily, or a shift basis without losing the exemption if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days, or shifts work and a reasonable relationship exists between the guaranteed amount and the amount actually earned. 29 C.F.R. § 541.604(b).

v. An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis. For example, an employee paid on a salary basis can receive additional compensation based on hours worked for work beyond the normal workweek. The employee can be paid on any basis including a flat sum, bonus payment, PTO, or time and one-half. 29 C.F.R. § 541.604(a).

b. The Executive Exemption Test

i. the employee is paid on a salary basis; 29 C.F.R. § 541.100(a)(1);

ii. the employee makes not less than $455 per week; 29 C.F.R. § 541.100(a)(1);

iii. the employee's primary duty is the management of the enterprise or a recognized department/subdivision of it; 29 C.F.R. § 541.100(a)(2);

iv. the employee directs the work of 2 or more other employees. 29 C.F.R. § 541.100(a)(3); and

v. the employee has authority to hire and fire or whose recommendations on hiring and firing are given particular weight. 29 C.F.R. § 541.100(a)(4).

c. The Administrative Exemption Test

i. the employee is paid on a salary basis; 29 C.F.R. § 541.200(a)(1);

ii. the employee makes not less than $455 per week; *Id.*;

iii. the employee's primary duty consists of office or non-manual work directly related to management policies or general business operations; 29 C.F.R. § 541.200(a)(2); and

iv. the employee's work requires the exercise of discretion and independent judgment with regard to matters of significance. 29 C.F.R. § 541.200(a)(3).

v. Examples include: business managers, directors of human resources and technology. 29 C.F.R. § 541.201(b).

d. Professional Exemption Test

i. the employee is paid on a salary basis; 29 C.F.R. § 541.300(a)(1);

ii. the employee makes not less than $455 per week; Id; and

iii. the employee's primary duties require "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study;" 29 C.F.R. § 541.300(a)(2)(i); or

iv. the employee's primary duties require invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor. 29 C.F.R. § 541.300(a)(2)(ii).

v. Examples include: counselors, psychologists, nurses, and attorneys. 29 C.F.R. §§ 541.301, 541.303, 541.304.

3. **Proposed Higher Minimum Salaries for Exempt Employees.** Presently, the minimum weekly salary for an employee to maintain a "white collar" exemption is $455 per week, or $23,660 per year. That minimum was set to jump to $913 per week, or $47,476 per year on December 1, 2016. This means employees who make less than $47,476 but perform executive, administrative, or professional duties would either need to be classified as non-exempt and qualify for overtime or have their salaries raised to meet the minimum. However, in late November of 2016, a Texas judge granted an injunction to indefinitely delay the implementation of the rule. This injunction was a response to a motion filed by 21 states claiming that the DOL exceeded its authority by raising the thresholds too high and for incorporating automatic changes to the threshold every three years.

4. **Implications.** With the new administration, the future of the threshold changes are unclear. The rule may remain, be modified, or revert back to the old standards. It may also be appealed to the U.S. Supreme Court. The case is set to be fully briefed by May 1, 2017, and oral argument will follow shortly thereafter.

5. **Review now.** If you have not done so already, it is still a good idea to review current employee classifications to ensure they are compliant based on their duties and salary. Budget reviews should also be conducted in light of the potential increase in white collar exemption minimum—be prepared for any of the afore-mentioned outcomes.

CASE LAW UPDATE

I. CAN AN EMPLOYER VIOLATE THE FIRST AMENDMENT BY MISTAKE? *Heffernan v. City of Paterson, N.J., 136 S. Ct. 1412 (2016)*

A. Background. In 2005, Jeffrey Heffernan was a police officer in Paterson, New Jersey. At the time, Lawrence Spagnola, a close friend of Heffernan, was running against the incumbent mayor who appointed the current police chief and other police department leadership. At the request of his bedridden mother,

Heffernan picked up a large Spagnola yard sign from the campaign headquarters to be put out in front of her house. While there, other police officers saw Heffernan with the sign and the following day, Heffernan's supervisors demoted him. They did so to punish him for participating in Spagnola's campaign, even though, in fact, he was only retrieving the sign for his mother and was not involved in the campaign.

B. **Claim.** Heffernan brought suit against the City claiming his demotion was unlawful "because he had engaged in conduct that (on their mistaken view of the facts) constituted protected speech" under the First Amendment. The City argued he could not prevail because he did not *actually* participate in protected activity.

C. **Holding.** "When an employer demotes an employee out of a desire to prevent an employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment…even if, as here, the employer makes a factual mistake about the employee's behavior."

D. **Implications.** Legally, this case stands for the proposition that a government employer can be held liable for intending to violate an employee's First Amendment rights, even if the employee is not exercising those rights. From a practical perspective, this case reaffirms the importance of conducting a thorough investigation before imposing discipline and making sure that discipline is based on legitimate business reasons.

II. DO FAIR SHARE FEES VIOLATE THE FOURTH AMENDMENT? *Friedrichs v. California Teachers Association, 136 S. Ct. 1083 (2016)*

A. **Background.** In California, a union is allowed to become the exclusive bargaining representative for teachers, and once it does so, the union may establish an "agency shop" arrangement with the district such that if the employees wish to continue employment with the district, they must either join the union or pay a fair share service fee, typically equivalent to the amount of union dues. The teachers who brought the claim had resigned their union membership and objected to paying any fair share fee.

B. **Claim.** "Plaintiffs claim that '[b]y requiring Plaintiffs to make any financial contributions in support of any union, California's agency shop arrangement violates their rights to free speech and association under the First and Fourteenth Amendments to the United States Constitution[.]'" *Friedrichs v. Cal. Teachers Assoc., et al.*, 2013 WL 9825479 at 2 (C.D. Cal. Dec. 5, 2013).

C. Precedent. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). "In *Abood,* the Supreme Court upheld the constitutional validity of compelling employees to support a particular collective bargaining representative and rejected the notion that the only funds from nonunion members that a union constitutionally could use for political or ideological causes were those funds that the nonunion members affirmatively consented to pay." *Id.*

D. Holding. Justice Scalia died after oral arguments were heard but before the decision was issued. Had he not passed away, it is likely that the Court would have held in favor of the employee and against the union. His death, however, resulted in a 4-4 deadlock (and a nine-word opinion). Because a tie cannot overrule a lower decision, the Court affirmed the lower courts' rulings and reaffirmed *Abood* as the controlling law on this issue.

E. Implications. So what can employers expect as a result from this ruling? Nothing has changed yet, but the Court agreeing to hear this case in the first place signals that they were ready to rule fair share fees unconstitutional. Whether a similar case makes it to the Court depends on the ideology of the new justice.

III. MAY A VIDEO THAT CONTAINS PRIVATE PERSONNEL DATA AND DATA ON ANOTHER INDIVIDUAL WHO IS THE SUBJECT OF THE DATA BE RELEASED TO THE SUBJECT OF THE DATA? ***Burks v. Metropolitan Council, 884 N.W.2d 338 (Minn. 2016*)**

A. Background. Burks, who is blind, requested video footage of an exchange that occurred between him and a Metro Transit bus driver. In his complaint, Burks and the bus driver engaged in an argument when Burks had difficulty boarding a bus due to objects in his way. The bus driver called for assistance and Burks was escorted off the bus. After a brief delay, the officers permitted Burks to board the next bus. Burks subsequently requested the video footage taken on the bus of the incident. Met Council refused to release the video to him because it deemed the footage to be "private personnel data on the driver," which may not be released under the Minnesota Government Data Practices Act.

B. Claim. Burks claims he is entitled to access the data because he would be classified as the "individual subject of the data" under the Minnesota Government Data Practices Act, and subjects of the data are entitled to the data. Met Council argues they do not have to release the video because it includes private personnel data on the bus driver, and if that's the case, Met Council cannot legally release the video.

C. Holding. Met Council must release the video footage to Burks. The Court explicitly rejects the argument that a passenger could not have a copy of video surveillance because the video contains private personnel data on the bus driver. The Court said that the MGDPA "confers a right of access to stored private or public data on an individual if he or she 'is or can be identified as the subject of th[e] data.' Minn. Stat. § 13.02, subd. 5. The right extends to 'the individual subject'— that is, the identifiable individual—even if the data in question identifies other individuals."

D. Precedent. Previous precedent has allowed public entities to withhold data when public and nonpublic information are so inextricably intertwined that segregation of the material would impose a significant financial burden and would leave the remainder of the document with little informational value. *See Northwest Publications, Inc. v. City of Bloomington*, 499 N.W.2d 509 (Minn. App. 1993). This holding calls this standard into question.

E. Implications. In the past, surveillance videos have commonly been withheld because they often contain personnel data on many people. With this new decision, such videos may be released to any individual who is the subject of the video even if other personnel are in the video.

IV. IS SURVEILLANCE FOOTAGE PRIVATE OR PUBLIC DATA? *KTSP-TV v. Metropolitan Council, 884 N.W.2d 342 (Minn. 2016)*

A. Background. KTSP requested surveillance footage showing a bus crash and a hostile interaction between a bus driver and a cyclist. Met Council refused to release the videos citing data practices restrictions.

B. Claim. KTSP claimed the footage was public under the MGDPA and should thus be released. Met Council responded that the footage is private personnel data because it was maintained "because the individual is or was an employee of a ... government entity," and thus should not be released. Minn. Stat. 13.43, subd. 1. Although Met Council surveils busses for a variety of reasons, it argued that one of its purposes in doing so was to monitor and discipline employees, and as a result it could classify that data as private personnel data.

C. Holding. The Supreme Court rejected Met Council's "multiple-purpose reading" of Minn. Stat. 13.43, reasoning that it would frustrate the MGDPA's presumption that data be public if public entities need only establish a personnel-related reason for maintaining data. It therefore adopted the "single-purpose reading" because it is more consistent with the" MGDPA as a whole. The Court held that data is private personnel data if the government maintains the data

solely because the individual is or was an employee. The Supreme Court further held that the determination of the government's purpose in maintaining data is to be made at the time of the data request.

D. Implications. This case reduces the amount of data that can be deemed personnel data and therefore protected by the MGDPA. If data was created for reasons other than, or in addition to, personnel reasons, but contains private personnel data, it may nevertheless be subject to release.

V. WHAT IS THE STATUTE OF LIMITATIONS FOR A WRONGFUL DISCHARGE CLAIM BROUGHT UNDER THE MINNESOTA WHISTLEBLOWER ACT? *Ford v. Minneapolis Public Schools, 874 N.W.2d 231 (Minn. 2016)*

A. Background. A former school district employee brought a federal action asserting retaliation in violation of the Minnesota Whistleblower Act (MWA). Her case was dismissed on the ground that the statute of limitations had expired.

B. Claim. The employee claimed that the applicable statute of limitations period was six years, not two years as the school district argued.

C. Holding. The Supreme Court found that the plaintiff's cause of action created by statute had no counterpart in Minnesota common law. The Court noted that the statute of limitations is two years for common law actions, but six years for actions created by statute; thus, the statute of limitations for the plaintiff's claim was six years. Accordingly, the Court held that the plaintiff's claim was timely.

D. Implications. As a result of this case, there exists a greater amount of time to file a wrongful discharge claim under the Minnesota Whistleblower Act. Accordingly, employers can expect an increase in claims of this nature.

VI. DOES DATA REMAIN PUBLIC EVEN IF THE DATA DUPLICATES OTHER DATA CLASSIFIED AS CONFIDENTIAL FOR OTHER PURPOSES? *Harlow v. State Dep't of Human Servs., 883 N.W.2d 561 (Minn. 2016)*

A. Background. A psychiatrist was fired after an incident with a vulnerable adult patient at the St. Peter Minnesota Security Hospital in St. Peter, Minnesota. The Department of Human Services ("DHS") conducted a maltreatment investigation and found that the psychiatrist's responsibility for the alleged maltreatment was "inconclusive." Minnesota Public Radio ("MPR") subsequently published a story which included statements about why the psychiatrist was fired made by the Administrator at the hospital and a Deputy Commissioner of DHS who were speaking on behalf of the agency.

B. **Claim.** The psychiatrist sued, alleging violations of the MGDPA.

C. **Holding.** The Supreme Court held that personnel data consisting of an employment investigation report that is reclassified as public upon the final disposition of an employee disciplinary action in accordance with Minnesota Statutes § 13.43, subdivision 2(a)(5) remains public, even though the data are duplicative of data that are part of a maltreatment investigation classified as confidential under Minnesota Statutes § 13.46, subdivision 3. The Court also held that the Deputy Commissioner of DHS had absolute immunity when speaking about the employee; but the hospital Administrator did not have immunity.

D. **Implications.** Based on the holding in this case, even greater scrutiny must be given when determining what data to include in a report. If a report contains data that is duplicated from a source where that data is otherwise classified as confidential, the data, may nonetheless be made public under this holding.

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