



## TN TOP 5

### *Must-Have Employee Handbook Policies*

Due to changes in federal, state or local employment laws, employee handbooks should be reviewed at least annually. Here are five policies that require careful attention or need review periodically.

1. **Anti-harassment policy.** New technologies are creating new methods by which harassment could occur. Make sure that your policy includes language that prohibits harassment by any form of verbal or electronic communication that could lead to an employee's sense of discomfort or harm while on the job.
2. **FMLA policy.** A family and medical leave policy is required if you employ 50 or more full-time equivalent employees. It is important to clearly state employee rights and responsibilities when they request or take leave. You must comply with FMLA, but you also want to avoid potential employee abuses of the policy or unnecessary business disruption.
3. **Information systems security policy.** Employee privacy is an emerging area of litigation due to the use of social media. A policy should advise employees that the employer has the right to and will be monitoring communications that employees make through

the employer's server, including e-mails, websites and instant messages. However, overly broad and overly strict policies, particularly regarding after-hours social media use, are being challenged in court.

4. **Confidentiality and trade secrets policy.** Any protection of the employer's proprietary information that is not included in an individual confidentiality agreement should be added to the employee handbook to explain the importance of protecting proprietary information and client or customer information.
5. **Employment at-will policy.** A standard policy in an employee handbook is the employment at-will statement, which allows either the employer or the employee to terminate employment at any time, without stating a reason or giving notice. An employer can note in the handbook that employees who sign an acknowledgement and understanding of the handbook also understand that employment is at will.

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## *Keep Estate Planning Flexible For Uncertain Tax Climate*

Recent changes to the federal estate tax law shouldn't cause concern for most people, but should give everyone another reason to review your estate plan.

Although the \$5 million federal estate tax exemption is in place for 2011 and 2012, it's not clear what Congress will do after that. Everyone must remember that Minnesota still has its own estate tax that kicks in after \$1 million. While people can still put away their "Minnesota million" in trust and allow any remaining monies to go to their spouse without estate tax upon death, we are finding that this tax planning strategy may not work so well for the spouse and/or future beneficiaries.

If you have older documents with rigid formulas, we recommend reviewing your documents and creating documents with the flexibility to ride the tide of law's uncertain future. Here is an example of why this is important:

Let's say that a husband has \$2 million in assets and his wife has \$5 million. The husband designates his Minnesota million that is Minnesota estate tax exempt and puts it in trust for his spouse or children. He designates the other \$1 million to go to his wife. While this results in zero Minnesota estate tax at the husband's death, his wife now has \$6 million. When she dies, that \$1 million from the husband will be subject to both Minnesota estate tax (at about a 10 percent rate) and federal estate tax (at a 35 percent rate).

Rather than using this old marital/credit shelter formula in estate documents, and leaving a large potential tax burden in the wife's estate, the husband could utilize a post-mortem election called a QTIP (qualified terminable interest property) trust election that allows election of how much of the estate is allocated to the credit shelter amount and how much is allocated to the marital following his death. He may choose to put the entire \$2 million estate in trust

at his death and pay the 10 percent Minnesota estate tax up front on the second million. In this way, the wife is only responsible for her \$5 million, paying only the 10 percent Minnesota tax at death and remaining totally exempt from federal estate tax. A federal tax of \$350,000 (\$1 million x 35 percent) is saved at the wife's death, at the cost of paying a \$100,000 Minnesota tax (10 percent x \$1 million) on that second million dollars at the husband's earlier death. Deferring Minnesota estate tax may be worth it if your spouse lives many years longer than you. If the spouse dies shortly after you, paying the Minnesota estate tax "up front" can reduce your overall tax.

Disclaimers are another way to add flexibility to your estate plan. Your document can say that everything shall pass to the spouse upon death, but if the spouse disclaims any of the inheritance, the disclaimed portion goes into a credit shelter type of trust and avoids any estate tax on the spouse's later death. Using this strategy, the spouse only ends up with assets in trust if necessary to avoid taxes. This is helpful if there is a law change in the future. With a formulaic trust, however, you will end up with a trust whether it saves estate taxes or not.

Also remember that federal "portability" of your estate tax exemption does not exist for Minnesota estate tax. If you die without designating the first \$1 million of your estate in trust, you could lose the state exemption credit even if your spouse is sole beneficiary. Federal portability could also be revoked in 2013. You still need to plan ahead if your individual or combined household estate is more than \$1 million. Contact Thomsen Nybeck to review your estate documents and planning options.

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Dennis Patrick contributed to this article. Dennis focuses his practice on estate planning, taxation, probate and business transactions.  
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## Is Collecting Money About to Get Harder?

In this challenging economy, one of the most important services we offer is helping clients collect money. Garnishment is a vital tool created by statute, which we use to help these clients by seizing a debtor's money from another party who may owe or be holding that money for the debtor. Often this includes a bank where the debtor holds an account.

The garnishment process does not involve the immediate turnover of the seized funds to the creditor; banks typically respond to a garnishment by stating the amount that is in the debtor's account. The bank then holds that money for up to six months until we "levy" on the money, unless the debtor can point to a reason under law that the funds should not be released to the creditor.

A case recently filed in the United States District Court in Minnesota challenges the constitutionality of the garnishment process. The plaintiffs in *Billiar v. Atlantic Credit & Financial, Inc.* claim the rights provided to creditors under the statute violate the 14th Amendment to the U.S. Constitution, the so-called "Due Process Clause". The Due Process Clause provides, essentially, that no person may be deprived of his or her property without first receiving "due process", or in other words notice and an opportunity to be heard.

The claim asserted in *Billiar* is that the creditor, who was owed money by Mark Fiers, garnished an account that Mr. Fiers held jointly with his children and his partner Kristie Billiar. Only Mr. Fiers owed money to the creditor, so the creditor had first obtained a judgment against Mr. Fiers, but it did not have a judgment against the other account holders. So while Mr. Fiers received notice and the opportunity to be heard, Ms. Billiar and the children did not.

A recent Minnesota Supreme Court decision previously established that creditors may seize funds in a joint account until and unless the non-debtor is able to establish that the funds in the account do not belong to the debtor. Ms. Billiar and the other plaintiffs claim that seizing the money of someone other than the debtor is not fair unless you first give them notice and a chance to object. The plaintiffs and others also point out that even seizing money for a day may cause a check to bounce, causing further damage to the non-debtor.

On the other hand: 1) neither the creditor nor the bank know how much of each account holder's money is in the account, and a creditor who knows of the account may not know it's a joint account, so requiring the creditor to provide notice to a non-debtor is not practical; 2) it is reasonable to assume that anyone who holds an account jointly with another person would (or should) be aware of a judgment against the debtor; and 3) if funds held jointly with another person were automatically protected from creditors, then debtors would have an easy way to stop collection activities simply by opening joint accounts.

As attorneys who perform a lot of this work, we will be watching the outcome of this case. Regardless what happens, however, we will continue to use our creative and results-driven approach to helping clients get paid.

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Matt Drewes contributed to this article. Matt practices primarily in the areas of Commercial Litigation, Community Association Law, Construction Litigation, Creditors Remedies and Debtor/Creditor Law, Real Estate Litigation and Insurance Litigation. [mdrewes@tn-law.com](mailto:mdrewes@tn-law.com); (952) 835-7000



**Tom Kelley**  
Attorney Profile

### Why are you passionate about your career choice?

The opportunity to assist clients toward a successful conclusion of their business transactions is very rewarding. I like to think of our role as that of a facilitator. We facilitate commerce and commercial transactions whether it is through the purchase and sale of a business, the acquisition of a new building or a contractual relationship that hopefully benefits all parties.

### Describe a success story related to your practice.

It is always a success story when you are involved in a business right from the start and assist in every phase such as the formation of the business, acquiring a building, negotiating contracts with key employees, suppliers and customers, and then seeing the business grow

and prosper. I have been fortunate to be involved with several ventures in this manner, covering fields as diverse as real estate development, technology, commercial real estate and oil and gas exploration. It is always gratifying.

### What are you known for among clients (personal brand)?

It would probably be making sure every little aspect of the transaction is taken care of properly and addressed. I am probably a bit obsessive-compulsive in this regard, but I have always found a little bit of that trait to be very helpful in the practice of law.

### What advice would you offer to younger/aspiring attorneys?

Pay attention to the details and the bigger items will take care of themselves.



Thomsen Nybeck hosted its first in-house "Broker Forum", with **Dave McGee (1)** and **Brad Boyd (2)** presenting to a capacity crowd of brokers and office managers on the subject of risk management for REO listing and buyer agents.

Attorney **Chris Renz (3)** presented at a continuing legal education (CLE) course at the Anoka County Courthouse on "The Basics of Non-Competes," a presentation regarding covenants not-to-compete.

Attorney **Dennis Patrick (4)** was one of the presenters for a continuing legal education course titled "Estate Planning for Nontraditional Families" on December 8. Dennis also continues as an adjunct professor in the area of Estate Planning at William Mitchell College of Law, now in his 17th year of being a professor at the institution.

Attorneys **Matt Drewes (5)** and **Dave McGee (1)** wrote the article "Time, and the Statute of Repose, Wait for No Man (or Woman, or Community Association)," which published in the November/December 2010 issue of Minnesota Community Living Magazine.

The American Association of Public Insurance Adjusters (AAPIA) posted a link to a blog article by attorney **Deb Newel (6)** titled "Roofing Contractors and Homeowners Beware: New Restrictions Apply to Negotiating Storm Damage Claims." [Reference: [http://www.aapia.org/news\\_and\\_blogs](http://www.aapia.org/news_and_blogs)]

**Thomsen Nybeck** is proud to be a corporate table sponsor for the 2011 Edina Chamber of Commerce Emerald Gala.

The firm hosted **Andrew Kelley** as its annual St. Olaf College intern for the month of January.

Thomsen Nybeck is glad to welcome back **Catlan McCurdy** as its law clerk.

## ATTORNEYS

This newsletter is presented to you by the attorneys of Thomsen Nybeck:

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**Brad Boyd**

## PRACTICE AREAS

Thomsen Nybeck has in-depth experience and knowledge in the following practice areas. For a complete list, visit [www.tn-law.com](http://www.tn-law.com). Call us at (952) 835-7000 to discuss your concerns or to determine if you have a case.

Business Law	Family Law
Civil Litigation	Financing
Construction Defect Litigation	Personal Injury
Corporations & Partnerships	Real Estate
Criminal Law	Taxation
Employment Law	Townhome & Condominium Law
Estates, Wills and Trusts	Wind Energy