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Moss & Barnett Advocate

To Disclose or Not to Disclose: A Primer on Data Breach Notification Rules

By Aaron P. Minster

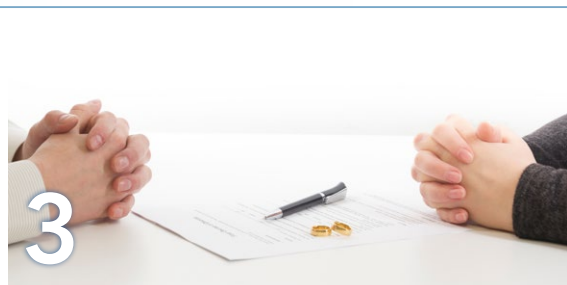
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To Disclose or Not to Disclose: A Primer on Data Breach Notification Rules



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Aaron is a member of Moss & Barnett's Litigation group. He has experience with litigation involving shareholder derivative actions, real estate, employment, trade secrets, malpractice actions, and construction disputes.

When hackers breach a company's network, disclosure of the breach is generally required by law. But did you know that something as innocuous as an employee's missing cell phone, tablet, or laptop might also constitute a "data breach" and trigger related notification laws? In fact, according to Verizon's 2022 Data Breaches Investigations Report, 82% of data breaches involved human error.

Defining "Data Breach"

Minnesota law requires a business to disclose "any breach of the security of the system" once discovered. A "breach of the security of the system" means an "unauthorized acquisition of computerized data that compromises the security, confidentiality, or integrity of personal information maintained by the person or business." Because the statutory definition of a "breach" is extremely broad, seemingly innocuous events may require a business to provide notice of a data breach. Consider the following examples:

- An employee loses an iPhone, and the iPhone had access to personal information maintained by the business.
- An employee accidentally copies an individual, who does not work for the business, on an email containing personal or confidential information.
- An employee falls victim to a phishing scam and unknowingly provides a hacker with company credentials and access to databases with personal or confidential information.

When Providing Notice of the Breach Is Required

Minnesota's data breach notification law is triggered as soon as it is reasonable to believe that personal information has been



"acquired" by a third party. Minnesota's definition of "personal information" includes first and last names or a first initial and last name, in combination with one of the following: a Social Security number; a driver's license number; a Minnesota identification card number; or an account, credit, or debit card number, in combination with any access or security information. Wisconsin's data breach notification law has similar rules. North Dakota's law expands the definition of "personal information" to include date of birth and health insurance numbers, among other information.

Data breach notification rules for organizations working within federally regulated industries, like health care and banking, are generally governed by federal privacy laws and regulations. Public entities and educational institutions also have their own data breach notification rules.

Form and Timing of Notice


Under Minnesota law, notification must be provided by mail to the most recent available address of the person or business affected, or by electronic notice (if electronic communication is the organization's primary method of communication with that individual). Under certain circumstances, substitute notice with notification on statewide media is permitted. Most data breach laws also require that notification be given to government agencies and law enforcement authorities.

In Minnesota, notice must be provided to affected individuals "in the most expedient time possible" unless law enforcement directs otherwise. Similarly, South Dakota's law requires disclosure within 60 days of discovery unless there is a legitimate law enforcement reason to delay disclosure.

Exceptions to the Rules

So, what of the employee's lost iPhone and other seemingly innocuous data breaches? There are exceptions to data breach notification laws for information that is protected by encryption and secured with an appropriate password or PIN.

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The Dangers of DIY Divorce: Omitted Assets and the Case of *Pooley v. Pooley*



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April is a member of Moss & Barnett's Family Law team. She assists clients in all family law matters, including divorce and custody proceedings.

A recent family law case before the Minnesota Supreme Court highlights the importance of a full financial disclosure and detailed property division in divorce proceedings.

The Facts

In *Pooley v. Pooley*, a couple jointly sought a dissolution of their marriage. They reached a settlement agreement, that they outlined in a divorce decree. Neither party was represented by an attorney. Instead, the couple memorialized their agreement using a template form made available to the public on the Minnesota Judicial Branch website.

One section of the form instructed the parties to list all of their assets on a separate asset sheet, which included columns for Husband and Wife. The form stated each party would be awarded the assets in his or her column as reflected on the asset sheet, but Wife made the following handwritten addition to this section: "Will be split equally — we will work together."

On the actual asset sheet, the parties listed "zero" as the value for a number of categories, including bank accounts, but they also listed the values for various personal property items and designated some of these items to Husband's column and other items to Wife's column. The couple wrote nothing in the lines provided for retirement accounts. They also did not check the boxes for "Profit Sharing Pension" or for "401(k), IRAs or other."

The judge signed the dissolution decree on the pre-printed form, and the court administrator entered judgment. The parties were divorced.

Post-Divorce Litigation

More than five years after the divorce, Wife returned to court seeking to enforce, clarify, or reopen the divorce decree.

Specifically, she sought to be awarded an equitable portion of Husband's retirement accounts as of the date of divorce.

The parties' motion pleadings revealed that, at the time of the divorce, Husband had a 401(k) with a value of approximately \$235,000 and an interest in a defined-benefit pension. Wife had a 401(k) with a zero balance and an unvested interest in a pension plan.

The parties presented conflicting evidence about their intentions regarding the retirement accounts when they agreed to the terms of their settlement. Wife argued her handwritten statement that the couple would split all marital property "equally" applied to the retirement accounts. But Husband argued the couple had an unwritten side agreement. Specifically, Husband claimed the parties discussed the retirement assets and agreed that they would each keep their own accounts, in part, because he had agreed to assume extra expenses and debt.

The Court's Decision

The Minnesota Supreme Court began its analysis by defining what courts may *not* do with respect to assets omitted from a divorce decree. Although Wife's motion was framed as one to enforce or clarify the divorce decree, the parties' settlement agreement completely omitted any reference to the retirement accounts. The issue was never presented to the district court, and therefore, there was nothing for the court to clarify, enforce, amend, or reopen.

However, Minnesota law has long recognized that the district court's role in divorce proceedings is to ensure a stipulation is fair and reasonable and to protect the interests of both parties. Refusing to address omitted assets would frustrate the district court's duty to ensure a just and equitable division of marital property. Thus, the Minnesota Supreme Court concluded the district court retained jurisdiction over the omitted assets and was required by statute to equitably divide them. Although not relevant to the facts of the *Pooley* case, the Minnesota

Kevin M. Busch, Christopher D. Stall, and James J. Vedder Included as *The Best Lawyers in America* "Lawyers of the Year" for 2023



Kevin M. Busch



Christopher D. Stall



James J. Vedder

Moss & Barnett is pleased to announce that *The Best Lawyers in America*® has named **Kevin M. Busch**, **Christopher D. Stall**, and **James J. Vedder** as "Lawyers of the Year" in Minneapolis for 2023. Only a single lawyer in each practice area and designated metropolitan area is honored as the *Best Lawyers* "Lawyer of the Year," making this accolade particularly significant. Lawyers honored as "Lawyer of the Year" are selected based on particularly impressive voting averages received during the exhaustive peer-review assessments *Best Lawyers* conducts with thousands of leading lawyers each year. Receiving this designation reflects the high level of respect a lawyer has earned among other leading lawyers in the same communities and the same practice areas for their abilities, professionalism, and integrity.

Kevin was named as the **2023 Securitization and Structured Finance Law "Lawyer of the Year" in Minneapolis**. Kevin was also named a *Best Lawyers* Litigation-Banking and Finance "Lawyer of the Year" in Minneapolis in 2022 and a *Best Lawyers* Financial Services Regulation Law "Lawyer of the Year" in Minneapolis in 2020, 2018, and 2015. Kevin leads the firm's team of lawyers practicing in financial services. Since 1981, he has practiced in the areas of bank regulation, commercial lending, real estate lending, and the Uniform Commercial Code. Kevin also serves as Moss & Barnett's Chief Operating Officer and Chief Financial Officer and is a Director on its Board of Directors.

Chris was named as the **2023 Business Organizations (including LLCs and Partnerships) "Lawyer of the Year" in Minneapolis**. Chris has extensive experience with drafting and negotiating contracts, business restructurings, mergers and acquisitions, financings, strategic partnerships, distribution agreements, licenses, governance issues, exit strategies, and sales and recapitalizations. He works with clients across many industries, including insurance, investment advisors, health care, manufacturing, distribution, pharmacy, hospitality, transportation, and accounting, as well as law, medical, and other professional service firms. Chris regularly assists closely held businesses regarding governance, risk management, contracting, and operational issues. Chris also serves as Chair of Moss & Barnett's Commercial Department.

Jim was named as the **2023 Family Law "Lawyer of the Year" in Minneapolis**. Jim has significant trial and settlement experience in complex marital dissolution matters, including the division of marital and nonmarital assets, the division of closely held businesses, spousal maintenance, child support, and custody issues. He regularly advises in the areas of antenuptial, prenuptial, and postnuptial agreements; business valuation litigation; complex litigation and settlement of marital and nonmarital assets; complex nonmarital tracing; spousal maintenance and child support; custody settlement and litigation; settlement negotiations; and appeals. Jim also serves as a Director on Moss & Barnett's Board of Directors.

Four New Lawyers Join Our Team

Gabrielle is a member of Moss & Barnett's Business Law and Real Estate teams, assisting clients on a broad range of corporate, business, and financial matters. She received her J.D., *cum laude*, from the University of St. Thomas School of Law and her B.S., *with distinction*, in Economics and History from the University of Wisconsin-Madison.

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Naomi is an experienced tax and business attorney assisting clients in structuring their business ventures in a practical and tax-efficient manner. She provides strategic advice to clients in the areas of mergers and acquisitions, entity formation, buy-sell agreements, and general business advice. Working as in-house counsel at leading manufacturing and technology companies has allowed Naomi to develop extensive knowledge of the business and legal needs of established and emerging businesses. She received her J.D., *magna cum laude*, from the University of Minnesota Law School and her B.A., *summa cum laude*, in Political Science and Government from St. Cloud State University.

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Aaron is a member of Moss & Barnett's Real Estate Finance, Real Estate, and Business Law teams, focusing his practice on general real estate and commercial real estate finance transactions. He represents clients through all stages of a transaction, including negotiating, structuring, and closing complex real estate transactions. Prior to joining Moss & Barnett and after graduating from law school, Aaron clerked for the Honorable Sheridan Hawley, chambered in Minnesota's Tenth Judicial District, and was in private practice in Minnesota and Texas. Aaron received his J.D. from Mitchell Hamline School of Law, where he earned his Law and Business Certificate and served as Editor of *Mitchell Hamline Journal of Public Policy and Practice*. He received his B.A. in Real Estate and Finance from the University of Northern Iowa.

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Jill is a member of Moss & Barnett's Real Estate Finance and Real Estate teams, representing clients in a broad range of general real estate transactions and representing lenders who originate and sell loans secured by multifamily projects to secondary market investors, Fannie Mae and Freddie Mac. Within this practice, Jill examines title, survey, and other due diligence items, reviews legal opinions, prepares loan documents, and works with all transaction parties to ensure a smooth closing. Jill received her J.D., *cum laude*, from the University of St. Thomas School of Law School and her B.A. from the University of Wisconsin-Madison, where she earned her Economics and Business Entrepreneurship Certificates.

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To Rural Minnesota and Beyond: Expanding Internet Access With Federal Aid



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Katie is a member of Moss & Barnett's Energy and Public Utilities group. She focuses her practice on representing utility service providers in regulatory proceedings.

The COVID-19 pandemic highlighted the need for access to reliable, high-speed internet in major areas of daily life, including employment, education, health care, and certain essential services. Yet, many places in the U.S. still lack access to high-speed, reliable internet. In response, the federal government created several programs to support the deployment of broadband networks in unserved and underserved areas. Locally, these programs are likely to lead to marked improvements in internet access across Minnesota.

The ReConnect Program

The Consolidated Appropriations Act of 2018 established the Rural Connectivity Program (the ReConnect Program). The ReConnect Program provides loans, grants, and loan/grant combinations to facilitate broadband deployment in rural areas and, in doing so, aims to support rural economic development and opportunities.

To date, Minnesota companies have received over \$56 million from the ReConnect Program to deploy fiber-to-the-premises networks to unserved and underserved areas. Recently announced awards will be used for broadband deployment in Aitkin, Crow Wing, Douglas, Freeborn, Houston, Morrison, Otter Tail, St. Louis, Stearns, and Todd counties.

In August 2022, the United States Department of Agriculture announced another round of funding for the ReConnect Program. This round will provide up to \$700 million in grants, \$150 million in loans, and \$300 million in loan/grant combinations to support broadband deployment projects across the country. A number of Minnesota companies are submitting funding applications.



Rural Development Opportunity Fund

In 2020, the Federal Communications Commission (FCC) created the Rural Digital Opportunity Fund (RDOF) to deploy broadband networks to unserved areas. In December 2020, initial awards were made on the basis of a "reverse auction," in which the lowest bidders win. The initial winning bidders submitted long-form applications to the FCC in 2021 for comprehensive review.

As of October 2022, the FCC authorized 19 applicants in Minnesota to receive RDOF funding. Applicants will receive \$51 million in RDOF support over the next ten years to deploy broadband networks to approximately 23,000 unserved locations across the state. Construction on some of the projects began this summer, and other RDOF recipients are expected to begin construction early next year.

The BEAD Program

The Broadband Equity, Access, and Deployment (BEAD) Program is the most recent, and by far the largest (\$41.6 billion), federal program created to expand access to reliable, affordable, high speed internet. Authorized by the Infrastructure Investment and Jobs Act of 2021, and administered by the National Telecommunications and Information Administration, the BEAD Program will expand access to high-speed internet by distributing federal funding to states and U.S. territories for redistribution to service providers.

The amount of federal funding distributed to each state and territory will be primarily based on the relative number of unserved locations. Initial estimates indicate Minnesota may likely

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Consider company policies that require strong encryption, passwords, and remote erase technologies on all employee devices, including employee-owned devices that have access to company data. If lost devices are secured and can be remotely erased, then there is no reasonable likelihood that personal information on that device will have been "acquired" and data breach notification rules are likely not triggered.

Conclusion

Laws involving data breach notification are complicated. Obtaining legal advice early on is key to implement prevention policies and navigate a data breach. This article is not intended to provide a comprehensive survey of data breach notification rules, which vary across states and industries. If your employee's iPhone goes missing or you want to review your company's data privacy policies, please contact your Moss & Barnett attorney.

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Supreme Court was particularly concerned that enforcing unwritten side agreements may allow for abusive spouses to force their victims to agree to extremely inequitable divisions of property without legal recourse or judicial review.

The *Pooley* case has now been remanded to the district court for further proceedings on the division of the omitted retirement accounts.

Conclusion

The *Pooley* case underscores the importance of having a family law attorney review the terms of a divorce decree. Even court-provided template forms cannot prevent parties from omitting relevant information and undermining the enforceability of their agreements.

At Moss & Barnett, our family law attorneys work diligently to resolve issues that arise during the divorce proceeding, but also anticipate and address issues that may arise once the divorce has been finalized. If you need assistance with your divorce or other family law matter, please contact your attorney at Moss & Barnett.

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receive approximately \$650 million in total funding through the BEAD Program. It is expected that funding levels will be finalized within the next year, and thereafter will be distributed to service providers by the Minnesota Department of Employment and Economic Development.

Conclusion

Providing high-speed internet access in hard-to-serve areas remains a national priority. Moss & Barnett's Communications group is available to help clients address regulatory and commercial issues in their efforts to bring this vital resource to customers.

Moss & Barnett Congratulates Our Lawyers Selected for Inclusion in *The Best Lawyers in America* for 2023

Moss & Barnett is pleased to congratulate our lawyers who have been included in the 2023 edition of *The Best Lawyers in America*® and *Best Lawyers: Ones to Watch in America*™, with special congratulations to Kevin M. Busch, Christopher D. Stall, and James J. Vedder who have been named as the 2023 “Lawyers of the Year” in Minneapolis.

The Best Lawyers in America



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