

The Bay State's Personnel Records Law

Beware — There Are Some Traps for the Unwary Employer

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The Commonwealth of Massachusetts has strict regulations regarding employee records, and non-compliance can be costly for employers. Employers and employees should be aware of certain obligations and rights regarding an employee's personnel file under the Massachusetts personnel records statute.

Amended in recent years to expand employers' duties, the statute outlines certain affirmative obligations on the part of employers regarding an employee's personnel record.

The statute defines a personnel record as a "record kept by an employer that identifies an employee, to the extent that the record is used or has been used, or may affect or be used relative to that employee's qualifications for employment, promotion, transfer, additional compensation, or disciplinary action." In short, all documents such as internal memos, letters, disciplinary actions, or notes that are being used, have been used, or could potentially be used to affect an employee's employment are considered part of that employee's personnel record.

Whether the employer keeps records in the employee's formal personnel file or in various files, these records are subject to the requirements of the Massachusetts personnel records statute.

Here are more things you need to know:

Review of Personnel Records

The statute has several notable requirements relevant to both employers and employees. Employees and former employees have the right to request any documents that their employers used to evaluate, investigate, or discipline them. They also have the right to review their personnel records within five business days, provided that the request to review the record is made to the employer in writing.

In response, the employer is required to produce all information identifying the employee that is subject to the statutory requirements. While the employee's writ-

ten request may imply that the employee is requesting only information formally kept in his or her personnel file, employers must be mindful that the statute's definition of an employee's 'personnel record' is very expansive, and must carefully examine all records related to the requesting employee to ensure full compliance with the statute's requirements.

Notably, employers will be in compliance with the statute if they simply allow the requesting employee to review his or her personnel record at the business itself; the statute does not require the employer to copy and

document meeting the expansive requirements of the statute is placed in an employee's personnel file, the employee must be notified. Additionally, employees now have the right to explain or rebut all information they may dispute in their personnel files in response to notification regarding negative information. The statute requires that an employee's rebuttal to any negative information be transmitted to third parties along with the disputed information.

Exceptions


The most recent amendment to the statute provides that employees will not be permitted to review their personnel records more than twice in a calendar year. However, if an employee makes a request to review his or her personnel record after being notified of negative information, as discussed above, the amendment specifically exempts such reviews from the two reviews permitted each year.

In addition, the statute specifically indicates that a personnel record cannot contain information about another employee if disclosure of the information

would be likely to invade the other employee's privacy. Employers should be careful to edit any information that identifies other employees in disciplinary action forms, notes, memoranda, and the like, in order to comply with the statute's privacy provision.

Specific Requirements for Larger Employers

Larger employers should note that the statute specifies what written information or documents must be contained in personnel records kept by employers with 20 or more employees. Such personnel files must contain the employee's name, address, date of birth, job application, résumés, job title and description, compensation, starting date, lists of probationary periods, performance evaluations, written warnings of substandard performance, any other documents relating to disciplinary action, dated termination notices, and waivers signed by employees.



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forward all records to the employee.

Notice Requirement

New to the most recent amendment, employers must now notify employees within 10 days whenever a document potentially affecting an employee's employment is placed in the personnel record. Specifically, the statute states that "an employer shall notify an employee within 10 days of the employer placing any information in the employee's personnel record to the extent that the information is being used, has been used, or may be used to negatively affect the employee's qualification for employment, promotion, transfer, or additional compensation, or the possibility that the employee will be subject to disciplinary action."

The implications of this recent requirement are significant for employers. They must now be more vigilant about how they document personnel issues, as each time a

Enforcement

The statute does not provide for a private right of action, so employees cannot file a lawsuit if they believe that their employer has violated the statute. However, the Massachusetts personnel-records law is enforced by the attorney general, who may impose fines between \$500 and \$2,500 for vio-

lations. These fines are applicable regardless of the number of employees an employer has.

The statute leaves many questions open regarding an employer's responsibility related to an employee's personnel file, so employers are advised to contact an employment-law attorney to create a compliant personnel-records policy. ■

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