Employment Law Advisor: Personnel Record Law

Employer Obligations Under the Massachusetts Personnel Record Law

June 01, 2013

For employers in Massachusetts, the Personnel Record Law, M.G.L. c. 149, §52C (the "Law"), sets out what must be included in a "personnel record" as well as various employer obligations and employee rights concerning personnel record access, challenges and retention. The Law was amended in 2010 to impose an affirmative duty on employers to notify employees whenever any negative information is added to their personnel record. This Employment Law Advisor addresses the Law's requirements and implications for employers.

What is a "Personnel Record"

The Law defines a "personnel record" broadly as any "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." Unquestionably, this definition is subject to some degree of interpretation.

- Employers with twenty or more employees must keep at least the following information or documents (to the extent prepared) in an employee's personnel record:
- Name, address, date of birth, job title and description;
- Salary or hourly wage and any other paid compensation;
- Starting date of employment;
- Job application, resumes or other employee responses to an employment advertisement;
- All employee performance evaluation documents, including evaluations, written warnings of substandard performance, documents relating to disciplinary action, list of probationary periods or waivers signed by the employee; and
- Copies of dated termination notices.

Note that personnel records are not limited to documents contained in official or formal personnel files maintained by their human resources department. Rather, the statutory definition also encompasses what individual managers and supervisors may view as their personal files or notes on employees under their supervision, if those documents are used or may be used to determine promotions, transfers, additional compensation or disciplinary action. Consequently, managers and supervisors should be made aware that affected employees may have access to such documents.

Significantly, the Law excludes from its definition of personnel record "information of a personal nature about *a person other than the employee* if disclosure of the information would constitute a clearly unwarranted invasion of such other person's privacy." No additional guidance is provided on what types of information fall within this exclusion. Employers sometimes can use this exclusion to shield sensitive documents relating to workplace investigations (e.g., a harassment

investigation) when private information concerning other employees is involved.

Although the Law itself does not address the subject, other laws (including the Americans with Disabilities Act) require employers to maintain information and documents regarding the medical condition or history of an employee in separate files and to treat them as confidential records. Thus, such information and documents should not be maintained in an employee's personnel record.

Notice Requirement

As a result of the 2010 amendments to the Law, employers are required to "notify an employee within 10 days of the employer placing in the employee's personnel record any information to the extent that the information is, has been used or may be used, to negatively affect the employee's qualification for employment, promotion, transfer, additional compensation or the possibility that the employee will be subject to disciplinary action."

Documents addressing an employee's performance deficiencies, attendance issues or improper workplace conduct that would normally be placed in an employee's official personnel file clearly trigger the notice requirement. In addition, because the Law defines "personnel record" quite broadly, the notice requirement arguably extends to email communications between managers and other informal written "information" that may negatively affect an employee's employment, but were not intended to be placed in the employee's personnel file.

However, the notice requirement created by the 2010 amendments is only triggered by an employer "placing" negative information in the employee's personnel record. Thus, an employer can argue that it has no duty to notify an employee of negative information unless the information is, in fact, "placed" in the employee's physical personnel record.

Employers should examine how they manage personnel records and whether their managers and supervisors create information concerning employee performance/conduct that may negatively affect an employee's employment but is not normally placed in the employee's formal personnel file. If that is the case, the employers should improve their management of such information to ensure that the employers meet their statutory obligations.

Employee Access

The Law entitles employees, upon written request, to review their personnel records during normal business hours and/or to obtain a copy of their records. Employers are required to make records available/provide copies to an employee within five business days of such request. The term "employee" under the Law has been interpreted to include both current and former employees.

Employers are not required to make personnel records available to employees "on more than two separate occasions in a calendar year." However, an employee request for access following notification that negative information was placed in the employee's personnel record will not count toward the twice-per-year limit. The Law contains no provision for charging employees the cost of copying their records.

Requests for Removal or Correction

Some employers are surprised to learn that an employee may challenge information contained in the employee's personnel record. An employee may request that the information be removed or corrected. If the employer refuses the request, the Law gives the employee the right to submit a written statement explaining the employee's position, and the Law requires the employer to maintain the statement as part of the employee's personnel record as long as the challenged information is retained in the record. Further, in the event the employer transmits the

challenged information to any third party, the employer is required to include the employee's statement with the challenged information.

Retention Requirements

Employers with 20 or more employees are required to retain the complete personnel record of an employee without deletions or expungement of information (except by mutual agreement of the employer and the employee) for three years after termination of employment. Further, if an employee brings a legal action against the employer in court or before an administrative agency (e.g., the Massachusetts Commission Against Discrimination), the employer must retain the personnel record until final disposition of the proceeding.

Penalties for Violations

The Law provides for a criminal penalty in an amount not less than $500 and not more than $2,500 against "whoever" violates its provisions, and is enforced by the Massachusetts Attorney General. While the Law entitles an employee to file suit in court to seek to have false information expunged from his or her personnel record, the Law has been interpreted as providing no civil monetary remedy for violations.

Is There a Claim on the Horizon?

An employee's request to review, or obtain a copy of, his or her personnel record is sometimes a sign that the employee is unhappy about something and is considering a potential employment-related claim. The risk is greater when the request comes from a *former* employee and may very well signal that the person is speaking to an attorney. (Often, one of the first things an attorney who is contacted by an employee will do is advise the employee to request a copy of his or her personnel record.)

At this point the employer should consider informing its in-house or outside counsel of the personnel record request. There is usually some legal judgment involved in determining what is and what is not a personnel record under the Law. Documents produced unnecessarily can cause problems for the employer in subsequent litigation and potentially may implicate the privacy rights of other individuals. Similarly, some documents may contain "privileged" information, such as documents reflecting communications with the employer's attorney and documents prepared in anticipation of litigation. These documents should not be produced in response to a personnel record request.

On the other hand, not producing certain documents (perhaps because the employer simply produced the employee's official personnel file without job performance-related documents contained in a file maintained separately by a supervisor), in addition to violating the Law, may cause the employee (and his or her attorney) to conclude that (1) the employer does not have documentation supporting its employment actions with respect to the employee (e.g., written criticisms of the employee's performance leading up to a discharge) and/or (2) the employer is hiding something. If the employer later attempts to use the documents in defending an employment claim, the employee may challenge the documents as manufactured, after-the-fact support for a wrongful employment action.

Finally, where an employee's request for his or her personnel record is, in fact, at the direction of an attorney, employers should be aware that the employee's attorney may be taking other steps to investigate whether the employee has legal claims against the employer (or to gather evidence to support such claims), including contacting other employees of the employer.

If you have questions about this topic, please contact any member of our Employment Law Group.