Responding to Personnel Record Requests in Massachusetts

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As layoffs continue throughout the country, many terminated employees are asking to review their personnel files, sometimes to assess whether they may have legal claims. In Massachusetts the Personnel Records Statute, M.G.L. c. 149, §52C (the "Statute"), 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. This Employment Law Advisor addresses the Statute's requirements and implications for employers.

What Is A "Personnel Record"?

The Statute 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." Clearly, 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.

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 Statute 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 Statute 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.

Employee Access

The Statute 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 Statute has been interpreted to include both current and former employees. The Statute contains no provision for charging employees the cost of copying their records.If an employee has asked to review his or her personnel record (as opposed to only requesting a copy) it may be prudent for the employer to have a representative present during the review to ensure that nothing is removed. (Occasionally an employer will report that an important document kept in a former employee's personnel file, such as a non-compete agreement, was mysteriously missing from a personnel file after an employee's review.)

Requests For Removal Or Correction

Many employers are surprised to learn that an employee may challenge information contained in his or her personnel record. An employee may request that the information be removed or corrected. If the employer refuses the request, the Statute gives the employee the right to submit a written statement explaining the employee's position, and the Statute 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 twenty 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 Statute 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 Statute entitles an employee to file suit in court to seek to have false information expunged from his or her personnel record, the Statute has been interpreted as providing no civil monetary remedy for violations.

Is 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 as defined by the Statute. 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 Statute, 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.