

# **Employment, Labor and Benefits Advisory: Amendment to Massachusetts Personnel Records Law Imposes Significant New Burdens on Employers**

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Recently, the Massachusetts Personnel Records Law was amended to require employers to notify an employee within 10 days of any addition to his or her “personnel record” of “any information to the extent 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.” Signed into law without fanfare, as part of a larger economic development bill, this new provision has the potential to cause significant uncertainty, and, perhaps, unintended and troublesome consequences.

Even before the amendment, Massachusetts law required well maintained personnel records. Under M.G.L. c. 149, §52C, “Personnel Record” has been—and continues to be—defined broadly 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.” For employers employing 20 or more workers, those records must include, without limitation:

- name, address, date of birth, job title and description;
- rate of pay and any other compensation paid to the employee;
- starting date of employment;
- the job application of the employee;
- resumes or other forms of employment inquiry submitted to the employer;
- all employment performance evaluations including, but not limited to, employee evaluation documents;
- written warnings of substandard performance;
- lists of probationary periods;
- waivers signed by the employee;
- copies of dated termination notices; and
- any other documents relating to disciplinary action regarding the employee.

The newly passed amendment, which is effective immediately, has added the requirement that employers provide notice to an employee whenever negative information is placed in the employee’s personnel record. Notice must be given within 10 days of “placing [the negative information] in the personnel record.” Thereafter, employees have the right to review or obtain a copy of the negative information.

In general, Massachusetts employers must provide an employee with a copy of, and/or the opportunity to review, their personnel record within five business days of a written request. Under the amended law, however, the employee's right to review his or her personnel record is limited to two separate occasions in a calendar year, except that any review occasioned by the employer's notification that negative information has been placed in the employee's file does not count against his or her right to two separate reviews per year.

The penalties for employer non-compliance with Personnel Record Law remain unchanged. Individuals cannot sue their employers for violations of this law, but the Attorney General, who is tasked with enforcing it, may seek fines ranging from \$500 to \$2500 for each violation.

The amendment to the Massachusetts Personnel Records Law is ambiguous. While it defines the term "personnel record" broadly, the statute's reference to "placing" negative information "in the personnel record," without so stating, seems to contemplate only the formal personnel file. Nonetheless, some commentators focus on the broad definition of "personnel record" set forth within the statute, and suggest that informal communications, such as e-mails and other casual communications may be part of a broadly defined "personnel record" and subject to the notification requirement if they contain information that may negatively impact the employee. If correct, this reading of the law would impose an impractical and substantial burden on employers across the Commonwealth, requiring notice to the employee whenever a supervisor documented for his or her own record something negative about an employee (or even retained such information received from any source), even though the document was not furnished to HR and not placed in the employee's personnel file. Without further guidance from the Attorney General's office or the courts, employers may decide to take the more practical approach of notifying an employee when negative information is placed in the employee's personnel file. Either way, employers will still be left to exercise some judgment as to whether or not a given document has been or "may be used" to negatively affect the employee. On this point, it is probably best to err on the side of caution and provide notice to the employee.

## **Action Items for Employers in Massachusetts**

- Sound HR principles have always supported transparency in sharing feedback with employees. Although these principles have not changed, transparency is more important now than ever before, so that an employee does not first learn of a problem by receiving the statutorily required notice that something negative has been placed in their personnel record.
- Massachusetts employers should immediately establish effective administrative protocols for alerting employees within 10 days whenever information that may negatively affect the employee's employment is placed in the employee's personnel file.
- Massachusetts employers should review their practices and procedures relating to what information and documents become part of the employee's personnel record, eliminating the accumulation of unnecessary information that might unnecessarily trigger Massachusetts' notice requirement but also ensuring that important documents that clearly may be relied upon for the purposes described in the statute (to the extent that can be determined at the time), and especially discipline, are included in the personnel record.

For specific recommendations on how best to deal with the new law in your organization, or other issues relating to your human resources and employment practices, please contact one of the attorneys listed on this alert or any member of your Mintz Levin client service team.

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