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Amendment to Massachusetts Personnel Records Statute Imposes Affirmative Obligation for Employer to Discuss "Negative" Information with Employees

Buried within the text of the recently-signed "Act Relative to Economic Development Reorganization" is a significant amendment to the Massachusetts Personnel Records Statute, G.L. c. 149, § 52C. Under this amendment, which took effect on August 1, 2010, employers are now obliged 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 employment status, including eligibility for promotions, transfers, additional compensation, or possible disciplinary action.

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This broadly-worded, open-ended amendment marks a sea change in employers' obligations. Pre-amendment, the employer's only obligation was to permit an employee to inspect or receive a copy of his or her personnel record upon request. Now, employers must engage employees directly on any "negative" information, arguably even if the information ultimately is not used for any concrete employment decisions.

The amendment does not change the existing definition of a "personnel record." Under existing law, a "personnel record" is not confined to a central file or compendium of documents. To the contrary, a "personnel record" includes any records that are used, have been used, or may be used relative to the employee's qualifications for employment, promotion, transfer, additional compensation or disciplinary action. Therefore, items such as a supervisor's personal notes, or an e-mail to others in the company concerning an employee, may be part of an employee's personnel record.

Given the existing, expansive definition of a personnel record, the notification requirement in the Personnel Records Statute amendment presents several compliance challenges for employers. Phrased in the conditional (e.g., the amendment requires disclosure of information that "may be used" for the "possibility" of disciplinary action), the amendment offers little guidance to employers as to precisely when an employer's duty to notify is triggered. Read broadly, however, the amendment potentially imposes a requirement that the employee be informed of every negative comment that a supervisor may utter about him or her in the workplace. Perhaps a court will construe the statute narrowly, focusing on the use of the verb "placing" in the amendment, which suggests that the information may have to be "placed" into a central file in order to trigger the notification requirements. In the meantime, however, employers must balance the risk of non-compliance with the statute against practicality and organizational efficiency.

The Personnel Records Statute amendment also limits employees' right to access their personnel records to two times per calendar year (previously, employees had a right to unlimited access to their personnel records). However, an employee's request to review his or her personnel record

following notification that "negative" information has been placed in it does not count toward this twice-per-year limit.

In light of this new amendment, employers should again review their personnel records creation and retention policies, train supervisors on the new requirements and develop protocols for notifying employees of any negative information to be placed in their personnel records.

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