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Amendment to MA Personnel Files Statute Affects How Employers Deal With Personnel Records

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A Recent Amendment to the Massachusetts Personnel Files Statute Dramatically Affects How Massachusetts Employers Deal With Certain Personnel Records

The Massachusetts Legislature recently made some substantive changes to the Massachusetts Personnel Records Statute, M.G.L. c. 149, §52C. The little known changes, enacted on August 5, 2010, as part of Chapter 240 of the Acts of 2010, (which is entitled an "Act Relative to Economic Development Reorganization") are effective immediately. Massachusetts employers are thus required to make immediate changes in their personnel file policies and practices.

Prior to the recent amendment to the Massachusetts Personnel Records statute, employers were only required to provide an employee with access to his or her personnel file upon the employee's request within five business days of the employee's request. An employer was also required to allow an employee to dispute any negative information in his/her personnel file by providing him/her the opportunity to place a written statement in the file setting forth the employee's position on the issue in dispute between the parties. Under Chapter 240, §148 of the Acts of 2010, employers are now required to provide an employee notice every time the employer places any negative information in the employee's personnel record that "is, has been or may be used to negatively impact the employee's qualification for employment, promotion, transfer, additional compensation or the possibility that the employee will be subject to disciplinary action." The employer must provide such notice within ten (10) days of the placement of the negative information in the employee's personnel file.

The amendment also now limits employees to two reviews or inspections of their personnel files during any calendar year. That limitation, however, does not apply to those times when an employee requests a review of his/her personnel file due to the receipt of a notice from the employer that the employer has placed negative information about the employee in the employee's personnel file.

Employers should act with caution in regard to the amendment due to the broad statutory definition of "personnel records". Under M.G.L. c. 149, §52C, the Massachusetts Personnel Records statute defines "personnel records" 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 be used relative to the employee's qualification for employment, promotion, transfer, additional compensation, disciplinary action." Although the statute gives examples of certain documents that must be kept in the personnel files of employers with twenty or more employees, the statute's definition of "personnel record" is vague and seems to encompass any and all documents that refer to an employee that may be used to impact or affect the terms or conditions of the employee's employment. Thus, the statutory definition could include any retained document of the employer not just those located in its employees' "personnel files" maintained by the employer's Human Resources Department. Consequently, any email communications, notes or internal memoranda or correspondence about an employee could be construed as part of the employee's "personnel record." Should the emails, notes or memoranda potentially impact the employee's employment in a negative way, notice of such communications may need to be given to the employee.

Such a broad interpretation of the statute poses obvious logistical and practical problems for employers, especially those with a large number of employees. Additionally, the amendment is silent as to any possible sanctions for a violation of the statute's new provisions. Although there are no statutory penalties for a violation, it is possible that there could be adverse consequences for an employer caught violating the statute. For example, in a suit by an employee or former employee, the employer might be barred by a court from using documents about the employee that were placed in the employee's personnel file but which were not disclosed to the employee at the time of placement. Massachusetts employers should remain alert for any guidance or interpretations of the new amendment from either the courts or the Massachusetts Attorney General's Office. We will continue to monitor the amendment's interpretation and/or application and will report on any developments as they occur.