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MASSACHUSETTS AMENDS PERSONNEL RECORDS STATUTE, PLACING NEW AFFIRMATIVE OBLIGATIONS ON EMPLOYERS

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On August 5, 2010, Massachusetts Governor Deval Patrick signed into law "An Act Relative to Economic Development Reorganization" (M.G.L. c. 240, §1, et. seq.), with a stated purpose of providing a business-friendly environment, stimulating job growth and coordinating economic development activities funded by the Commonwealth. Buried deep within the Act is a significant amendment to the Massachusetts Personnel Records Statute (M.G.L. c. 149, § 52C).

The amendment, which became effective immediately, requires Massachusetts employers to affirmatively notify employees any time certain negative information is placed in their personnel records. This affirmative notice obligation marks a dramatic departure from Massachusetts' prior law, which required only that employers allow employees to review their personnel records on request. It is also evidence of the evolving right of employees to inspect their own personnel files, a right protected through statute in many states.

We summarize below the statute's new notification requirement and offer our recommendations to employers both in Massachusetts and nationwide.

Notification Requirement

Massachusetts' personnel records statute, Mass. Gen. Laws c. 149, § 52C, defines "personnel record" rather broadly to include any document that identifies an employee and affects, or may affect, that employee's qualifications for employment, promotion, transfer, additional compensation, or disciplinary action. In other words, whether a document constitutes a "personnel record" depends on what it contains, not where or by whom it is kept. This broad definition presumably includes not only formal personnel files maintained by human resources but also the informal files supervisors maintain and other similar records, to the extent those records are or may be used to affect the terms and conditions of employment.

Starting from this already broad definition of a personnel record, the amended statute now provides:

An employer shall 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 qualifications for employment, promotion, transfer, additional compensation or the possibility that the employee will be subject to disciplinary action.

Read literally, this new notification requirement could be triggered whenever a supervisor sends an e-mail message to human resources concerning potential discipline or a manager places a note concerning the employee's promotion potential within the manager's own file. Whether the Massachusetts attorney general's office, which has responsibility for interpreting and enforcing this provision, will interpret the statute so broadly remains to be seen.

New Burden on Employers

Regardless of any interpretive opinions that may be forthcoming from the Massachusetts attorney general, this amendment creates a significant administrative burden for employers. Historically, maintenance of detailed employee-discipline and job-performance documents was one of the best tools an employer had to correct job-performance issues and protect against lawsuits alleging discrimination or wrongful termination. Massachusetts employers will now have to balance the utility of such documentation with the need to analyze every writing or e-mail to determine whether it triggers the notification obligation, i.e., whether the document is "placed" in the employee's "personnel file" and whether the document contains "negative" information.

Recommendations for Massachusetts Employers

- Require employees to sign and acknowledge receipt of evaluations, performance plans and warnings.
- Evaluate whether less formal documents qualify as "personnel records" under the statute, and, if so, whether the document contains negative information that requires notification.
- Provide any required notification in writing.
- Train supervisors on proper documentation of employee issues and the risk of maintaining unofficial personnel files.
- Update all relevant policies and train appropriate personnel of their notification obligations.

Recommendations for Employers Nationwide

- Since laws vary from state to state, learn the exact requirements for every state in which you have employees. Pay special attention to

the prescribed procedures for requesting and conducting inspections as well as time limits for responding to employee requests.

- Use the relevant statutory definition of “personnel file” as a guide for determining what documents should be produced for inspection.
- Establish an official company procedure for employees to follow when requesting inspections, including requiring written inspection requests and specifying where and when inspections should occur. Make sure supervisors are familiar with this procedure.
- If allowed under state law, have a representative of the employer in the room while the employee inspects the file.
- Be accommodating to employees who wish to contest information in their personnel files. Investigate whether the information should be removed or corrected. If an agreement cannot be reached with an employee, consider allowing him/her to submit a written statement for inclusion in the file.

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