

PERSONNEL RECORDS: ACCESS AND DISCLOSURE

Direct Representation of Municipalities, Municipal Law Practice Groups

November 1, 2007

Author: Carolyn M. Jereck
Direct: (248) 594-6363
cjereck@plunkettcooney.com

Once an employer ensures that the correct documents are included in employee personnel files, the question arises, “who may have access?” The answer is, it depends.

Employee Access to Their Own Personnel Files

Under Michigan’s Bullard-Plawecki Employee Right to Know Act (“ERKA”) employees have the right to review their personnel file upon written request. ERKA requires employers to allow review at reasonable intervals, generally not more than twice a calendar year. It must be at a place reasonably near to the employee’s normal place of work and during office hours, unless office hours would require the employee to take time off from that employer – in that case, another reasonable time. If an employee demonstrates an inability to review the file at the employer’s site, the employer must mail a copy of the records upon written request. Finally, employees have the right to a copy of their file. Employers may charge the actual incremental cost of duplication.

Disciplinary Documents Under ERKA

ERKA prohibits an employer from divulging disciplinary information “to a third party, to a party who is not a part of the employer’s organization, or to a party who is not a part of a labor organization representing the employee,” without providing the employee with written notice specified under the statute. Note, ERKA does not prohibit disclosures of disciplinary information; it simply requires the employer to provide notice to the employee. Thus, employers may define who has access to disciplinary documents by following the notice requirements under ERKA.

However, members of “the employer’s organization” are permitted under ERKA to view disciplinary records without notice. Unfortunately, there is little guidance on who this includes. The statute does not define the phrase and only one case addresses the issue. In *Loftis v. G.T. Products*, the court of appeals found that an employee committee set up by the employer was part of “the employer’s organization,” and the employer was not required to provide written notice prior to sharing disciplinary records with the committee. The employer provided the committee with evidence of plaintiff’s absences and write-ups for the committee’s recommendation concerning termination.

The court noted the absence of caselaw to guide it in defining “employer’s organization.” Nevertheless, it determined that the committee – established in the employee handbook and

used as part of the company's disciplinary procedures established in the handbook – was part of the organization. Thus, *Loftis* suggests that if individuals are identified in an employee handbook and incorporated into established disciplinary procedures (which are followed), they may be part of the “employer's organization” under ERKA.

Finally, employers must comply with ERKA's requirement that employers review personnel records and delete disciplinary records more than four years old – unless ordered in a legal action or arbitration.

Application of Michigan's Freedom of Information Act

ERKA explicitly states that it shall not be construed to diminish a right of access to records as provided under Michigan's Freedom of Information Act (“FOIA”). Of course, providing an employee with ERKA notice does not conflict with FOIA.

FOIA includes an exemption for personnel records of law enforcement agencies. However, FOIA does not exempt personnel records of non-law enforcement employees. To the contrary, courts have ordered their release. Disclosure must instead be examined under FOIA's other exemptions on a case by case basis.

Social Security Numbers

FOIA does exclude records disclosing social security numbers. Likewise, Michigan's Social Security Privacy Act requires employers to protect the confidentiality of social security numbers. Employers must limit access to social security numbers and have policies to provide confidentiality. Except in specific cases, employers should always redact social security numbers when disclosing documents.

Additional Considerations

Although personnel files do not generally include medical information, employers must also comply with HIPAA and agreements with HIPAA covered entities. A collective bargaining agreement may also impact access to personnel records. Simply put, numerous factors govern the disclosure of personnel records. This article merely touches on a few.