



Recent Amendment To Massachusetts Law Regarding Personnel Records Places New Affirmative Obligation On Employers

Insights

9.01.10

On August 5, 2010, 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 within the Act is a significant amendment to the Massachusetts Personnel Records Statute (M.G.L. c. 149, § 52C). The amended statute, which became effective immediately, now requires that employers provide notice to employees every time certain negative information is placed in their personnel files. This affirmative notice obligation is in stark contrast to prior law, which only required that employers allow employees to review their personnel records at the employee's request.

Employee Notification Requirements

The amendment specifically provides that an employer must "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 qualification for employment, promotion, transfer, additional compensation or the possibility that the employee will be subject to disciplinary action." Upon written request by the employee, the employer must provide the employee with the opportunity to review his or her personnel file within five business days of the request. The Attorney General is responsible for enforcing the amendment, and violations carry a penalty of between \$500 and \$2,500 each. On its face, violations and monetary penalties can add up quickly if an employer fails to take steps to address this new notice requirement.

New Administrative Burden For Employers

This amendment creates a new administrative burden for employers. Generally, detailed documentation of employee disciplinary action is one of the best tools an employer has for correcting performance problems and/or protecting against a subsequent lawsuit regarding discrimination or termination. Employers will now have to balance the utility and protection of documentation with the need to analyze each and every writing or email 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. In particular, given that the term "personnel file" is defined broadly under Massachusetts law (including any document that may affect an employee's qualifications for employment, promotion, transfer or additional compensation, or may lead to disciplinary action), it is possible that informal emails between

compensation, or may lead to disciplinary action), it is possible that informal emails between supervisors, or between a supervisor and a human resources employee, trigger the notification obligation.

Several Unanswered Questions

The amendment also leaves open several questions that have yet to be addressed by the legislature, the courts, or the Attorney General. When is a document "placed" in a personnel file? What qualifies as "negative" information? What type of notification is required? What is the necessary content of the notice? What is the result of the Attorney General finding that a violation has occurred in a subsequent discrimination or termination lawsuit?

Not All The News Is Bad

There is a small amount of good news for employers. While the amendment retains the requirement in the original statute that an employer must allow an employee to review his or her personnel record within five business days of receiving a written request to do so, an employer is required to allow an employee to review his or her personnel record only two times each calendar year. Notably, a records review that results from the new notification requirement relating to negative records *does not* count as one of the two permitted annual reviews, giving employees an unlimited number of records reviews in such a situation.

Review And Update Policies

Massachusetts employers should immediately review and update their current human resources policies and procedures to comply with this notification requirement. For assistance in reviewing and revising your policies and procedures to comply with the amended Personnel Records Statute, please contact your local Fisher Phillips attorney.

This Legal Alert provides an overview of a specific state law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.