



**August 27, 2010**

## **LABOR & EMPLOYMENT UPDATE**

### **RECENT AMENDMENT TO THE MASSACHUSETTS PERSONNEL RECORD STATUTE**

On August 5, 2010, Governor Patrick signed into law an amendment to the Massachusetts statute governing employee access to personnel records, Chapter 149, § 52C. The amendment, which the Legislature included in an economic development bill, received little public attention prior to its enactment but requires immediate changes to employers' practices concerning personnel records.

Effective August 1, 2010, the statute requires an employer to provide notice to an employee within ten days if the employer places any negative information in the employee's personnel record. Specifically, the statute requires notice of information "to the extent that it 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."

Although it is unclear from the wording of the statute, employers should assume that the notice period is ten calendar days until this issue is further clarified. Employers remain obligated to provide a copy of an employee's personnel record within five business days of a written request, although the amendment permits employers to limit the number of occasions on which an employee may request his or her personnel file to "two separate occasions" per calendar year. These two occasions do not include, however, requests by the employee following the employer's notification that negative information has been placed in the personnel record.

Which documents are covered? The statutory definition of "personnel record" is broad and covers performance-related information maintained by an employer, not just information placed in a physical personnel file. On one hand, it is unclear whether everyday communications such as emails that contain negative opinions about an employee's performance would be covered by the notice requirement. On the other hand, the statute specifies that documents such as negative performance evaluations, written warnings, and other documents relating to disciplinary action fall within the definition of a personnel record and therefore they will require notice.

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If you have any questions about the issues addressed here, or any other matters involving Labor & Employment law issues, please feel free to contact:

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The statute does not specify the manner in which an employer must provide notice, but we recommend creating a written record to demonstrate an employer's compliance with the notice requirement. Employers should ordinarily provide the employee with a copy of the negative information together with written notice that the information has been placed in the employee's personnel file.

The issues raised by the amendment to the personnel record statute may be clarified by the courts, the Legislature or the Attorney General's Office. In the meantime, employers should provide immediate notice to employees of any negative information that has been placed in a personnel file since August 1, 2010 and contact their employment attorneys with any specific questions relating to their personnel records practices.

Employers should also be aware of changes to Massachusetts' Criminal Offender Record Information ("CORI") law, some of which take effect in November, 2010. We expect to issue a client alert in the coming weeks to address this topic.

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