New Personnel Records Law

By: Joshua D. Krell, Esq.

Did you know that, thanks to a new law, whenever an employer puts any negative or unfavorable information in an employee's personnel file, that employer is now required to notify that employee of that fact within ten days? A lot of people don't.

It all started with a local police officer who lost out on a promotion. He later learned that there had been some unfavorable information contained in his personnel file, unbeknownst to him. This led him to believe that the negative information actually cost him the promotion.

After a handful of state senators learned of the police officer's plight, they set out to craft a legislative fix for such situations. Specifically, the senators wrote and submitted an amendment that wound up getting tacked on the Economic Development Reorganization Bill, which was signed into law by Governor Deval Patrick on August 5, 2010. That amendment fundamentally altered Massachusetts General Laws Chapter 149, Section 142C, which governs access to personnel records, and has done so in a way that has both employers and employees seemingly dissatisfied.

The amendment requires employers in Massachusetts to notify employees "within ten 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." In other

words, if an employer ever puts a negative report in an employee's file, there is an obligation to promptly notify said employee.

Because the new law was the product of a compromise between large employers and employee unions, it is now, predictably, being criticized by both sides. Many employers are upset because they are left to wonder whether informal reports such as e-mails or managerial notes about employees need to be filed as personnel records, which would trigger the notification requirement. Similarly, many employees and their advocates are upset that the amendment can only be enforced by the Attorney General's Office and lacks a "private right of action." The Attorney General can send out letters requesting compliance and/or levy fines between $500 and $2,500, but aggrieved employees cannot sue their employers.

The consensus seems to be that even though the new law is quite burdensome for employers, it is no boon to employees either. If you are an employer dealing with a problem employee who may need to be terminated in the near future, you would be wise to still keep informal documentation of any problems, regardless of where it is kept. In the event that the employee sues your company at some point, you will be well-served by that paper trail justifying termination. On the flipside, if you are an employee concerned about the contents of your personnel file, the new amendment allows you to request a review of your file up to two times per year, in addition to views related to the filing of negative information.

While it appears that nobody is completely satisfied with the new law, it is important to keep in mind that it does significantly impact the rights and obligations of employers and employees alike. Obviously, it is in the best interest of both groups to strive to maintain a harmonious work environment. Resorting to the filing of a complaint with the Attorney General's Office under this new law should be a rare occurrence. Nonetheless, the Attorney General's Office is an option if needed.

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