SPECIAL REPORT

PERSONNEL RECORDS MAY BE THE LANDMINE YOUR COMPANY NEVER EXPECTED

(05-01-13)

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- Failure to include documentation in a personnel file as required by law may preclude your company from using such information in subsequent litigation according to one Michigan statute.
- At least ten separate statutes address personnel files and record keeping responsibilities. Would your company be in compliance if you were audited or subpoenaed?
- Internal and external job advertisements must be maintained for specific time periods.
- Releasing disciplinary records that are more than 4 years old may expose your organization to liability.
- The ADA imposes strict confidentiality requirements on certain employee records with only limited exceptions for disclosure.
- Investigations into suspected employee criminal behavior call for special handling and record keeping.
- Michigan law imposes a responsibility upon an employer to notify an employee if disciplinary records are being released to a third party.
- Employment “write-ups” and disciplinary records could be used against you later in many types of litigation.
- The Department of Labor and the Department of Consumer and Industry Services Wage and Hour Division routinely find employers in violation of record keeping responsibilities.
- Some OSHA records must be maintained as long as thirty years.
- Procedures for handling subpoenas and record requests can limit your company’s exposure to liability and fines.

Michigan employers collect, use and disseminate employment related documents as a regular part of the employment relationship. However,

such a process is a landmine waiting for many employers who are unknowingly out of compliance with the laws pertaining to employment records. Marsh and McLennan attorneys have seen the improper maintenance, use or release of such records cause legal problems for many employers both in litigation as well as from regulatory authorities.

The purpose of this Special Report is to examine certain key issues related to employment records and to inform the client of common pitfalls to avoid.

WHAT LAWS GOVERN EMPLOYMENT RECORDS?

There are a number of laws and regulations that relate to employment records. In Michigan, the Bullard Plawecki Employee Right to Know Act directly regulates personnel files and provides an employee with the right to review and copy such documents. It also defines what an "employment record" is and is not.

On the federal level, the Fair Labor Standards Act and Equal Pay Act, as well as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Family Medical Leave Act, the Americans with Disabilities Act, the Occupational Safety and Health Act, the Immigration Reform and Control Acts of 1986 and 1990 and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 all govern employment records. Federal contractors have a host of additional laws to comply with.

A. What Should Be Kept Out of Personnel Files?

Michigan's Bullard Plawecki Employee Right to Know Act, which applies to employers with 4 or more employees, excludes certain things from the definition of "personnel record" including:

1. Employee references that identify the person making the reference.
2. Staff planning materials that involve more than one employee.
3. Records kept by an executive, administrative or professional employee that are solely in their possession and are not available to others.

The Bullard Plawecki Employee Right to Know Act prohibits an employer from keeping certain records such as the following unless such records

relate to activities conducted on the work-place premises or interfere with the employee's work. MCL 423.508.

1. An employee's associations
2. Information on record's concerning an employee's political activities
3. Publications of non-employment activities

B. When Can an Employee Review, Copy and File a Response to Material in His or Her Personnel File?

The Michigan Bullard Plawecki Employee Right to Know Act allows an employee to review, copy and file a response to any personnel record. MCL 423.502. Upon written request from the employee, the employer can schedule a supervised review of the employee's personnel file.

It is important to note that the law only allows an employer to charge the actual cost of reproduction of employment records, not including labor charges or other incidental charges. For example, it is probably acceptable to charge .15 cents per page if that is the going rate for copying.

As a result, it is advisable to address this in personnel handbooks and indicate that employees can obtain copies for the actual cost of reproduction.

If there is a disagreement between the employer and the employee as to the contents of the file, the employee may submit up to five pages (8.5x11) of written response. This response must be included when the file is divulged to a third party. As a result, it is usually advisable to give employees the opportunity to review and acknowledge receipt of disciplinary forms and other adverse information.

C. Taking Caution When Releasing Records to Others

Except where records are subpoenaed, an employer must take out disciplinary records, letters of reprimands or disciplinary actions that are more than four years old. MCL 423.507.

The Act also requires that where the disciplinary records are four years old or less, the employer is required to mail notice to the employee that

such records are being disseminated to a third party. The notice must be sent via first class mail on or before the day the information is divulged.

It is usually advisable to have legal counsel review document requests, even where such requests involve a subpoena, so that the interests of the company and the employee can be preserved.

D. Keep Separate Files in Some Situations

1. *Medical records.*

   The Act prohibits an employer from keeping medical records of an employee in the personnel file. Instead, where such records come into the possession of the employer, the employer should keep a separate file.

2. *Investigations of suspected criminal activity.*

   Although Michigan law does not require it, employers are allowed to maintain a separate file on an employee's suspected criminal activity if the employer has reasonable cause to believe that the employee is engaged in criminal activity which may result in loss or damage to the employer's property or disruption in business operations.

   Upon completion of the investigation or after two years, whichever comes first, the employee must be notified that the investigation was or is being conducted. Upon completion of the investigation, if disciplinary action is not taken, the investigative file and all of the copies must be destroyed.

E. Improper Record Keeping May Preclude Use of Records in Court or Similar Proceedings

The Michigan Employee Right to Know Act excludes an employer's use of information that was not in a personnel file but should have been. However, if a court or referee finds that the failure to include the information was not intentional, such information might be admitted into evidence. MCL 423.502.

The problem with this section of the statute is that it could promote the argument that information kept in files other than personnel files such as in administrative files, should be excluded from use in subsequent litigation or an administrative hearing. The purpose behind this section of the statute is that it promotes the overall theme of allowing an employee to have the ability to review, copy and respond to what might be used against him or her.

F. <u>Wage Information Should be Kept at Least Three Years</u>

The Michigan Wages and Fringe Benefits Act applies to all Michigan employers and requires employers to maintain certain personnel and payroll records for three years including the following:

- Name, address
- Birth date
- Occupational classification
- Total basic rate of pay
- Total hours worked in each pay period
- Total wages paid in each pay period
- An itemization of deductions and fringe benefits

MCL 408.479.

In addition, the federal Fair Labor Standards Act (FLSA) and Equal Pay Act require that certain records be maintained including:

- Wage rates
- Job evaluations
- Job descriptions
- Merit systems
- Seniority systems
- Collective bargaining agreements
- Explanations about wage differentials among employees
- Sex of employees
- When the workweek begins / length of work period
- Straight time vs. overtime pay

29 CFR 516.2(a).

Under the FLSA, payroll records must be kept at least three years. 29 CFR 516.5. Basic employment, wage rate tables and time cards must be kept at least two years. 29 CFS 516.6(a).

G. Job Advertisements and Interview Files Should Be Kept for at Least Three Years

Job applications, resumes, replies to job advertisements, promotions, demotion and transfer, discharge and other actions must be maintained for at least one year from the date of the action under the Age Discrimination in Employment Act of 1967 (ADEA). This also applies to opportunities for overtime work, employment agency records, union records, test papers from employer testing and physical examination results. 29 CFS 1627.3(b)(1).

H. Employee Benefit Plan Documents Should Be Kept for the Plan Life Plus One-Year

The ADEA also requires employers to maintain employee benefit plan documents and seniority system records for the same period as the plan plus one-year. 29 CFR 1627.3(b)(2).

I. Health & Safety Records and Reporting Require Attention to Detail

The Michigan Occupational Safety and Health Act applies to most every employer in Michigan employing one or more employee. This law requires employers to maintain and provide to employees certain records concerning health and safety.

Employers of 11 or more persons are required to maintain an OSHA log and a summary of occupational injuries on a calendar-year basis using the MIOSHA form. Any injury or illness must be reported to MIOSHA within six working days. MCL 408.1001; R 408.22101.

Employers falling under this provision must also post an annual summary of occupational injuries and illnesses and current and former employees are entitled to review this information. R 408.22116.

Employers are required to report to the Bureau of Safety and Regulation an industrial injury or accident involving the death or in the hospitalization of 5 or more employees within 8 hours. R 408.22117.

The federal OSHA statute requires that such OSHA logs be kept for five years following the end of the year to which the injuries and illnesses relate. This includes fatalities or lost workdays or where the injury requires transfer to another job, terminates the employment, or involves loss of consciousness.

Medical examination records relating to employee injuries on the job must be kept for the duration of the employment plus 30 years. 29 CFR 1910.1020(d)(1)(ii).

The MIOSHA logs should be kept in a separate file that is readily accessible in the event of an audit. Such records should not be included in the personnel files of any employees. Moreover, any medical records about a particular employee should be kept in a separate file.

J. <u>Anti-Discrimination Procedures Require Separate Record Keeping and Reporting</u>

Title VII of the Civil Rights Act applies to employers with 15 or more employees. Further, those employers with 100 or more employees must file an EEO-1 form on or before September 30 of each year. This EEO-1 form requests information on race and gender breakdowns among full and part-time employees.

Employers falling under this law must retain personnel or employment records for one-year from the date of making the record including the following:

- Applications and hiring and screening records
- Promotion, demotion, transfer and layoff records
- Termination records
- Pay raise and compensation terms records
- Records relating to selection of employees for training programs citing 29 CFR 1602 *et seq*.

K. The Family Medical Leave Act Requires Other Record Keeping

This law applies to employers with 50 or more employees and requires that the following records must be maintained:

- Dates FMLA leave is taken
- Hours or leave if taken less than one full day
- Copies of employee notices of leave furnished to the employer. This can be kept in the personnel file.
- Documents describing employee benefits and leave policy
- Premium payment of employee benefits
- Records of any dispute between employer and employee as to FMLA leave.

29 CFR 825.500(c).

Note that medical certifications notices and other medical records must be kept separate from the personnel file.

The FMLA requires that the above documents be kept for three years or more.

L. The Americans with Disabilities Act Imposes Strict Confidentiality Requirements Upon Employers.

This law imposes strict limitations on the use of medical information by employers. Such information must be kept in a file separate from that of the employee file and must be kept confidential. 29 CFR 1630.14(c)(1). The employer should take steps to keep such information confidential by retaining in a locked filing cabinet.

The only exceptions to confidentiality are as follows:

1. Supervisors and managers can be informed about restrictions and accommodations.
2. First-aid personnel can be informed
3. Safety personnel can be informed if special procedures must be taken in the event of a fire
4. Government officials investigating compliance with state and federal laws.

5. Workers' Compensation offices
6. Insurance companies for health or life insurance.

Employers should also use conditional job offer forms where pre-employment medical exams are requested.

M. What Else Should Be Included in a Personnel File?

1. *I-9 Form.*

   The Immigration Reform and Control Acts of 1986 and the 1990 provide that all employees must complete I-9 forms within 3 days of hire. This form must be kept for 3 years after hiring or one year after termination, whichever is longer. 8 USC 1324a(b)(3).

2. *New Hire Reporting Form.*

   Effective October 1, 1997, the Personal Responsibility and Work Opportunity Act of 1996 requires every state to develop an automated directory of employee information. This is, in part, to improve collection of child support. 42 USC 653 a *et seq*. Reports of new hires must be made within 20 days after hire. Such reports can be made electronically as well.

3. *Other Lawful Documents.*

   Additional permissible information such as tax withholding and training information is appropriate. Consult with your attorney for a comprehensive list.

N. Document Retention Policies.

Although many state and federal statutes only require that employment records be kept for up to three years, it is advisable to develop a document retention policy that provides for at least six years retention of most documents. The reason for this is that even if your company is in compliance with document retention from a compliance audit standpoint, employees can sue for up to six years for certain causes of action involving breach of contract. As noted in this report, some statutes actually require that records be retained for longer than six years.

RECOMMENDATIONS ON DEVELOPING AND MAINTAINING EMPLOYMENT RECORDS

The following are recommendations on dealing with personnel files and employment records:

1. Use a single system for personnel records that is consistent in its application and includes required information but excludes prohibited information.
2. Designate a single records custodian that has access to confidential information such as medical files on employees rather than allowing any employee to have access to such information.
3. Contact legal counsel if you receive a subpoena or request for records.
4. Keep medical records separate from personnel files and adhere to strictly confidentiality.
5. Develop an organization document retention policy in conjunction with the requirements of the numerous laws that govern employee record retention.
6. Exclude from personnel files employee references that disclose the identity of the person making the reference.
7. Remove disciplinary records from personnel files after 4 years from the event.
8. Do not enter information into a personnel record if it is more than six months after the date of the occurrence of a disciplinary incident.
9. Keep detailed information on requested leaves and related information if you are governed by the FMLA.
10. Maintain an employee handbook that references an employee's right to review his or her own personnel file and to obtain copies of it for the actual costs of reproduction.

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