
Changes To Massachusetts' Personnel Record Law Require Employers To Notify Employees Of Negative Personnel Documents

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Massachusetts Governor Deval Patrick recently signed into law a significant amendment to Massachusetts' Personnel Record Law, M.G.L. c. 149, § 52C. This amendment requires that within 10 days of an employer placing in an employee's personnel record, information that could negatively affect the employee, the employer notify the employee of such fact. Specifically, the amendment provides:

An employer shall 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.

As drafted, the amendment is imprecise and creates uncertainty as to the particular circumstances when notification is required. A broad interpretation of the amendment would require an employer to notify an employee of *any* document created that may negatively affect his/her employment, irrespective of how informal the document may be. Consequently, the imprecisely drafted amendment leaves open the possibility that it could require an employer to notify an employee concerning a broad range of "negative" documents, including informal e-mails between a supervisor and a manager about an employee's performance difficulties, a supervisor's notes about an employee's absenteeism, and documents concerning an ongoing employee investigation.

While guidance has not yet been issued about this amendment, we believe it unlikely (and unfeasible) that the amendment will be interpreted so broadly as to require employee notification of the above-mentioned "informal" documents. That said, the amendment will likely require employers to notify employees about documents formally memorializing negative information about their performance or conduct, such as written warnings, disciplinary write-ups, negative evaluations, and e-mails documenting verbal warnings. This also means that an employer will no longer be permitted to draft "memos to file" about employee difficulties without notifying the employee of the

same, if the memo may be used "to negatively affect the employee."

What remains to be seen is whether guidance will be issued addressing the imprecision of the amendment, which uses the term personnel "record" instead of "file," thereby requiring employee notification of all negative documents drafted and not solely those "placed" in employee "personnel files." It also remains to be seen just how broadly the Attorney General or the courts interpret "any information... [that] may be used to negatively affect the employee []..."

Until further guidance is issued, employers are urged to contact employment counsel to discuss how they should comply with the amendment in light of their personnel file policies and practices and how they manage their personnel. Proper training of supervisors and managers on the effect of this amendment in documenting employee performance and conduct is advisable.

Because the amendment to the Personnel Record Law is effective retroactively to August 1, 2010, employers should notify employees as soon as possible of negative documents created about them since that date if they have not already done so through their regular practices.

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