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ALERTING MANAGEMENT TO BREAKING LABOR AND EMPLOYMENT LAW DEVELOPMENTS



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PERSONNEL FILE ACCESS LAW UPDATE

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In This Issue

- ◆ Personnel File Access Law Update
- ◆ Firm Announces New Office Space & Address
- ◆ Breakfast Briefing
- ◆ Lawfax Update

The Minnesota Personnel File Access Statute, which affects every employer in the State, was amended by the Legislature in 2004 and the change (noted below in outline) is now in effect. If you have not recently reviewed your personnel file policy and practices under this Statute and the related Right to a Statement of Reasons for Termination Statute, we recommend that you plan to do so in 2004. The handling of personnel files and responses to requests for access to files or for termination reasons can significantly affect employer liability for employee claims. Employers should also become familiar with the new Employee Reference Statute for additional guidance on which personnel file documents can be disclosed and under what circumstances (see our *LawFax* of July 2004, or call, email, fax or write us for a copy). Following is a summary of the applicability and current requirements of the Personnel File Statute:

I. APPLICABILITY

- A. Employers with one or more employees (except paragraph IV)
- B. Minnesota employees (services performed predominantly within state)
- C. Employees and former employees separated from employment (amended in 2004)
- D. No applicability to independent contractors

II. CLASSIFICATION OF DOCUMENTS CHECKLIST

A. Personnel Records (employee has right to review)

- | | |
|-------------------------------|--|
| 1. Application for employment | 9. Authorization for deduction/withholding |
| 2. Wage/Salary history | 10. Salary and compensation history |
| 3. Fringe benefit information | 11. Employment history, including |
| 4. Notices of commendation | a. Job titles |
| 5. Warnings | b. Dates of status changes |
| 6. Discipline | c. Attendance records |
| 7. Terminations | d. Retirement records |
| 8. Leave records | e. Performance evaluations |

B. Non-Personnel Records (no employee right to review)

- 1. References (written) (but see the new Employee Reference Statute for exceptions).
- 2. Information from investigation of crime or civil law violation/incidents, until employer takes adverse action based upon information, or investigation is complete and either no action will be taken, or criminal proceedings have been exhausted.

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3. Education records under 20 U.S.C. § 1232(g) maintained by institution.
4. Test results (except employee entitled to see cumulative test score).
5. Certain management information:
 - a. salary system,
 - b. staff planning,
 - c. material related to expansion, downsizing, reorganization, job restructuring, future compensation, promotion plans and job assignments
6. Personal information about a person other than employee, if disclosure would be an invasion of the other person's privacy.
7. Information kept by employee's supervisor or other managers, if kept solely by maker.
8. Information which is nondiscoverable in workers' compensation, grievance arbitration, administrative, judicial or quasi judicial proceedings.
9. Co-workers' statements concerning employee's job performance or job related misconduct which disclose the identity of co-worker by name, inference, or otherwise.
10. Medical reports/records.

III. SUMMARY OF EMPLOYEE REVIEW RIGHTS

- A. Once every six months.
- B. After separation, once each year for as long as personnel records are retained (amended in 2004) (which we recommend you retain for six years after separation, longer if relevant to ongoing litigation).
- C. Employer may require written request to review.
- D. If employee makes a written request for a copy of any records, the employer must provide a copy to the employee at no charge within seven working days (fourteen if personnel record is located out of state).

IV. IF THE EMPLOYEE DISPUTES THE RECORDS

- (pertains only to employers with 20 or more employees)*
- A. Employer may remove or revise the disputed records pursuant to an agreement with the employee.
 - B. Employee may submit response (not more than five pages) which must be kept in file with disputed information.
 - C. Employer must provide employee's response, along with disputed record, to any person who receives copy of disputed record (see also the Employee Reference Statute).

There are many legal and practical issues related to employee files which are not fully addressed by the statute. Examples include creation and maintenance of medical, drug testing and worker's compensation records, I-9s, supervisor and investigative files, post-separation documents and references. Other related issues are employer responses to requests for reasons for termination and to factual inquiries or subpoenas of employment records by third parties including prospective employers, government agencies, unions, lawyers and courts. The creation, filing, disclosure and destruction of such documents can create or can limit or avoid employment or labor law liability for the employer, depending on what is done or said. We would be happy to provide a free initial consultation on any of these issues to any employer *LawFax* recipient who has questions about the File Access statute or any of these related issues. Call the author or any of the attorneys listed on this *LawFax* and we'll be happy to help.

Our firm has new digs!!!

We've relocated to the building adjacent to our former office and our new address is:

7300 Metro Boulevard, Suite 500

Minneapolis, MN 55439

Our phone, fax and email remain the same

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How to Protect Yourself as an Employer:

- The New Job Reference Statute
- Defamation Law
- Personnel File Statute Amendment

Reserve a spot at our **August 19, 2004 Breakfast Briefing** by completing & returning the attached reservation form.

Fax, E-mail or "None of the Above?"

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