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Can and Should Employers Purge Personnel Files?

By JoAnn Victor

To purge, or not to purge, that is the question. While employers are usually diligent about keeping the personnel files of current employees, there is sometimes a tendency to dump or delete the files of past employees. This poses a problem in some states, such as Illinois and Wisconsin, where former employees have certain statutory rights to their personnel files. For employers with employees in multiple states, the patchwork of differing laws regarding access to personnel files can be difficult to keep track of, especially where violation of the statute can result in monetary penalties. California, through a recent revision to its statutes, has become the latest state to require employers to keep the files of former employees for a certain period.

Under the recently revised California Labor Code section 1198.5, employers with employees in California are required to retain personnel files of former employees for three years after termination of employment. This contrasts with the requirements of EEOC regulations, which requires that private employers retain such records for one year after an involuntary termination.

But just what constitutes a personnel file? Rather than provide a definitive answer, Section 1198.5 addresses only two types of records - those relating to the employee's performance and those relating to any grievance concerning the employee. Even then, employers are entitled to redact the names of any nonsupervisory employee contained in a personnel file. Further, the requisite record keeping does not apply to a broad range of documents, including records relating to the investigation of a possible criminal offense; reference letters; and ratings, reports, or other records that were obtained before the employee was hired, prepared by identifiable examination members or obtained in connection with a promotional exam.

So what if a former employee leaves his employer on less than favorable terms and decides to file a lawsuit? Section 1198.5 provides that if the lawsuit relates to a "personnel matter," the right of the former employee to inspect or copy his personnel records under the statute ceases during the pendency of the lawsuit in the court with original jurisdiction. However, because a lawsuit relates to a personnel matter if the disgruntled litigant's personnel files are relevant to the litigation, such material may still be requested during the course of discovery and would ordinarily have to be produced regardless of Section 1198.5. Similarly, when a charge of discrimination has been made under Title VII, the ADA, or the Genetic Information Nondiscrimination Act, or where the EEOC has instituted a civil action, the respondent private employer must retain all records related to the charge or action until final disposition of the action or charge. This provision is true of current as well as former employees.

Indeed, by its terms, Section 1198.5 is meant to put both past and present employees on a level playing field for purposes of accessing (or being denied access to) personnel files during the retention period prescribed for those files. This includes minimum standards for the inspection and receipt of personnel records. Requests for access to personnel records may be made via a personal, written request from the former employee or that former employee's representative. After receiving such a request, an employer must make the contents of personnel files available for inspection, or otherwise provide a copy of such records within 30 calendar days of the request, unless the parties agree to a brief extension of time, not to exceed 35 calendar days from the employer's receipt of the request. The requesting party bears the cost of copying, but even then only the actual cost of reproduction.

It is worth noting that the statute also allows employers to prevent former employees who were terminated for violating the law or an employment-related policy involving harassment or workplace violence from reentering the workplace to inspect or copy personnel records. In such cases, the employer may make the records available at a location a "reasonable distance" from the workplace or simply mail the records to the former employee.

The statute further provides that former employees cannot serially request access to their personnel files; they are limited to one request per year. Nevertheless, employers are expected to honor reasonable requests for inspection of personnel files. Failure to comply with the law carries a penalty of \$750. Additionally, injunctive relief and attorney's fees are available if a current or former employee must sue to gain lawful access to personnel files. While there are some exceptions to the applicability to Section 1198.5, employers are now essentially expected to retain the personnel files of past employees for at least three years. During that time, purging of personnel files is prohibited.

In light of the new law, it is important for employers with employees in California to train file managers to retain the personnel files of former employees and to be prepared to provide prompt access to those files.

Ideally, employers should include information about how current and former employees can access such files in both employee material (e.g. employment handbooks) and in the separation materials afforded former employees. The employer's retention policy should also be made current to assure that relevant records are not discarded prematurely. Whether under state or federal law, personnel files, when relevant to on-going litigation, should never be discarded before the litigation is completed.

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