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## The GSH 60-Second Memo

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### "I want to see my file and I want to see it now!" How to Handle Personnel Records Requests

By Julie Tomka, Esq.

It is a typical Tuesday afternoon in the Human Resources Department and the phone rings. "Hi. This is Jane Doe. May I get a copy of my personnel file?" What do you do? Your first thought probably is that she is going to file a complaint or lawsuit against your company. You may be right. However, you should not panic.

The first thing you should do is consult your company's policy manual or handbook. If your company has a policy addressing access to personnel files, and assuming your policy conforms to applicable state law, then you should follow your policy. What should you do if you do not have a policy addressing personnel files? The answer likely lies in your state's laws.

Many states, such as Wisconsin and Iowa, have laws allowing current and former employees access to their own personnel files. For example, Chapter 91B.1 of the Iowa Code provides:

An employee ... shall have access to and shall be permitted to obtain a copy of the employee's personnel file maintained by the employee's employer ... including but not limited to performance evaluations, disciplinary records, and other information concerning employer-employee relations.

(Emphasis added.) The statute goes on to provide that:

1. The employee and employer shall agree on the time the employee may have access;
2. The employee shall not have access to references written for the employee; and

3. The employer may charge a reasonable fee for copies made of items in the file.

Thus, Chapter 91B.1 of the Iowa Code specifically enumerates the items (performance evaluations, disciplinary records, and other information concerning employer-employee relations) that can be viewed by employees and specifically exempts access to employment references.

Similarly, Wisconsin Statutes Section 103.13 states, "Every employer shall, upon the request of an employee, which the employer may require the employee to make in writing, permit the employee to inspect any personnel documents which are used or which have been used in determining that employee's qualifications for employment, promotion, transfer, additional compensation, termination or other disciplinary action, and medical records," subject to certain exceptions. Moreover, employers must grant such requests "at least two times" per calendar year, and must provide the records within seven working days.

Even if your state has a law governing access to personnel records, your company should still address access to personnel records in its policies or handbook and prepare a standard written request form on which to submit the request to review one's personnel file. A written policy setting out the procedure for employees to access their personnel files not only will inform employees of their rights, but it may serve as evidence that the organization has complied with the applicable laws regarding employee access to personnel files.

In general, employees have access to the following types of records pursuant to state laws: their employment application and resume; personnel action forms such as hiring, promotion, or job title changes; performance evaluations (although employees should have received a copy of those when prepared); documents relating to employment eligibility (I-9 etc.); forms relating to tax withholding; attendance records; accident reports; toxic substance exposure records; and documents relating to disciplinary action excluding those prepared for an ongoing investigation. These general guidelines vary by state, and employees are commonly restricted from access to documents prepared for trial, materials relating to an ongoing investigation, the actual employment test taken so it cannot be disclosed to future test takers and business planning documents.

What do you do if a former employee makes a request? As with current employees, you should first check your company's policies and any applicable state law. Next, you should pull the personnel file and read through it carefully. As long as there are no red flags, allowing access to the file may satisfy the former employee's quest for information and may even demonstrate to a Plaintiff's attorney that there is no claim. However, if you find some red flags in your review, withholding the file may be the proper course of action if that option is allowed under state law and your company's policy. You will, however, likely be required to provide the employee with access to their file through discovery after a complaint is filed.

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Although some states, like Iowa, have personnel access statutes that are silent on whether an organization must provide a former employee with access to their personnel file; other states, such as Wisconsin, do allow former employees access to their personnel records. Employers should be aware of the laws of each state in which they have employees to ensure compliance.

If your state does not have a state law specifically addressing access to personnel records, then you are free to choose whether your employees and former employees can access their personnel records outside of litigation. However, as with all company policies, the key is to be consistent in your application of the policy. Inconsistent application of your personnel records access policy will not only raise a red flag for any attorney representing your employees, but it may open your company to other claims and allegations.

In short, employers should plan ahead to avoid problems with personnel record requests. Employers should create a written policy for granting employees access to their personnel files to ensure that the company is in compliance with the law. By outlining the written policy for granting employees access to their personnel file, employers will create an environment where employees are reassured that their employer is treating them in an equitable manner, with no secret documents or hidden files being maintained by the employer. By taking these steps, employers can ensure that regardless of what claims the employee may be planning to file, a violation of the state personnel file access law will not be one of them.

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