A Timely Analysis of Legal Developments

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Effective August 5, 2010, Massachusetts employers are required to notify employees within ten days of placing information in their personnel files that may negatively affect their employment. This obligation creates a significant burden on employers, particularly considering the broad and uncertain definition of a personnel file under the Massachusetts Personnel Records Statute.

Massachusetts Imposes Onerous New Personnel File Requirements

By Adam Forman and Carie Torrence

The 2009-2010 formal session of the Massachusetts Legislature ended with another new law that will affect Massachusetts employers. Governor Deval Patrick signed into law "An Act Relative to Economic Development Reorganization" intended to promote long-term economic recovery by creating jobs, assisting small businesses, and improving infrastructure with the hope of making the Commonwealth more attractive to businesses considering locating or expanding in Massachusetts. The legislation was effective immediately upon the Governor's signing on August 5, 2010. The portion of the legislation receiving the most attention was the recent sales tax holiday. Buried within the text of the legislation, however, is an amendment to the Massachusetts Personnel Records Statute that requires employers to notify an employee within ten days of placing in the employee's personnel file any information that "is, has been used or may be used" to negatively affect an employee. (emphasis added) Ironically, while the legislation as a whole was designed to attract businesses to Massachusetts, this particular amendment makes the Massachusetts Personnel Records Statute the single most onerous legislation of its type in the entire country.

On its face, the amendment seems straightforward and does not appear to create an unreasonable burden on employers. However, given the broad definition of a "personnel record" in the statute, the new notice requirement has far-reaching ramifications. The Massachusetts statute defines a covered "personnel record" to include more than the folders in which employers typically store each employee's offer letter, W-4 forms, payroll information, and performance evaluations. In addition to the foregoing, the statute also defines the following as a "personnel record" that must be collected and stored by the employer: any document that may affect an employee's qualifications for employment, promotion, transfer, or additional compensation, or may lead to disciplinary action. Unfortunately, there is little guidance as to what types of documents fall within the scope of these broad categories, and, thus, must be stored in personnel files.

Given the broad definition of a "personnel record" and the uncertainty as to its scope, employers are faced with the difficult task of identifying what types of documents must be collected and stored in personnel files and thereby trigger the ten-day notice requirement. For some documents, such as formal discipline, this analysis is simple. For many documents, such as informal emails between supervisors and human resources employees, there are no bright line answers as to whether the document "negatively affects" an employee's qualifications for employment, promotion, transfer, or additional compensation, or may lead to disciplinary action. Employers are placed in the unenviable position of having to evaluate documents on a case-by-case basis. After having navigated this issue, employers must now provide notice to employees within ten days of placing any such document in their personnel files. The amendment fails to provide any guidance as to what type of communication will satisfy this notice requirement.

Despite all of this ambiguity, what is clear is that the Massachusetts Personnel Records Statute undermines the confidential nature of communications among and between managers and human resources employees about the status of employees. Managers must now assume when drafting an email about taking adverse action against an employee that: (1) the email will end up in that employee's personnel file; (2) the employee will be alerted as to the existence of that communication; and (3) the employee will request access to his or her personnel file in order to review the document.

The Massachusetts Attorney General is tasked with enforcement of the legislation, and the penalty for noncompliance is a fine ranging between $500 and $2,500 per violation. Although individual employees do not have the right to seek damages for violations of the legislation, employees may have the right to seek a judicial determination of whether or not a particular document falls within the definition of a "personnel record." What remains unanswered is whether and how an adverse finding by the Attorney General's Office can be used by an employee in a subsequent discrimination or wrongful discharge litigation.

The only good news for employers is a new limitation on the number of times an employer is required to permit inspection of an employee's personnel file. While the statute previously contained no limit, the legislation limits such a review to two per calendar year. However, a review requested in response to a notification of negative information does not count as one of the two annual reviews.

Recommendations

The legislation was effective August 5, 2010, so employers should immediately update policies and procedures to ensure employees are notified within ten days when negative information is added to a personnel record. With respect to documents that employees currently sign, such as evaluations, performance improvement plans, and formal discipline, an easy solution to the notice requirement is to add language to the document itself placing the employee on notice that the record will be placed in his or her personnel file. For other documents, such as internal memoranda and emails, employers are encouraged to weigh carefully the likelihood of whether or not the document may affect an employee and evaluate the nature of the document to determine if it is a "personnel record" that triggers the notice requirement. Littler will issue a follow-up ASAP if the Attorney General's Office releases any guidance.

For guidance on two other new state laws to affect Massachusetts employers, see *Workers' Compensation Private Right of Action Bill Creates New Hazards for Massachusetts Employers and Massachusetts Becomes the Second State to "Ban the Box" on All Employment Applications*.

Adam Forman is a Shareholder, and Carie Torrence is an Associate, in Littler Mendelson's Boston office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Forman at aforman@littler.com, or Ms. Torrence at ctorrence@littler.com.