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# Significant, Immediate Changes To Massachusetts Personnel Record Law

On August 5, 2010, Governor Patrick signed into law an economic development bill, *An Act Relative To Economic Development Reorganization*, Chapter 240 of the Acts of 2010. Chapter 240 includes an amendment to the Massachusetts Personnel Record Law, M.G.L. c. 149, § 52C that, among other changes, imposes a new notice requirement on employers. Chapter 240 took effect when signed by the Governor and the changes effected by the amendment to the Personnel Record Law are retroactive to August 1, 2010.

## Required Notification

The Personnel Record Law has been amended to require employers to give notice to an employee within 10 days of placing certain negative information into the employee's personnel record. Specifically, notice to the employee is required "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."

While elsewhere in the same paragraph the Public Record Law requires an employer to provide an employee with access to, or a copy of, the employee's personnel record within "five business days" of the employee's request for same, the notice regarding negative information is required within "10 days," suggesting that the time for giving such notice is 10 calendar days.

The amendment does not require that the notice to the employee be in writing, although employers may want a record of compliance with the notice requirement. In some cases, such as that of a disciplinary warning or a performance evaluation, the notice requirement should be satisfied through the employer's normal procedure of providing a copy of the warning or evaluation to the employee with a notation included on the copy that the original (or another copy) has been forwarded to the employee's personnel file.

## Employee Access Is Limited

The amendment also provides employers with the right to limit the number of times that an employee may review his or her personnel record to "two separate occasions" per calendar year, but qualifies that right by providing that "the notification and review caused by the placing of negative information in the personnel record" cannot be counted against the employee's right to two reviews in a calendar year. As noted above, the statute continues to provide that an employer must permit an employee to review his or her personnel record within five business days of the employee's written request to do so, and that an employee has a right to be given a copy of his or her personnel record within five business days of submitting a written request.

## Penalties For Violations Of The Personnel Record Statute

The statute does not provide employees a right to sue for violations of the Personnel Record Law, but the Attorney General has jurisdiction to enforce the statute. A violation is punishable by a fine of not less than $500 nor more than $2,500 per violation.

## What This Means For Your Organization

The amendment raises uncertainty on a number of significant issues, such as the obligation of an employer to notify an employee of negative information documented during an investigation into misconduct that requires more than ten days to complete, or to notify an employee of a casual email exchange between two managers criticizing an employee's performance. Until there is further guidance from the Attorney General or the courts, we suggest that employers take the steps below and consult with legal counsel with additional questions.

In the short term, employers should promptly notify any employee who has had negative information added to his or her personnel record since July 31, 2010 and has not previously been informed of that addition. More generally, employers should implement a procedure to provide that employees are notified within ten days whenever potentially negative information is added to the employee's personnel record.

Employers should also coordinate with their human resources personnel to develop and implement a standard procedure for adding information to employee personnel files; identifying information that has the potential to negatively impact an employee's employment prospects; and notifying an employee of the inclusion of such information in his or her record. Employers with unionized employees should review their collective bargaining agreements for possible interaction with the new notification requirements.

The critical question raised – but not clearly answered – by the new law is whether every document that meets the broad definition of a "personnel record" (which might well include a preliminary investigatory document, or an informal email between managers) will trigger the notification requirement, or whether the notification duty is triggered *only* upon the employer's "placing" of negative information in the employee's formal "personnel record." There will certainly be those who argue for the broader notification requirement, despite its obviously impractical implications. We believe, however, that strong arguments can be made for the right of employers to limit notification to those instances where a personnel action (e.g., an evaluation, formal discipline, etc.) has achieved a sufficient degree of finality to warrant its inclusion in the employee's actual Human Resources file. At least until further guidance is provided by the Attorney General or the courts, deciding which approach to follow will necessarily require employers to balance the potential for legal risk against the demands of operational efficiency, and different workplace considerations may lead employers to weigh these factors in different ways. Each employer may wish to seek the input of legal counsel in determining the right approach for its own organization.

If you have questions concerning the amendment to the Personnel Record Law or would like assistance developing a new personnel record policy or procedure or updating your current policy or procedure, please contact the Ropes & Gray attorney with whom you regularly work.