

LOONEY & GROSSMAN LLP

Attorneys at Law

101 Arch Street
Boston, Massachusetts 02110
Telephone (617) 951-2800
Facsimile (617) 951-2819
www.lgllp.com

WHAT EMPLOYERS NEED TO KNOW ABOUT THE NEW LAW REGARDING EMPLOYEE PERSONNEL RECORDS



Nancy L. Perlman, Esq.
nperlman@lgllp.com



Elizabeth M. Adler, Esq.
eadler@lgllp.com

By: Nancy L. Perlman, Esq. & Elizabeth M. Adler, Esq.

Deep within a recent economic development bill signed by Governor Deval Patrick is a significant, obligation-creating amendment to the Massachusetts Personnel Records Statute (M.G.L. c. 149 § 52C), of which all employers in Massachusetts need to be aware. No employer is exempt from these requirements, which impact their day-to-day handling of employment matters.

The amended statute, which took effect retroactively as of August 1, 2010, places an affirmative duty on employers to “**notify an employee 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.” (Emphasis supplied.)

The amendment broadly requires employers to notify employees about “any information” placed in the employee’s personnel record that “may” have a negative impact on an employee’s employment. Massachusetts broadly defines the term “personnel record”, and that definition is not limited to the employee’s personnel file. It is thus likely that the notification requirement will apply to negative information kept anywhere by the employer to the extent it has (or could have) an adverse impact on the employee’s status. Information such as negative e-mails between supervisors, or between a supervisor and Personnel/ Human Resources, about an employee would almost certainly prompt notification.

There remain unanswered questions about the interpretation of the amended statute in certain scenarios. The changes have also raised concern that the employment relationship will be unduly agitated by an obligation to notify employees regarding matters that previously would have been an undisclosed file note. We believe that employers ought to take a conservative/protective approach and provide notification

September 2010

Looney & Grossman

Practice Areas:

Bankruptcy & Insolvency
Business
Employment Law
Family Law
Litigation
Professional Liability
Defense & Insurance
Real Estate
Transportation & Maritime
Employee Personnel Records

LOONEY & GROSSMAN LLP

Attorneys at Law

101 Arch Street
Boston, Massachusetts 02110
Telephone (617) 951-2800
Facsimile (617) 951-2819
www.lgllp.com

The changes have also raised concern that the employment relationship will be unduly agitated by an obligation to notify employees regarding matters that previously would have been an undisclosed file note.

whenever possible. **Employers should be mindful, when drafting an e-mail or other documentation about an employee that could be deemed adverse or negative in nature, that the writing will likely be considered a part of the employee's personnel record and that the employee must therefore be given notice of the communication.**

In this new law there is also some employer-friendly news. While employers must still permit employees to review their personnel records within five business days of a written request for review, the new law now limits employees to two such reviews of their file within any given calendar year. A review triggered by any employer's notice that it has placed negative information in the personnel file does not count as one of the two annual reviews.

The Attorney General retains enforcement authority and may fine an employer at least \$500, but not more than \$2,500, for a violation. (Employees have the right to seek a judicial determination of whether a particular document falls within the broad definition of a "personnel record" but do not have the right to seek monetary damages against the employer for violations of the statute.) Further, in the event of a dispute, employees may argue, from an evidentiary standpoint, that an employer's noncompliance with these requirements should result in inadmissibility at trial of negative documents about the employee, documents upon which the employer's legal case may depend.

These developments are relevant to employers of any size, and noncompliance will have adverse impacts.

Looney & Grossman

Practice Areas:

Bankruptcy & Insolvency
Business
Employment Law
Family Law
Litigation
Professional Liability
 Defense & Insurance
Real Estate
Transportation & Maritime

We are here to help. Please contact Nancy Perlman, Esq. at (617) 951-2800 (x505) or Elizabeth Adler, Esq. at (617) 951-2800 (x577) with any questions about this or any other workplace matter.