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New Law Expands Personnel File Inspection and Copying Rights

California law, Labor Code section 1198.5, currently allows employees to inspect their personnel files and receive a copy of any document that was signed by the employee. Now, A.B. 2674, which takes effect on January 1, 2013, expands the right to review personnel files, and creates some new obligations for employers. Here is a summary of the new provisions.

Records Request Procedures

A.B. 2674 specifies that employees, former employees, or a representative designated in writing by the employee or former employee, may request to inspect or receive a copy of personnel records the employer maintains relating to the employee's performance or to any grievance concerning the employee. The request for inspection and/or copies must be in writing. If an employee requests copies, the employer can require the employee to pay the actual copying costs. Note that under prior law, employees could request copies only of personnel documents they had signed.

The new law allows employers to designate an individual to whom requests must be made. Also, employers are required to develop a form for employees to use to make an inspection or copy request. However, employees do not have to use the form as long as their request is in writing.

The right to inspect or obtain copies does not apply to employees covered by a collective bargaining agreement that provides procedures for inspection and copying of personnel records, provided the agreement also provides premium wage rates for all overtime hours worked and a regular rate that is at least 30 percent more than the state minimum wage.

Responding to Requests

Until now, section 1198.5 has required only that employers respond to requests "within a reasonable period of time." The new law, however, imposes strict deadlines and requirements, as follows:

111 SUTTER STREET
SUITE 700
SAN FRANCISCO
CA 94104
415 464 4300 T
415 464 4336 F

12121 WILSHIRE BLVD.
SUITE 1300
LOS ANGELES
CA 90025
310 943 8500 T
310 943 8501 F

- *Current employees*

When the employer receives a written request, the employer must allow the inspection or provide copies, as applicable, no later than 30 calendar days after receipt of the request. The employee and employer can agree to extend this deadline, but only up to five additional days.

The records must be made available for inspection, or a copy of the records must be furnished, at the place where the employee reports to work, unless the employer and employee agree on another location. The employer is not required to make the records available for inspection at a time when the employee is supposed to be working. However, if the employee is required to inspect or receive a copy at a location other than where he or she reports to work, the employee cannot suffer any wage loss for that time.

An employer is not required to comply with more than 50 inspection and/or copy requests filed by a representative of one or more employees during one calendar month.

- *Former employees*

An employer is only required to comply with one request per year from a former employee. The request must be in writing and the employer has 30 calendar days to produce the records for inspection or provide copies, at the location where the employer stores the records unless the parties agree in writing on another location. The former employee can also request a copy by mail, but must pay the actual postage.

If the former employee was terminated for a violation of law or an employment-related policy involving harassment or workplace violence, the employer may comply with the records request either by mailing a copy or making the records available for inspection at a location other than the workplace that is within a reasonable driving distance of the former employee's residence.

An employer may redact the name of any nonsupervisory employee contained in the personnel records before providing them to the employee or former employee.

Furthermore, an employer may take “reasonable steps to verify the identity” of a requestor, although the statute does not specify what amounts to reasonable steps.

If a current or former employee files a lawsuit that relates to a personnel matter, the right to inspect or receive copies ceases while the lawsuit is pending.

Recordkeeping – and Penalties

Employers must retain copies of an employee’s personnel records for at least three years after termination of employment.

Violations of the new law carry a penalty of \$750. In addition, a current or former employee can bring an action for injunctive relief and recover attorney’s fees and costs.

What’s In a “Personnel File”?

Section 1198.5 specifies two categories of records that employers must make available to employees or former employees in personnel files: 1) records relating to an employee’s performance and 2) records relating to any grievance concerning the employee. The California Labor Commissioner has broadly interpreted these categories to include, for example, the employment application, performance reviews, attendance records, and other records that are used to determine an employee’s qualifications for promotion, additional compensation or disciplinary action, including termination.

Section 1198.5 also specifies categories of records that an employee or former employee does *not* have the right to inspect or copy: letters of reference; records that relate to an investigation of a possible criminal offense; ratings, reports or records obtained prior to employment, prepared by examination committee members, or obtained in connection with a promotional examination. Note, too, that other laws specify types of records that should be retained separate from personnel files, such as medical information.

Suggested Compliance Actions

Recommended steps that employers can take to ensure compliance with the revised law by January 1, 2013 include:

- Develop a request form for inspection or copying of personnel records.
- Update employee handbook provisions that cover personnel records.
- Educate human resources and supervisors on the new procedures for responding to requests.
- Designate company representatives responsible for responding to requests, and ensure that all requests go through those individuals.
- Ensure that personnel files contain only appropriate materials, and that human resources and supervisors are aware of what should – and should not – be in personnel files.

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