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What's In YOUR Personnel File? California Greatly Expands Employee Access and Creates Employer Penalties

By Christopher Cobey and Tomomi Glover

In its first change to the state statute on inspection of personnel files since the law was enacted a dozen years ago, the California Legislature passed, and Governor Jerry Brown signed on September 30, a bill that significantly changes the rights of current and former California employees, and the obligations of employers, concerning employees' personnel files. The bill, Assembly Bill (A.B.) 2674,¹ becomes effective January 1, 2013.

California Labor Code section 1198.5 was amended to resemble more closely another statute spelling out employees' rights to review and obtain copies of payroll records, California Labor Code section 226.²

According to legislative committee reports, the bill was sponsored by the California Rural Legal Assistance Foundation, and was supported by the American Federation of State, County, and Municipal Employees, and the California Labor Federation, AFL-CIO.

Employees' New Rights

Former employees: Former employees now have the same rights to inspect and have a copy made of the contents of their personnel files as do current employees.

Until A.B. 2674 was enacted, the right of former employees to inspect their personnel files had been subject to conflicting interpretations. In 2007, a bill was passed allowing former employees the right to review their personnel files. The accompanying legislative committee reports commented that the bill was necessary to resolve the ongoing ambiguity as to the rights of former employees under the statute. Then-Governor Schwarzenegger vetoed the bill.³

Copy: Current and former employees now have the right not only to view the contents of the personnel file, but also to receive a copy of the contents on request, provided they pay the actual cost of copying.

- 1 California's legislative bills, accompanying committee reports, and statutes are available online at www.leginfo.ca.gov.
- 2 A.B. 2674 also amended portions of another statute concerning employees' rights to access, and to obtain copies of, their payroll records (Labor Code section 226). These changes are detailed in Littler's ASAP, *What's New? California's Major 2012 Employment Laws Affecting Private Sector Employers*, which covers 2012 California legislation affecting private sector employers.
- 3 2007-2008 Legislative Session, Assembly Bill (A.B.) 1707

Employee's representative: An employee can designate a representative to conduct the inspection of, or to receive a copy of, the employee's personnel file. The representative must be authorized, in writing, by the employee to inspect, or receive a copy of, his or her personnel records.

No employee compensation loss to inspect: If an employee is required to inspect or receive a copy at a location other than the place where he or she reports to work, no loss of compensation to the employee is permitted because of the time needed for the employee to travel from the site where the employee normally reports to work.

Employers' New Obligations

Creation of an inspection/copy request form: Employers must develop, and provide upon request, a written form employees may use to request access to, and a copy of, records in their personnel file.

Deadline to allow viewing or to produce a copy: Employers are obligated to allow viewing or to produce a copy of the records within 30 calendar days of a written request of a current or former employee, or the employee's representative.

Exceptions to required responses to requests:

- An employer is not required to comply with more than 50 requests for a copy of the records described in this statute (seeking 50 separate employee's records) filed by a representative or representatives of employees in one calendar month.
- An employer is not required to comply with more than one request per year by a former employee to inspect or to receive a copy of his or her personnel file.
- The requirements of the amended statute do not apply with respect to an employee covered by a valid collective bargaining agreement if the agreement provides, among other things, for a procedure for inspection and copying of personnel records.

Penalty for non-compliance: In the event an employer violates these provisions, a current or former employee, or the Labor Commissioner, may recover a penalty of \$750 from the employer. In addition, a current or former employee may obtain injunctive relief and attorneys' fees necessary in asserting these rights.

Retention of personnel files: An employer is required to keep the personnel file records for a period of three years following the termination of an employee's employment.

Verification of identity of person requesting: The statute allows an employer to "take reasonable steps to verify the identity" of a requestor.

The statute does not identify what "reasonable steps" would be for this function. Other statutes and regulations permit identity verification by means of a driver's license or other government identification cards that include a photograph of the bearer.⁴

Employers' New Rights

Employers have the right to redact the names of any non-supervisory employee from the records being copied and produced.

If a former employee seeking to inspect his or her personnel records was terminated for a violation of law, or an employment-related policy, involving harassment or workplace violence, an employer may comply with the request by doing one of the following: (a) making the personnel records available to the former employee for inspection at a location other than the workplace that is within a reasonable driving distance of the former employee's residence; or (b) providing a copy of the personnel records by mail.

Other Exceptions to the Amended Statute

The requirements of the amended statute do not apply to records relating to the investigation of a possible criminal offense or letters of reference. In addition, the requirements do not apply to ratings, reports, or records that were obtained prior to an employee's employment, or prepared by identifiable examination committee members, or obtained in connection with a promotional examination.

⁴ Employers should bear in mind that if they require production of personal information, such as a driver's license or identification card, to verify identity, and then record such information electronically; information from such sources is considered to be "personal information" under California's Information Practices Act. Accordingly, if the electronic data were made available to unauthorized persons, the data breach must be reported to the person whose personal information was compromised. Cal. Civil Code § 1798.82.

The requirements of the amended statute also do not apply to employees who are subject to the Public Safety Officers Procedural Bill of Rights, or employees of agencies subject to the Information Practices Act of 1977.

For an employee covered by a valid collective bargaining agreement (CBA), the requirements of the amended statute do not apply if the agreement expressly provides for all of the following: (a) the wages, hours of work, and working conditions of employees; (b) a procedure for the inspection and copying of personnel records; (c) premium wage rates for all overtime hours worked; and (d) a regular rate of pay of not less than 30 percent more than the state minimum wage rate.

Other Provisions

Under existing section 1198.5, an employer who fails to permit an employee to inspect the employee's personnel records is guilty of a misdemeanor punishable by a fine or imprisonment, as specified.

The amended statute provides that a violation of the provisions requiring that personnel records be made available for inspection is reduced to an infraction, which is a lesser criminal offense than a misdemeanor.

What the New Law Does Not Cover, Address, or Change

Amended section 1198.5 does not define a personnel file, nor indicate what should or should not be included within it.⁵ Other California and federal statutes indicate, for certain categories of records, what documents should be filed separately from an employee's personnel file.

The *scope* of what personnel records must be allowed to be inspected or copied remains unchanged by the new law. Section 1198.5 provides that only two categories of personnel records maintained by a California employer must be produced for inspection, or copying: (1) those "relating to the employee's performance;" and (2) those relating to "any grievance concerning the employee." These categories, however, have been broadly interpreted to include, for example, applications for employment and attendance records.

Recommended Action Items for Employers of California Private Sector Employees

It is recommended that employers:

1. Train all managers on the existence of this new right of current and former employees to request and review a copy of the contents of their personnel files, and the processes by which the organization will channel such requests. Remind them that they must act upon an employee's *verbal* request to inspect the employee's personnel file, or to obtain a copy of the file's contents.
2. Draft a form to be used by employees for requests for inspection and copying under section 1198.5(b)(2)(A)(ii).
3. Understand that if any of their employees are covered by CBAs, requests under the new law may come from union representatives on behalf of union members.
4. Consider providing written notice to affected employees of the name of the person to whom a written inspection request should be submitted.
5. Update employee handbook references to availability of personnel file review.
6. Confirm that appropriate staff know what items should not be in personnel files (e.g., Form I-9s, medical information covered by either the Americans with Disabilities Act or the California Confidentiality of Medical Information Act, letters of reference, EEOC or DFEH complaints or charges, workers' compensation material).
7. If not already in place, consider now adoption and implementation of a recordkeeping policy, to confirm that employment records are kept as long as legally required and, if not needed for other purposes, then appropriately deleted or destroyed.
8. Identify the position (or positions) responsible for responding to the requests within the deadlines given by law. The occupants of these positions should also be instructed on the availability of the optional five-day extension of the inspection/production deadline

⁵ Five California codes use the term "personnel file" a total of 20 times (the Labor Code is not one of the five); however, none of the codes which use the term define it. Likewise, the term "personnel records," although used in several codes, is not defined.

by mutual agreement. For those employees tasked with providing the files for inspection, or a copy of contents of personnel files, train on:

- a. Limits on the number of requests by employees and representatives.
- b. Litigation exception to production/copying.
- c. Categories of documents that may be withheld from production or copying
- d. Site of production for inspection requests (e.g., records' storage location for former employees).
- e. Determining whether the personnel file rights of employees covered by a CBA are governed by the statute, or by the CBA.
- f. Calculating and collecting costs of copying of mailing where necessary.
- g. Option for redaction of names of non-supervisory employees from responsive records before production or copying.

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