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Connecticut Adds Burdensome Requirements to Personnel File Statutes

By George E. O'Brien, Jr.

Connecticut has added several burdensome obligations to state statutes that give employees the right to inspect, copy and rebut their personnel files. At the urging of legal aid lawyers and other employee advocates, the legislature passed Public Act No. 13-176 (the Act) despite strong opposition from organizations representing businesses. The Act amends Connecticut's Personnel Files Act,¹ which has been in effect since 1980. Governor Dannel P. Malloy signed the Act into law on June 21, 2013. The new amendments will take effect on October 1, 2013.

Obligation to Provide a Copy of Disciplinary Action

The Act adds a new requirement to Connecticut law obligating employers to provide employees with copies of certain personnel documents on a "real time" basis. Beginning October 1, 2013, an employer must provide an employee with a copy of "any documentation of any disciplinary action imposed on that employee" within one business day after the date the discipline is imposed.

There is ambiguity in the new law that should concern employers. One interpretation would be that an employer will have to provide only copies of disciplinary documents that it chooses to create (such as a written warning or a suspension notice), with no obligation to create a record of counseling or an oral warning just for the purpose of giving it to the employee. A more extreme interpretation that employee advocates may pursue, however, would be that the duty to provide "any documentation" of a disciplinary action means the employer must provide *all* documents relating to it, including investigation notes, witness statements and the like. The latter approach could threaten to expose witnesses to harassment, spawn internal disputes about otherwise routine matters, and prejudice the employer in future grievances, arbitrations, administrative proceedings and litigation.

Employees challenging discipline or discharge decisions may also argue that their employer should be foreclosed from introducing as evidence in any proceeding involving the discipline or discharge any document that the employer did not provide to the employee within a day of the action. There is no indication in the analysis of the bill prepared by Connecticut's Office of Legislative Research that the amendments were intended to have such a radical effect, but a legal aid lawyer who

¹ Conn. Gen. Stat. §§31-128a to 31-128h.

testified in favor of the Act asserted that it is designed to help employees “effectively advocate for unemployment compensation, respond to groundless discipline or a discharge notice, or withstand a challenge by employers to discrimination complaints.” Employers should monitor carefully how the Connecticut Department of Labor, which enforces the Personnel Files Act, will interpret this new obligation.

Obligation to Provide a Copy of Termination Notice

The Act will also require that an employer “immediately provide” an employee with a copy of “any documented notice of that employee’s termination of employment.” This new language does not expressly require preparation of a written notice of termination, and does not appear to have the same potential for ambiguous reading as the language about discipline decisions.

Obligation to Provide Notice of Right to Submit Rebuttal

Since 1980, the Personnel Files Act has provided employees with the right to ask for removal or correction of information in their personnel files and, if the employer refuses the request, to submit a written statement explaining the employee’s position. The employer must maintain the statement in the employee’s personnel file and include it in “any transmittal or disclosure from the personnel file to a third party.” Proponents of the bill told the legislative committee that workers often have no knowledge of this right. The Act will now require employers to *include in every documented disciplinary action, notice of termination and performance evaluation* a statement in “clear and conspicuous language” that if the employee disagrees with any of the information in the document, the employee may submit a written statement explaining his or her position.

Time Limits for Inspection and Copying

Since its enactment, the Personnel Files Act has required employers to permit a current or former employee to inspect the employee’s personnel file “within a reasonable time” after receipt of a written request. The Act modifies this obligation by providing current employees with a right to inspect within seven business days of their request and an accompanying right to copy the file at the time of the inspection. Former employees will have a right to inspect within 10 business days of their written request, provided that the employer receives the request within one year of the employee’s departure.

Place of Inspection

The Personnel Files Act already requires that inspection and copying by current employees take place at or reasonably near the employer’s place of employment. The Act adds a new twist in requiring that inspection by former employees take place at a “mutually agreed upon” location. If the employer and former employee “cannot agree” on a location, the employer is to mail a copy of the personnel file to the former employee within 10 days of receiving the written request. This may ultimately provide a means through which a former employee, by refusing to agree on a place for inspection, can obtain a free copy of the personnel file despite another provision of the Personnel Files Act that allows an employer to charge a reasonable fee for copies.

Penalties Adjusted

The Act provides the Connecticut Labor Department with some flexibility and discretion when imposing civil penalties for violations of the Personnel Files Act, as amended. The law currently makes an employer, officer, agent or other person who violates the Act subject to a civil penalty of \$500 for the first violation “related to an individual employee” and \$1,000 for each subsequent violation related to such individual employee.” The Act amends this provision to empower the Labor Department to impose civil penalties *up to* \$500 for a first violation and *up to* \$1,000 for subsequent violations. In setting the amount of civil penalties, the Labor Commissioner is to consider all factors the Commissioner deems relevant, including “the level of assessment necessary to insure [sic] immediate and continued compliance,” “the character and degree of impact of the violation” and any prior violations by the employer. These civil penalties will apply with equal force to all violations of the Personnel Files Act, as amended, including the new requirements to provide copies of disciplinary documents and termination notices and to include a notice of rebuttal rights in all disciplinary, termination and performance evaluation documents.

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