

CLIENT ALERT: Massachusetts Law Requires Employers to Notify Employees When Adding Negative Information to Personnel Records

On August 6, 2010, Governor Deval L. Patrick signed into law an economic development bill that was reported as promoting job creation, streamlining the state's economic development efforts, and creating a state sales tax holiday on August 14 and 15, 2010. The Bill (Chapter 240 of the Acts of 2010) also contains a provision that will directly impact how employers maintain personnel records in Massachusetts.

The Bill's amendment to the personnel records statute, Mass. General Laws. ch. 149, § 52C (the "Personnel Records Statute") requires employers to modify their policies on personnel records and notify employees when information is added to the file. The Bill requires an employer to notify an employee within 10 days of the employer placing in the personnel record any information that 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. This addition places the burden on the employer to notify an employee whenever any negative information is placed in his or her file. Although less clear from the text of the Bill, it appears to provide the employee with the right to review such information. Employers should continue to note that the Personnel Records Statute also contains a mechanism whereby employees may dispute information in the personnel record, and the Bill does not change that procedure.

In addition, prior to the Bill, the Personnel Records Statute provided that upon request, an employer was required to provide the employee with an opportunity to review his/her personnel record or deliver a copy of the personnel record within five business days of a request. The Bill does not disturb this five-day requirement, but now adds that an employer need not allow an employee to review his/her personnel record more than twice in a calendar year. An employee's review of newly added negative information (after being informed of the inclusion of any negative information placed in the file) does not count towards the twice per year limit.

While it often is the best practice to inform employees when adding information, such as disciplinary actions or investigation results, to their personnel files, this new law makes it mandatory to alert them when this happens. Moreover, the Bill, as written, takes a very expansive view of what information must be disclosed to employees, since the Bill's mandatory disclosures include any information that "may be used" to negatively impact an employee, including the "possibility" of disciplinary action. As with any new law, it will take time for Courts to interpret the language and clearly set forth the rights of employees and employers with respect to personnel records. Nonetheless, going forward, employers in Massachusetts should notify employees of the inclusion of negative information and provide employees with an opportunity to review that information.

Employers are encouraged to consult with their MBJ attorney if they have any questions concerning this new requirement or the maintenance of personnel records generally.

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