# Chapter 9, Part I

# THE MASSACHUSETTS PERSONNEL RECORDS STATUTE

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Note: Updated for the 2010 Supplement by Robert G. Young, Esq., of Edwards Angell Palmer & Dodge LLP, Boston.

### Scope Note

This chapter addresses handling personnel records. The first part of the chapter provides an overview of the Massachusetts personnel records statute, G.L. c. 149, § 52C—setting forth its requirements, applicable fines, questions regarding its application, and certain additional requirements applicable to employers of twenty or more employees. The second part of the chapter addresses challenges in records management and suggests strategies for developing effective records management policies. Sample inventory and retention forms are attached as exhibits, as well as an advisory on G.L. c. 93H and 93I, Massachusetts' data security law.

## § 9.1 OVERVIEW OF THE STATUTE

Originally enacted in 1986, the Massachusetts personnel records statute, G.L. c. 149, § 52C, requires Massachusetts employers to provide an employee or former employee, upon written request, with his or her "personnel record," which the statute broadly defines as a record that identifies an employee "to the extent that the record is used, has been used, may affect or be used relative to that employee's qualifications for employment, promotion, transfer, additional compensation or disciplinary action."

The legislature's first major revision of the Act was 1992 Mass. Acts c. 284, which became effective on March 23, 1993. The pre-1993 provisions, along with newly enhanced criminal fines, still apply to all employers in Massachusetts. As a result of the 1993 amendments, additional substantive provisions apply to em-

ployers with twenty or more (full- or part-time) employees, provisions intended to institutionalize the retention, content, and disclosure of employee files and documents. The statute was subsequently amended to include a five-day time limit to respond to requests for personnel files. *See* 1998 Mass. Acts c. 231.

Because there have been no reported cases relating to the original statute, there has been considerable inconsistency in how employers implement the statute and widespread misunderstanding and disagreement as to what information must be kept by employers and supplied to employees who request their records. The amendment also contains some internally conflicting language about record retention, which may further complicate compliance in the future.

Under the original statute, an employer must provide an employee, upon written request, with an opportunity to review his or her personnel records at the place of employment during normal business hours, as well as a copy of his or her personnel record. The definition of "employee" exempts people with tenured, tenure-track, or similar positions with "private institutions of higher learning."

In some cases, the "personnel record" comprises more than what is contained in the official personnel file. Because the definition of "personnel record" is so expansive, relevant company documents maintained outside of the official personnel file (such as a performance evaluation or a record of discipline located in a separate supervisor's file) may be subject to disclosure.

The original statute also gives employees the right to explain or rebut disputed information, and their rebuttal has to be transmitted to third parties along with the disputed information. General Laws c. 149, § 52C further provides a right of action "through . . . the judicial process" to have false information expunged. Since this relief may be viewed as an equitable remedy, it appears to be within the jurisdiction of the Superior Court.

Using the Massachusetts personnel records act, present or former employees may request whatever documents were used to evaluate, investigate, or discipline them. Employees may seek notes, internal memos, letters, or other records in various files. Under the statute, a request is sometimes used as a prelitigation discovery tool by employees to obtain documents that will aid them in the evaluation of potential claims against their employer. The company must then locate or assemble what does or does not constitute the "personnel record," often asking its counsel about what should be or must be produced.

In some instances, this information is then released by the company under the statute. Other employers, however, resist producing some or all of the documentation on confidentiality or privacy grounds, or on a claim of attorney-client, work product, or other privilege. The statute precludes the dissemination of informa-

tion "of a personal nature" about someone other than the employee "if disclosure of the information would constitute a clearly unwarranted invasion of such other person's privacy." The balance between the employee's right to obtain adverse information under the personnel records act, the privacy rights of others, and the company's rights to protect confidential or privileged material has yet to be struck.

In another context, one court has ruled that complaints of sexual harassment are not confidential under Title VII. *Whitaker v. Carney*, 778 F.2d 216, 220 (5th Cir. 1985). Discovery was denied, on work product and other grounds, of witness interview notes taken by a city attorney in a sexual harassment case after an MCAD complaint was filed. *Sarabia-Boudreau v. City of Beverly*, No. 90-13098-H, Memorandum and Order on Defendant's Motion for Protective Order (Collings, U.S.M.J.) (D. Mass. Aug. 24, 1992) (Mass. Law. Wkly. No. 05-044-92).

General Laws c. 149, § 52C is not expected to overcome common law or statutory privileges such as these. Rather, each request that potentially involves such information should be evaluated individually.

## § 9.2 FINES AND OTHER REQUIREMENTS

The 1993 amendments to G.L. c. 149, § 52C increased the old, rather nominal fines of $50–$200 to $500–$2,500. These fines apply to all employers, regardless of the number of their employees. Enforcement powers are granted to the Attorney General's office, which replaced the Department of Labor and Industries (DLI).

**Practice Note**

Reportedly, the DLI had been in the process of drafting materials interpreting the statute, and some of what followed reflected that agency's interpretation of the statute.

The DLI previously took the position that identifiable documents specifically used or relied upon to evaluate or discipline an employee, but kept in a separate supervisor's file, probably are to be disclosed upon request. However, if the documents are of a routine nature, such as a supervisor's file or notes on attendance, they need not be disclosed. To the extent the employee is aware of or has been shown such documents (regardless of the file in which they are contained), the DLI had indicated that they may have to be produced.

In 2004, the Appeals Court decided that individual employees do not have the right to seek damages for violations of G.L. c. 149, § 52C, nor can they seek a judicial order directing the attorney general to impose a fine for a company that violates the statute. *See Kessler v. Cambridge Health Alliance*, 62 Mass. App.

Ct. 589 (2004). As the court noted, G.L. c. 149, § 52C vests the Attorney General's Office with the sole authority to enforce the statute.

However, the *Kessler* court decided that individual employees do have the right to seek a judicial determination of whether a document falls within the definition of a "personnel record." The court found that this right was ancillary to the employee's right to correct or expunge information within a personnel record, as provided by G.L. c. 149, § 52C.

Requirements have been imposed regarding the form of personnel records. Presumably intended to minimize alteration of documents, the statute now requires that a record "shall be maintained in typewritten or printed form or may be handwritten in indelible ink." However, the employer and employee may agree to the removal of information "for any reason," regardless of whether it is false or incorrect.

## § 9.3 EMPLOYERS WITH TWENTY OR MORE EMPLOYEES

General Laws c. 149, § 52C, as amended by Chapter 284 of the Acts of 1992, enumerates specific types of written information or documents that must be contained in personnel records "to the extent prepared by an employer of twenty or more employees":

- name, address, and date of birth;
- job application;
- résumés "or other forms of employment inquiries submitted to the employer in response to his advertisement";
- job title and description;
- compensation;
- starting date;
- lists of probationary periods;
- performance evaluations;
- written warnings of substandard performance;
- any other documents relating to disciplinary action;

- dated termination notices; and
- waivers signed by employees.

This list, the statute states, is not intended to limit "the applicability or generality" of what otherwise should be included in the "personnel record." The DLI reported that, in one case, it demanded and obtained a videotape regarding an employee's performance as part of a compliance request.

The statute requires inclusion of information only "to the extent prepared by an employer." It mandates no affirmative duty to create such documents, only to maintain (and supply) those that have been prepared. For instance, smaller employers often do not maintain formal job title or job description documents or use form evaluations or written warnings.

An employer need not start preparing such documents, but ought to be consistent about the routine gathering and storing of the required documents it does have. Job titles and descriptions, for instance, are increasingly written down (or at least they should be) with an eye toward Americans with Disabilities Act (ADA) issues, such as the "essential functions of the job." Under the Massachusetts personnel records statute, an employer of twenty or more employees cannot delete or expunge any information until at least three years after the employee leaves. Documents may be stored in a computer format, but the DLI suggested that all handwritten notations or draft versions should also be maintained.

If the employee brings a lawsuit or administrative complaint, "relevant" documents must be retained, according to G.L. c. 149, § 52C, throughout the duration and until final disposition of the matter. This prohibition is not easy to reconcile with the broad date-removal provisions discussed in § 9.1, above. Even though an employer should—and perhaps must—remove or redact incorrect, false, or defamatory information from a personnel record, any "removed" information should not be destroyed but instead stored in a separate confidential file (perhaps with the company's counsel) to be produced later, if necessary.

Any written personnel policies the employer "elects to have" regarding the terms and conditions of employment, and all future amendments to these records, must be "maintained" at the office where personnel matters are administered. Because this provision is likely (and indeed may be intended) to increase employee access and awareness of company policy, employers should review those policies to be sure they comport with current state and federal laws. Management and human resources personnel may need training in consistently identifying, processing, and retaining the proper information, as well as in responding to requests for records.

**Practice Note**

An awareness of these requirements may bring to light deficiencies in employee recordkeeping. A lack or inconsistency of documentation of oral or written warnings is frequently seized upon as evidence by plaintiffs in termination or discipline cases to suggest the absence of cause for dismissal, condonation of past conduct, or failure by the employer to follow personnel policies on discharge. Conversely, an awareness of these defects is sometimes a basis for an employer to reconsider its adverse personnel action. Detailed and well-documented disciplinary or termination memoranda sometimes dissuade potential plaintiff-employees from proceeding with complaints or lawsuits, and ultimately save considerable effort and expense on all the parties' behalf.

"After-acquired evidence," such as errors, misrepresentations, or fraud, discovered after hire on employment applications, résumés, or related materials, may be discovered and has been used to provide a limited defense for employment discrimination and for other purposes. *See McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995) (after-acquired evidence no bar to liability, but may affect remedy). Using after-acquired evidence, the employer may assert (and the employee may contest) that it would not have hired (or would have fired) the employee in the first place if it had known of the worker's inadequate credentials, misrepresentations, or misconduct, and thus contend that the suit should be barred or the damages limited. *See generally* William S. Waldo & Rosemary A. Mahar, "Lost Cause and Found Defense: Using Evidence Discovered After an Employee's Discharge to Bar Discrimination Claims," 9 *Lab. Law.* 31 (1993); Robert J. Gregory, "The Use of After-Acquired Evidence in Employment Discrimination Cases: Should the Guilty Employer Go Free?," 9 *Lab. Law.* 43 (1993) (a mock trial sponsored by MCLE where a videotaped debating "jury" in an ADA case reflected the potential importance of such evidence on credibility issues).

## § 9.4 QUESTIONABLE AREAS

The Massachusetts personnel records statute does not specifically address a number of areas, leaving many questions unanswered, including those listed below.

- To what extent will the statute apply or be enforced regarding personnel records maintained outside of Massachusetts, to Massachusetts employers with employees working outside of Massachusetts, and to non-Massachusetts employers with fewer than twenty employees in Massachusetts?

- Do items such as drafts of documents stored in or generated by computer, electronic messages, videotapes, audiotapes, or photographs constitute "personnel records"?
- What factors should be considered in determining whether to release documents produced in the course of a "confidential" investigation of complaints or allegations by coworkers?
- How are collective bargaining agreements, requiring the expungement of disciplinary notices after a period of time, to be reconciled with the personnel records statute's record-retention requirements?

Although few employees, standing alone, are likely to litigate such issues, these contentions may start to arise in the context of Massachusetts employment cases. The threat of a criminal complaint will be a source of constant tension between employers and employees, and the attorney general's office and the courts will increasingly be called on to settle these issues.