

EMPLOYER LAW BLOG

Personnel Records 101

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By Courtney Cox

Cox, C. An employee (or former employee) wants to see their personnel records. Now what? First step – read the Illinois Personnel Records Review Act (before the employee makes the request). It is found at 805 ILCS 40.

Here are some highlights of that Act.

Who can ask?

- A current employee
- A former employee who is subject to recall after a layoff
- A former employee on a leave of absence with a right to return to work
- A former employee who was terminated within the preceding year

Does this apply to all employers?

Short answer – pretty much.

- An individual, corporation or partnership
- A labor organization
- An unincorporated association
- The State or an agency or political subdivision of the State
- Any other legal, business or commercial entity with 5 or more employees other than immediate family members.

Can I require the employee to make the request on a written form supplied by you?

Yes.

What records do I have to provide?

- Records which have been, or intended to be, used in determining the employee's qualification for –
- Employment
- Promotion
- Transfer
- Additional compensation
- Discharge
- Other disciplinary action

- There are exceptions-
- Letters of reference and peer review documents for academic employees of institutions of higher learning
- Any portion of a test document – but the employee can see the test scores
- Materials relating to staff planning if the documents relate to more than 1 employee
- Information of a personal nature about someone other than the requesting employee
- The employer does not keep personnel records
- Records relevant to a pending claim by the employee which can be discovered in a judicial proceeding
- Investigations of criminal conduct by an employee
- NOTE – performance evaluations are not subject to the Freedom of Information Act

How often can the employee request records?

Twice within the calendar year when made at reasonable intervals, unless otherwise provided under a collective bargaining agreement.

How long do I have to comply with the request?

You have to let the employee inspect the records within 7 days after the request is made (this is why it's good to use a request form, to keep track of when the request was made).

If you can show that this deadline cannot be met you can have an additional 7 days.

Where and when should the inspection take place?

...at a location reasonably near the employee's place of employment, during normal working hours.

You can allow a time and place that is more convenient for the employee.

Who has to conduct the inspection?

The employee who is involved in a current grievance can designate a representative in writing to inspect records which may have a bearing on the grievance, unless the records are subject to an exception.

NOTE – You cannot disclose a disciplinary action to a third party or a party not a part of your organization or to a party who is not a part of the employee's collective bargaining unit without providing notice to the employee as provided in the Act.

This notice requirement does not apply if the employee has signed a waiver, the employer is ordered to do so in a legal proceeding or arbitration, is requested by a government agency regarding the claim of an employee, or is part of a criminal investigation.

Before releasing records to a third party, you must remove disciplinary actions that are more than 4 years old. This does not apply to production ordered in a legal proceeding or arbitration.

What about copies?

You have the choice to mail the records to the employee if you wish.

If the employee inspects the documents and wants copies, you must provide a copy of the requested documents.

You can charge for the actual cost of copying the documents.

What can I not include in the personnel file?

You cannot gather or keep a record of the employee's –

- Associations
- Political activities
- Publications
- Communications
- Non-employment activities

...unless the employee authorizes you to do so in writing.

NOTE – This does not apply to activities that occur on your premises during the employee's work hours that interfere with employee's duties or the duties of other employees, if the activity is criminal or could reasonably be expected to harm your property, operations, business or could cause financial liability.

DCFS - You cannot keep a record identifying an employee as the subject of a DCFS investigation IF the investigation resulted in an unfounded report. If you get a notice the report is unfounded you have to show the notice to the employee.

What if I don't keep a record I am supposed to keep?

If you don't keep a record in the personnel file that you are supposed to keep (see above) you cannot use the document in a legal or quasi-legal proceeding, unless you can convince the judge the omission was unintentional and the employee is given a reasonable time to review the document.

What if I don't comply?

The employee can file a complaint with the Department of Labor, which can investigate and obtain a search warrant or subpoena to inspect the records. The Department can file a complaint in circuit court to obtain compliance in the county where the employee is employed or where the file is maintained.

The employee also has the right to file a complaint in circuit court if the Department's efforts have failed and the Department has not filed suit.

The employee may be awarded actual damages and costs and if the violation is willful and knowing, can be awarded \$200, plus costs, reasonable attorney fees and actual damages.

In addition you can be found guilty of a petty offense.

Retaliation for complaining?

You cannot discharge or otherwise discriminate against an employee for making a complaint to you or the Department, or because the employee has, or is about to initiate legal action against you. Employees who have, or are about to, testify in a proceeding are also protected. Such retaliation is a petty offense.