

### **EMPLOYEE RECORDS: KEY STATE LAWS FOR DISCLOSURE**

As an employer, it is in your best interest to be sure that you have an accurate and complete record of your employees' history with your organization. Documentation of an employee's hiring, compensation, performance and discipline all provide valuable information for making personnel decisions, as well as support for past decisions. At the same time, an employee is likely to be concerned about what is in their employee record and who has access to it. Questions may arise in a number of situations, but are most common when a current or former employee wishes to see their own personnel record, or when a prospective employer seeks information about a former employee.

There are a number of state and federal laws addressing these issues. In Michigan, both the Bullard-Plawecki Employee Right to Know Act (commonly known as the "Right-to-Know Act") and Act 90 of 1996 (Disclosure of Employee Job Performance) govern your obligations as an employer.

#### **What's Considered Part of the Personnel Record?**

Under the Right-to-Know Act, a personnel record is any record kept by an employer that identifies a specific employee and is used to determine whether that employee is hired, promoted, transferred, has a change of compensation or is subject to some form of discipline. It includes all types of records, such as standard forms, handwritten notes and supplemental documents of all kinds. The format doesn't make a difference, nor does the source of the information.

If there is a disagreement between the employee and employer about information in the personnel record, the employee is entitled to submit a written statement explaining their position. This written statement is considered part of the personnel record, and must be included for as long as the disputed information is part of the record.

The definition of personnel records doesn't include certain information, such as the following:

- Employee references that were given to an employer, if the identity of the reference-givers are disclosed.
- Materials that relate to overall staff planning, not just one employee.
- Medical reports or records, if the employee could get copies of the documents from the doctor or medical facility who produced them.
- Personal information about someone other than the employee, if disclosing that information would be an invasion of the other person's privacy (this is most common if there have been conflicts or harassment in the workplace).
- Information regarding an investigation of criminal or other wrong-doing that could result in a loss to the employer. This exception is only valid if the information is kept in a separate file.

While there are other exceptions, these are the most common. In each case, they are not considered part of the employee's personnel record, and are not subject to the same rules regarding disclosure requirements.

# Legal Lines

## Legal Issues for Nonprofits

It is important to remember that there are certain types of information that cannot be included in a personnel record. For instance, an employer cannot keep a record of an employee's political activities, associations, or other activities that are unrelated to their employment, unless the activities occur during work-hours, or on the premises, or affect the employee's performance. Other information, such as federal I-9 forms, must be stored separately.

### **What Can the Employee See?**

The Right-to-Know Act gives the employee (or a former employee) the right to periodically review the employee's personnel record. The employee must submit a written request, and may review the record in person. Following an in-person review (or if the employee cannot review the records in person), the employee may request a copy of the information. The employer may charge a fee for copying the record. Failure to let the employee review their personnel record can result in a lawsuit, with damages up to \$200 plus costs, attorney's fees and damages.

### **What Can Other People See?**

In most circumstances, an employer cannot disclose a disciplinary report, letter or reprimand or other disciplinary action to anyone outside of the employer's organization, unless written notice is provided to the employee either at the time of or before disclosure (again, this includes former employees). The employer does not have to give written notice if the employee has specifically waived the right to notice (commonly done as part of employment applications), if the records are being disclosed as part of a legal action, or if the information is being requested by a government agency as part of a claim filed by the employee. Any records of disciplinary action that are more than 4 years old must be deleted entirely from the personnel record before sharing the records with a third party, unless the record is being released as a part of a legal proceeding.

### **What About Liability?**

A common question for employers is that of liability for the content of a personnel record. Particularly when a current or former employer is disclosing information to a prospective employer, there may be a fear of a civil lawsuit. If the former employee doesn't get the job because of something the former employer shared during a reference check, or if the employee doesn't live up to the expectations of the new employer, the former employer may find themselves facing a lawsuit. Because of these fears, many employers hesitate to share more than name, dates of employment and salary levels.

Upon request of an employee or a prospective employer, the Michigan laws of Disclosure of Employee Job Performance allow an employer to share job performance information from an employee's personnel file with a prospective employer. So long as the employer discloses this information in good faith, they are immune from civil liability resulting from the disclosure. "Good faith" is presumed, unless the employer knows that the information is false or misleading, or the employer showed reckless disregard for the truth, or if the disclosure is otherwise prohibited by federal or state laws.

While there are other laws regarding personnel records and their disclosure, the Right-to-Know Act and the Michigan laws on Disclosure of Employee Job Performance answer some of the most common questions that



# Legal Lines

## Legal Issues for Nonprofits

nonprofit organizations encounter. Complying with these laws is the first step your organization should take when these questions arise.

*This publication is intended to provide general information, and is not a substitute for legal advice.  
If you have additional questions about this issue, contact Community Legal Resources at 313/964-4130.*

*Community Legal Resources  
220 Bagley · Suite 900 · Detroit · Michigan · 48226-1498  
Phone: 313/964-4130 · Fax: 313/964-1192*

© 2003 Community Legal Resources