BULLARD-PLAWECKI EMPLOYEE RIGHT TO KNOW ACT: MANAGING RISK WHEN PRODUCING A PERSONNEL FILE

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I. BULLARD-PLAWECKI EMPLOYEE RIGHT TO KNOW ACT (MCL 423.501 – 512) ("The Act")

A. This Act permits employees to review personnel records; to provide criteria for the review; to prescribe the information which may be contained in personal records; and to provide penalties for non-compliance with the Act.

B. What is a "Personnel Record" under the Act?

1. "Personnel Record" is defined as a record kept by the employer that identifies the employee, *to the extent that the record is used or has been used, or may affect or be used relative to that employee's qualifications for employment, promotion, transfer, additional compensation, or disciplinary action*. A personnel record also includes a record in the possession of a person, corporation, partnership or other association who has a contractual agreement with the employer to keep or supply a personnel record as provided in this subdivision.

2. Just as in life, there are exceptions to the Personnel Record, which include the following:

a. References on documents found within the file that identify the person making the reference. Said another way, the star of the personnel file is the employee (and not his/her manager and/or employer's hiring staff).

b. Staff planning with respect to more than one employee (*i.e.* salary, bonus, promotions, assignments).

c. Staff medical reports or records made or obtained by employer if record is available to employee from doctor or medical facility involved.

d. Personal information about person other than employee should it constitute clearly unwarranted invasion of other person's privacy.

e. Investigation records must also be excluded as a personnel record because when an employer has reasonable cause to believe that an employee is engaged in criminal activity which may result in loss or damage to the employer's property or disruption of the employer's business operation, and the employer's property or disruption of the employer's business operation, and the employer is engaged in an investigation, then the employer may keep a separate file of information relating to the investigation separate from that of the personnel file. Of note, upon completion of the investigation *or* after 2 years, whichever comes first, the employee shall be notified that an investigation was or is being conducted of the suspected criminal activity described in this section. Upon completion of the investigation, if disciplinary action is not taken, the investigative file and all copies of the material in it must be destroyed.

f. Grievance investigations not used for the purpose of personnel record.

g. Records kept by executive, administrative, or professional employees that are kept in sole possession of the maker of the record and not accessible or shared with others. Such a document may be entered into the personnel record if more than six (6) months after date of occurrence or fact about an employee becomes known.

h. An employer shall not gather and keep records of an employee's associations, political activities, publications or communications of non-employment activities, except if the information is submitted by, or authorized to be kept or gathered, in writing by the employee.

C. The ABCs of producing the personnel record to the employee based on Frequently Asked Questions from our clients.

1. The employee may request a copy of the employee record no more than two times in a calendar year or as otherwise required by law or a collective bargaining agreement. The record must be produced at a location reasonably near place of employment and during normal office hours.

2. The employee may obtain a copy, however, the employer may charge a fee for a copy. (The charge is limited to incremental cost of duplicating the record.)

3. The employee may request that the file be mailed, upon a showing that the employee is unable to review it at the employer.

4. An employer may not divulge a disciplinary report/reprimand to a third party (such as a new prospective employer, spouse, newspaper, etc.) without providing written notice to the

employee (mailed on or before the day divulged), unless the employee waived written notice by agreement or disclosure ordered by legal action or arbitration to party in action or arbitration. This goes beyond providing copies of the employee file but statements made by the employer's representatives can be actionable (*i.e.*, comments to a newspaper about an employee's termination).

5. Unless required by legal action or arbitration, an employer must delete disciplinary action information more than 4 years old prior to production.

D. Consequences of violation of the Act. (MCH 423.511)

1. Violations of the Act result in an employer being responsible for the payment of its employee's actual damages plus costs.

2. Willful and knowing violations of the Act by an employer result in a penalty of $200.00 to the employer, in addition to reasonable attorney's fees and actual damages.

II. <u>RESOLVING DISAGREEMENTS WITHIN PERSONNEL RECORD</u>

A. It is not uncommon to have disagreements between the employer/employee regarding certain information within the personnel record. Although an employer should consult with counsel, some general suggestions to address recurring, basic issues relating to contested information include:

1. Remove or correct the subject information or document upon mutual written agreement between the employer and employee.

2. If the parties cannot reach an agreement, an employee may submit a written statement explaining the employee's position, not to exceed five (5) pages (8.5 x 11). The employer must

include the employee's position statement upon request if the original information/document that was contested remains in the file.

B. False information in personnel record that was placed knowingly, by employer or employee, can only be expunged via legal action.

III. HOW COURTS MAY ADDRESS "PAPERING" PERSONNEL FILES CREATED POST-TERIMINATION.

A. Papering a personnel file after an employee files a charge or engages in other protected activity could be enough to establish a prima facie case of retaliation (*i.e*., by soliciting feedback from employees – even when known that everyone has problems with employee). *Upshaw v. Ford Motor Co.* (8/14/09; 6th Circuit Court of Appeals)

B. Courts have been skeptical to find an honest belief of the employer in a legitimate business reason for post-termination inclusions in the employee's file particularly when any incidents or concerns were not timely documented or the documents created post-termination.

1. A*bdulnour v. Campbell Soup Supply Company, LLC* (7/25/07 – 6th Circuit Court of Appeals). In that case, Defendant did not tell Plaintiff he was being fired for poor performance, but rather told him that his termination was the result of an unspecified "personality conflict." While the law does not specifically require an employer to list every reason or incident that motivates its decision to terminate an employee, courts are skeptical of undocumented accounts of employee conduct when those documents may have been created post-termination. Under the facts of this case, however, ample evidence existed that indicated that Plaintiff's performance was inadequate to meet his job requirements.