

WHAT TO INCLUDE (AND EXCLUDE) IN YOUR EMPLOYEES' PERSONNEL FILES

During the month of April, our columns will be focusing on issues of employee privacy. Privacy has become a very hot topic in workplace litigation, and we wanted to give readers some information about this volatile and ever-evolving legal arena. This subject will be covered through four separate columns: Personnel files, employee references, workplace searches, and drug testing.

Personnel Files

Q.I have heard so many different things about what should and shouldn't be in a personnel file. Could someone please tell me what the law actually says?

A. Your bewilderment is understandable; there are many conflicting ideas about this subject. Part of the uncertainty is that there is no law that actually requires employers to create or maintain personnel files (although almost all employers appear to do so, and for good reason). However, federal and state laws require that if an employer does keep personnel files, any medical information regarding an employee must be kept out of the employee's file and in a separate, secure location.

In addition, although not technically required, it is wise to keep I-9 Forms out of personnel files, as they often contain personal information about the employee. In addition, if an employer is audited by the U.S. Citizen and Immigration Service (formally the Immigration and Naturalization Service), it is far better to be able to just give the inspectors one file with all of the I-9 Forms, rather than having them rummage through each employee's personnel file.

So what should be in the personnel file? Employers should only include information directly related to employment, such as the individual's application, job description, hiring documents, performance appraisals, written warnings, termination notices, etc. Conversely, employers should exclude information related to personal characteristics (such as age, race, religion, etc). Also excluded should be unsubstantiated information and rumors or gossip. While this may seem obvious, some employers have been unpleasantly surprised to find that this kind of information has inadvertently slipped into an employee's personnel file (through a supervisor's idle doodles on the application form, for example). And while that is not in and of itself illegal, it can create the impression that these personal characteristics were somehow considered by the employer to be "job-related."

There is also an Oregon law, ORS 652.750, that requires employers to let employees inspect their "personnel records" upon request. Interestingly enough, the law makes no mention of "files;" it just refers to "...those personnel records of the employee which are used or have been used to determine the employee's qualification for employment, promotion, additional compensation or employment termination or other disciplinary action."

This terminology can serve as a reality check for employers: If you have "informal" or "investigative" files on your employees, keep in mind that if any of that documentation has been

used to take employment action (such as demoting, suspending or terminating the employee), it would probably fit into the definition of “personnel records” and you may need to provide it to the employee (including the aforementioned supervisor’s doodles – this time on the employee’s performance appraisal). Employers need not turn over records of an individual relating to the conviction, arrest or investigation of criminal conduct, confidential reports from previous employers, or certain educational records.

In addition to making these records available for inspection, Oregon employers must provide a certified copy of them to the employee, upon request. Employers may charge the employee for making these copies, but cannot charge any more than “is reasonably calculated to recover the actual cost of providing the service.”

And in keeping with our theme of employee privacy, employers should never release any information from an employee’s personnel file without the employee’s clear consent. We’ll be discussing that, and a lot more, in the next column on employee references.

For more information about this and other important areas affecting Oregon employers, including seminars conducted by our Technical Assistance staff, please visit our website at www.Oregon.gov/boli/ta. You can also call us at 971-673-0824.