PERSONNEL RECORDS:
WHAT ARE THEY, AND WHEN AND HOW DO EMPLOYEES GET THEIR FILES?

By Jeff Burgess, Program Coordinator
Technical Assistance for Employers
Bureau of Labor and Industries

Many Oregon employers have too broad an understanding of what exactly personnel records are under the law. When they do learn what the statute says, their understanding may be too narrow. Confused yet? Depending on the situation at hand, certain types of documents might be within the definition of personnel records, but in another case those exact same types of documents may not be. Now you're really confused, right? Take heart, because the law is actually pretty straightforward. As you determine on a case-by-case basis whether a particular document is or is not a personnel record, keep an open mind. For example, time cards and attendance records may not constitute personnel records for most employees, but if they were used as the basis for disciplinary action, they would meet the definition of personnel records. Of course, if an employee files a lawsuit, wage claim or civil rights complaint, she or he may be entitled to more records than those available under a simple personnel records request. In that case, it is up to the court or administrative forum to determine the scope of relevant, discoverable documents that tend to prove or disprove the elements of the case. But when current or former Oregon employees merely request their personnel records, the statute specifies exactly what must be provided and when and how.

Here are a few frequently asked questions that illustrate the scope of the law:

Q: A recently terminated employee just requested a copy of his personnel file. Do I have to copy every scrap of paper that I have pertaining to him?

A: No. ORS 652.750 provides a fairly limited definition of personnel records. Those are records of the employee that are used or have been used to determine the employee's qualification for employment, promotion, additional compensation or employment termination or other disciplinary action. Examples include job applications, résumés, cover letters, reference checks, reviews or evaluations, write-ups, and termination notices. Certain items are specifically excluded from the definition of personnel records. Those are: records of an individual relating to the conviction, arrest or investigation of criminal conduct, confidential reports from previous employers or certain faculty records maintained in compliance with ORS 351.065.

Q: Does that mean I don't have to provide that employee with copies of payroll or attendance records?

A: It depends. For most employees, those types of records would not fit the definition above. But if the employee had been disciplined or terminated for poor attendance or for working
unauthorized overtime or for having a co-worker punch a time clock for him, payroll and attendance records would almost certainly fit the definition of personnel records.

Q: How long do I have to provide the personnel records to my former employee?

A: The statute provides that the records must be provided within 45 days of the request unless the parties agree to an extension of that deadline. Any such agreement should be confirmed in writing, since there is a civil penalty of up to $1,000 for violating the provisions of the law.

Q: Do I have to provide access to the original records, or are copies sufficient?

A: The statute technically requires both, if the employee or former employee requests both. ORS 652.750(2). Additionally, the copy must be certified, but that is generally considered to mean that the employer need only state, in a cover letter or otherwise, that it certifies the records to be true and correct copies of the originals. A certified copy of the personnel records is usually sufficient, though, unless the requesting party insists on inspecting the originals. If there is an inspection of the originals, the employer should carefully supervise the process to protect those documents. Otherwise, a disgruntled former employee may take the opportunity to remove or destroy the documents that were painstakingly compiled to demonstrate that the termination was for legitimate, non-discriminatory reasons such as poor performance or violations of employer policy.

Q: This employee worked for me for over 20 years. It will take a long time to compile the records. Do I have to incur the costs associated with providing the records?

A: No. An employer may charge an employee or former employee an amount reasonably calculated to recover the actual cost of providing these services. Presumably, this would include the actual hourly cost of staff time, photocopying and postage. Employers should determine what the reasonable, actual costs would be and provide the copies upon receipt of payment for the costs.

Q: How long am I required to retain personnel records?

A: The statute only requires employers to retain personnel records for 60 days following termination of the employment relationship. Payroll records must be retained for 2 years. But it is unwise to discard records immediately after these deadlines have passed. The statute of limitations for wage claims in Oregon is 6 years (2 years for overtime hours). Discrimination complaints must usually be filed within 1 year of the alleged harm.

For more information about this subject, please consider attending our full-day seminar on recordkeeping, currently scheduled for June 8 in Salem. For additional information and a full schedule of seminars and other services provided by the Technical Assistance to Employers program, visit our website at www.oregon.gov/BOLI/TA or call 971-673-0824.