

End-of-the-year checkup concerning personnel files

It is officially that time of year again. The weather will soon be frightful, and if your place of employment is anything like mine, the first of many holiday parties is already in the rearview mirror. Please don't worry, this is not another article about how to behave (or how not to behave) at an office party. No, this article is about a considerably less scandalous topic: whether and how employees and former employees may view their own personnel files. Please try to contain your enthusiasm, and demonstrate a bit of holiday charity by continuing to read.

Many employers use the month of December to wrap up financial matters and to plan for the coming year by preparing goals, budgets, forecasts and strategic plans. Many employers also use this time of year to conduct employee reviews and make determinations about employees' compensation. Hopefully, most of your employees will receive good or even great reviews. Some may even receive yearend bonuses. (Side note: if paid to non-exempt employees, bonuses should either be (1) discretionary or (2) taken into consideration when calculating the regular rate for overtime purposes, but that is another article for another issue of The PIOGA Press).

Some employees receive a review that is the equivalent of a proverbial lump of coal. As you might imagine, employees who receive such reviews react in a number of different ways. Some react emotionally, others stoically. Some take constructive criticism to heart and address the problematic aspects of their review head-on, in a sincere attempt to improve upon their performance. Others immediately begin to search for a new place of employment. Most react somewhere in between.

Those employees who receive mediocre to problematic reviews may wish to review their personnel files. Pennsylvania employers should be mindful of the fact that the law entitles them to do so—within certain parameters.

Pennsylvania's Inspection of Employment Records Law, 43 P.S. §§ 1321-24, (the "Personnel Files Act") entitles employees (or an employee's designated agent) to view their own personnel records once each calendar year, absent reasonable cause to do so more frequently. The law gives employees this right to review their own files for the purposes of determining "qualifications for employment,

promotion, additional compensation, termination or disciplinary action." As a result, employers must reasonably make the records available during regular business hours.

Employers can (and should) make and enforce rules concerning the manner in which employees can request and review personnel records. For instance, employers can require requesting employees to inspect the records on the employee's free time, rather than while they are on the clock. Employers can also require requesting employees to fill out a form when requesting access to the files, and they can prohibit employees from removing the records from the employer's premises. While employers may prohibit employees from copying the records, employers should allow employees to take notes about the content of the records. Moreover, employers should allow employees sufficient time to review the records, commensurate with the size of the file. Finally, employers have the right to protect their records, and therefore they may require employees to inspect the records in the presence of an official designated by the employer.

But what about those individuals who are no longer employees? What rights, if any, do they have to review their own personnel records? Suppose a performance review later this month results in either a termination or a resignation. Is the recently separated former employee entitled to review his or her own personnel file following the end of employment? Does the answer depend upon the length of time between the separation and the request to view the file? Earlier this year, the Pennsylvania Supreme Court clarified this very issue.

Prior to this summer, this area of the law was unclear. In 1996, the Pennsylvania Commonwealth Court held, in dicta, that former employees could review their personnel files if they made the request to do so contemporaneously with termination, or within a reasonable time immediately following termination. *Beitman v. Dep't of Labor & Indus.*, 675 A.2d 1300, 1302 (Pa. Cmwlth. 1996). Since then, the Pennsylvania Department of Labor and Industry developed a policy of allowing former employees to access their personnel records within a "reasonable" amount of time, which generally meant within 30 days of termination. That changed during the summer of 2017

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with a ruling by the Pennsylvania Supreme Court.

In *Thomas Jefferson University Hospitals, Inc. v. Pennsylvania Department of Labor and Industry*, — A.3d — (2017), 2017 WL 2651980, the Pennsylvania Supreme Court overruled *Beitman* when it held that the plain language of the Personnel Files Act applies only to current employees, including those who have been laid off with re-employment rights, and those who are on leaves of absence. In its opinion, the court characterized the Commonwealth Court's definition of the term "current" as strained and stated that "the term 'currently employed' cannot mean both presently employed and formerly employed. *Id.* at 6. The court then held that "former employees, who were not laid off with re-employment rights and who are not on a leave of absence, have no right to access their personnel files pursuant to the act, regardless of how quickly following termination they request to do so." *Id.* at *8.

Whether in the context of upcoming performance reviews or otherwise, employers should be mindful of this recent change in the law.