

# Employment Law Corner

## Monthly Report



FOLEY & FOLEY<sup>PC</sup>  
ATTORNEYS AT LAW

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### December Updates

1. [NEW: Quick Links to 2022 MA PFML Posters & Notices](#)
2. [The Lawsuits against the ETS Rules Are Piling Up: Now What?](#)
3. [The Shrinking US Workforce and Your Business](#)
4. [OSHA Slows its Roll on the Vaccine Mandate: For Now](#)
5. [Are Courts Putting the Brakes on the Mandatory Vaccines? The Latest](#)
6. [What Do Women Want?](#)

### Massachusetts Personnel Files: Start the New Year Right!

With 2021 coming to an end, it is a great time for Massachusetts employers to brush up on the ins and outs of employee personnel files. Personnel files are governed by state law in Massachusetts, and many employers do not know or are overwhelmed by the law. Not to worry, we have laid out a full overview to keep you compliant with all matters related to personnel files. We also have a fixed fee service to review your personnel file policies and practices, along with an audit of compliance documents.

### What to Include?

Massachusetts law broadly defines a personnel record as: “a record kept by an employer that identifies an employee to the extent 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.” Yes, that covers a lot.

For employers with 20 or more employees, these personnel records must include the employee’s:

- Name;
- Address;
- Date of birth;
- Job title and description;
- Rate of pay and any other compensation paid to the employee;
- Starting date of employment;
- Job application;
- Resumes or other forms of employment inquiry submitted to the employer in response to the job advertisement;
- Performance evaluations (including but not limited to: evaluation documents, written warnings of substandard performance, lists of probationary periods, waivers signed, and copies of dated termination notices); and
- Any other documents relating to disciplinary action regarding the employee.

### What Not to Include?

The obvious answer is any documents that do not fall under the list above would not be included in a personnel file. In particular, the law also prohibits an employee’s personnel file from including information of a personal nature about a person other than the employee if disclosure of the information would constitute a clearly unwarranted invasion of such other’s privacy. What does this mean? Essentially, any document that contains information about a third

party (not the employee) that would invade that person's privacy is to be excluded (i.e., a document with another individual's medical information).

Additionally, certain documents should be kept in separate, confidential or medical files such as:

- Background checks;
- Drug tests results;
- EEO identifications;
- Affirmative action documents;
- Medical records;
- Litigation documents;
- Child support garnishment; and
- Workplace investigation records (relevant disciplinary action, counseling or other direct communications would go in the employee's personnel file).

### **When Can an Employee View Their File?**

An employee must request to view their personnel file in writing. Once the employer receives this written request, they must allow the employee the opportunity to view the personnel file within five days. This review occurs at the place of employment during normal business hours. Additionally, the employee may request, in writing, a copy of their personnel file which must be given to them within five days. Employees do not have an unlimited number of views of their file however. Specifically, employers do not have to allow an employee to review their file on more than two separate occasions in a calendar year.

### **BUT, there is a catch!**

An employer is required to notify the employee within 10 days of placing any information that has been used or may be used to negatively affect the employee's qualifications for employment, promotion, transfer, additional compensation or the possibility that the employee will be subject to disciplinary action in their personnel file. These required notifications do not count towards the employee's two-time limit of reviewing their file and can trigger a review request.

### **What if a Disagreement Exists?**

If there is a disagreement over any of the information in the personnel file, the employer and employee may mutually agree to remove or correct the information. If an agreement cannot be reached, the employee may submit a written statement explaining the employee's disagreement with the information, and that document will become a part of the employee's personnel file. The employee's statement of disagreement is to be included in the file when it is shown to a third party as long as the original (disputed) information remains in the file.

Worth noting is an employee has legal remedies against any employer keeps information in the personnel file that they knew or should have known was false.

### **How Long Do You Have to Keep these Files?**

For employers with 20 or more employees, personnel files must be kept from the date employment begins until 3 years after the date of termination.

## Why Follow These Guidelines?

It is simple: violating the Massachusetts personnel file law can be punished by a fine of at least \$500 up to \$2,500, happily enforced by the Attorney General.

**Questions?** We can help.

### Contact Us



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