

FOCUS ON COLORADO

Colorado Private Sector Employees Will Soon Have Right of Access to Their Personnel Files

Beginning January 1, 2017, private employers in Colorado must allow current employees to inspect their personnel file, at least annually, upon request. As to former employees, employers must allow them to make one inspection of the file after termination of employment. Employers can restrict the ability to inspect the file by requiring that it be done in the presence of a current employee or other individual designated by the employer. In addition, employers can require the employee or former employee to pay the reasonable costs of copying the documents in the personnel file.

The personnel file is defined as the employee records maintained by the employer for determining the employee's qualifications for employment, promotion, additional compensation or employment termination or disciplinary action. This definition does not include: (i) documents or records required to be placed or maintained in a separate file from the regular personnel file by federal or state law or rule; (ii) documents or records pertaining to confidential reports from previous employers of the employee, or (iii) an active criminal investigation, an active disciplinary investigation by the employer, or an active investigation by a regulatory agency.

There are several things that the law expressly does not do. The new law does not require an employer to create, maintain, or retain a personnel file on an employee or former employee. It also does not require the employer to retain any documents in the personnel file for a specified period of time. Lastly, the law expressly states that it does not create a private right of action for violations of its provisions.

The legislative declaration accompanying the law states that it is the public policy of Colorado for employees to have access to their personnel files. This right previously existed for public-sector employees only, who had access to their personnel records via the Colorado Open Records Act. Now, private-sector employees can enjoy this same right, as defined in the new law.

Other U.S. states have similar laws (e.g., Alaska, California, Connecticut, Delaware, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, Oregon, Pennsylvania, Rhode Island, Washington, and Wisconsin) signaling a

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trend toward balancing the interests of employees to find out what information employers hold while giving employers control over how that right of access can be exercised. Internationally, this right is generally recognized in the context of data protection laws and is not limited to employment records but includes any personal information a company holds about an individual. The shift toward accessibility means that companies should reassess records management practices and consider developing procedures for handling requests from employees to access their personnel file.