

# Labor & Employment Alert

An informational newsletter from Goodwin Procter's Labor & Employment Practice

## Massachusetts Appeals Court Interprets Civil Enforcement Provisions of Personnel Records Statute

The Massachusetts Appeals Court recently issued an important decision regarding an employer's failure to produce all documents constituting a personnel record under Massachusetts General Laws chapter 149, Section 52C, otherwise known as the "Personnel Records Statute." In the case of *Kessler v. Cambridge Health Alliance*, the Appeals Court held that an individual – as opposed to the Attorney General – may bring a private claim against an employer for violating the Statute, but that the remedy is limited to providing the employee with an opportunity to review information that had been improperly withheld and to either correct or comment on the information or to seek its expungement.

### The Facts

The *Kessler* case involved a doctor, Michael Kessler, who was hired as a resident fellow in the child and adolescent psychiatry unit at the Cambridge Health Alliance ("Alliance"). One month after his hire, Alliance terminated Kessler's employment after receiving unsatisfactory information in response to a criminal offender record information ("CORI") request, upon which Kessler's employment had been conditioned. After being notified of his termination, Kessler sought to obtain his personnel record from Alliance pursuant to the Personnel Records Statute. He made three separate requests. Although Alliance provided Kessler with documents in response to his requests, Kessler believed that there were additional documents that should have been included in his personnel record under the terms of the Statute that had not been provided to him.

Kessler filed suit against Alliance alleging that it had violated the Statute. Specifically, Kessler claimed that "examination of the contents of [the personnel record that Alliance had sent to him] reveals a notable absence of documents which would reasonably be expected to be within the plaintiff's file and for which plaintiff has given no waiver of his right to examine." The allegedly withheld documents included Kessler's termination letter, copies of correspondence sent by the senior director of labor relations for Alliance, a letter from the director of Alliance's department of psychiatry, and notes and/or information from the director of Alliance's training program for the child and adolescent psychiatry department.

### The Personnel Records Statute's Requirements

The Personnel Records Statute requires an employer to provide a requesting employee<sup>1</sup> with an opportunity to review his or her "personnel record" within five business days of receiving a written request. Employers are cautioned that the Statute offers a broader definition of "personnel record," than what ordinarily might be included in the employee's "personnel

<sup>1</sup> The Statute specifically excludes individuals employed in tenure-track or similar positions by private higher education institutions from the definition of "employee."

file,” as those files typically are maintained by an employer’s human resources department. Specifically, the Statute defines a “personnel record” to include all documents kept by an employer that are or have been used “or may affect or be used relative to that employee’s qualifications for employment, promotion, transfer, additional compensation or disciplinary action.”

The Statute also makes clear that personnel records produced by all employers with more than 20 employees must include “all employee performance evaluations, including but not limited to, employee evaluation documents” and any documents relating to disciplinary action regarding the employee. The statute cautions, however, that “a personnel record shall not include 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 person’s privacy.” Finally, the Statute provides that “[w]hoever violates the provisions of this section shall be punished by a fine of not less than five hundred nor more than twenty-five hundred dollars” and that the Statute “shall be enforced by the attorney general.”

Because of the broad language contained in the Personnel Record Statute, employers are well advised to exercise care when responding to a request for a personnel record made pursuant to the Statute. In addition to gathering the employee’s personnel file from the human resources department, the employer also should contact the requesting employee’s manager or other supervisory personnel to determine whether they have separately maintained any information about the employee that is not included in the employee’s personnel file, including any documents written for the purpose of evaluating the employee’s performance and any documents that otherwise have a bearing on any discipline that the employee may have received. It is common for managers to maintain this information – either in paper or electronic form (*i.e.*, e-mails) and employers should take care not to overlook them when gathering documents in response to personnel record requests. When producing the personnel record to the requesting employee, the employer should ensure that private information regarding other employees has been redacted or removed.

Once the personnel record has been provided to the requesting employee, the Statute lays out a mechanism whereby the employee can attempt to resolve disagreements as to the content of the personnel record. Specifically, the Statute provides that the employer and employee may mutually agree to remove information challenged by the employee. If the employer and employee are unable to reach agreement, then the employee may submit a written statement explaining the employee’s position with respect to the disputed information and the employer must then include that statement when transmitting the personnel record to any third party. The Statute also permits the employee to sue the employer to expunge information which the employer “knew or should have known to be false” from the employee’s personnel record.

### **The Court’s Ruling in *Kessler***

The trial court dismissed Kessler’s claim that his employer improperly withheld documents that properly should have been included in his personnel record, holding that only the Attorney General has standing to enforce the provisions of the Statute and that no private cause of action exists to enforce the Statute. The Appeals Court reversed this ruling, holding that employees hold the individual right to file a legal action “to seek a judicial determination whether a document is a ‘personnel record’ as defined by the Statute and therefore constitutes a part of, and must be physically included in, the personnel file.” Thus, the Appeals Court remanded the case back to the lower court to determine whether documents alleged to be improperly withheld by the employer constitute “personnel records” and, if so, to provide Kessler with the right to correct or comment on the information

contained in the produced documents, or to seek their expungement as contemplated by the Statute.

The Appeals Court, however, rejected Kessler's assertion that he was entitled to either damages for violation of the provisions of the Personnel Records Statute, or an order directing the Attorney General to impose a fine for the alleged violation. The Court made clear that the statutory remedy afforded to employees who have not had their full personnel records produced when requested is limited to an order requiring the employer to produce the full record and provide the employee with the opportunity to comment, correct, or expunge allegedly incorrect or false information.

### **Analysis**

The *Kessler* decision provides some comfort to employers that, to the extent that they inadvertently fail to produce a full personnel record to an employee in response to that employee's request, the employee's remedy will be to file a legal action seeking production of any missing documents and an opportunity to have those documents removed from the personnel record or to otherwise provide a written response to the information in a document included in the record. The Appeals Court did not explain when a court should be prepared to fine an employer should the Attorney General bring suit for violation of the statute.

Prior to the *Kessler* decision, it had remained an open question as to whether an employer's failure to produce a document in response to a personnel record request might result in an order from a court preventing the employer from using that document offensively in the context of a subsequent litigation with that employee. The *Kessler* decision appears to make clear that such a remedy would not be permissible.

If you have any questions about the issues raised in this Alert, please contact:

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