

PERSONNEL RECORDS: HOW TO MAINTAIN AND WHEN TO DISCLOSE

I. INTRODUCTION

A. Personnel Records

1. Employers are required by law to retain and maintain true and accurate records of its employees. Generally, the personnel file should contain records as may be necessary to support the action of the employer with respect to compensation, discipline, promotion, transfer or discharge.

2. Board Policy

Most school districts have a Board policy addressing personnel records, including maintenance, retention, and access to personnel records. This is typically Board Policy 5:150.

3. Collective Bargaining Agreements and Employee Handbooks

These resources often contain provisions governing employee personnel records and/or files, including requirements for notice to employee of documents being maintained in the personnel file and employee/representative access to the personnel file.

B. Statutory Authority

1. Illinois Personnel Records Review Act, 820 ILCS 40/0.01 et seq.

2. Illinois Minimum Wage Law, 820 ILCS 105/8.

3. 29 Code of Federal Regulations §516.2.

4. 23 Illinois Administrative Code §1.660.

II. THE PERSONNEL FILE

A. The following documents are generally maintained in an employee's personnel file:

1.* Employee name;

2.* Employee address;

3. Job application/Formal job offer;
- 4.* Social security number;
5. Proof of age (request only after hire);
6. Federal and state tax withholding forms;

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7. Fingerprint card (if applicable) or criminal background check information;
8. Union dues checkoff authorization;
9. Medical and life insurance plan information;
10. Retirement plan information;
11. Evaluations;
12. Disciplinary actions (final discipline, but not the investigation documents);
- 13.* Information on position;
- 14.* Rate of pay and basis of pay (i.e. salary, hourly);
- 15.* Hours worked each day and hours worked each workweek; and
- 16.* Amount paid each pay period including overtime.

*Information required by the Illinois Department of Labor and/or U.S. Department of Labor

B. The following documents should not be maintained within an employee's personnel file:

1. Medical information:
 - a. Pursuant to the Americans with Disabilities Act ("the ADA"), information obtained from medical examinations and inquiries must be collected and maintained on separate forms and in separate medical files and treated

as confidential medical records.

Note: This includes information collected pursuant to the Family and Medical Leave Act ("FMLA").

b. Exceptions to Confidentiality Requirement:

- Supervisors and Managers who need to know of work duty restrictions and accommodations;
- First aid and safety personnel; and
- Governmental entities.

c. Recommendations:

- Keep medical information in a medical file in a separate cabinet;
- Keep medical information apart from the location of personnel files; and

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- Designate a specific person(s) to have access to the medical files.

2. Affirmative action information.

3. Records regarding an employee's associations, non-employment activities, political activities, publications or communications. An employer may not maintain such records in a personnel file unless:

- a. The employee submits the information in writing or authorizes the employer in writing to keep or gather the information;
- b. The activities occur on the employer's premises or during the employee's working hours which interfere with the performance of the employee's duties;
- c. The activities interfere with the duties of other employees;
- d. The activities constitute criminal conduct;

e. The activities may reasonably be expected to harm the employer's property, operations or business; or

f. The activities could, by the employee's action, cause the employer financial liability.

4. Investigation of an employee's criminal activities by the employer.

5. A record identifying an employee as the subject of an investigation by DCFS if the investigation by DCFS resulted in an unfounded report as specified in the Abused and Neglected Child Reporting Act.

a. Employees who receive written notification from DCFS that an investigation resulted in an unfounded report shall take the written notification to his or her employer and have any record of the investigation expunged from his or her employee record.

b. Possibly maintain outside of personnel file.

C. Retention of Personnel Records

1. Default Rule (without consideration of Local Records Act)

Employers should keep the following employee information for a period of not less than three (3) years:

a. True and accurate records of the name, address and occupation of employees

b. The rate of pay, the amount paid each pay period to each employee and the hours worked each day in a work week by each employee.

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2. Changes to Illinois Department of Labor Rules

a. Adopted in August, 2014

b. Regardless of an employee's status as either an exempt administrative employee, executive or professional, every employer shall make and maintain, for a period of not less than 3 years, records that show the

following:

- i. The name and address of each employee;
 - ii. The hours each employee worked each day in each work week
;
 - iii. The employee's rate of pay;
 - iv. Copies of all notices of rate of pay;
 - v. The amount paid each pay period; and
 - vi. All deductions made from wages or final compensation.
- c. Any employer that provides paid vacation to its employees must maintain, for a period of not less than 3 years, true and accurate records of the number of vacation days earned for each year and the dates on which vacation days were taken and paid.

3. Federal Laws - Title VII, ADA, ADEA and FMLA

- a. EEOC regulations require employers to maintain records which are relevant to employment discrimination actions, including personnel files of the charging party and any similarly situated employees, until the resolution of the litigation.
- b. Americans with Disabilities Act (ADA)
 - i. Employers are required to treat medical information as confidential and may not disclose it, other than in very limited circumstances.
 - ii. Protections apply beyond employees to applicants, individuals who have been hired but have not yet begun working and former employees.
 - iii. Medical documents must be stored separately from personnel files.
 - iv. Individuals likely need to demonstrate an "injury in fact" to recover for violation of the privacy protections.

c. Family and Medical Leave Act (FMLA)

Records and documents relating to certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files.

4. If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing family medical history or genetic information as defined in GINA shall be maintained in accordance with the confidentiality requirements of Title II of GINA, which permit such information to be disclosed consistent with the requirements of FMLA.

5. If the ADA, as amended, is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements, except that

a. Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;

b. First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and

c. Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

6. Recommendations for reproducing records in a digitized electronic format

a. Per the Illinois Local Records Act, electronic version must legibly reproduce the original record in all details and be in a medium that does not permit additions, deletions or changes to the original document.

b. Plan to refresh digital data on a regular basis and to convert images to new storage media as necessary.

- c. Each year, district should sample 5% of images from both primary and backup storage media to verify continued accessibility.

7. Process for disposal of original document once digitized

- a. Original public records can only be disposed of with approval of the Illinois Local Records Commission.
- b. District must submit application for authority to dispose of local records to commission. Once the application is approved, it becomes the retention schedule.

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- c. Once the minimum retention period has been met, district may file records disposal certificate with commission to destroy records, provided there is no litigation hold on the documents.
- d. Certificate must be sent to commission at least 30 days before proposed disposal date.
- e. Commission will approve or deny certificate.
- f. If certificate is approved, records containing personal information must be disposed of in such a manner as to render the personal information unreadable, unusable and undecipherable.

III. INSPECTION OF PERSONNEL RECORDS BY EMPLOYEES

A. Statutory Authority

Illinois Personnel Records Review Act provides employees the right to inspect certain documents within their personnel files. Provides specific rules and procedures for such inspection.

1. Employees do not have to subpoena their own records.
2. However, the employer may require the request to be in writing on a form provided by the employer.

B. Who Constitutes an Employee (per the Act)

1. A person currently employed, whether full-time, part-time, temporary or substitute;
2. A former employee subject to recall or layoff or on a leave of absence with a right to return a position; or
3. A former employee who has terminated service within the preceding year.
4. Recommendation: Check collective bargaining agreements, board policies, and handbooks to determine whether employer has broadened statutory definition of "employee" for purposes of personnel record review.

C. Records Which Are Subject to Review

1. Any personnel documents which have been or are intended to be used in determining that employee's qualifications for employment, promotion, transfer, additional compensation, discharge or other disciplinary action.

This includes any such records which are in the possession of a person, corporation, partnership, or other association having a contractual agreement with the district to keep or supply a personnel record.

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If the above records are not included in an employee's personnel file but should have been included, the employer may not use the records in a judicial or quasi-judicial setting. If material is excluded from the file, but not intentionally, a judge may allow the use of the material.

2. The following records are not subject to employee inspection:
 - a. Letters of reference;
 - b. Test documents and protocols, although an employee may view cumulative test scores;
 - c. Materials relating to the employer's staff planning, such as matters relating to business development, expansion or goals where material relate to more than one employee except where the materials are, have

been or are intended to be used by the employer in determining an individual employee's qualification for employment, promotion, transfer, additional compensation discharge or discipline;

d. Information of a personal nature of another person if the disclosure would be a clearly unwarranted invasion of that person's privacy;

e. Records relevant to a pending claim between the employer and employee which may be discovered in a judicial proceeding; and

f. Investigatory or security records maintained by the employer to investigate criminal conduct by an employee or could harm the employee property or business unless and until the employer takes adverse personnel action based on information in such records.

D. Procedures for Inspection

1. Employees have the right to:

a. Conduct two inspections during a calendar year if the requests are made at reasonable intervals;

b. Obtain copies of information reviewed;

Note: An employer may charge for the cost of copying of such information.

c. Allow a representative to inspect records if the employee is involved in a current grievance against the employer.

Note: The employer may require the employee designate the representative in writing.

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2. Employer is required to:

a. Allow the employee to inspect the records within seven (7) working days of the request (or if the employer can show that this deadline cannot

reasonably be met, within an additional seven days); and

b. Provide a location for inspection that is reasonably near the employee's place of employment and during normal working hours. Can provide for another place or time if more convenient for the employee.

3. Employers are not required to:

Permit an employee to remove any part of the personnel file from the employer's premises where it is made available for inspection. Employer retains the right to protect its records from loss, damage or alteration to insure the integrity of the records.

IV. CORRECTION OF PERSONNEL RECORD

A. The employee may disagree with information in the personnel record.

B. Employers have two options:

1. Mutually agree with employee to remove or correct specific information; or

2. Allow the employee to submit a written statement explaining the employee's position.

a. Employer must attach employee's statement to disputed portion of personnel record.

b. Employee's statement must be included whenever disputed portion is released to a third part.

3. If either employer or employee knowingly places false information in record, employer or employee may bring legal action to expunge such information.

V. LIABILITY FOR VIOLATION OF THE ILLINOIS PERSONNEL RECORD REVIEW ACT

A. Aggrieved individuals can bring a claim in state court or with the Illinois Department of Labor.

B. Court may award:

1. Actual damages plus costs;

2. A fine for willful violation; and

3. Attorneys' fees and costs.

C. Violation may also be a criminal offense.

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VI. INSPECTION OF PERSONNEL RECORDS BY THIRD PARTIES

A. Restriction on Disclosure of Discipline

1. Restriction applies to disciplinary reports, letters of reprimand or other disciplinary actions.
2. Employers prohibited from providing discipline to third parties, parties who are not part of employer's organization or parties who are not part of union organization without providing written notice to employee.
3. Employers cannot provide discipline that is four (4) or more years old to third parties, except when release is ordered in a legal action or arbitration.
4. Disclosure of performance evaluations under FOIA is prohibited.

B. Written Notice Requirement

1. Written notice must be by first-class mail to the employee's last known address and mailed on or before the records are released.
2. Exceptions
 - a. Employee has specifically waived written notice as part of written, signed application for employment;
 - b. Disclosure is ordered to a party in a legal action or arbitration; or
 - c. The information is requested by a government agency as a result of a claim or complaint by an employee, or as a result of a criminal investigation by such agency.

VII. ILLINOIS EMPLOYMENT RECORD DISCLOSURE ACT

A. OVERVIEW

1. Provides conditional immunity to employers responding to a reference request.
2. States: “[a]ny employer or authorized employee or agent acting on behalf of an employer who, upon inquiry by a prospective employer, provides truthful written or verbal information, or information that it believes in good faith is truthful, about a current or former employee’s job performance is presumed to be acting in good faith and is immune from civil liability for the disclosure and the consequences of the disclosure.”
3. Does not create an exemption to the requirements of the Personnel Records Review Act with respect to disclosure of a disciplinary report, letter of reprimand, or other disciplinary action to a third party.

VIII. ILLINOIS PERSONAL INFORMATION PROTECTION ACT

A. Overview

1. Enacted in 2006 to help prevent identity theft before it occurs.
2. The Act provides that “Data Collectors” are responsible for notifying Illinois residents if they have suffered a “Breach” of the security of their system data affecting the resident’s “Personal Information.”
3. “Data Collector” includes government agencies and any other entity that, for any purpose, handles, collects, disseminates, or otherwise deals with non-public personal information.

Under this law, “personal information” means either of the following:

- a. An individual’s first name or first initial and last name in combination with any one or more of the following data elements when either not encrypted or redacted or are encrypted but the keys to unencrypt have been acquired:
 - i. social security number;

- ii. driver's license number or state identification card number;
- iii. account number or credit or debit card number, or an account number or credit or debit card number in combination with required security code, access code or password that would permit access to an individual's financial account;
- iv. medical information;
- v. health insurance information; and/or
- vi. unique biometric data.

b. A user name or email address, in combination with a password or security question and answer that would permit access to an online account, either when the information is not encrypted or it is encrypted but the keys were acquired.

4. "Medical information" is any information regarding an individual's medical history, mental or physical condition, or medical treatment or diagnosis by a healthcare professional, including such information provided to a website or mobile application.

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5. "Health insurance information" means an individual's health insurance policy number or subscriber identification number, any unique identifier used by a health insurer to identify the individual, or any medical information in an individual's health insurance application and claims history, including appeals records.

6. "Personal Information" does **not** include publicly available information that is lawfully made available to the general public from government records.

B. Breach of Security of Information

1. A breach occurs when there is an unauthorized acquisition of computerized data that compromises the security, confidentiality, or integrity of personal information maintained.

2. When a breach occurs, the entity must notify Illinois residents of the breach and provide contact information for credit reporting agencies and how to obtain fraud alerts and security freezes, as specifically set forth in the Act.

ENCLOSED REFERENCE DOCUMENTS:

- Decision Tree for Scanning Projects – Source: Illinois Secretary of State, State Archives,
https://www.cyberdriveillinois.com/departments/archives/records_management/home.html
- Reliable Storage Media for Electronic Records – Source: Illinois Secretary of State, State Archives,
https://www.cyberdriveillinois.com/departments/archives/records_management/home.html
- Illinois Department of Labor Personnel Record Review Act FAQ's,
<https://www2.illinois.gov/idol/FAQs/Pages/personnel-records-review-faq.aspx>

