

CONFIDENTIALITY AND PRIVACY IN EMPLOYEE RECORD KEEPING

As part of our continuing series on personnel file/record keeping requirements in the workplace, this article will examine areas that require employers to maintain confidentiality of their employees' records. The main area where confidentiality is required is in medical files of employees.

There are a number of restrictions on handling employee medical information and generally these laws treat medical information as confidential records and require employers to maintain such information in separate, confidential files with restricted access. The main areas dealing with employee record confidentiality are: Americans with Disabilities Act, Family and Medical Leave Act, Fair Credit Reporting Act and any drug or alcohol testing program.

Preserving confidentiality of employee records in these areas is very important because of the potential for defamation, invasion of privacy, or emotional distress claims by employees if information such as past medical problems is improperly released. For example, an Illinois court held that an employer's disclosure of an employee's mastectomy to coworkers was actionable. *Miller v. Motorola, Inc.* (1990). Apart

from concerns about legal liability, it is just not a good idea to allow a lot of people access to confidential files and the resulting situation of some individuals not being able to resist gossiping about another employee's circumstances.

ADA

The Americans with Disabilities Act contains many specific provisions restricting employers' collection and maintenance of information on employees' medical conditions. Employers are allowed to gather certain employee medical information (such as the results of a post-employment offer physical exam) in order to determine whether a reasonable accommodation is necessary but access to the information is very regulated. Under ADA regulations, any information relating to the medical condition or history of an applicant or employee must be kept in separate medical files from general personnel information and treated as confidential.

Disclosure of such medical records is authorized under the ADA only to: supervisors and managers who must be informed of any restrictions on the employee's duties, to first aid personnel in the event of a medical emergency, and to government officials investigating ADA compliance.

Because medical information collected under the ADA may concern sensitive physical or mental disabilities, extra caution must be taken in keeping such records separate from other personnel files and in limiting access to these files.

Personnel records relating to the ADA (such as resumes, applications, records on promotions, demotions, transfers, layoffs and compensation information) should be retained for one year and all information pertaining to a discrimination charge must be retained until the charge is resolved.

FMLA

The Family and Medical Leave Act also has confidentiality requirements in record keeping because, like the ADA, it concerns medical conditions and people tend to want to keep their medical conditions private and the regulations enforce that tendency. Like the ADA, the FMLA also requires that medical information be kept separate from the regular personnel file in a secured area.

Under FMLA an eligible employee may take up to 12 weeks of unpaid leave from work each year under qualifying

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circumstances. Since the leave may be taken either intermittently or in a lump sum, and since employee benefits may continue during the leave, it is important that detailed records be kept. Many companies use standard forms for employee requests and employer responses to FMLA leave.

Payroll personnel must keep track of how much FMLA leave is being taken by an individual and any employee payment of health insurance premiums during the leave. Such information will most likely be kept in a regular personnel file but the reason for the leave and any medical certification involved in substantiating that leave must be kept in a separate, confidential file. Records concerning FMLA leave, including employee requests for leave and employer notices regarding leave, must be retained for three years.

Fair Credit Act

If as part of the employment process, your company does credit investigations and background checks on potential or current employees, you must be aware of the record keeping and confidentiality obligations of the Fair Credit Reporting Act (FCRA). Under the FCRA, an employee must be notified if he or she will be the subject of a consumer report and must give written authorization to obtain the report. If an adverse employment decision is made based on the results of the report, the affected individual must be provided with a copy of the credit report. Copies of employees' written authorizations to obtain a credit report should be kept in their file. However, the actual credit report should be kept in a separate, confidential file so that access to it is severely limited. Very few supervisors or managers would need to see that file.

Drug/Alcohol Testing

If an employer chooses to do workplace drug or alcohol testing under the Iowa law (Ch. 730.5) it must abide by confidentiality requirements also. All communications received by an employer relevant to employee or prospective employee drug or alcohol test results, or otherwise received through the employer's drug or alcohol testing program, are confidential communications and can only be disclosed as authorized by the statute. Make sure that you maintain any drug testing records in a separate, confidential file. The Iowa drug testing law does not contain any specific record retention requirements for employers.

For those companies that do drug/alcohol testing under the U.S. Department of Transportation rules, records relating to such testing "shall be maintained in a secure location with controlled access" and individual records are to be kept in employee medical files. The retention requirements of the DOT rules may be summarized as requiring most records relating to testing to be kept for five years with the exception of records relating to the collection process (two years) or records of negative tests (one year).

Others

Although no legal requirement exists to do so, there are many other employee documents that you may wish to keep apart from regular

personnel files. One example is references obtained pursuant to hiring an individual. Keep them out of personnel files - do not let employees see their references. You may also wish to keep confidential an employee's dependant and beneficiary information and, perhaps, what benefit plan choices an employee makes.

Also, the Immigration and Naturalization Service suggests that I-9 forms (establishing employment eligibility) and copies of verifying documents not be placed in the personnel file because of the potential for discrimination on the basis of national origin. [More on I-9 forms in another article]

Preventing Improper Release

Because of the confidentiality requirements of the above employee records, it is imperative that a system be in place to prevent the improper release of confidential records. Train managers and supervisors to carefully limit the disclosure of personnel information both within and outside the organization.



To help control access to confidential files, a suggestion would be to make confidential files a different color, such as red, than regular personnel files. Keep such files in a separate drawer, cabinet, or even office to reduce the possibility of someone examining the wrong file. Within the confidential file, keep medical information in a large manila envelope so it can be easily extracted if someone needs to view the rest of the file but does not need access to the medical portion.

Keeping certain employee records separate from others and in a secure area does require extra effort but the law mandates it, as does your ethical duty to your employees to keep such information entrusted to you private. As always, HR-OneSource is available to assist employers if you have any questions.

FMLA Suit May Be Brought Against Public Officials In Their Individual Capacities

In our last issue, we discussed the complexity of FMLA. Now a court finds that supervisors have individual liability for FMLA violations. (We also discussed Supervisory Liability in Volume 2, Issue 3 of this newsletter.)

Susan Darby brought this action alleging, among other things, that the Kansas City, Missouri, Police Department, the Kansas City Board of Police Commissioners, the City of Kansas City, Missouri, and several individual employees retaliated against her in violation of the Family and Medical Leave Act. The district court granted the defendants' motions for a summary judgment. The Eight Circuit Court of Appeals (which includes Iowa) held that a suit under the FMLA can be brought against public officials in their individual capacities.

The Court stated that they must address:

"Whether a retaliation claim under the FMLA can be brought against public officials in their individual capacities." This issue is one of first impression for our Court. Other courts have analyzed this issue by comparing the definition of employer under FMLA to the definition of employer under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq. The FMLA defines employer as "any person who acts, direct-

ly or indirectly, in the interest of an employer to any of the employees of such employer[.]" 29 U.S.C. § 2611(4)(A)(ii)(I). This language is very similar to the definition of employer under the FLSA. Under the FLSA, an employer is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee..." 29 U.S.C. § 203(d). The implementing regulations of the FMLA recognize the similarities of the FMLA and FLSA definitions of employer. 29 C.F.R. § 825.104(d). These regulations also suggest that individual liability arises under the FMLA. *Ibid*.

This Court has addressed the issue of personal liability of an employer under the FLSA in *Rockney v. Blohorn*, 877 F.2d 637 (8th Cir. 1989). In that case, the Court decided whether personal liability for an employer exists under ERISA. In the course of our discussion, we compared the definition of employer under ERISA to that under the FLSA. However, we have not directly addressed the issue of individual liability for public officials under either the FLSA or the FMLA.

It seems to us that the plain language of the statute decides this question. Employer is defined as "any person who acts, directly or indirectly, in the interest of an employer to any of the

employees of such employer[.]" 29 U.S.C. § 2611(4)(A)(ii)(I). This language plainly includes persons other than the employer itself. We see no reason to distinguish employers in the public sector from those in the private sector. See *Morrow*, 142 F.Supp.2d at 1275 (stating that opinions which hold public officials are not subject to individual liability "do not explain why public officials should be exempted from liability while managers in the private sector are not."). If an individual meets the definition of employer as defined by the FMLA, then that person should be subject to liability in his individual capacity.

As the Courts continue to find individual supervisors personally liable for discriminatory and harassing acts, the need for supervisory training is even more important. Employers must be aware that if a supervisor is named in a lawsuit, he or she may switch allegiance to the plaintiff (cut a deal) in order to protect themselves from liability, or at the very least, the employer may have to provide additional legal representation for the supervisor.

HR-OneSource provides a myriad of supervisory training programs. Please call 515-221-1718 for written information or other human resource consulting.

OSHA Announces Plan To Reduce Ergonomic Injuries

The Occupational Safety and Health Administration unveiled a comprehensive plan designed to dramatically reduce ergonomic injuries through a combination of industry-targeted guidelines, tough enforcement measures, workplace outreach, advanced research, and dedicated efforts to protect Hispanic and other immigrant workers.

"Our goal is to help workers by reducing ergonomic injuries in the shortest possible time frame," said Labor Secretary Elaine L. Chao. "This plan is a major improvement over the rejected old rule because it will prevent ergonomics injuries before they occur and reach a much larger number of at-risk workers."

Guidelines

Occupational Safety and Health Administrator John Henshaw said his agency will immediately begin work on developing industry and task-specific guidelines to reduce and prevent ergonomic injuries, often called musculoskeletal disorders (MSDs), that occur in the workplace. OSHA expects to begin releasing guidelines ready for application in selected industries this year. OSHA will also encourage other businesses and industries to immediately develop additional guidelines of their own.

Enforcement

The Department's ergonomics enforcement plan will crack down on

bad actors by coordinating inspections with a legal strategy designed for successful prosecution. The Department will place special emphasis on industries with the sorts of serious ergonomics problems that OSHA and DOL attorneys have successfully addressed in prior 5(a)(1) or General Duty clause cases. For the first time, OSHA will have an enforcement plan designed from the start to target prosecutable ergonomic violations. Also for the first time, inspections will be coordinated with a legal strategy developed by DOL attorneys that is based on prior successful ergonomics cases and is designed to maximize successful prosecutions. And, OSHA will have special ergonomics inspection teams that will, from the earliest stages, work closely with DOL attorneys and experts to successfully bring prosecutions under the General Duty clause.

Compliance Assistance

The new ergonomics plan also calls for compliance assistance tools to help workplaces reduce and prevent ergonomic injuries. OSHA will provide specialized training and information on guidelines and the implementation of successful ergonomics programs. It will also administer targeted training grants, develop compliance assistance tools, forge partnerships and create a recognition program to highlight successful ergonomics injury reduction efforts.

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Benefits Averaged One-Third of Company Payrolls in 2000

Employee benefits accounted for more than one-third of the total cost of company payrolls in 2000, with health insurance the most expensive single benefit cost, according to a study released by the U.S. Chamber of Commerce.

Employee benefits cost employers an additional 37.5 percent of total payroll in 2000.

Benefit costs varied significantly among companies, according to the survey, with one in 10 paying more than 45.2 percent of its payroll on benefits and an equal number of companies paying less than 20.4 percent.

The top 10 percent of companies reported an average benefit cost of \$21,774 per employee, while the lower 10 percent paid an average of \$5,850.

In general, larger companies offered more employee benefits than smaller companies. Companies employing 5,000 or more employees paid an average of 39.1 percent of payroll for benefits, compared with 29.4 percent for companies with fewer than 100 workers.

Health care continues to be the largest benefit cost. Employers spent an average of 10.5 percent of their payroll, about \$4,800 per employee, on health care benefits in 2000. Approximately \$3,000 of that was spent on medical insurance premiums alone.

The most common retirement and savings programs were 401(k) plans, offered by 88 percent of companies.

SHORT FACTS

UNEMPLOYMENT - The national unemployment rate increased to 5.7% in March. The jobless rate was 4.3% a year ago. Iowa's unemployment rate for March was 3.4%. The Iowa rate one year ago was 3.1%

CPI - The Department of Labor reported that for the 12-month period ending in March, the CPI-U increased 1.5%.

REFERENCE CHECKS - BNA reports that three fourths of plaintiffs in employment lawsuits have something in their background that did not match their resume and studies have shown that 25 percent of applicants misrepresent their accomplishments on resumes and applications.

EMPLOYMENT OUTLOOK - Employment prospects will remain weak through the spring, but employees appear to face less risk of job loss than they did three months ago, according to projections from 228 respondents to BNA's latest quarterly employment survey.

INSURANCE PREMIUMS INCREASE - A recent Iowa survey reported that health insurance premiums increased over 17% in 2001. Smaller employers (less than 50 employees) saw increases over 19% while larger employers (over 1,000 employees) averaged 10%. Double digit increases are expected again in 2002.

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Hispanic Outreach

As part of the Department of Labor's cross-agency commitment to protecting immigrant workers, especially those with limited English proficiency, the new ergonomics plan includes a specialized focus to help Hispanic and other immigrant workers, many of whom work in industries with high ergonomic hazard rates.

Ergonomics Research

The plan also includes the announcement of a national advisory committee; part of their task will be to advise OSHA on research gaps. In concert with the National Institute for Occupational Safety and Health, OSHA will stimulate and encourage needed research in this area.

"Bureau of Labor Statistics' data show that musculoskeletal disorders are already on the decline. This plan is designed to accelerate that decline as quickly as possible," said OSHA Administrator John Henshaw. "Thousands of employers are already working to reduce ergonomic risks without government mandates. We want to work with them to continuously improve workplace safety and health. We will go after the bad actors who refuse to take care of their workers."