



## EMPLOYEE ACCESS TO PERSONNEL FILE

This newsletter has featured a series of articles dealing with record keeping requirements and employee personnel files. As a corollary to those articles, we will now examine the subject of employee access to his or her personnel file - should it be allowed, under what circumstances, what procedures should be followed, how often can files be viewed, are corrections allowed, and what files should an employee have access to? This article will address those questions.

The first question - should employees be allowed to view their personnel files - is the easiest. Iowa law mandates that employees have access to their files. Chapter 91B.1 of the Iowa Code provides that:

"An employee ... shall have access to and shall be permitted to obtain a copy of the employee's personnel file maintained by the employee's employer ... including but not limited to performance evaluations, disciplinary records, and other information concerning employer-employee relations."

The statute goes on to provide that the employee and employer shall agree on the time the employee may have access, the employee shall not have access to references written for the

employee, and the employer may charge a reasonable fee for copies made of items in the file. So the law is clear that employees in Iowa are allowed access to their personnel files. In addition, under federal OSHA regulations employees are allowed access to records concerning employee exposures to toxic and hazardous substances including related medical records.

However, giving employees access to personnel records under these mandates can create an administrative burden on an employer's human resource staff such that formal procedures may need to be established to handle employee requests to inspect their records.

### Access Guidelines

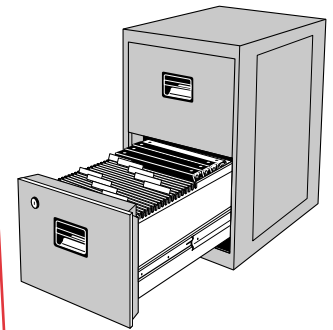
Most medium to large organizations will want to require that a written request be made by the employee in order to view his/her file. A form should be provided on which to submit the request. Oral requests for access to files may work fine for small offices. Either way, after receiving the request human resources personnel should then set up a time for the employee to come in and view his/her record. This gives the file keep-

er time to look over the file and extract any information which the employee is not permitted to view (more about that later) and allows for spacing of appointments such that there is not a number of employees trying to examine their files at the same time, particularly if some incident triggers a sudden urge by employees to check out their files.

It is strongly recommended that all personnel record inspection take place in the human resources department area in the presence of a human resources representative. No files should be removed from the area. Employees should be allowed to make handwritten notes from their files. Iowa law provides that an employer may charge a "reasonable fee" for an employee to make copies of items in their file with reasonable being defined as the amount charged per page by a commercial copying business.

Iowa law does not address the issue of how often an employee may examine his/her file. The statute does provide that the employer and employee "shall agree on the time the employee may have access to the employee's personnel file..." Generally,

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in the absence of a specific limitation, the number of times an employee can examine his/her records in a given time period would be governed by the test of "reasonableness." The company may wish to provide that the files be examined during regular business hours and on the employee's own time, such as during break time or lunch period.

## What Can Be Seen

The Iowa Code section quoted above specifically lists several items (performance evaluations and disciplinary records) that can be viewed by employees in their files and specifically exempts employment references from being accessible to employees. Outside of these enumerated items, what should and should not employees have access to in viewing their files?

Employees should generally have access to the following types of records: their employment application and resume; personnel action forms such as hiring, promotion, or job title changes; performance evaluations (although employees should have received a copy of those when prepared); documents relating to employment eligibility (I-9 etc.); forms relating to tax withholding; attendance records; accident reports; toxic substance exposure records; and documents relating to disciplinary action excluding those prepared for an ongoing investigation.

## What's Off Limits

As mentioned above, the only record specifically exempted from Iowa law giving employees access to their personnel records is employment references. However, other records which are commonly exempted from disclosure include: documents prepared for trial, materials relating to an ongoing investigation, the actual employment test taken so it can't be disclosed to future test-takers, and business planning documents such as management succession plans and the like. Although these items are not specifically mentioned in the Iowa statute, legitimate arguments could be made to prevent their disclosure, particularly for items gathered in preparation for litigation or information considered trade secrets.

## Correcting Files

After viewing their personnel file, an employee may wish to make a correction in some aspect of the record. Corrections to information such as emergency contact numbers or tax withholding information is very helpful to the human resources department. Employees may also wish to correct, clarify or counter information in their personnel file relating to matters such as their performance evaluation or disciplinary action. In that situation, the company may wish to require that the employee's supervisor or a human resources representative review such suggested changes before any modifications are made to the file. It should be noted that Iowa law does not give employees any specific rights to correct personnel records.

## Written Policy

Establishing a formal procedure to handle employee's requests to inspect personnel records is a good idea for all but very small organizations. A written policy setting out file review guidelines will inform employees of their rights and furnish evidence that the company is complying with state or federal laws regarding employee access to personnel files.

A written access policy should either be placed in the employee handbook or disseminated to employees in some manner. It should include provisions on: what records are subject to disclosure; materials exempt from employee review; frequency that employees can view records; procedures for requesting access; time and manner for viewing records; employee rights to photocopy records; and the method to request corrections in the file.

Granting employees access to their personnel files can be an encumbrance to your staff but it is the right thing to do both because of the legal mandates and because it gives employees the sense that they are being dealt with in an open and equitable manner, with no hidden files or secret documents maintained on them.

By the way, if your company operates in states other than Iowa, be sure to check the laws in those states as laws vary widely regarding employee access to personnel records. As always, HR-OneSource is available to assist employers if you have any questions.

# Headline headline headline

The loss of wealth is forcing a growing number of older workers planning to retire to decide between living less or working more, warned John A. Challenger, of Challenger, Gray & Christmas, Inc., an international outplacement firm. "Fewer retirements will not allow younger workers to enter or move up the corporate ladder, thus limiting their income and spending. The other option - living less - will mean reduced spending by the fastest growing segment of the population," Challenger predicts that working more will likely win out as the strategy of choice: "Rather than proceeding with retirement

plans, which would only be possible by significantly reducing lifestyle costs, workers in their 50s, 60s and 70s are staying in the workforce and retirees are returning." As a result of would-be retirees staying on the job, there will be a dramatic change in the demographic makeup of the workplace, one that will force many companies to alter future plans for the hiring and/or promotions of younger workers. The number of people in the workforce age 55 and older increased by 8.4 percent or 1.6 million people between June 2001 and June 2002, according to the Bureau of Labor Statistics, well above increases in previous



years. A January Gallup poll conducted long before the market's recent losses found that 26 percent of individuals in their 50s and 21 percent of those in their 60s are considering delaying their retirements.

# Final HIPAA Health Privacy Rules Defines Employers' Role in Securing Medical Data

According to the Bureau of National Affairs (BNA), the Department of Health and Human Services' final version of its health privacy regulation creates a clearly defined "firewall" between employment records and the medical information that is protected under the rule. The final Rule clarifies that employment records maintained by a covered entity in its capacity as an employer are excluded from the definition of protected health information.

In general, the rule gives individuals more control over how their health records are used and disclosed. For example, health care providers, health insurance plans, and other entities covered under the rule must limit access to individuals' health information and obtain their authorization before using information for certain nonmedical purposes. Covered entities are expected to comply by April 14, 2003.

## Clarifying 'Confusion' About Employment Records

Since the rule's release by the Clinton Administration in December 2000, employers have worried that companies would be counted as one of the rule's "covered entities," thus leaving them responsible for protecting the privacy of employees' health information.

The 2000 rule's definition of protected health information did not expressly exclude personnel or employment records. This created confusion for employers that obtain health information about employees. The rule's language also was problematic for employers that provide health services or have self-insured plans.

The final rule spells out when an employer is on the hook to comply. When an organization that is acting as an employer receives protected health information, the rule does not apply. For example, when an individual submits a doctor's statement to document sick leave, that medical information becomes part of the employment record, and, as such, is no longer protected health information.

The same pattern applies to the interaction between employers and health plans. A health plan must limit access to individuals' health information in accordance with the privacy rule. But when it discloses such information to a plan sponsor - for reasons allowed under the rule, of course - the protections are lifted. Similarly, if the group health plan received the



information from the plan sponsor, it becomes protected information when received by the group health plan.

For self-insured organizations, coverage under the rule depends on which cap - that of the plan administrator or that of the plan sponsor - is being worn at the time. "The plan sponsor is not the covered entity," according to the final rule, "so this information will not be protected when held by a plan sponsor, whether or not it is part of the plan sponsor's employment record."

## Recommendations for Employers

Whether employers are directly affected by the final privacy rule or not, Frank Morris and Mark Lutes, attorneys with Epstein, Becker & Green in Washington, D.C., said they should tone up their privacy practices to avoid being "reeled into the litigation mix" that might ensue.

Employers should explain in writing to their health plans how they will use and disclose protected health information. This is especially important for self-funded employers because of their added responsibility under the rule.

The attorneys also recommended that employers:

- craft a policy for handling protected health information as defined under the rule;
- make "absolutely clear" that protected

health information should not be used for employment decision making; and

- have in place a mechanism for disciplining violators of the policy.
- Other terms of note in the final rule include:
- The rule allows a group health plan to disclose to a plan sponsor, such as an employer, information on whether an individual is enrolled or has disenrolled from a plan without having to amend its plan documents.
  - HHS considered, but did not adopt, suggestions that health plans be permitted to send notice of individuals' rights under the rule to a plan sponsor, which would then be responsible for distributing the notice to each enrollee. Instead, HHS decided to keep the requirement that health plans distribute notice to each individual covered by the plan. "Health plans may arrange to have another entity ... distribute the notice on their behalf," HHS said. However, it added, if the plan sponsor fails to distribute the notice, the health plan would be liable.

HR-OneSource will keep you informed as the rules and regulations for HIPAA become available. In the meantime, if you have any questions, please call 515-221-1718.

## SHORT FACTS

**UNEMPLOYMENT** - The national unemployment rate was 5.9% in July. The jobless rate was 4.6% a year ago. Iowa's unemployment rate for July was 4.0%. The Iowa rate one year ago was 3.4%

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

**Health Costs Lead 4 Percent Increase in Compensation Costs** - The Labor Department's Bureau of Labor Statistics reported that compensation costs increased 4.0 percent for private industries for the year that ended in June 2002, the same increase recorded for June 2001. Wages and salaries paid to workers increased 3.6 percent over the year, compared with a 3.8 percent increase in June 2001. Benefit costs rose 5.1 percent, compared with a 4.8 percent increase last year. The increase in benefit costs largely was due to an increase in employer costs for health insurance. Union workers compensation costs increased 4.5 percent over the year, compared with a 3.9 percent increase for non-union workers.

**WEEKLY EARNINGS ROSE 2.2 PERCENT IN SECOND QUARTER, BLS SAYS** - The median weekly earnings of full-time workers in the second quarter of 2002 were 2.2 percent higher than reported in the second quarter of 2001, according to figures released July 22 by the Labor Department's Bureau of Labor Statistics.

**MASS LAYOFF EVENTS DOWN IN JUNE; MOST IN MANUFACTURING** - Mass layoff events totaled 1,557 in June, accounting for 159,352 job losses, compared with 2,107 layoff events involving 253,826 workers in June 2001, according to data released July 24 by the Labor Department's Bureau of Labor Statistics.

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## EEOC RESCINDS GUIDANCE ON UNDOCUMENTED WORKERS

In March, the Supreme Court ruled in *Hoffman Plastic Compounds v. NLRB* (169 LRRM 2769) that the National Labor Relations Board cannot require employers to pay back pay to illegal workers, even when their firing constitutes an unfair labor practice under federal labor law.

Following *Hoffman*, the EEOC determined that it would no longer seek reinstatement or back pay for undocumented workers for periods after discharge or failure to hire. In a June 27 directive, the commission also rescinded 1999 guidance that provided undocumented workers were entitled to the same remedies available to all other workers under Title VII of the 1964 Civil Rights Act.

## Employer's Misplaced Reliance on Third Party to Mail COBRA Notice is No Antidote to Liability

An insurer's failure to send a terminated employee notice of his COBRA rights warranted a \$10,500 fine against his employer, the U.S. Court of Appeals for the Eleventh Circuit ruled June 25 (*Scott v. Suncoast Beverage Sales, Ltd.*)

The court rejected the company's argument that its good-faith reliance on the insurance company to send the notice of workers' rights to continued health coverage under the Consolidated Omnibus Budget Reconciliation Act satisfied the company's obligation under the law. COBRA specifically assigns that obligation to the employer, it said.

The court added that the company could cite no case where an employer or administrator was relieved of liability because it had contracted its notification obligations out to a third party.