FORMAL EMPLOYMENT/PERSONNEL RECORDS

Formal employment records or personnel records should be maintained according to policies and procedures of the employer. Supervisors should be aware of the content of those records, as they apply to the employee's current responsibilities for employees under the direction of the supervisor. Each employer should take steps to ensure that current maintenance, access, disclosure, and review procedures are in compliance with state laws, which are regularly being modified. Several principles of fairness are outlined and discussed below generally related to employment records, including the supervisor's "currently using" or "fairness" files and records.

RECORD KEEPING GUIDELINES

Guidelines for maintenance of personnel record systems should be based primarily upon FAIRNESS and to some degree upon CONSENT, as indicated by the following considerations:

1) The system should not be secretive, manipulative, or vindictive, and the employee should know a record exists.
2) The individual ought to be able to see items for which he/she has a legitimate need.
3) Individuals should be able to learn how the information is used and who has access to it.
4) The information should be used only for the purpose intended during collection and should not be indiscriminately made available to others, including union representatives, without the consent of the employee.
5) The information holder should take adequate steps to keep the record current, accurate, and complete; and records should be protected and confidential.
6) Individuals should have recourse to an expedient method to correct inaccuracies and prevent breaches of confidentiality.

These matters have generally been voluntarily established by employers whose employer/employee relationships are based upon fair play and reasonableness, which incorporate dignity, responsibility, and respect by and for both parties. Increasingly, states have adopted formal and rigid regulations regarding employment-related records.

Before anything regarding difficulties or other problems is placed in the employee's file, the employee should, at least, be made aware of the supervisor's displeasure or concern at the time of the observation or incident. Do not "make book." This "fairness" consideration generally affords the employee an opportunity to correct most problems before formal disciplinary action occurs.

NOTE: No records regarding grievances or grievance activity should be kept in any individual's personnel file. A separate overall grievance file should be maintained, rather than a file by individual employee's name.

Supervisors utilizing this manual should consult the specific policies, Agreement, guidelines, etc., of their own organizations and comply with same especially in those areas where the employer policies, guidelines, Agreement, etc., may be slightly different from items in this manual.

SUPERVISOR'S DESK FILE/THE "CURRENTLY-USING" OR "FAIRNESS" FILE

Often the question arises: "Which personnel files should be maintained in the supervisor's desk/office?" The files maintained by a supervisor should relate to the current JOB PERFORMANCE activities of the employee and should contain only information which the supervisor is currently using, and should include:

___ information relating to the employee's work schedule,
___ information relating to the employee's vacation or leave,
___ information relating to the employee's absence record,
___ information relating to overtime hours distribution,
___ current active disciplinary track items,
___ employee's last performance review/performance appraisal,
___ items regarding performance observations or other items which are current since last review/appraisal, and which will be utilized to prepare the next review/appraisal,
___ positive comments as well as negative.

All other file information should be kept in the employee's master company personnel record.

HANDLING ACCESS REQUESTS

In any instance where employees request access to their employment-related records, supervisors should ask the employee:

1) Why do you want the information?
2) Specifically, what do you want to see?

REMEMBER, the personnel file of any employee is company property.

BUT BEWARE:

___ If the information pertains to a school record which is not available anywhere else, the Family Educational Rights and Privacy Act or other state or federal law may apply.
___ If the information was obtained by a credit agency or if any credit agency has access to the information, then employees may have the right to know the information under the Federal Fair Credit Reporting Act.
___ If the information has been used against the employee in any way, access may be obtained by subpoena during legal or due-process proceedings, or through routine discovery process for arbitration.
___ Supervisors should notify the personnel and labor relations/legal departments of any and all requests by the employee for access to employment-related records or information, and once the request is approved, release should be only in the form approved by those departments.
___ Requests from the union for access to information contained in an employee's file should not be honored without approval of the employee and approval of the personnel or labor relations department.

DISCLOSURE OF INFORMATION: EMPLOYEE TO EMPLOYER

The basic criterion supporting the employer's desire for information has generally been: "Is there a legitimate business reason for the information requested, and is that information reasonably necessary for the proper conduct of business?"

With the claim by the employer of the "need to know" is the obligation on the part of the employer to exercise confidentiality and to protect the information from access by individuals who do not have a legal right to know.

Rules requiring specific types of information, such as knowledge of employee residence or phone numbers, have been cited by arbitrators as "a reasonable method of supervising employees...that did not trespass on their right of privacy, since there was no public disclosure of private facts." However, misuse of those records or laxness of proper controls to protect confidentiality or failure to provide an expedient method to correct errors or inequities in records may result in a loss on the part of the employer of the right to know.

DISCLOSURE OF INFORMATION: EMPLOYER TO EMPLOYEE

Factors governing whether or not an employer discloses file information to an employee include:

1) Is there a legitimate reason for the employer not to disclose the information?
2) Why does the employee wish to see the information and what specific information is desired?
3) What are the applicable state and federal laws?

The recommended employer response to any employee requests for access to his/her personnel file information is as follows:

1) Ask the question, "Why do you wish to see the file?"
2) Ask the question, "Specifically, what do you wish to see?"
3) Release only the specific information requested and then only in the form approved by the Legal and Labor Relations Departments.

Do not release the entire packet. Do not allow the information to leave the "secure room." Do not allow others to see the information. Many employers allow for examination of an employee's records by the employee with proper request during non-work hours.

Only when there are urgent and compelling circumstances or in specific instances consistent with the employer's policies should the employer agree to provide a copy of specific information to the employee, and then only with the Legal and Labor Relations Departments' approval. The employer need not furnish information that the union or the employee can reasonably obtain from other convenient sources or from documents they already have. Require the employee, as well as any other individual who accesses the records for any reason, to sign and date the information seen on the "access record." This access record or acknowledgment of having seen the information, should be a physical part of the employee's personnel file.

The employer should only release information approved by the Personnel Department and Labor Relations/Legal Departments, and only in the form advised by those departments. Ultimate control responsibility for preservation of confidentiality and for security of personnel files should be vested in a single management representative.

INFORMATION THAT SHOULD NOT BE AVAILABLE FOR EMPLOYEE OBSERVATION

1) Reports containing comparisons with co-workers for purposes of merit raises, promotions, and layoffs (unless specifically covered by an Agreement and grieved or appealed).
2) Specific supervisor comments or evaluations concerning development plans, training plans, and work assignments of other employees (unless specifically covered by an Agreement and grieved).
3) Specific supervisor comments or assessments of other employees who are considered qualified replacements for the employee (unless specifically covered by an Agreement and grieved or appealed).
4) Supervisory evaluations of employee "tendencies" or aberrant behavior that might give management cause for concern but which do not constitute a reasonable belief or suspicion sufficient to prompt action or further investigation.
5) Information about other employees (unless specifically subpoenaed, such as during class-action suits).
6) Information from "confidential sources."
   Employee threats or statements insinuating they are considering action against the employer for libel, slander, or defamation do not give an employee unrestricted license to examine personnel records and files.

Beware of hearsay or off-the-record response or information, except when information may be considered as a reason for investigation.

Several states have laws which permit an employee to inform an employer that information in his/her employment-related records is not to be disclosed to any third party. Similarly, several states have laws which grant an employee the right to be informed by an employer of all requests for any information which may be contained in his/her employment-related records.

Supervisors should REPORT TO PERSONNEL/LABOR RELATIONS/LEGAL DEPARTMENTS ANY REQUESTS/DIRECTIVES BY EMPLOYEES REGARDING NON-DISCLOSURE OF PRIVILEGED-RELATIONSHIP FILE INFORMATION. Employers should periodically take steps to update their employment records policies, as laws governing collection, control, use, release, etc., of such records by both private and public employers are routinely being adopted and expanded by both state and federal governments.

Employers are cautioned to maintain ANY AND ALL employee personnel information in extreme confidence, as there is increasing litigation activity against employers for defamation of character and libel as a result of employer release or "leak" of information about an employee, especially information that is "moral turpitude" in nature.

Employers are facing increasing controls and restrictions in their use of "investigative reports" that contain information compiled through a field investigation.

Restriction/Guidelines on Employer Use of Consumer Reports Under the Fair Credit Reporting Act:

___ The employer should tell the employee or applicant when ordering the report; and if the employee so requests, the employer should discuss the nature and scope of the investigation.
___ If the employer makes an adverse decision based upon such a report, the employer should so inform the employee and also inform the employee of the identity of the agency that prepared the report.
___ The employee is then entitled to go to the agency for additional information.
___ Consumer reports over seven years old cannot be used for employment purposes, unless the job pays over twenty thousand dollars.
___ A consumer report cannot contain adverse information about an applicant or employee which has been obtained from public records without notice to the employee or applicant.

The Personnel Department should maintain a CONFIDENTIAL record of any employment-related items that deal with topics which might involve an employee's moral turpitude, such as records regarding discipline for theft or other illegal acts, sexual harassment charges or investigations or discipline. A reference sheet can be inserted into the employee's master file or records indicating there is confidential information regarding the employee in the CONFIDENTIAL records maintained by the Personnel Department, but only the Personnel Department manager should be allowed to approve access to such CONFIDENTIAL records, and then only after he/she considers the legitimacy of the need for the solicitor to see the information.

ACCESS TO GRIEVANCE RECORDS

The simple fact that there exists a collection of notes and outlines maintained by the supervisor to assist in the conduct of a grievance meeting (such as MARC Grievance Checklist pages G-O, G-2A, etc.) does not of and by itself obligate the employer to provide the union with copies of such notes and outlines. The business meeting outline notes are simply planning pages and while they should not be hidden and secretly referred to, they need not be given to the union, absent contractual obligation to do so by virtue of specific language in the Agreement.

If the employer representative makes claims based upon the contents of those notes and outlines, or if the employer representative specifically refers to the notes or outlines, and if then the union requests copies of such notes and outlines to verify those claims, then the employer would likely be obligated to disclose them.

It is appropriate that during advanced steps of the grievance procedure, if an employer representative makes reference to notes from an earlier step of the grievance procedure, the employer representative should, at least, at that point show the notes to the union representative. Copies of those notes need not be provided unless the union representative, in writing, requests them.

If such or similar notes are referred to by employer representatives during an arbitration proceeding, copies of the notes should be entered as exhibits, with copies provided, at that time for both the arbitrator and the union advocate. (See MARC Checklist Page 64 "Submitting the Supervisor's Notes as Exhibits in Arbitration.")

MAINTAINING GRIEVANCE RECORDS ("EMPLOYER WORK PRODUCT")

Employer notes, planning outlines, and checklists generated during the investigation and processing of a grievance should be maintained in a separate file, preferably in chronological fashion. Such notes should not be kept or referenced in any of the personnel files of the grievant or in any other employment-related files connected with the grievant.

Such notes and planning information should be considered the employer's "work product'" in effect, material prepared by the employer's representative and utilized in anticipation of or preparation for a grievance meeting. If the supervisor uses those meeting planning notes during the meeting to assist in staying on schedule or following an agenda, the notes should be placed on the table in full view of all present, rather than hidden and secretly or surreptitiously referred to. The supervisor may also make a statement such as: "as you can see I have prepared an outline for this meeting, and I have covered all of the steps I intended to cover at this time."

The union has the opportunity to prepare and maintain a substantial equivalent of the materials, especially notes which they could have taken during the actual meeting.

Employer legal representatives should take steps to ensure that policy regarding the access of the union to the employer's "work product" grievance records should be similar to Rule 26(b)(1) as reflected in:

_____Fed. R. Civil P. 26 (b)(3)
_____Hickman v. Taylor, 239 U.S. 495, 67 S. Ct. 385, 91L.Ed.451
_____Com. of Puerto Rico v. S. S. Zoe Colocotroni, D.C. Puerto Rico, 61 F.R.D. 653, 658

"DUTY TO DISCLOSE" INFORMATION "RELEVANT AND NECESSARY" TO VERIFY CLAIMS

The obligation upon the employer to disclose information to verify claims made by the employer is further supported by the section 8 (a)(5) requirement of the National Labor Relations Act; namely, that the employer should provide such "relevant" and "necessary" information in a "timely" manner where the union demonstrates "relevancy" of the information to the subjects being discussed and to the "claims" made by the employer's representative.

B. F. Diamond Constr. Co., 163 NLRB 161 (1967) enforced per curiam, 410 F.2d 462 (5th Cir.) cert. denied 396 U.S. 835 (1969)

N.L.R.B. v. Yawman & Erbe Mfg. Co., 187 F.2d 947 (2nd Cir. 1951)

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