

RESOLUTION 08-01-2011

DIGEST

Employees' Right to Copy and Inspect Personnel Records

Amends Labor Code section 1198.5 to allow copying and inspection of personnel records related to the employee's performance or any grievance concerning the employee.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No prior resolutions found.

Reasons:

This resolution amends Labor Code section 1198.5 to allow copying and inspection of personnel records related to the employee's performance or any grievance concerning the employee.

This resolution should be approved in principle because it makes clear that current and former employees have a right to receive copies of documents related to both their performance and any grievance the requesting employee was involved in during their tenure with a specific employer.

Presently, Labor Code section 1198.5 provides that the employee may inspect and copy only those documents maintained by the employer which the employee has signed. This may include items such as performance evaluations, but does not include items such as a complaint made by or against an employee, or an investigation resulting from that complaint. Accordingly, for a former employee to receive copies of documents relating to his or her performance or grievances concerning his or her former employment, the former employee can only do so through formal discovery. This increases the number of lawsuits – some of which may be unnecessary – as this is the only mechanism for employees to receive copies of their records. Employees should be permitted to receive copies of their performance and grievance documents within a certain statutory time period, without having to file a lawsuit first. Further, an employee, upon receipt of these documents – prior to filing a lawsuit – will allow prospective counsel to properly analyze and advise the employee regarding whether a lawsuit was unmeritorious.

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Labor Code section 1198.5 to read as follows:

1 § 1198.5

2 (a) Every employee has the right to inspect and copy the personnel records that the
3 employer maintains relating to the employee's performance or to any grievance concerning the
4 employee.

5 (b) The employer shall make the contents of those personnel records available to the
6 employee at reasonable intervals and at reasonable times. Except as provided in paragraph (3) of
7 subdivision (c), the employer shall not be required to make those personnel records available at a
8 time when the employee is actually required to render service to the employer.

9 (c) The employer shall do one of the following:
10 (1) Keep a copy of each employee's personnel records at the place where the employee
11 reports to work.
12 (2) Make the employee's personnel records available at the place where the employee
13 reports to work within a reasonable period of time following an employee's request.
14 (3) Permit the employee to inspect the personnel records at the location where the
15 employer stores the personnel records, with no loss of compensation to the employee.
16 (d) An employee, upon termination of employment, has the right to inspect and copy
17 personnel records maintained by the employer relating to the employee's performance or to any
18 grievance concerning the employee so long as such a request is made within the two year period
19 following the date of termination of employment.
20 (e) The employer shall make the contents of those personnel records available to the
21 former employee at reasonable intervals and at reasonable times in accordance with paragraphs
22 (1),(2),(3) of subsection (c).
23 (f) An employer, under sections (a) and (d), may recover from the employee an amount
24 equal to the actual cost of providing copies of the personnel records.
25 ~~(d)~~(g) The requirements of this section shall not apply to:
26 (1) Records relating to the investigation of a possible criminal offense.
27 (2) Letters of reference.
28 (3) Ratings, reports, or records that were:
29 (A) Obtained prior to the employee's employment.
30 (B) Prepared by identifiable examination committee members.
31 (C) Obtained in connection with a promotional examination.
32 (4) Employees who are subject to the Public Safety Officers Procedural Bill of Rights,
33 Chapter 9.7 (commencing with Section 3300) of Division 4 of Title 1 of the Government Code.
34 (5) Employees of agencies subject to the Information Practices Act of 1977 (Title 1.8
35 (commencing with Section 1798) of Part 4 of Division 3 of the Civil Code).
36 ~~(e)~~(h) The Labor Commissioner may adopt regulations that determine the reasonable
37 times and reasonable intervals for the inspection of records maintained by an employer that is not
38 a public agency.
39 ~~(f)~~(i) If a public agency has established an independent employee relations board or
40 commission, an employee shall first seek relief regarding any matter or dispute relating to this
41 section from that board or commission before pursuing any available judicial remedy.
42 ~~(g)~~(j) In enacting this section, it is the intent of the Legislature to establish minimum
43 standards for the inspection of personnel records by current and former employees. Nothing in
44 this section shall be construed to prevent the establishment of additional rules for the inspection
45 of personnel records that are established as the result of agreements between an employer and a
46 recognized employee organization.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

Existing Law: Allows for the inspection of employee records by every employee and provides that the employer make the personnel records of the employee available at reasonable intervals and at reasonable times so long as the employee does not request inspection during hours the employee is required to render services to the employer. Existing law also provides certain exemptions on record types that must be provided and states that legislative intent is to establish minimum standards for inspection of personnel records by employees.

This Resolution: Would specifically enable current and former employees the right to both copy and inspect personnel records at a cost equal to the actual cost to the employer of providing copies of the personnel records. This resolution also limits, within current statutory boundaries, the period of time within which a former employee may inspect and copy personnel records.

The Problem: Existing law makes no provisions for the copying of personnel records by current employees. In addition, existing law is completely silent on the rights of former employees to inspect and copy their own personnel records. Because existing law does not provide the employee, current or former, the right to copy their personnel records the employee is placed at a substantial disadvantage when seeking legal counsel on their rights under the laws. Employees, current and former, seeking documentation in support of possible legal action against the employer, under the current law, are forced to file suit and proceed with discovery in order to have their personnel documents evaluated by legal counsel. The unwarranted effects of this practice have been the proliferation of frivolous lawsuits against employers and the disenfranchising of both the current and former employee to solicit an informed prelitigation opinion on the merits of their potential claim against the employer. This resolution, in keeping with the stated legislative intent of Labor Code section 1198.5, seeks to provide minimum standards of protection for both the employee and the employer by allowing for the inspection and copying of personnel records, permitting the employer to recover the actual cost of providing the employee with copies and limiting the time within which a former employee may inspect and copy personnel records.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

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