

The Personnel File: What Documents Should it Contain?

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Employee Claims Against Employers are Rising

One result of the pandemic is the rise in employee claims against employers, including whistleblower claims, for discrimination, wrongful termination, and violations of COVID-19 related government orders and directives. Many complaints and lawsuits are anticipated as the pandemic continues to evolve.

Employee lawsuits may claim that federal and/or state laws and regulations were violated by the employer. These laws offer protection to employers or to employees, and must be followed by employers. These laws include:

- New Jersey Law Against Discrimination
- Conscientious Employee Protection Act (CEPA)
- Americans with Disabilities Act (ADA)
- Executive Orders and Department of Health and/or Labor Regulations/Directives
- Age Discrimination in Employment Act
- Fair Labor Standards Act
- New Jersey State Wage and Hour Law

The Importance of Documenting and the Requirements of Reporting

In lawsuits alleging a violation of any of the above laws or regulations, it is essential that the employer has factual documentation on file that will dispute an employee's claims against the entity or its supervisors. In particular, performance related documents need to be filed and saved, with access typically limited to the HR department.

In some situations, there is a requirement for the employer to report the employee issue to a particular agency or regulatory body.

The question then is what type of file should store an employee's information?

The Personnel File: What Should it Contain?

An employee's personnel file is a critical item that serves many purposes. It is a repository for the employee's initial application and resume, reference letters and the job description. If the parameters of the job should change, updated descriptions should be added to the personnel file. Documents relating to promotions, raises, transfers, layoffs, rates of pay, other compensation, professional development and training, positive reviews and other types of factual information about the employee should be within the personnel file.

In addition, the personnel file should contain all disciplinary notices, suspension notices and termination records.

A lawsuit or an EEOC complaint could trigger a subpoena for the personnel file. For this reason, and because the personnel file is generally accessible to the HR staff, the employee, and sometimes an employee's manager or supervisor, it is very important to know what type of information should not be in this file.

Using Alternative Files to Contain Other Information

Many types of information about the employee should not be included within the personnel file. For those documents, it is advisable to set up separate files, perhaps classified as supervisory or management notes. Information that should not be in a personnel file can instead be retained in a medical file, a payroll file, an I-9 file, an investigation file, or another confidential file. Alternatively, some documents should not be kept at all by an employer.

In general, employers should not include the following information in an employee's personnel file:

- documents relating to the applicant's interview notes
- employment tests
- reference/background checks
- employment/payroll verification
- drug tests
- immigration forms
- payroll and benefits
- medical/insurance records
- workers' compensation
- child support/wage garnishment
- any litigation documents and records of investigations

An employer that follows these guidelines and the applicable laws and regulations will be able to maintain the appropriate information and files about the company's employees. When in doubt, consult with the HR department and with counsel.