

Virginia Employees Receive the Right to Obtain Copies of Personnel Records Upon Written Demand

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The Law

Virginia employers have never been required to provide employees with access to personnel files absent the issuance of legal process. That changed as of July 1, 2019 when an amendment to the evidence section of the Virginia Code granted all employees (current and former) the right to obtain copies of records in whatever format maintained that “reflect” the employee’s dates of employment, position held, wages earned, job description and title, and any injuries the employee sustained during the course of his/her employment with the employer. VA. Code Ann. §8.01-413.1(B).

Prior to the amendments, Section 8.01-413.1 of the Virginia Code merely addressed the admissibility of typewritten copies or photostatic copies subpoenaed from the employer in the place of the employer’s original records. The amendments provide a mechanism for an employee or his/her attorney to receive copies of personnel records, which fall into the categories above, within thirty (30) days of a written request for the records. The employer may charge a reasonable fee for the reproduction of the records in paper or electronic formats. If the employer does not comply with the written request, the employee or his attorney may cause a subpoena to be issued, even if no lawsuit is pending. Attorney’s fees and costs may be imposed if a court finds that the employer willfully refused to comply with the request for the records.

As noted below in subsection E, there are two exceptions to the requirement to provide records to the employee. First, an employer is not required to provide records that include opinions of the employee’s treating physician or clinical psychologist (made in the exercise of their professional judgment) that furnishing the records to the employee would endanger the life or physical safety of the employee or another person. Second, an employer is not required to provide records that reference a person other than a health care provider, and granting the access requested would be “reasonably likely to cause substantial harm to such referenced person.” If the employee requests these records, the employer may provide them only to the employee’s attorney or authorized insurer. The records may not be provided to the employee.

Steps Employers Should Take

Employers should review current personnel manuals and policies and adopt policies or update existing policies that govern access to employment records such that the policies align with the rights provided under Virginia Code §8.01-413.1. Language in manuals or policies that provide that: access to personnel records is not permitted; employees may only review records; and that employees may only receive copies or access to records at the employer’s discretion should be revised.

In addition, because an employer only has thirty (30) days to provide the copies or request an additional thirty (30) days to provide the copies and because a court can award an employee his/her court costs, reasonable attorney's fees and damages – expenses incurred in obtaining the copies – for an employer's failure to respond, employers should put procedures in place for the handling of any requests, to include designating personnel responsible for responding to such requests.

Finally, since current and former employees may request copies of these records, and employers must provide copies of "all records or papers retained by the employer," employers should review current document retention policies such that records are retained for the minimum time necessary under applicable federal and state law. Employers should also consider adopting procedures that require that all personnel records are to be maintained only by the human resources department.

If you have any questions or need assistance in preparing or reviewing existing policies, please contact any member of the Rees Broome Employment Practices Group.

The amended code provisions are set forth in full below:

Virginia Code Ann. 8.01-413.1(B), (C) and (D).

B. Every employer shall, upon receipt of a written request from a current or former employee or employee's attorney, furnish a copy of all records or papers retained by the employer in any format, reflecting (i) the employee's dates of employment with the employer; (ii) the employee's wages or salary during the employment; (iii) the employee's job description and job title during the employment; and (iv) any injuries sustained by the employee during the course of the employment with the employer. Such records or papers shall be provided within 30 days of receipt of such a written request. If the employer is unable to provide such records or papers within 30 days, the employer shall notify the requester of such records or papers in writing of the reason for the delay and shall have no more than 30 days after the date of such written notice to comply with such request. If the records or papers are kept in paper or hard copy format, the employer may charge a reasonable fee per page for copying. If the records or papers are kept in electronic format, the employer may charge a reasonable fee for the electronic records.

C. Upon failure of any employer to comply with a written request made in accordance with subsection B, the employee or his attorney may cause a subpoena duces tecum to be issued. The subpoena may be issued (i) upon filing a request therefor with the clerk of the circuit court wherein any eventual suit would be required to be filed and upon payment of the fees required by subdivision A 18 of § 17.1-275 and fees for service or (ii) by the employee's attorney in a pending civil case in accordance with § 8.01-407 without payment of the fees established in subdivision A 23 of § 17.1-275.

D. If the court finds that an employer willfully refused to comply with a written request made in accordance with subsection B, either (i) by failing to respond to a second or

subsequent written request, properly submitted by the employee in writing, without good cause or (ii) by imposing a charge in excess of the reasonable expense of making the copies and processing the request for records or papers, the court may award damages for all expenses incurred by the employee to obtain such copies, including a refund of fees if payment has been made for such copies, court costs, and reasonable attorney fees.

E. The provisions of this section shall not require copies of an employee's records or papers to be furnished to such employee when the employee's treating physician or clinical psychologist, in the exercise of his professional judgment, has made a part of the employee's records or papers a written statement that in his opinion the furnishing to or review by the employee of such records or papers would be reasonably likely to endanger the life or physical safety of the employee or another person, or that such records or papers make reference to a person, other than a health care provider, and the access requested would be reasonably likely to cause substantial harm to such referenced person. In any such case, if requested by the employee or his attorney or authorized insurer, such records or papers shall be furnished within 30 days of the date of such request to the employee's attorney or authorized insurer, rather than to the employee.