

EMPLOYERS' DUTIES REGARDING EMPLOYMENT RECORDS

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Employment records often contain private employee data or information that employees generally do not want disclosed to others. In some cases, legal requirements actually forbid employers from disclosing private employee data to others. Private employee data contains such information as home addresses, photographs, social security numbers, dates of birth, demographic information reflecting protected class status, and medical information. Employment records could also include private financial information such as compensation and benefit plan participation that could have value as a commodity to marketers.

1. Medical Information

The Americans with Disabilities Act (“ADA”) and the Family and Medical Leave Act (“FMLA”) place specific requirements on employers regarding medical information about employees. Employers must maintain information collected from or about employees’ medical condition or medical histories on separate forms and in separate files. Employers must also treat the medical information as confidential. Employers should not disclose such medical information in response to a subpoena or release that only requests an employee’s personnel records.

Employers may only disclose such medical information to: (a) supervisors and managers who need the information regarding work restrictions and accommodations; (b) first aid or safety personnel for purposes of emergency treatment; and (c) government officials who investigate compliances with law.

The HIPAA Privacy Rule prohibits employer-sponsored benefit plans from disclosing employee medical information without a HIPAA-complaint written authorization. If employers sponsor self-funded health plans, the employees of the health plans must not allow access to employee private health information by employees who do not work for the health plans.

2. Criminal and Credit Information

Many employers routinely undertake criminal background checks on employees and prospective employees. Employers many also undertake credit background checks on employees and prospective employee responsible for an employer’s financial resources or monetary transactions. The Fair Credit Reporting Act (“FCRA”) places narrow limitations on the circumstances in which employers may use such information. Consequently, employers should take precautions to prevent disclosures of credit information for purposes not authorized by the

FCRA. In particular, employers should maintain pre-employment investigative records separate from post-employment personnel records.

3. Personal Information Protection Statutes

Colorado has enacted statutes that require employers to protect employees from potential identity theft. One statute requires employers to give notice to employees if an employer believes, or have reason to believe, that another person has obtained an employee's private or personal data. Another Statute requires employers to develop a policy for the proper destruction or disposal of paper documents containing "personal identifying information."

4. Tort Theories of Liability

Colorado has recognized common law invasion of privacy tort theories. With respect to private employee data, these claims fall under two theories. First, the "publication of private facts" theory arises when an employer (a) unreasonably creates publicity about a person's private life; (b) in a highly offensive manner to a reasonable person; and (c) involving disclosures that lack a legitimate public concern. Colorado law initially recognized this tort theory in a case in which an employer publicized the HIV-positive status of an employee.

Second, the "misappropriation of name or likeness" theory arises if an employer permits or facilitates a misappropriation of the name or likeness of an employee for another's benefit. This theory could arise if a supervisor began using an employee's photograph or identifying information without her permission for the personal gain of the supervisor.

Because of these legal obligations, employers should work with their legal advisors to develop policies and practices designed to protect and to preserve personal information contained in employment records.

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