

Employment Edge 118th Edition—Making the Digital Leap: Special Considerations for Electronic Storage of Personnel Records

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Given the declining cost and the accessibility advantages of electronic storage, many employers already have or are considering making the digital leap to "paperless" human resources offices. In today's workplace, many employment records are created and maintained electronically and never make their way to paper files. In addition, paper records can be scanned into electronic form, reducing the long-term costs of storage and allowing users to preserve, search, and access vast databases of records with the click of a mouse. Despite the many benefits of going "paperless," there are, however, a host of legal ramifications that can derail even the most well-intentioned plan to go digital. Minnesota employers should, therefore, carefully consider a number of legal issues in planning any leap into the world of electronic personnel records, including the following:

- **If You Maintain a Personnel Record, You Must Produce It.** Minnesota, like many states, has a law that gives employees and former employees the right to review their official personnel record. Minnesota's personnel records law, found at Minnesota Statutes Section 181.960 et. seq., does not distinguish between electronic and paper records. As a result, employers must remember that the obligation to produce an employee's personnel record extends to all covered records, including electronic data. Production of an employee's personnel record under Minnesota law may consist of allowing the employee to review the record during business hours in the presence of a company official or producing a copy of the personnel record without charge upon an employee's request.
- **Electronic Records Should be Accessible and Well-Organized.** Employers should store electronic personnel records in an accessible, organized manner so that they can timely produce a personnel record upon a lawful request. In some states, employers are required to keep personnel records at each employee's worksite. Minnesota Statutes Section 181.961 provides employers with seven to 14 working days, depending on a record's location, to respond to an employee's or former employee's request to review a personnel record. A personnel record might also have to be produced in response to a legal subpoena. The time set by law to produce a personnel record may not be sufficient if the employer's electronic storage system is not well-organized and accessible. Quick access to all necessary files, searchability, and the ability to cull records are essential elements of an effective electronic storage system.
- **Electronic Records Should be Kept Confidential.** Personnel records often include information that employers must keep confidential, such as employee medical records, drug testing records, social

security numbers, and credit reports. Personnel records may also include sensitive information that should be maintained confidentially, such as pay records, leave requests, and performance or termination data. When dealing with physical files, employers can safeguard files by keeping them in locked cabinets in a locked office and only providing keys to authorized individuals. Employers must take similar virtual measures in the electronic realm—such as limiting access by security settings, password protection, and data encryption—to ensure that electronic records can only be viewed by authorized individuals. These measures are particularly important where storage is in "the cloud" on a remote server not maintained by the employer.

- As would be the case with paper records, employers must ensure that their electronic storage system follows the rules applicable to particularly sensitive information, such as medical data or drug testing results, which should, under various laws, be stored confidentially in a file that is separate from an employee's personnel file. For various legal reasons, I-9 forms should also be maintained separately from personnel records.
- **Plan for Document Retention and Destruction.** Employers maintaining electronic records need to think carefully about how long to preserve such records and when to destroy them. While Minnesota's personnel records statute does not specify how long a personnel record must be maintained, other employment laws contain recordkeeping requirements that may apply to various documents within a personnel record. On the other hand, storing electronic records indefinitely can be counterproductive despite the relatively low costs of electronic storage, such as, for example, where an employer must produce damaging electronic personnel records in litigation that it could have lawfully destroyed at an earlier date.
- To address these dual considerations, many businesses choose to implement document retention and destruction policies that set minimum retention periods but provide for the eventual destruction of unnecessary documents. Employers that adopt such a policy should seek legal counsel for assistance in understanding any legally required retention periods and for help in drafting and implementing a policy that complies with applicable law.

While there are a number of issues to consider and address in preparing to go "paperless," employers who carefully consider their legal obligations and practical needs should be well-equipped to successfully convert to an electronic personnel record system that both complies with the law and makes sense for their business.

The attorneys of Gray Plant Mooty's Employment and Labor practice group are available to assist employers with workplace policies, training and compliance, as well as litigation and dispute resolution. If you have questions about electronic storage of personnel records, or other workplace issues, please contact any other member of Gray Plant Mooty's Employment and Labor practice group.

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