

Ask the Attorney: personnel file FAQs, cost of living salary adjustments and more

In this month's roundup of questions from our readers, Nancy Delogu, expert employment law attorney, tackles personnel files and file retention, whether or not a cost of living salary adjustment is lawful, and more.

Who has the right to know what's in a personnel file?

Q: “Do employees have a legal right to information an employer keeps in its personnel records? Or should Human Resources be the only department with access to this information (except for Legal when required for compliance reasons)?” - Maren, Virginia

A: Whether employees have the legal right to see what is in their personnel “file” varies by jurisdiction. Some jurisdictions, like Massachusetts, require employers to make this information available to employees upon request in most circumstances, and others, like Virginia, do not require private sector employers to provide this information to employees.

Governments also usually have an obligation to provide certain records to their employees. As you note, documents may also be obtained by third parties through the legal or compliance process. It is best to check the law of your jurisdiction whenever you are unsure.

What is the most efficient method to deal with prolonged file retention?

Q: “An employer is seeking to transition from paper to digital employment files. They have a retention policy that is based on the type of each document, rather than a standard policy that permits them to retain everything for a set number of years following termination of employment or a period of time afterward. Their policy requires them to add metadata to each document so that documents that reach their retention date can be purged automatically by the system.

“They would prefer not to increase the staff workload by requiring them to tag individual documents. Currently, they have two team members spend several weeks a year reviewing every employee file to purge documents that should be shredded. What is best practice here, and what have you seen other companies do to comply with the file retention guidelines of multiple laws and regulations?” - Maren, Virginia

A: I am not sure there is a “best” practice that works for every employer, as the size of the employer as well as the rate of employee turnover, benefits practices and type of work they do all contribute to the number of documents to be managed. In my experience, however, more sophisticated employers keep documents based on the type of document, rather than retain a file containing all documents associated with a certain personnel record for a certain number of years after employment has ended.

Certain Occupational Safety and Health documents must be retained for 50 years after the affected employee is no longer employed, but retaining all employment records that long would be incredibly burdensome! The

digital system has the potential to eliminate quite a lot of time spent on digital management.

I like the idea of assigning each digital document a classification that will allow it to be sorted and automatically purged when stale, whether that is a certain time after it is created, after the employee is no longer employed, or some other measure.

Can we adjust salaries downward because of a lower cost of living?

Q: “An employee is moving within the company from the California, Ventura area to Phoenix, Arizona. When discussing compensation, would it be discriminatory to remove considerable pay after relocating? For example, if the employee is making 64k and we lower the pay by 17% because of the lower cost of living?” - David, Arizona

A: No, lowering the pay to fit within your pay structure at the new facility would not be discriminatory, as long as it is actually tied to the cost of living and imposed for that reason.

You don't say why the employee is moving locations, and he or she may not wish to accept the transfer under these circumstances, of course. For that reason, you should be frank about the option or request for transfer, the salary being offered, the opportunities for advancement, and other factors that an employee would consider relevant in making the major decision to relocate.

What can we ask under the New Jersey Sick Leave Pay Law?

Q: “Regarding the newly enacted New Jersey Sick Leave Pay Law, it is my understanding that employers cannot ask employees about the specific reason for using NJ Sick Leave. However, how does a supervisor establish whether the days qualify for NJ Sick Leave pay or not? If an employee just asks for a day off, can the supervisor ask if it falls under one of the qualifying reasons? We have a number of temporary workers who are now entitled to this paid time off and we are being cautious about what to ask, but we also need to know if the time off requested is covered.” Monica, New Jersey

A: You are allowed to ask questions about the request for sick leave sufficient to establish that the employee's request qualified for paid leave under the law. You can further require documentation of the employee's need for the leave in some circumstances.

For example, if the need for leave is foreseeable—for example, the employee has an appointment to see a health care practitioner or the employee's child has a school event—then you can require the employee to provide you notice of the need for the leave seven days in advance. If the need for leave is not foreseeable, the employee only needs to provide reasonable notice.

You can require documentation of the need for leave if the employee claims to need leave for an event that was not foreseeable, and the leave falls within a “blackout” date that you have provided, or the employee is out for three or more days to care for his or her own medical condition. You can find the New Jersey Department of Labor's current guidance on the law [here](#).