

Labor Negotiations

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A Couple of Items for Summer Vacation Catch-Up

“At last, its summer, now I can get some work done.” How many of us in New Jersey local governments have said that to ourselves? For me, every summer for 40 years. So, I thought it would be good to give you something to do (HA!).

There are two matters that often come up that can easily be left for “the summer” when you have some time. The need to review how my organization is managing the requirement of the Fair Labor Standards Act (FLSA) and a thorough look at my personnel files. In this article, I will give you a brief outline of these two matters to consider.

Fair Labor Standards Act

The FLSA is probably one of the most overlooked federal requirements that has been in place since 1986. The problem is that we all have our own interpretation of what causes overtime and who gets it. Some believe that the collective bargaining agreement, or the New Jersey Civil Service Commission governs the rules on FLSA. It does not. Many towns that I am familiar with often use stipends to pay for additional work that are after hours. An example is a clerical worker taking minutes at an Environmental Commission. A stipend in this example will not satisfy the requirements of the Act.

Every administrator should take time to review those positions that are not covered by a labor agreement. Typically, these are management employees. Once identified, the reviewer needs to determine the exempt status of an employee.

Exempt or not exempt status must be determined based on the employee salary and duties, the actual work being done. If the employee is exempt, overtime, or any compensation for time worked beyond 40 hours, is a local policy decision. Often, we skip the process of determining if the status is in accord with the FLSA and simply say that the employee is “salaried” and, therefore, no overtime. That would be a mistake that could be costly. The exemption test must be done thoroughly and completely. And keep all those records used in making the determination!

Next should be to determine if stipends are being paid to nonexempt employees who are eligible for overtime according to the Act. Generally speaking, stipends for work that is done during the course of the normal workday do not satisfy the requirements of FLSA. Please note that even if there is an agreement of any sort that provides for the stipend in lieu of overtime, there would still be a violation of the Act.

The US Department of Labor, Wage and Hours Division has a helpful “Toolkit” designed to assist you. Here’s the site: <https://www.dol.gov/agencies/whd/compliance-assistance/toolkits/government-contracts>

Personnel Files

A review of how you keep your personnel records and what should be kept in certain folders is important to protect confidentiality. As always, you should consult your labor attorney for specific advice. But here’s what I would do.

First, review each personnel file to determine what should be in there, and what should be separated into another subsidiary file.

Many times, I have seen personnel files that includes everything on the employee. That could be a legal problem that you want to avoid.

All personnel files for each and every employee, retiree, and former employee, should have at least two separate files: primary personnel file and a medical (other) information file. They can be kept in the same file drawer, but it would be better to keep them in a completely separate cabinet.

Here is a list to guide:

- The employee’s initial application.
- Resume and any reference letters.
- Job offers and acceptance documentation.
- The job description of the original job and any changes thereafter.
- Documents relating to promotions, transfers or raises.
- Training certificates, professional development.

- Positive reviews and other types of review information about the employee.
- All disciplinary notices, suspension notices and termination records.

Remember that the employee has complete access to their personnel file. That does not mean that they have access to confidential notes and memos.

What's Out

Now, let's go through what should not be there and what to do with that information. These documents should be kept separate and in a different file cabinet if possible.

Here is a guide for those documents.

- Any medical files or documents, medical/insurance records.
- Workers' compensation.
- Drug tests.
- Payroll file.

- I-9 file.
- Employment tests.
- Reference/background checks.
- Employment/payroll verification.
- Immigration forms.
- Child support/wage garnishment.

Not accessible by the employee:

- Any investigation file, or other management confidential reports.
- Any litigation documents and records of investigations.

Most important, medical information, doctors' notes, results of physical or drug test results, cannot be seen by anyone other than the personnel manager. If a supervisor or other who may review the personnel file sees medical information, then you will have a HIPAA violation. Medical records, drug tests, workers comp information all are similar and must be treated confidentially. My recommendation is that this

information is in a separate cabinet. You may want to bifurcate these items into (1) medical information and (2) all other information. I recognize that my primary recommendation is to simply separate a file into two files. I suggest you separate it even further into three files.

I am hopeful that this provides you with some ideas on important items that you might get done during the summer. 📧

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