

Funding for the Conference of Delegates is obtained entirely from voluntary, non State Bar of California sources. Points of view expressed in this resolution are solely those of the author(s), have not been adopted or endorsed by the State Bar's Board of Governors or overall membership, and do not represent the position of the State Bar of California.

RESOLUTION 8-03-2002

DIGEST

Employment Records: Right to Copy

Amends Labor Code section 1198.5 to permit an employee to copy personnel records.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History: Similar to resolution 1-07-00, which was approved in principle. Legislation consistent with that resolution was passed by the Legislature but vetoed by the Governor.

Reasons:

This resolution amends Labor Code Section 1198.5 to permit an employee to copy personnel records. This resolution should be approved in principle because the right to copy is a natural extension of the right to inspect.

Currently, section 1198.5 gives employees a right to inspect their personnel files and provides specific guidelines for that purpose. The right to copy those records, which may be implicit in the right to inspect, should be made explicit. Without the right to copy, the right to inspect is hollow, because the employee cannot be expected to remember everything that he or she has read. Besides, the denial of the right to copy will only prolong the process by forcing the production of the records at a later time in formal discovery.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommend legislation to amend Labor Code Section 1198.5 to read as follows:

- 1 §1198.5
- 2 (a) Every employee has the right to inspect ^{*make a*} and copy at the employer's
- 3 reasonable cost the personnel records that the employer maintains relating to the
- 4 employee's ^{*complete*}
- 5 (b) The employer shall make the contents of these personnel records available to
- 6 the employee at reasonable intervals and at reasonable times. Except as provided in
- 7 paragraph (3) of subdivision (c), the employer shall not be required to make these
- 8 personnel records available at a time when the employee is actually required to render
- 9 service to the employer.
- 10 (c) The employer shall do one of the following:

RESOLUTION 8-03-2002

DIGEST

Employment Records: Right to Copy

Amends Labor Code section 1198.5 to permit an employee to copy personnel records.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History: Similar to resolution 1-07-00, which was approved in principle. Legislation consistent with that resolution was passed by the Legislature but vetoed by the Governor.

Reasons:

This resolution amends Labor Code Section 1198.5 to permit an employee to copy personnel records. This resolution should be approved in principle because the right to copy is a natural extension of the right to inspect.

Currently, section 1198.5 gives employees a right to inspect their personnel files and provides specific guidelines for that purpose. The right to copy those records, which may be implicit in the right to inspect, should be made explicit. Without the right to copy, the right to inspect is hollow, because the employee cannot be expected to remember everything that he or she has read. Besides, the denial of the right to copy will only prolong the process by forcing the production of the records at a later time in formal discovery.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommend legislation to amend Labor Code Section 1198.5 to read as follows:

- 1 §1198.5
- 2 (a) Every employee has the right to inspect and copy at the employer's reasonable cost
- 3 the personnel records that the employer maintains relating to the employee's
- 4 (b) The employer shall make the contents of these personnel records available to the
- 5 employee at reasonable intervals and at reasonable times. Except as provided in paragraph (3)
- 6 of subdivision (c), the employer shall not be required to make these personnel records
- 7 available at a time when the employee is actually required to render service to the employer.
- 8 (c) The employer shall do one of the following:
- 9 (1) Keep a copy of each employee's personnel records at the place where the
- 10 employee reports to work.
- 11 (2) Make the employee's personnel records available at the place where the employee
- 12 reports to work within a reasonable time following an employee's request.

13 (3) Permit the employee to inspect and copy the personnel records at the location
14 where the employer stores the personnel records, with no loss of compensation to the
15 employee.

16 (d) The requirements of this section shall not apply to:

17 (1) Records relating to the investigation of a possible criminal offense.

18 (2) Letters of reference.

19 (3) Ratings, reports, or records that were:

20 (A) Obtained prior to the employee's employment.

21 (B) Prepared by identifiable examination committee members.

22 (C) Obtained in connection with a promotional examination.

23 (4) Employees who are subject to the Public Safety Officers Procedural Bill of Rights,
24 Chapter 9.7 (commencing with Section 3300) of Division 4 of Title 1 of the Government Code.

25 (5) Employees of agencies subject to the Information Practices Act of 1977 (Title 1.8
26 (commencing with Section 1798) of Division 3 of the Civil Code).

27 (e) The Labor Commissioner may adopt regulations that determine the reasonable time
28 and reasonable intervals for the inspection and copying of records maintained by an employer
29 that is not a public agency.

30 (f) If a public agency has established an independent employee relations board or
31 commission, an employee shall first seek relief regarding any matter or dispute relating to this
32 section from that board or commission before pursuing any judicial remedy.

33 (g) In enacting this section it is the intent of the legislature to establish minimum
34 standards for the inspection and copying of records by employees. Nothing in this section shall
35 be construed to prevent the establishment of additional rules for the inspection and copying of
36 personnel records that are established as the result of agreements between an employer and a
37 recognized employee organization.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

Existing Law: By not specifying the right to copy records the present law has been interpreted to limit an employee's access to personnel records to inspection only.

This Resolution: Because access to personnel files is crucial to former employees and their counsel in deciding whether there is a basis to bring an action, granting employees the right to copy as well as inspect personnel files serves public policy by preventing the filing of unnecessary litigation.

The Problem: If the employer refuses to allow employees to copy their files, the employee is forced to file suit to obtain copies by discovery procedures.

IMPACT STATEMENT

The proposed legislation does not affect any other law, statute or rule.

AUTHOR AND/OR PERMANENT CONTACT: Harris Kershner, 17592 Irvine Blvd., Tustin, CA 92780; (714) 730-5300.

RESPONSIBLE FLOOR DELEGATE: Harris Kershner

COUNTERARGUMENT

SAN DIEGO COUNTY BAR ASSOCIATION

How and where the employee will do the copying is not specified in the resolution. This resolution would permit such copying repeatedly, at "reasonable intervals," and all at the employer's expense. These problems could be addressed by providing that such copying must be on the employer's premises unless the employer expressly agrees otherwise; that such copying shall be at the employee's expense if it is requested more than one time in a single calendar year; and that the employer may elect to do the copying itself and provide the employee with a copy of the employee's personnel records.

SANTA CLARA COUNTY BAR ASSOCIATION

Although there is valid reason for allowing an employee to copy his or her personnel records, having the employer pay for the copying can lead to abuse by disgruntled employees. Rather than imposing a "reasonableness" test or requiring a showing of potential impending legal action before allowing copying, shifting the payment burden back to the employee would at least somewhat reduce the chance of employee harassment.

The Santa Clara County Bar Association recommends amending the resolution to change the words "employer's reasonable cost" (at line 2) to "employee's reasonable cost." Without this change we would recommend disapproval of this resolution.