

Employee files: use and abuse

USE AND ABUSE OF INFORMATION BY THE EMPLOYER

What kind of records about me can my employer obtain or keep? Can I look at my personnel file? Can my boss get arrest reports and use them to fire me?

The answers to questions of this sort are found in three areas. First, the collective bargaining agreement may contain provisions dealing with the employee's files and related matters. Second, the Union has the right to act for the worker in many situations. This includes the right of access to information related to disciplinary or grievance disputes. Third, the individual worker in California has important rights directly spelled out by law.

PERSONNEL FILES

Every worker in California has the right to see his or her own personnel files. The employer must make these files available for inspection, during regular business hours, "within a reasonable period of time after a request." Moreover, the employer must make the files available "at the place the employee reports to work." And the employer may not provide access only to the "official" file, while withholding other papers. Labor Code section 1198.5 spells out what must be revealed: all papers and files "used to determine that employee's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action." The only exceptions are (1) letters of reference and (2) records "relating to the investigation of a possible criminal offense"; this particular law does not require that these be shown. (Of course, the Union has the right to see the "investigation" records if the employer takes any disciplinary action.)

An employer who violates this law commits a misdemeanor. A worker denied access to all his or her records may complain to the Union or to the state Labor Commissioner.

FALSE OR DEROGATORY FILES

Since 1972, the California Constitution, Article I, section 1, has specifically protected the "privacy" rights of all employees, both public and private. Every Californian has a legal and enforceable right to be free from:

- government snooping and the secret gathering of personal information;
- the extensive collection and retention of unnecessary personal information by government and business interests;
- the improper use of information

properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party; the lack of a reasonable check on the accuracy of existing records. Enforcement of these rights, as with all rights, may require a struggle. The Union or a lawyer can help workers whose employer is violating these privacy rights.

ARREST RECORDS

One specific kind of information is particularly liable to be misused. This is information concerning an arrest or detention which did not result in a conviction. Employers often assume that being stopped or arrested for something is grounds for discipline or discharge. In California, that is a false assumption.

Labor Code section 432.7 specifically forbids the receipt or use of such arrest information to discipline or fire or refuse to hire a worker. Any public or private employer who violates this law may be sued for damages. If the violation is intentional, the employer is guilty of a misdemeanor and is also liable for treble damages (e.g., three times the amount of wages lost).

It is very important to keep this law in mind when a worker is arrested. There is a natural tendency to plead guilty to some charge so as to avoid attorney's fees or repeated trips to court. But such a guilty plea is a conviction; the protection of this statute would be lost. If the arrest or detention concerns alleged off-the-job behavior, the employee may not legally be suspended or

fired, so long as no conviction occurs. The arrested person should discuss possible job ramifications with the Union before making any decisions.

Most counties have "diversion" programs. Participation in "diversion" does not count as a conviction.

A related problem is time lost from work while in jail or court. Again, contact with the Union as soon as possible is very important.

Even records concerning criminal convictions are now subject to many restrictions. For example, no California employer may fire, discipline, or refuse to hire a worker for a marijuana conviction more than two years old. Specific questions concerning conviction records should be addressed to the Union or a lawyer.

MEDICAL RECORDS

This is another area in which employer misuse of information has been common. As a result, workers have won a variety of new protections. For example, employers with federal or state contracts are subject to restrictions on the kind of questions they may ask concerning physical disabilities. In California, a new law, the Confidentiality of Medical Information Act, imposes tight controls on the employer's right to obtain data from physicians and other health-care providers. Most employers are not yet aware of their new responsibilities in this area, and many questions remain to be answered. Specific problems should be brought to the attention of the Union or an attorney.