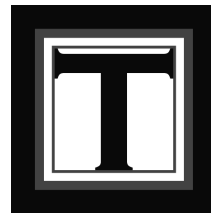


# What is the “Employment File” Anyway?



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Ryan J. Murray



**THRUN**  
LAW FIRM, P.C.

# Caution:

These slides reflect general legal standards for the related presentation and are not intended as legal advice for specific situations.

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Future legal developments may affect these topics.

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# “Employment Record” vs “Personnel Record”

- Sometimes used interchangeably
- **“Employment Record”**: refers to the documentation an employer keeps regarding each employee
- **“Personnel Record”**: defined by statute

# Personnel Records

- **Issues surrounding:**
  - Collection
  - Retention
  - Disclosure
- **EE right to review**
- **EE right to notice of disclosure to 3rd parties**



# Bullard-Plawecki Employee Right to Know Act (ERKA)

- Legislation establishing EE rights
- Defines personnel record
- Lists exclusions from personnel record
- An EE has the right to:
  - Review and obtain a copy of personnel record
  - Attach written rebuttal
- Restricts divulging discipline to 3rd party

# ERKA: “Personnel Record”

Defines “*personnel record*” as a record used or that may affect EE’s qualifications for employment, transfer, promotion, additional compensation or disciplinary actions

MCL 423.501





# Examples

- Application
- Resume
- Certifications/Licensure
- Employment Contracts
- Transfer notice
- Disciplinary letter
- Layoff letter

# ERKA

## Exclusions:

Several exclusions from definition of “personnel record”:

- Record kept by executive, administrative or professional EE in maker’s sole possession (not accessible to or shared with others),
- EE references if the identity of the person making the reference is disclosed

MCL 423.501



# ERKA Exclusions:



- ER's staff planning with respect to more than 1 EE, including salary increases, management bonus plans, promotions, and job assignments,
- Medical reports/records made or obtained by ER if the records or reports are available to the EE from the doctor or medical facility involved,

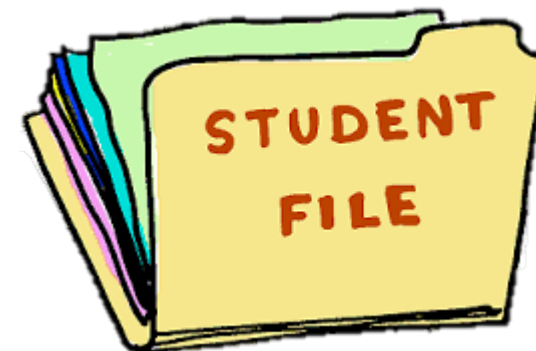
# ERKA Exclusions:

- Info of a personal nature about a person other than the EE if disclosure would constitute a clearly unwarranted invasion of the other person's privacy,
- Info that is kept separately from other records and that relates to investigation of criminal activity,

MCL 423.501

# ERKA Exclusions:

- Records limited to grievance investigations which are kept separately and are not used for the purposes provided under ERKA, and
- FERPA protected education records and personally identifiable information



# Exclusionary Rule

*Personnel record information which was not included in the personnel record **but should have been** as required by this act shall not be used by an employer in a judicial or quasi-judicial proceeding.*



MCL 423.502

## Exception to Exclusionary Rule

*However, personnel record information which, in the opinion of the judge in a judicial proceeding or in the opinion of the hearing officer in a quasi-judicial proceeding, **was not intentionally excluded in the personnel record**, may be used by the employer in the judicial or quasi-judicial proceeding, **if the employee agrees or if the employee has been given a reasonable time to review the information.***

MCL 423.502

# Why is this important?

The union will request to review or obtain a copy of an EE's personnel file when the EE is under investigation in anticipation of an arbitration or tenure hearing to prevent information that should have been in the file from being admitted in the hearing



# Disclosure Under ERKA to EEs

- EEs have right to review their personnel records maintained by their ERs
- ERKA applies to ***current and former*** EEs but does not apply to job applicants

# Record Review

*An employer, upon written request which describes the personnel record, shall provide the employee with an opportunity to periodically review at reasonable intervals...the employee's personnel record....*



MCL 423.503

# Copy of Personnel File

*[A]n employee may obtain a copy of the information or part of the information contained in the employee's personnel record. An employer may charge a fee for providing a copy of information contained in the personnel record.*

MCL 423.504

# Disagreement

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*If there is a disagreement with information contained in a personnel record, removal or correction of that information may be mutually agreed upon by the employer and the employee. If an agreement is not reached, the employee may submit a written statement explaining the employee's position.*



MCL 423.505

# Disclosure Under ERKA to 3<sup>rd</sup> Parties

*An employer or former employer shall not divulge a disciplinary report, letter of reprimand, or other disciplinary action to a third party, to a party who is not a part of the employer's organization, or to a party who is not a part of a labor organization representing the employee, without written notice as provided in this section.*

MCL 423.506





# Disclosure Under ERKA to 3<sup>rd</sup> Parties

- Written notice to EE (first class mail) on/before disclosure date
- Cannot disclose disciplinary documents more than 4 years old (but, could be a FOIA issue)
- Exceptions: employment application waiver, legal actions, agency investigation
- RSC § 1230b waives notice for unprofessional conduct check, including discipline over 4 years old

## *McManamon v Redford Twp* (Mich App, 2006)

- Former EE claimed violation of ERKA when township's supervisor made statements to a newspaper about the EE's suspension
- Supervisor quote: "the issue of the embezzlement is under review" and "McManamon was suspended due to problems in the performance of his day-to-day duties beyond the embezzlement charge"
- Court: because the supervisor disclosed to the newspaper that the EE was suspended, that action constituted disclosure of a "disciplinary action" under ERKA Section 6

## *McManamon v Redford Twp* (cont.)

- *Because there was no evidence that defendant complied with the notice requirements of ERKA, the divulging of a disciplinary action against plaintiff, without giving plaintiff notice, was a violation of the act.*
- *Notably, the statute does not forbid the disclosure; it merely requires that the employee receive notice of the disclosure.*

# ***McManamon v Redford Twp*** **(cont.)**

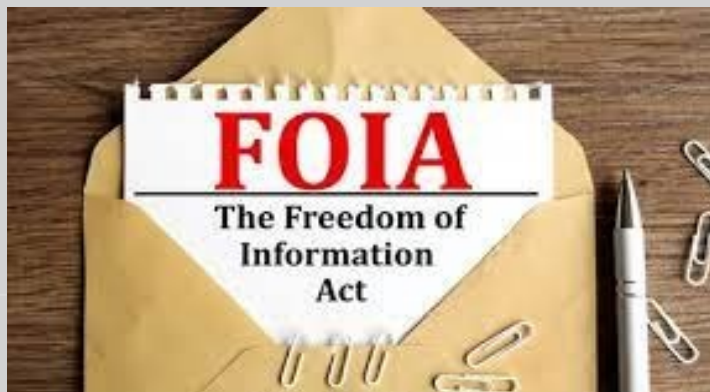
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- ERKA requires ER to notify EE *before* releasing disciplinary information to 3rd party
- Township violated law by disclosing information from personnel record
- Application
  - Section 1230b requests
  - FOIA requests



# Application to FOIA

*This act shall not be construed to diminish a right of access to records as provided in [Michigan's Freedom of Information Act], or as otherwise provided by law.*



MCL 423.510

# Personnel Records: FOIA

Documents in an EE's personnel record are subject to disclosure under the Michigan Freedom of Information Act (FOIA), 1976 PA 442, MCL 15.231, *et seq.*

**F O I A**

# Disciplinary Actions: FOIA

- Disciplinary records of public school EEs are subject to disclosure under FOIA. *Bradley v Saranac Cmty Schs*, 455 Mich 285 (1997)
- Required written notice of disclosure to EE. See MCL 423.506

Privacy exemption applies only to information that  
“*reveals intimate or embarrassing details of an individual’s private life*”

Does not automatically apply to

- Evaluations
- Complaints
- Discipline

***Bradley v Saranac Bd of Ed,  
455 Mich 285 (1997)***



## **Unprofessional Conduct**

- Definition of “unprofessional conduct” includes one or more acts of “*misconduct, immorality, moral turpitude, inappropriate behavior involving a minor, or commission of a crime involving a minor*”
- No contract or agreement to suppress information about EE’s unprofessional conduct

MCL 380.1230b

## **Unprofessional Conduct**

*Before hiring an applicant for employment, a school ... shall request:*

1. Applicant ... to sign statement that authorizes applicant's current or former ER(s) to disclose unprofessional conduct and releases current or former ER from liability for disclosure
2. Applicant's current ER to provide requested information

# Unprofessional Conduct

- Except as provided by law, board members and EEs cannot disclose information except to applicant or to other persons directly involved in selection process
- Penalty: misdemeanor; \$10,000 fine

MCL 380.1230b

# Personnel Records: Medical Files

- **ADA** requires medical records to be collected and maintained on separate forms and in separate medical files apart from rest of EE's personnel records
- **FMLA** requires that records/ documents relating to medical certifications and medical histories be maintained as “confidential medical records in separate files/records from the usual personnel files”

# Important:

**“You gotta keep ‘em separated!”**





# Requirements

*[U]pon an offer of initial employment being made by the board of a school district ... to an individual for any full-time or part-time employment or when school officials learn that an individual is being assigned to regularly and continuously work under contract in any of its schools, the district ... shall request from the criminal records division of the department of state police a criminal history check on the individual*

MCL 380.1230(1)

# Requirements (cont.)

*[T]he board of a school district ... shall request the department of state police to conduct a criminal records check through the federal bureau of investigation*



MCL 380.1230a(1)

# Requirements (cont.)

- Each applicant must provide written consent for criminal check
  - MCL 380.1230(6), 1230a(6)
- School generally must obtain criminal check results before employing an applicant
  - MCL 380.1230(9), 1230a(10)



# Restrictions

1. If background check discloses individual convicted of a "listed offense," school cannot employ individual
2. If background check discloses individual convicted of felony other than "listed offense," school cannot employ individual unless Superintendent and board each specifically approve employment in writing

# “Listed Offenses” Include:

- Accosting or soliciting a child for immoral purposes,
- Child sexually abusive activity or material,
- Criminal sexual conduct, and
- Pandering

MCL 380.1230(15)(d), 1230a(15)(c)



# Felony Conviction Other Than “Listed Offense”

- School (after verifying the information) cannot employ the individual *unless* the Superintendent and the board *each* specifically approve the employment in writing
- Best Practice
  - Check board policy
  - Consider the following factors:
    - Student/minor/individual in vulnerable state/physical harm involved?
    - Expungement; how long ago conduct occurred; mitigating/redeeming factors?

# Misdemeanor Conviction Other than “Listed Offense”

- Statute is silent as to individuals convicted of a misdemeanor that is not a listed offense
- Boards may determine through policy as to how those individuals will be considered for employment with the Board
- Consider the following factors:
  - Student/minor/individual in vulnerable state/physical harm involved?
  - Expungement; how long ago conduct occurred; mitigating/redeeming factors?

# Verifying Conviction

If background check reveals individual convicted of "listed offense" or felony other than listed offense, District "shall take steps to verify that information using public records"

MCL 380.1230(12)(d)



# Check Independent Contractors?

- RSC Section 1230a(1) requires a criminal records check for “an individual . . . who is assigned to regularly and continuously work under contract in any of its schools.”
- “Regularly and continuously work under contract”:
  - to work at school on a more than intermittent or sporadic basis,
  - as an owner or EE of an entity that has a contract with a school district,
  - to provide food, custodial, transportation, counseling, or administrative services, or to provide instructional services to pupils or related and auxiliary services to special education pupils. MCL 380.1230a(15)(d)

# Check Volunteers?

- RSC is silent regarding volunteer criminal checks
- School has discretion to determine whether it will require a criminal check for volunteers
- School also has discretion to identify disqualification criteria for volunteers, such as conviction of listed offenses or felonies, which are the same disqualifying factors for employees
- Volunteer's felony conviction for a non-listed offense:
  - Superintendent or designee should review the circumstances of the conviction and determine whether that conviction should disqualify the person from volunteer duties

## **Other Considerations – Maintenance & Non- Disclosure**

- Board Policy
  - Thrun Policy 4205 & 4205 AG1 - Hiring and Background Checks
- Confidentiality of Results
  - Non-disclosure
  - Exempt from FOIA

# Penalties for Disclosure

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- *A representative of the individual's employer who receives a copy of a report . . . shall not disclose the report or its contents or the results of the report to any person outside of the employer's business or to any of the employer's personnel who are not directly involved in evaluating the individual's qualifications for employment or assignment.*
- Violation = misdemeanor punishable by a fine of not more than \$10,000

MCL 380.1230(10)

**Questions?**



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