

## **What is an Employee Record?**

*It is essential for employers to fully understand what an employee record is when complying with the legal requirements for keeping and divulging such records. Recent case law has shed some light on the meaning of this term.*

Employers in Michigan are familiar with the requirement to keep a file on each employee that contains all “employee records.” The primary reason for this requirement is to enable an employee or former employee to review his or her employee file. This statutory scheme leads to the question as to what is an employee record that must be kept in the employee file.

*Definition.* The term “employee record” is governed by the subsection of the Bullard-Plawecki employee right to know act (ERKA) that explicitly defines the term. There are four essential elements to defining an employee record found in this section of ERKA:

1. The record must be kept by an *employer* who employs four or more persons.
2. The record must relate to a present or prior *employee* of the employer.
3. The record must relate to the employee’s *qualifications* for employment, promotion, transfer, additional compensation, or disciplinary action. Further, it must be used or have *potential* for being used on these job actions.
4. Records expressly *excluded* by the statute are not employee records.

This definition raises a host of questions before one even gets to the exclusions. Is there an employer-employee relationship? For example, the person in question may be an independent contractor. Does the record in question actually relate to the employee’s qualifications for the listed job actions? Many records will not meet this qualifier.

*The Exclusions.* Most of the intriguing questions on this topic arise from the exclusions. Employee references, general staff planning that relates to more than one employee, medical records that are otherwise available, and information that would impose an “unwarranted invasion of privacy” appear among the among several exclusions that apply in specified circumstances. These categories of exclusions are at least somewhat clear-cut and are not as likely to raise thorny legal issues.

Other exclusions are not as benign. In one recent case, *Wright v Kellogg Company*, Kellogg Company (the employer) refused to relinquish its internal notes from the grievance proceedings relating to the employee’s disciplinary suspension. Kellogg relied upon two exclusions to withhold the notes – grievance investigations and “records kept by an executive, administrative, or professional employee that are kept in the sole possession of the maker of the record, and are not accessible or shared with other persons.” The trial and appellate court found that Kellogg properly invoked and followed these exclusions and denied Mr. Wright access to the records.

*Wright* is one of the few appellate cases to examine this issue and offers employers some assurance that Michigan courts will apply the exclusions as written.