



Are You Storm-Ready?
*PROACTIVE STRATEGIES
FOR INFORMATION
MANAGEMENT AND
DOCUMENTATION*

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November 19, 2024
2024 Employment Law Seminar



Disclaimer: This presentation is not legal advice and is based upon current statutes, regulations, and related guidance that is subject to change. It is provided solely for informational and educational purposes and does not fully address the complexity of the issues or steps employers must take under applicable laws. For legal advice on these or related issues, please consult qualified legal counsel directly.

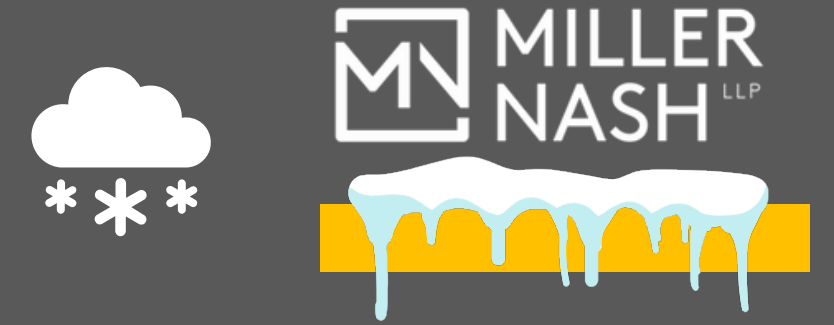
Storm Trackers



Iván Resendiz Gutierrez
Partner

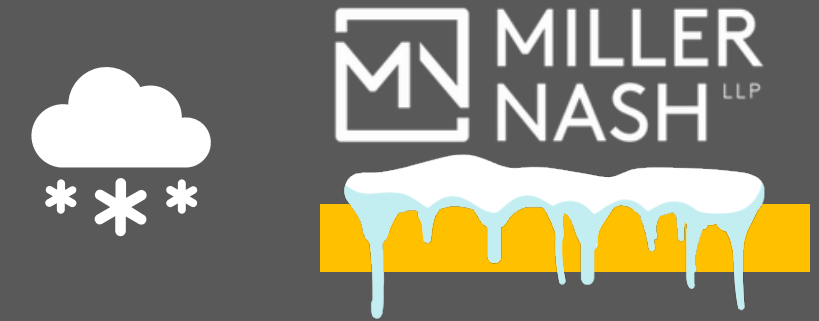


Amy Robinson
Partner



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Learning Objectives



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- Understand employers' current obligations for retention and storage of personnel files in Oregon and Washington.
- Recognize what is and is not included in the definition of "personnel file," and employee's rights of access to these records.
- Learn the legal requirements and best practices for responding to request for personnel files from former employees or related records requests.

Let's Check In—POLL



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How often are you dealing with requests for personnel records/personnel files?

- A. All the time, regularly (all the time)
- B. A few times a year (sometimes)
- C. I haven't in a long time (rarely)

Text millernash0333 to 22333 to join the poll

The Statutes: Oregon

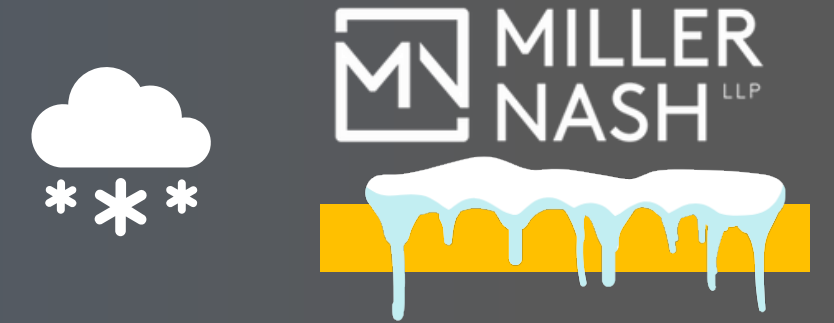


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ORS 652.750(2):

“[W]ithin 45 days after receipt of an employee’s request, an employer shall provide reasonable opportunity for the employee to inspect, at the place of employment or place of work assignment, the personnel records of the employee that are used or have been used to determine the employee’s qualification for employment, promotion, additional compensation, employment termination or other disciplinary action and time and pay records of the employee for the period required by the Fair Labor Standards Act, 29 U.S.C. 211(c), and accompanying regulations. Within 45 days after receipt of the employee’s request, the employer shall furnish a certified copy of the records.”

The Statutes: Oregon

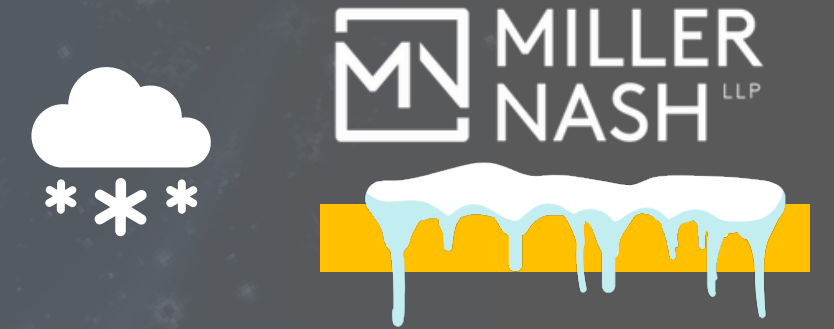


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ORS 652.750(1)(d):

“**Time and pay records**” means “payroll records and other records and data described under the administrative rules established by the Bureau of Labor and Industries pursuant to ORS 653.010 to 653.261.”

The Statutes: Washington



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RCW 49.12.050

“Employer’s record of employees—Exemptions.

(1) Every employer shall keep a record of the names of all employees employed by him or her, and shall on request permit the director to inspect such record.

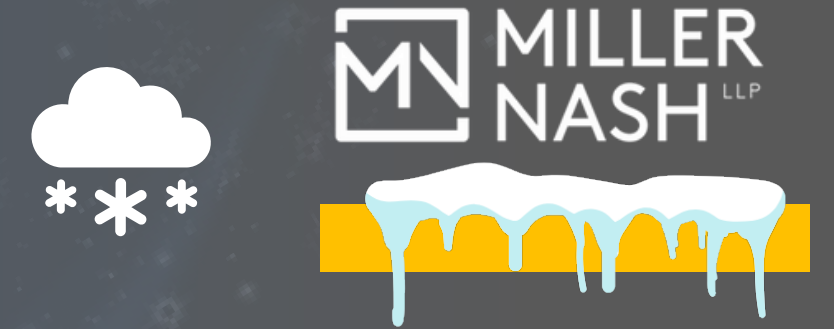
(2) Rules adopted under this chapter regarding records of hours worked do not apply to employees who have entered into a contract to play baseball at the minor league level and who are compensated pursuant to the terms of a collective bargaining agreement that expressly provides for wages and working conditions.”

RCW 49.12.240

“Employee inspection of personnel file.

Every employer shall, at least annually, upon the request of an employee, permit that employee to inspect any or all of his or her own personnel file(s).”

The Statutes: Washington



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RCW 49.12.250

“Employee inspection of personnel file—Erroneous or disputed information.

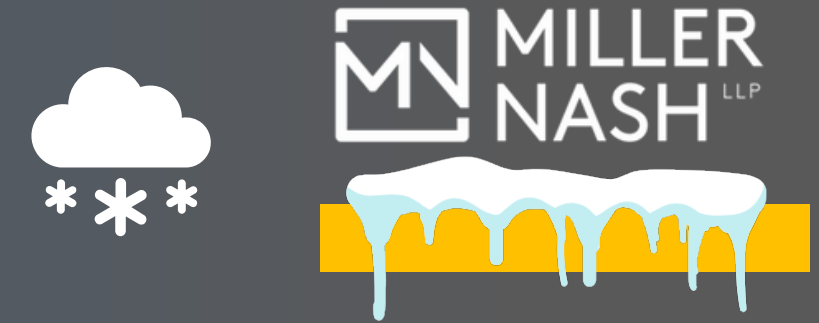
(1) Each employer shall make such file(s) available locally within a reasonable period of time after the employee requests the file(s).

RCW 49.12.260

“Employee inspection of personnel file—Limitations.

RCW 49.12.240 and 49.12.250 do not apply to the records of an employee relating to the investigation of a possible criminal offense. RCW 49.12.240 and 49.12.250 do not apply to information or records compiled in preparation for an impending lawsuit which would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts.”

Administrative Guidance (WA)



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The Washington Department of Labor and Industries (LNI) has provided more specific definitions and guidance (See, “Employee Access to Personnel File”, Administrative Policy, ES.C.7):

- The term “**locally**” means at the location where the requesting employee works or at a mutually convenient location agreed upon between employer and employee.”
- “**Within a reasonable period**” generally means within ten business days of the employee’s request unless good cause is shown that more time is needed.
- “**Personnel file**” includes records that are regularly maintained by the employer as part of the business records or those that are subject to reference for information given to persons outside the company. The term “personnel files” is further interpreted to generally include, but is not limited to, records of employment and such other information required for business or legal purposes; documents containing employees’ qualifications; verification of training completed; signed job descriptions; supervisor’s files; all performance evaluations, letters of commendation and letters of reprimand; salary, sick and vacation leave hours; and summaries of benefits and other similar information.

The Statutes: Washington



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RCW 49.46.070(1)

“Every employer subject to any provision of this chapter or of any regulation issued under this chapter shall make, and keep in or about the premises wherein any employee is employed, a record of the name, address, and occupation of each of his or her employees, the rate of pay, and the amount paid each pay period to each such employee, the hours worked each day and each workweek by such employee, and such other information as the director shall prescribe by regulation as necessary or appropriate for the enforcement of the provisions of this chapter or of the regulations thereunder...”

WAC 296-128-010 – lists the specific records required.

Administrative Rules: Washington



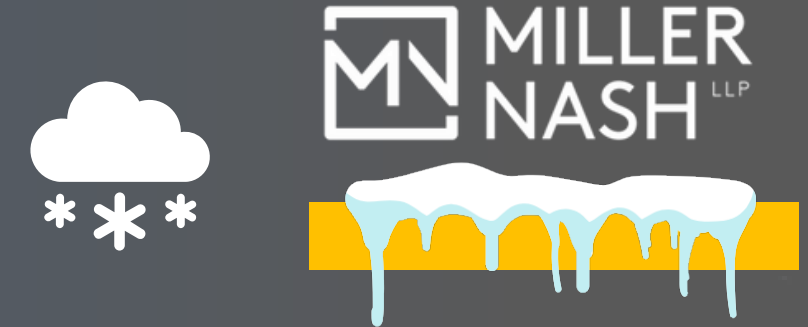
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Special requirement for Washington government agencies:

WAC 357-22-015

“Each employer must develop and publish a policy pertaining to the retention and confidentiality of personnel records in accordance with chapter 357-22 WAC and all relevant state and federal laws. The employer’s policy must include the requirement that personnel and payroll records are open to the inspection of the board, state auditor, the director or director’s designee, and prospective employers.”

Retention Requirements



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In Oregon:

- Employers must keep an employee's personnel records for at least **60 days** after termination.
- Time records must be retained for **two years**
- Payroll records must be retained for **three years**

In Washington:

- All records required must be kept by an employer for **at least three years**. See WAC 296-126- 050(1).

Retention Requirements



Other laws may also have record retention requirements:

- Under Title VII of the Civil Rights Act of 1964, employers must retain all hiring records for **a minimum of one year from the date of the hiring decision.**
- Under the federal Fair Labor Standards Act (FLSA), employers must retain general payroll records for **at least three years** and **individual timecards for a minimum of two years.**
- Under the federal Family and Medical Leave Act (FMLA), employers must retain all family leave records for **a minimum of three years.**

Practice Pointers

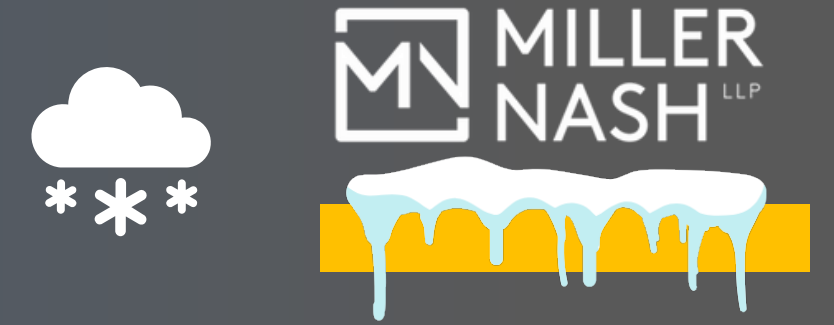


Records may need to be kept for longer periods if there is a litigation hold. When in doubt, please consult counsel.



The statute of limitation for contract claims is six years, in both OR and WA. According to BOLI, “[a]n employer would be at a distinct advantage if they did not have these records while defending a civil rights or wage claim and may choose to retain the records for at least seven years.”

Location of Employee Records



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An employee's personnel records could be located in a variety of locations including:

- The official file maintained by Human Resources;
- For educational institutions, in either “open” or “restricted” files if the employee at issue is a faculty member.
- A separate file maintained in payroll/bookkeeping with time and pay records only;
- Informal notes or records maintained by supervisors.
- Email folders of those involved in personnel decisions.

Location of Employee Records



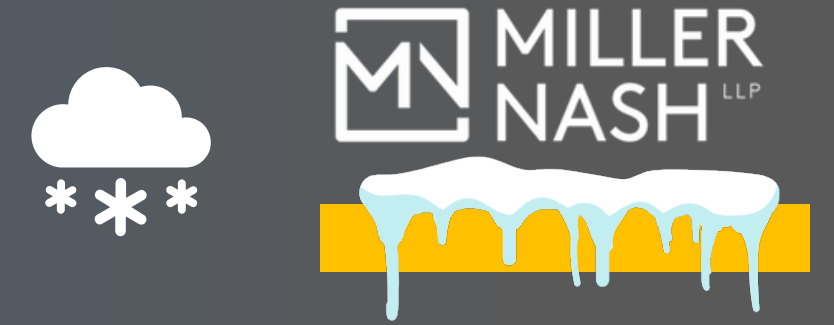
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Consider this discussion in the current “Documentation, Discipline and Discharge, Handbook for Employers” published by BOLI earlier this year:

...Say, for example, that [HR] sent an e-mail from home to Lane’s supervisor, asking [if the employee’s] tardiness has improved. That e-mail, as well as the supervisor’s response, is within the definition of “personnel records” if it contributed to any decisions [the employer] made about Lane’s employment...

...The bottom line is that you should create any documentation for the personnel file in a neutral, factual, and objective manner. Do not write anything in your employee’s file or anywhere else for that matter that you are not comfortable with the employee eventually viewing.

Location of Employee Records



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- Given difficulties that can arise in this area, employers should be sure to provide direction to supervisors regarding recordkeeping. Some may even want to discourage or prohibit supervisors from keeping separate, informal files on employees.
- But supervisors may temporarily maintain records concerning ongoing employee performance. These records will be considered personnel records if they fall within the definition of “personnel records.”
- Supervisors must follow all personnel record retention and confidentiality requirements and must transmit any personnel records to Human Resources in a timely manner and upon request by Human Resources.

Confidentiality and Medical Records



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- To ensure the confidentiality of personnel information, access to an employee's personnel file is limited to the employee and authorized personnel (usually HR, payroll, and leadership).
- Pursuant to the ADA, information containing any personal medical information is to be maintained separately from the primary personnel file, and access to medical information is restricted to those with a legitimate "need to know" and to be disclosed only to the extent necessary.
- This means supervisors typically may not need to access the medical file, but may need to be provided with limited information to understand the nature and extent of a need for reasonable accommodations.

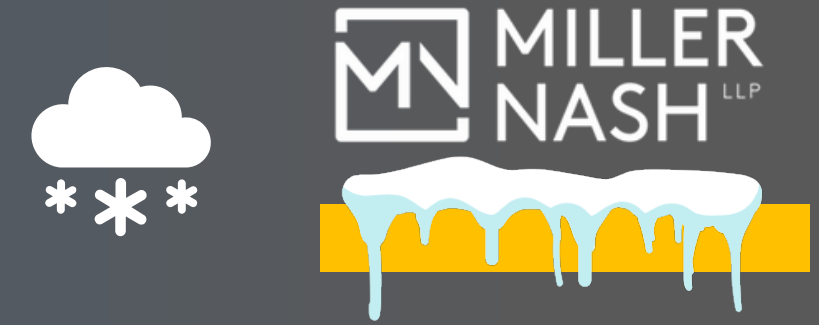
Storage and Retention of I-9 Forms



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- Form I-9 contains personal information about employees. When storing these forms (regardless of the format you choose), USCIS recommends that employers provide adequate safeguards to protect employee information.
- Employers who choose to keep paper copies of the documents their employees present may store them with the employee's Form I-9 or with the employees' records. However, USCIS recommends that employers keep Form I-9 separate from personnel records to facilitate an inspection request.
- No matter how you choose to store your Form I-9, you must be able to present them to government officials for inspection within 3 business days of the date when the forms were requested.

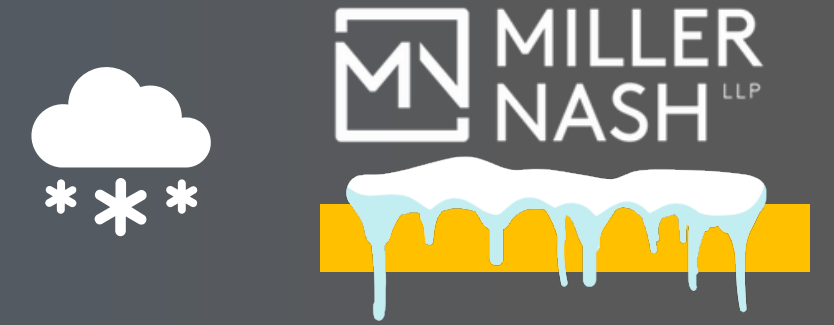
Managing Personnel Records Requests



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- Employers may adopt reasonable rules/procedures for requesting and accessing such records, provided they don't impede access and otherwise comply with the applicable statutes we have discussed.
- An employee is not required to cite the applicable statute, and if they make a request outside of particular procedures, the best practice is to calendar the response from the date of the initial request even if it did not comport with internal procedures.
- Where inspection of the physical file is permitted, it is important to ensure that (a) review is supervised or monitored to avoid tampering and (b) the personnel file cannot and should not be removed from the Human Resources Department.

Requesting Personnel Records



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- Nothing in Oregon or Washington's current personnel file statutes or interpretive guidance prohibits an employer from inquiring whether employees making a request for records want access to or copies of all of their time and pay records or only their personnel records.
- Clarifying what records the employee would like to inspect or obtain might narrow the number of documents to be provided.
- However, if the employee requests all of the time and pay records, the statute requires them to be provided.

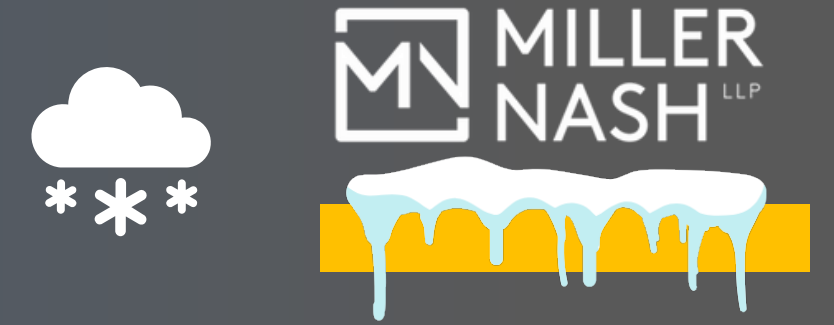
Certification of Personnel Records (Oregon Only)



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- In Oregon, an organization should provide certified copies of personnel records in the format requested by an employee or if providing the records in an electronic format, the organization will provide the certified copies of records in a downloadable and printable format (e.g., as a portable document format (PDF) file).
- There should be no medical records or immigration documents included in response to an employee's request for their personnel records. **Only records that have been used to determine an employee's qualifications for employment, promotion, additional compensation, termination or other disciplinary action, and time and pay records (if requested) must be included.**
- Employers may impose a reasonable charge (for example, \$20) for hard copies requested by employees.

Certification of Personnel Records (Oregon Only)



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QUESTION: I reviewed ORS 652.750(2) and there is reference to providing certified copies. What is that? Do I need to notarize something?

Answer:

- There is no formal process to certify personnel records.
- A cover letter signed by the custodian of records or the Human Resources manager certifying the copies as true and correct should be sufficient to meet this requirement.
- See the sample certification included in the whitepaper.

Recordkeeping of Personnel File Requests



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QUESTION: Does my organization need to keep a record of the delivery or inspection of an employee's personnel file?

Answer: While there is no affirmative requirement in Oregon or Washington to maintain a record of it, an organization should retain a copy of the transmittal to the employee in the employee's personnel file.

An Employee's Right to Rebuttal (Washington Only)



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- Washington law allows the employer to determine whether the personnel file contains “erroneous or irrelevant” information and, if the employer makes such a determination, the information must be removed from the file. If the employee disagrees with the employer’s determination of which information is subject to removal as “erroneous or irrelevant,” the employee may place a statement in the file documenting their disagreement with the employer’s assessment.
- Former employees retain the right to rebut or correct the employer’s determination of erroneous or disputed information for up to two years from the termination of the employment relationship. See RCW 49.12.250 (3).

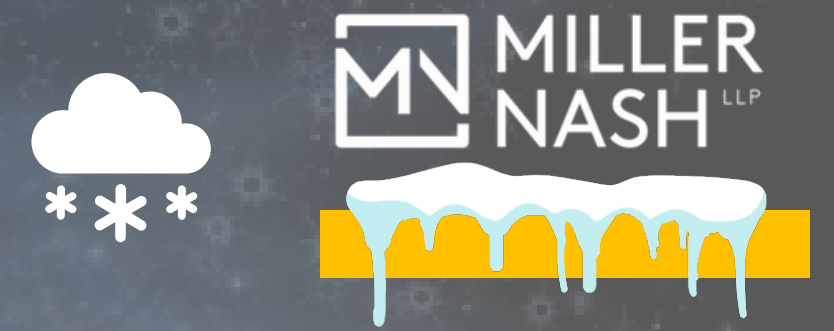
Best Practices for Collection and Transmittal of Personnel Records



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- ❑ **Calendar the Due Date:** Remember, the file must be provided within 10 days of a request in Washington, and 45 days in Oregon.
- ❑ **Collect and Review the Personnel File:** If an employee requests their personnel file or personnel records, HR should collect and, after careful review, provide the documents that fall within the definition of “personnel records.”
- ❑ **Don’t Forget Any Supervisor File(s)/Email Folders:** HR should request and provide personnel records from the employee’s supervisor’s file(s).
- ❑ **Include Payroll Records:** If the employee has requested time and pay records, or if it is unclear, HR should collect and incorporate the time and pay records from the organization’s payroll file(s) for the last three years of the employee’s employment.

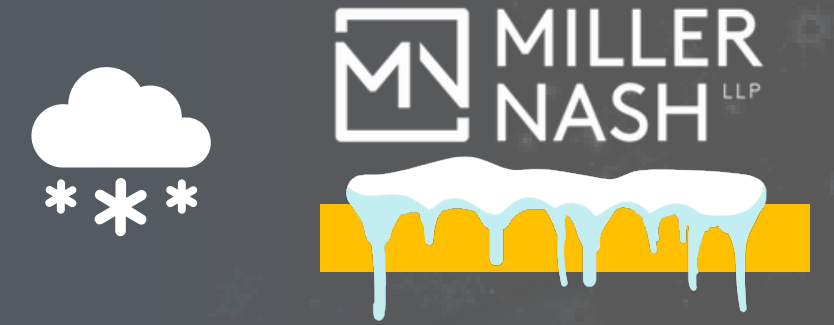
Best Practices for Collection and Transmittal of Personnel Records



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- ❑ **Plan Ahead for Legal Review, If Needed:** Before producing a personnel file, employers should consider whether legal review may be needed and plan accordingly. In particular, legal review may be needed to confirm whether and to what extent any responsive document may need to be redacted or otherwise protected from disclosure based on the attorney-client privilege, work production doctrine, the Family Educational Rights and Privacy Act of 1974 (commonly referred to as FERPA), the Health Insurance Portability and Accountability Act (HIPAA), data privacy laws, or other disclosure protection.
- ❑ **(Oregon Only) Comply with Certification Requirement:** In Oregon, the transmittal communication sent with the personnel records must also include the required certification.

Additional Resources



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For Oregon:

- BOLI's Website at <https://www.oregon.gov/boli/workers/Pages/access-to-employee-records.aspx>.
- BOLI's Handbook for Employers, "Documentation, Discipline and Discharge" available at <https://www.oregon.gov/boli/employers/Pages/purchase-employment-law-handbooks.aspx>

For Washington:

- LNI's Administrative Policy, "Employee Access to Personnel File", Administrative Policy, ES.C.7 at https://www.lni.wa.gov/workers-rights/_docs/esc7.pdf
- LNI's Administrative Policy, "Recordkeeping And Access To Payroll Records (Non-agricultural Employment), ES.D.1 at https://www.lni.wa.gov/workers-rights/_docs/ESD1.pdf

THANK YOU

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