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Striking a Balance in Indiana: Employee Access to Employment Records Maintained by Employers

RaeLee Cunningham Hudson

Notes

STRIKING A BALANCE IN INDIANA: EMPLOYEE ACCESS TO EMPLOYMENT RECORDS MAINTAINED BY EMPLOYERS

Adverse information in...employees' personnel files could, unbeknownst to the employees, materially affect their future, without the employees having had an opportunity to challenge the purported results.... Denying employees access to their own files allows employers to gather secret information on their employees with impunity. To prevent this type of injustice, many states have enacted legislation requiring private employers to permit employees to examine their own personnel files.[1]

I. INTRODUCTION

For four long years Brian Ellis could not figure out why he was having such difficulty both finding and keeping employment.[2] Mr. Ellis, an experienced salesperson, submitted his resume to hundreds of companies across Northern Indiana. Although his resume reflected his vast sales experience, employers rarely offered Mr. Ellis a job. On the exceptional occasion that Mr. Ellis did gain employment, the employer always fired Mr. Ellis within the first few days on the job. As a result of his inability to get and maintain a job during these four years, Mr. Ellis was forced to file for bankruptcy, lost his home, and began living on the streets. Mr. Ellis's self-blame changed to anger and frustration when he finally discovered the root of his employment problems. At a previous sales job, some inaccurate information was inadvertently placed in Mr. Ellis's personnel file and was subsequently transmitted to future potential employers during reference checks. Unbeknownst to Mr. Ellis, this inaccurate black mark on his profile was duplicated again and again, ultimately leading to devastating employment and financial problems for Mr. Ellis.

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[1] Cleghorn v. Hess, 853 P.2d 1260, 1263 (Nev. 1993). In *Cleghorn*, the employer required employees to submit to medical and psychological examinations to determine their suitability for employment. *Id.* at 1261. However, after being subjected to the examinations, the employees were denied access to the results of the testing. *Id. See also infra* note 204 and accompanying text.

[2] This narrative is based roughly on David E. Kalish, *Privacy Nightmare*, GREENSBORO NEWS & REC., Sept. 28, 1997, at E-1, in order to illustrate the potentially devastating effects of inaccurate information that remains uncorrected in a personnel file.

Not only was Mr. Ellis refused employment and fired based on inaccurate information, Mr. Ellis was never informed of the reason for his termination.[3] Because Indiana remains an employment-at-will state, employers could fire Mr. Ellis for any reason or no reason at all.[4] Furthermore, Mr. Ellis never had the opportunity to review or correct any of the information in his personnel file because employees have no common law right to inspect or copy their employment records.[5] In order for an employee, like Mr. Ellis, to have the right to access his personnel file, the employee must have a written agreement with his employer securing that right, or must seek access under a statute that mandates disclosure of the personnel file.[6]

Almost all employers maintain employment records pertaining to each of the employer's current and former employees.[7] These employment records often include information such as the employee's name, address, social security number, birthdate, job titles, payroll records, tax records, benefits information, disciplinary records, employee evaluations, letters of reference, and medical records.[8] Because employers extensively use

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[3] Although Indiana Code Section 22-6-3-1 provides that an Indiana employer, if given a written request, must issue a letter upon termination stating "for what cause, if any, such employee has quit or been discharged," this statute does not create an exception to the employment-at-will doctrine; the words "if any" signify that the employer may discharge the employee for no reason at all and still comply with this statute. IND. CODE ANN. § 22-6-3-1 (West 1991); Orr. v. Westminster Village N., Inc., 651 N.E.2d 795, 802 (Ind. Ct. App. 1995), *vacated*, 689 N.E.2d 712 (Ind. 1997) (opinion vacated but did not alter statement that Indiana Code Section 22-6-3-1 does not create an exception to the employment-at-will doctrine in Indiana).

[4] *See* William T. Hopkins & Stephen D. Vernia, *Preventing Lawsuits for Wrongful Discharge, in* INDIANA LABOR AND EMPLOYMENT LAW 1, 5 (National Business Institute, Inc. ed., 1995). Although the employment-at-will doctrine is firmly established in Indiana, there can be exceptions to this generally strict rule. F. Joseph Jaskowiak & Christopher A. Nichols, *Preventing Lawsuits for Wrongful Termination, in* INDIANA LABOR AND EMPLOYMENT LAW 1, 6 (National Business Institute, Inc. ed., 1994). Three limited exceptions to the employment-at-will rule have been recognized in Indiana. *See infra* note 82.

[5] Steven K. Like, *What You Need to Know About Employee Handbooks, Personnel Policies and Employee Records, in* INDIANA LABOR AND EMPLOYMENT LAW 95, 141 (National Business Institute, Inc. ed., 1994). "Employment records" include both personnel files and medical records. 1 MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW: PRACTITIONER TREATISE SERIES § 5.9 (1994) [hereinafter ROTHSTEIN ET AL., PRACTITIONER TREATISE].

[6] *See* Like, *supra* note 5, at 141. Indiana does not have a statute giving private Indiana employees the right to inspect their personnel records. *Id.*

[7] LEWIN G. JOEL III, EVERY EMPLOYEE'S GUIDE TO THE LAW 159, 160 (1993).

[8] Jeffrey S. Nickloy & Kelley Bertoux Creveling, *Handling Employee Records—A Brief Guide*, RES GESTAE, Feb. 1996, at 14. Federal and state laws require that employers comply with procedures regarding where and how personnel records are maintained, and for how long. STEVEN C. KAHN ET AL., PERSONNEL DIRECTOR'S LEGAL GUIDE 10-48 (2d ed. 1993); *see also infra* Section III and accompanying footnotes. Employers maintain medical records as a

computers to maintain records, the business of gathering, storing, and disseminating personal employee information has grown substantially.[9] The federal government and many state governments have enacted statutes permitting public and private-sector employees access to their personnel and medical record files.[10] Thus, most employees are entitled to review their own personnel files.[11] However, Indiana has no statutory law providing private-sector employees the right to review their personnel or medical files that their private-sector employers maintain.[12] Therefore, any

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consequence of providing employees with medical care and as a result of requiring medical examinations as a condition of employment, placement, or certification to return to work. PRIVACY PROTECTION STUDY COMMISSION, PERSONAL PRIVACY IN AN INFORMATION SOCIETY 266 (1977) [hereinafter PERSONAL PRIVACY].

[9] Joel R. Reidenberg, *Privacy in the Information Economy: A Fortress or Frontier for Individual Rights?*, 44 FED. COMM. L.J. 195, 197 (1992). The proliferation of computers in the last decade has encouraged extensive gathering and dissemination of personal information through sophisticated data collection techniques. David Churbuck, *Computers' New Frontier*, FORBES, Nov. 26, 1990, at 257, 258. *See also* BARBARA KATE REPA, YOUR RIGHTS IN THE WORKPLACE § 6 (3d ed. 1996). These new technological advancements are actually pushing the imbalance of power between employers and employees even further back in the direction of an unfair advantage by the employer. Fred W. Weingarten, *Communications Technology: New Challenges to Privacy*, 21 J. MARSHALL L. REV. 735, 746 (1988).

[10] Jeffrey S. Goldman & Colette M. Foissote, *Fighting Over the Files; When the States Open Personal Files: What an Employer Should Do*, BRIEF, Fall 1988, at 20. Permitting access to personnel information retained by employers is an emerging trend in both state and federal law. *Id. See also infra* notes 83-149 and accompanying text. A survey by the American Society for Personnel Administration found that 96% of the 520 responding companies permitted their employees to review their own personnel files. IRA MICHAEL SHEPARD ET AL., WORKPLACE PRIVACY 295 (2d ed. 1989). *See infra* Section III and accompanying footnotes for a discussion of federal and state laws regulating employee access to personnel and medical records.

[11] JOEL, *supra* note 7, at 181. The emerging trend in both state and federal law is the expansion of employee access to personnel information retained by their employers. Goldman & Foissote, *supra* note 10, at 20. Fourteen states allow both private and public-sector employees access to their own personnel files, two states only permit access by private employees, and seven states only allow access by public employees. ROTHSTEIN ET AL., PRACTITIONER TREATISE, *supra* note 5, § 5.9 (1994). Furthermore, a number of employees may access their employment files pursuant to federal law. *See infra* notes 87-127 and accompanying text.

[12] *See* ALFRED G. FELIU, PRIMER ON INDIVIDUAL EMPLOYEE RIGHTS 81-82 (2d ed. 1996); LITTLER, MENDELSON, FASTIFF, TICHY & MATHIASON, P.C., FUNDAMENTALS OF EMPLOYMENT LAW 152-53 (1994) [hereinafter FUNDAMENTALS]; *Answers to Often Asked Questions*, IND. EMPLOYMENT L. LETTER, July 1992, at 1 (John T. Neighbours & Todd M. Nierman, eds.) [hereinafter *Answers*]. There is no law in Indiana mandating that private employers furnish employees with information contained in the employee's personnel file. M.G. SAUTTER, EMPLOYMENT IN INDIANA 212 (1985).

private-sector employee in Indiana could suffer employment difficulties similar to those of Mr. Ellis.[13]

Further, the federal laws that may allow some Indiana employees access to their employment records apply only in very limited circumstances in Indiana employer-employee relationships.[14] Therefore, valid reasons exist for enacting an Indiana statute that will permit private-sector employees in Indiana access to their employment records. Similar to Mr. Ellis's experience, the inaccuracy of employers' files may have a far-reaching impact on employees' career futures and economic well-being.[15] In the case of medical records, employees may face life-threatening implications if they are denied access to their employer-maintained medical file.[16] This could occur if an employer hires a physician to perform a medical examination of an employee, and the physician detects a serious

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[13] If inaccurate information in an employee's personnel file remains uncorrected, the inaccurate information can lead an employer to unfairly fire, demote, or refuse to hire the employee. PERSONAL PRIVACY, *supra* note 8, at 5.

[14] For example, the Occupational Safety & Health Act requires that private-sector employers provide their employees who work with toxic and hazardous materials access to their employer-maintained medical records. 29 U.S.C. § 657 (1994). *See infra* Section III.A. and accompanying footnotes for a discussion of the circumstances in which current federal laws regulate employees' access to their records. An example of a limited circumstance in which an Indiana employee will be notified of his or her employer's retention of personal information is under the federal Fair Credit Reporting Act, 15 U.S.C. § 1681d (1994). *See* Goldman & Foissote, *supra* note 10, at 20. Under the Fair Credit Reporting Act, employers must inform employees, of whom the employer has requested credit information, that a record of the employee's credit information may be retained. *See* 15 U.S.C. § 1681d (1994); *see also* Robert F. Stewart, Jr. & Randall K. Packer, *Checking Up on Job Applicants and Employees: Federal Limits on Background Investigations*, N.J. LAW., Jan. 1994, at 16, 17. Moreover, the U.S. Constitution only protects employees from federal, state, or local government employers and employment actions taken by private employers in compliance with government requirements. MARK A. ROTHSTEIN ET AL., HUMAN RESOURCES AND THE LAW viii-ix (1994) [hereinafter ROTHSTEIN ET AL., HUMAN RESOURCES].

[15] *See Workplace: Do You Have a Right to See Your Personnel File?*, ORANGE COUNTY REG., July 1, 1996, at D6 [hereinafter *Workplace*]; Kalish, *supra* note 2, at E-1; Barbara Whitaker, *Personal Business: Access to Personnel Files Varies—Employees Enjoy a Right to Inspection in 17 States*, ATLANTA J. & CONST., April 22, 1996, at E4. Inaccurate information in an employee's personnel file can drastically affect the employee's future employment. Don D. Sessions, *Shop Talk*, L.A. TIMES, Feb. 26, 1996, at D1.

[16] *See, e.g.*, Lotspeich v. Chance Voight Aircraft, 369 S.W.2d 705 (Tex. App. 1963). In *Lotspeich*, the plaintiff-employee was examined by the employer's physician. *Id.* at 707. The physician was hired on behalf of the employer to conduct a pre-employment physical examination of the employee. *Id.* at 708. The physician performed chest X-rays that disclosed active tuberculosis. *Id.* Neither the employer nor the physician informed the employee of the results of the X-rays. *Id.* The court held that neither the physician nor the employer owed any duty to the applicant, and thus there was no actionable negligence. *Id.* at 710.

medical condition that the physician records in the employer-maintained medical file without informing the employee of the risk.[17]

However, despite these concerns, employers also have a competing interest in protecting the confidential information that the employer may place in the employers' records. Private-sector employers generally regard employment records as property of the employer.[18] Employers desire the ability to record matters without having to convey all information to the company's employees.[19] Thus, the greatest problem in this area is the imbalance between the rights of employers and employees.[20] Consequently, for effective administration by employers, and the need for access to information by employees, employer and employee interests must be balanced to reach an equitable solution.[21]

This Note examines when employees have the right to review their own employer-created personnel or medical records. Specifically, this Note addresses the need in Indiana for statutory law allowing private-sector employees access to their personnel and medical records under reasonable circumstances. Section II of this Note briefly discusses the history and development of employment law in the United States, as well as a history of employee rights and the current balance of power between employers and employees.[22] Section III describes the current status of employee access to employer medical and personnel records and examines both federal and state laws.[23] Section IV explains why a need exists in Indiana for statutory law regulating private-sector employee access to personnel and medical records. This Section explores the interests of both Indiana employers as well as private-sector employees in Indiana.[24] Furthermore, Section IV

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[17] *See infra* notes 210-13 and accompanying text.

[18] PERSONAL PRIVACY, *supra* note 8, at 253.

[19] For example, employers need to be able to conduct confidential security and criminal investigations, maintain the confidentiality of business development and expansion matters, keep test questions classified, maintain the privacy of records regarding pending judicial proceedings, and protect the identity of third parties who have supplied information in confidence. *See, e.g.*, ILL. COMP. STAT. ANN. 40/10 (West 1993). *See also infra* notes 177-80 and accompanying text.

[20] The Privacy Protection Study Commission elicited extensive testimony on employers' practices and concerns regarding personnel and medical records. Following this study, the Commission issued recommendations designed to balance the concerns of employers and employees in access to records, correction to records, and internal disclosures of information contained in the records. PERSONAL PRIVACY, *supra* note 8, at 3-6, 223-75.

[21] *See, e.g.*, Reidenberg, *supra* note 9, at 239.

[22] *See infra* notes 26-82 and accompanying text.

[23] *See infra* notes 83-159 and accompanying text.

[24] *See infra* notes 160-223 and accompanying text.

examines some of the current solutions that states have implemented to permit employees access to their employment records. Section V presents a model Indiana statute that balances the countervailing interests of employees and employers, as well as distills current effective federal and state statutes.[25]

II. THE HISTORY AND DEVELOPMENT OF EMPLOYEE RIGHTS

This Section analyzes the foundation and history of employment law as it has developed in the United States. This review of the evolution of employer-employee relations is important in order to provide the necessary context for understanding current developments in employment law. The first Subsection begins by discussing how American employment law traces its roots to feudal England where the law regarded the relationships of servants to masters and employees to employers as analogous to the relationship of children to parents.[26] Next, this Subsection examines the emergence of the employment-at-will doctrine, which has had a pervasive impact on the development of employer-employee relations in the United States.[27] This employment-at-will ideology effectively barred all employee claims of wrongful discharge until the 1970s.[28] The Labor Movement of the early twentieth century is then presented in the second Subsection in order to examine the development of collective rights in the United States.[29] Following the discussion of collective rights, the Civil Rights Movement and the progression towards individual rights are examined in the third Subsection.[30] This concept of individual employee rights in the employer-employee relationship is a relatively new idea in the United States.[31] In fact, individual employee rights were scarcely a part of either federal or

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[25] *See infra* notes 224-68 and accompanying text.

[26] ROTHSTEIN ET AL., HUMAN RESOURCES, *supra* note 14, at vii. In feudal England, servants lived on the property of their masters and often remained with the same master their entire lives. *Id.* Masters were held responsible for any wrongful acts committed by their servants under domestic relations law. *Id.* Further, masters were required to provide their servants with reasonable protection. *Id. See also* Stephen W. Lyman, *Indiana's Employment-at-Will Doctrine, in* DEFENDING WRONGFUL DISCHARGE CLAIMS UNDER INDIANA LAW 1, 3 (National Business Institute, Inc. ed., 1994). *See infra notes* 34-38 and accompanying text.

[27] JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 13 (1983); MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW: CASES AND MATERIALS 2 (1987) [hereinafter ROTHSTEIN ET AL., CASES AND MATERIALS (1987)]. *See infra* notes 38-53 and accompanying text.

[28] FELIU, *supra* note 12, at 1.

[29] *See infra* notes 54-65 and accompanying text.

[30] *See infra* notes 66-79 and accompanying text.

[31] FELIU, *supra* note 12, at 1. *See also* ROTHSTEIN ET AL., PRACTITIONER TREATISE, *supra* note 5, § 5.9; CHARLES A. SULLIVAN ET AL., CASES AND MATERIALS ON EMPLOYMENT LAW xxvii (1993).

state law in the United States until the 1970s.[32] Finally, this Section concludes with a survey of current employment law in the United States.[33]

A. *The Emergence of the Employment-at-Will Doctrine*

Following 1850, the law of the master-servant relationship served as the basis for employer-employee relations in the United States.[34] Master-servant law considered employment a matter of private contract and was both paternalistic and status-based.[35] In England, the birthplace of American common law, the master-servant relationship accommodated agricultural and domestic labor.[36] Masters and servants presumed that the employment relationship was a one-year commitment in order to secure labor for the masters during planting and harvesting seasons.[37] Likewise, masters assured their servants that the servants would have shelter and food through the winter months.[38]

As the nineteenth century progressed and the industrial workplace emerged in the United States, master-servant law failed to meet the needs of the industrialists who were striving for maximum productivity and profit.[39] The United States rapidly industrialized, and the importance of agriculture began to decline.[40] Furthermore, employees increasingly depended on their industrial employers for survival, thus limiting employees' rights and bargaining power.[41] The employer-employee relationship in the United States struggled to find harmony between the British year-to-year commitment and other emerging contradictory arrangements.[42] Employment in the industrial field emerged as the only

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[32] *See* FELIU, *supra* note 12, at xi; ATLESON, *supra* note 27, at 15.

[33] *See infra* notes 75-82 and accompanying text.

[34] ATLESON, *supra* note 27, at 13; ROTHSTEIN ET AL., CASES AND MATERIALS (1987), *supra* note 27, at 2.

[35] *See* MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW: CASES AND MATERIALS 1 (1994) [hereinafter ROTHSTEIN ET AL., CASES AND MATERIALS (1994)]. This household-type arrangement focused on the bonds of loyalty and subservience, as well as provided that the master had the inherent power to prescribe for his family, as well as for his servants. ATLESON, *supra* note 27, at 13.

[36] ATLESON, *supra* note 27, at 13-14; ROTHSTEIN ET AL., HUMAN RESOURCES, *supra* note 14, at vii.

[37] FELIU, *supra* note 12, at 2; Seymour Moskowitz, *Employment-At-Will and Codes of Ethics: The Professional's Dilemma*, 23 VAL. U. L. REV. 33, 35-36 (1988).

[38] Moskowitz, *supra* note 37, at 36.

[39] FELIU, *supra* note 12, at 2.

[40] SULLIVAN ET AL., *supra* note 31, at xxxvii.

[41] *Id.*

[42] FELIU, *supra* note 12, at 2-3; MORRIS D. FORKOSCH, A TREATISE ON LABOR LAW § 22 (2d ed. 1965). As industrialization grew prominent in the United States, the traditional status categories that had defined the employment relationships of earlier years were in conflict with

employment option for many Americans, and workers became increasingly dependent on industry for their livelihood.[43]

In the late 1800s, the employment-at-will doctrine emerged and has served as the foundation for the development of American employment law.[44] In 1877, an American attorney, Horace G. Wood, proclaimed that in the United States, the master-servant relationship was a presumptively at-will relationship and that the servant bore the burden of proof that the employment relationship was a year-to-year relationship.[45] In 1884, the employment-at-will doctrine was first judicially adopted in *Payne v. Western & Atlantic Railroad*,[46] wherein the court held that even if the employer's dismissal was morally wrong, no legal wrong had occurred.[47]

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the changing conditions and relationships of the new industrial workplace. ROTHSTEIN ET AL., PRACTITIONER TREATISE, *supra* note 5, § 1.4. The early English common law embodied a presumption of yearly hiring. *See* 1 W. BLACKSTONE, COMMENTARIES 425 (1878); 1 C.B. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT § 156 (2d ed. 1913).

[43] SULLIVAN ET AL., *supra* note 31, at xxxvii. Furthermore, the United States was also experiencing large waves of immigration. ALVIN L. GOLDMAN, LABOR LAW AND INDUSTRIAL RELATIONS IN THE UNITED STATES OF AMERICA 22 (1979).

[44] ROTHSTEIN ET AL., HUMAN RESOURCES, *supra* note 14, at vii. An employment-at-will relationship may be terminated by either the employee or the employer at any time, with or without reason or notice. *Employment-at-Will Update*, IND. EMPLOYMENT L. LETTER, April, 1992, at 2 (John T. Neighbours & Todd M. Nierman, eds.) [hereinafter *Employment Update*]. The employment-at-will relationship exists for an indefinite period of time, and termination of the relationship is wholly unrestricted. *Id.* The employment-at-will doctrine has favored employers because employers have traditionally been in a more advantageous position in the employment relationship. JOEL, *supra* note 7, at 47.

[45] *See generally* HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT (1877) (asserting that employment relationships without a defined duration were terminable at will by either the employer or the employee). Horace G. Wood's rule was quickly adopted by the United States and went unchallenged for almost 100 years. LABATT, *supra* note 42, § 159; ROTHSTEIN ET AL., HUMAN RESOURCES, *supra* note 14, at vii. However, legal scholars have vigorously debated the basis for Wood's employment-at-will rule, and have, for the most part, concluded that Wood's rule was neither supported by legal history, legal precedent, nor legal analysis. *See, e.g.*, Jay M. Feinman, *The Development of the Employment-At-Will Rule Revisited*, 23 ARIZ. ST. L. J. 733 (1991); Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976); Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679 (1994); Moskowitz, *supra* note 37, at 33; J. Peter Shapiro & James F. Tune, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 235 (1974). *But see* Deborah A. Ballam, *Exploding the Original Myth Regarding Employment-At-Will: The True Origins of the Doctrine*, 17 BERKELEY J. EMP. & LAB. L. 91 (1996); Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of "Wood's Rule" Revisited*, 22 ARIZ. ST. L. J. 551 (1990).

[46] 81 Tenn. 507 (1884).

[47] REPA, *supra* note 9, § 10/2 (3d ed. 1996) (citing *Payne*, 81 Tenn. 507, *overruled on other grounds by* Hutton v. Watters, 179 S.W. 134, 138 (Tenn. 1915)). The *Payne* court explained that employers may discharge an employee-at-will "for good cause, for no cause or even for cause

By the twentieth century, courts throughout the United States uniformly followed this employment-at-will presumption, and employers were able to terminate employees at will with no legal repercussions.[48] Courts regarded employment-at-will as a strict rule, and employees were rarely able to defeat this legal presumption.[49] For nearly a century, American industry thrived under this arrangement.[50] The unrestrained power of employers to hire and fire as they pleased generally favored the employers who could simply replace any employee who decided to quit under this at-will arrangement.[51] Under this system, American industry enjoyed a flexible workforce, the existence of which helped propel the economic growth of the rapidly industrializing nation.[52] However, this inequity eventually fueled a labor movement that would dramatically change the dynamics of the employer-employee relationship.[53]

B. *The Labor Movement: A Movement for Collective Rights*

During the early twentieth century, Congress and state legislatures struggled with the courts to carve out laws that would protect the growing labor movement.[54] More often than not, courts struck down the new legislation as an unconstitutional infringement on the substantive due process right of the freedom of contract.[55] The American labor movement began to rally to secure rights for organized employees.[56] Despite employer resistance and government hostility, laws that sought to protect employee rights began to emerge, and Congress began to recognize that

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morally wrong, without being thereby guilty of a legal wrong." *Payne*, 81 Tenn. at 519. *See also* ROTHSTEIN ET AL., PRACTITIONER TREATISE, *supra* note 5, § 1.4.

[48] FELIU, *supra* note 12, at 3; ROTHSTEIN ET AL., HUMAN RESOURCES, *supra* note 14, at vii.

[49] *See* FELIU, *supra* note 12, at 3; ROTHSTEIN ET AL., EMPLOYMENT LAW: HORNBOOK SERIES § 1.4 (1994) [hereinafter ROTHSTEIN ET AL., HORNBOOK].

[50] FELIU, *supra* note 12, at 3.

[51] SULLIVAN ET AL., *supra* note 31, at xxxvii. The quick and universal acceptance of the employment-at-will doctrine gave employers absolute control of their employees. Moskowitz, *supra* note 37, at 35. Employment-at-will transformed the early American employment relationship, that had been based on the English concept of master-servant status, into a contract doctrine with all the benefits concentrated on the side of the employer. *Id.*

[52] FELIU, *supra* note 12, at 3; REPA, *supra* note 9, §§ 10/2-10/3.

[53] ROTHSTEIN ET AL., HORNBOOK, *supra* note 49, §§ 1.11-1.12.

[54] FELIU, *supra* note 12, at 3.

[55] *See, e.g.*, Adkins v. Children's Hosp., 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915); Lochner v. New York, 198 U.S. 45 (1905). *See generally* FELIU, *supra* note 12, at 3; ROTHSTEIN ET AL., CASES AND MATERIALS (1987), *supra* note 27, at 2; SULLIVAN ET AL., *supra* note 31, at xxxix.

[56] *See* SULLIVAN ET AL., *supra* note 31, at xxxix. The union movement aggregated workers in the hope that unified conflict could bring employer comprise and increased recognition of employee interests. *Id.*

workers had a right to engage in collective activity such as unionization.[57] A turning point came during the mid-1930s as the United States was in the midst of the Great Depression.[58] During the Depression and the New Deal era, the Supreme Court began to uphold collective-bargaining legislation.[59] The New Deal legislation served to empower employees to bargain collectively for better working conditions and offered employees the opportunity to bargain on more equal footing with their employers.[60] The New Deal legislation was the first effective national regulation of terms and conditions in employment.[61] Employees gained security through the collective bargaining process and escaped the at-will doctrine.[62] However, these rights were collective rights and were only available to union members.[63] Non-union individuals continued to be vulnerable to the inequities of at-will employment.[64] Nonetheless, by defining a number of the inequities in American employment relations, the collective bargaining legislation paved the way for a new approach to regulating employer abuses during the 1960s. The civil rights movement of the 1960s began to establish boundaries to the employment-at-will doctrine, giving all employees, both individually and collectively, some protection against discrimination in the workplace.[65]

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[57] FORKOSCH, *supra* note 42, § 24; ROTHSTEIN ET AL., HUMAN RESOURCES, *supra* note 14, at viii (1994). *See, e.g.*, National Labor Relations Act of 1935, 29 U.S.C. § 151 (1994); Fair Labor Standards Act of 1938, 29 U.S.C. § 201 (1994).

[58] GOLDMAN, *supra* note 43, at 22.

[59] ROTHSTEIN ET AL., HUMAN RESOURCES, *supra* note 14, at viii. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). In 1935, with the passage of the National Labor Relations Act, labor unions legally secured the right to represent employees in their employment relationships. 29 U.S.C. § 151 (1994); REPA, *supra* note 9, § 16. The first major waive of legislation regulating working conditions arose during the ideologically turbulent New Deal era. ROTHSTEIN ET AL., HUMAN RESOURCES, *supra* note 14, at viii. The Depression brought ideological change and new government leaders who were interested in the plight of the common worker. SULLIVAN ET AL., *supra* note 31, at xl. "The Great Depression shook public confidence in the beneficent operations of the free market." SAR A. LEVITAN ET AL., PROTECTING AMERICAN WORKERS 4 (1986).

[60] *See, e.g., Jones & Laughlin*, 301 U.S. 1.

[61] SULLIVAN ET AL., *supra* note 31, at xl.

[62] FELIU, *supra* note 12, at 4. Most collective bargaining agreements specify that union members can be fired only for just cause. JOEL, *supra* note 7, at 47. This provides union members a form of contractual protection not extended to non-union employees without a specific employment contract. *Id.* The employer-employee relationship of a union member is dictated by the union's collective bargaining agreement with the employer. *See, e.g.*, REPA, *supra* note 9, § 6.

[63] *See* JAMES W. HUNT & PATRICIA K. STRONGIN, THE LAW OF THE WORKPLACE: RIGHTS OF EMPLOYERS AND EMPLOYEES 39 (3d ed. 1994).

[64] FELIU, *supra* note 12, at 4. Furthermore, today union membership has substantially declined; less than 15% of all Americans in the workforce are union members. REPA, *supra* note 9, § 16.

[65] FELIU, *supra* note 12, at 4; ROTHSTEIN ET AL., HUMAN RESOURCES, *supra* note 14, at viii.

C. *The Civil Rights Movement: A Movement to Fairness for the Individual*

Federal civil rights legislation empowered employees by protecting individual rights against discrimination.[66] A dramatic shift in employment law took place in the 1960s with the introduction of new legislation that was initiated during the Civil Rights Movement.[67] Furthermore, during the 1960s and early 1970s, Congress enacted several federal laws to prohibit discrimination by employers on the basis of race, color, religion, sex, national origin, age, and handicap.[68] In 1963, the Equal Pay Act made it illegal for employers to discriminate between men and women with respect to compensation.[69] In 1964, Title VII of the Civil Rights Act made it unlawful for an employer to discriminate on the basis of race, color, religion, sex, or national origin.[70] Congress enacted the Age Discrimination in Employment Act in 1967 to prohibit employment discrimination based on age.[71] The Occupational Safety and Health Act of 1970 established minimum requirements to ensure workplace health and safety.[72] Congress also enacted the Vocational Rehabilitation Act of 1973, which serves to protect the rights of handicapped employees.[73] In 1978, Congress enacted the Pregnancy Discrimination Act, which provides pregnant employees the same benefits as disabled workers.[74]

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[66] ROTHSTEIN ET AL., HUMAN RESOURCES, *supra* note 14, at viii.

[67] FELIU, *supra* note 12, at 4. Federal civil rights legislation empowered individual employees for the first time. *Id.* The legislation was enacted by Congress to protect designated classes of employees and enforce these employees' rights individually against discriminatory employment decisions. *Id.*

[68] *See* ROTHSTEIN ET AL., HORNBOOK, *supra* note 49, § 1.12; SULLIVAN ET AL., *supra* note 31, at xlii.

[69] Pub. L. No. 88-38, § 3, 77 Stat. 56-57 (1963); 29 U.S.C.A. § 206(d) (West 1988). *See* ROTHSTEIN ET AL., CASES AND MATERIALS (1987), *supra* note 27, at 2; SULLIVAN ET AL., *supra* note 31, at xlii.

[70] 78 Stat. 253 (1964); 42 U.S.C.A. §§ 2000e to 2000e-17 (West 1988). *See* ROTHSTEIN ET AL., CASES AND MATERIALS (1987), *supra* note 27, at 2; SULLIVAN ET AL., *supra* note 31, at xlii. Title VII of the Civil Rights Act of 1964 applies to all private establishments, employment agencies, and labor organizations employing or serving 25 or more persons. LEVITAN ET AL., *supra* note 59, at 60.

[71] 29 U.S.C. § 211 (1994); Pub. L. No. 90-202, 81 Stat. 602 (1967); 29 U.S.C.A. §§ 621-634 (West 1988). *See* ROTHSTEIN ET AL., CASES AND MATERIALS (1987), *supra* note 27, at 2; SULLIVAN ET AL., *supra* note 31, at xlii. The Age Discrimination Act of 1967 prohibits discrimination in hiring, retaining, compensating, and promoting older employees. LEVITAN ET AL., *supra* note 59, at 64.

[72] 29 U.S.C. §§ 651-678 (1994). *See* ROTHSTEIN ET AL., CASES AND MATERIALS (1987), *supra* note 27, at 2; SULLIVAN ET AL., *supra* note 31, at xlii.

[73] 29 U.S.C. § 793 (1994); ROTHSTEIN ET AL., CASES AND MATERIALS (1987), *supra* note 27, at 2.

[74] 42 U.S.C. § 2000K (1994); HUNT & STRONGIN, *supra* note 63, at 54, 82-83. Federal legislation opened opportunities for Americans who had previously been excluded from the labor force or had been unjustly denied employment. LEVITAN ET AL., *supra* note 59, at 6.

Between 1970 and 1980, Congress and state legislatures enacted a significant amount of legislation that expanded the rights of employees.[75] Legislators began to recognize that the prevailing employment practices were unfair, thus giving rise to the legal concept of wrongful discharge.[76] Exceptions and limitations to the employment-at-will doctrine developed out of the common law of contracts, and the legislatures enacted laws to specifically address the inequities in the American workplace.[77] Since 1980, the employment-at-will doctrine has been rapidly deteriorating in most states as courts have increasingly held that employers have an obligation to deal fairly and in good faith with their employees.[78] In these states, a wrongful discharge suit may enable an employee to recover from an employer if that employer has terminated the employee in violation of law, in violation of public policy, in breach of an implied contract, or in bad faith.[79]

Modern employment law struggles to resolve and balance the conflict between an employer's preference for having the power to terminate employees as the employer pleases, and the employee's interest in maintaining secure and remunerative employment.[80] Currently, a number

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[75] FELIU, *supra* note 12, at 5. The web of federal workplace laws and regulations has benefited millions of American workers and has resulted in more just and stable social order. LEVITAN ET AL., *supra* note 59, at 6.

[76] JOEL, *supra* note 7, at 48.

[77] Lyman, *supra* note 26, at 3-4.

[78] David F. Linowes & Ray C. Spencer, *Privacy: The Workplace Issue of the '90s*, 23 J. MARSHALL L. REV. 591, 592 (1990). *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974), and *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977), extended an implied covenant of good faith and fair dealing to employment-at-will contracts. Following these decisions, courts have recognized both tort and contract actions for bad faith by an employer. *See, e.g.*, Metcalf v. Intermountain Gas Co., 778 P.2d 744 (Idaho 1989) (recognizing a bad faith contract cause of action); Gates v. Life of Mont. Ins. Co., 638 P.2d 1063 (Mont. 1982) (recognizing a bad faith tort cause of action).

[79] JOEL, *supra* note 7, at 48. Note, however, that while Indiana has recognized the tort of wrongful discharge in cases of violation of certain public policy, violation of an express contract, and violation of a statute, Indiana has refused to recognize an exception to employment-at-will in cases of breach of an implied contract, such as an employment handbook, or when the termination arose in bad faith. *Id.* at 61; Lyman, *supra* note 26, at 3. For discussion regarding Indiana's employment-at-will doctrine by Indiana courts, see, for example, *Jarboe v. Landmark Community Newspapers*, 644 N.E.2d 118 (Ind. 1994); *Streckfus v. Gardenside Terrace Coop.*, 504 N.E.2d 273 (Ind. 1987); *Pepsi-Cola Gen. Bottlers, Inc. v. Woods*, 440 N.E.2d 696 (Ind. Ct. App. 1982); *Campbell v. Eli Lilly & Co.*, 413 N.E.2d 1054 (Ind. Ct. App. 1980). *See also infra* note 82 and accompanying text.

[80] SULLIVAN ET AL., *supra* note 31, at xxvii. The employment relationship exists for the economic benefit of both the employer and employee. Jeff Kray & Pamela Robertson, *Enhanced Monitoring of White Collar Employees: Should Employers Be Required to Disclose?*, 14 U. PUGET

of federal and state laws are in place that seek to balance these conflicting interests in the specific area of regulation of employee access to employer personnel and medical records. A clear shift has occurred in employment law across the United States that has eroded the employment-at-will rule and rectified the inequity of power between employee and employer.[81] Nonetheless, Indiana remains a strict employment-at-will state.[82]

III. THE CURRENT STATUS OF EMPLOYEE ACCESS TO EMPLOYER MEDICAL AND PERSONNEL RECORDS

The evolution of employment relations in the United States lays the foundation for understanding current employer-employee relations and the status of employee access to employment records. This Section discusses both federal and state laws that impact employees' access to their medical and personnel records maintained by their employer. The first

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SOUND L. REV. 131, 132 (1991). The labor market strives to match the employer's need for labor to produce income with the employees' desire to earn wages. *Id.* at 151.

[81] Robert K. Bellamy, *Employment-at-Will/Unjust Dismissal Litigation—How to Recover and How to Defend, in* LABOR AND EMPLOYMENT LITIGATION II-1, II-1 (Indiana Continuing Legal Education Forum, ed., 1988); Martin J. Klaper, *Employment at Will Revisited: The Employer's Perspective, in* LABOR AND EMPLOYMENT LAW VII-1, VII-4 (Indiana Continuing Legal Education Forum, ed., 1988). Nonetheless, in 1990 roughly 65% of all Americans were still being hired on an at-will basis. Kray & Robertson, *supra* note 80, at 132.

[82] *Answers, supra* note 12, at 1. "Indiana courts have consistently followed the employment at will doctrine under which an employee at will may be discharged by his employer for any cause whatsoever, or for no cause, without giving rise to an action for damages." Mead Johnson & Co. v. Oppenheimer, 458 N.E.2d 668, 669 (Ind. Ct. App. 1984). Employment-at-will remains the rule in Indiana and is deeply rooted in Indiana's jurisprudence. *Jarboe*, 644 N.E.2d at 121; *Campbell*, 413 N.E.2d at 1060; *Employment Update, supra* note 44, at 2-3. However, there are some very limited exceptions to Indiana's employment-at-will rule. William T. Hopkins & Stephen D. Vernia, *Preventing Lawsuits for Wrongful Discharge, in* INDIANA LABOR AND EMPLOYMENT LAW 1, 5 (National Business Institute, Inc. ed., 1995). The Supreme Court of Indiana has recognized only three limited exceptions to avoid the presumption of employment-at-will. Orr v. Westminster Village N., Inc., 689 N.E.2d 712, 718 (Ind. 1997). The first exception that may be recognized in Indiana, in which termination may only be for good cause, is if the employee is able to establish that adequate independent consideration supports an employment contract. *Id.* Secondly, the Supreme Court of Indiana has recognized a public policy exception in the case of discharge for filing a worker's compensation claim or discharge when an employee refuses to commit an illegal act. *Id.* In both of these public policy situations, the court held that there was a clear statutory expression of a right or duty. *Id. See* McClanahan v. Remington Freight Lines, Inc., 517 N.E.2d 390 (Ind. 1988); Frampton v. Central Ind. Gas, Co. 297 N.E.2d 425 (Ind. 1973) (holding that absent protection from the threat of employer reprisal, employees would not avail themselves of legally available compensation for work related injuries). Lastly, in limited instances an employee in Indiana may use the doctrine of promissory estoppel to rebut an employment-at-will relationship. *Orr*, 689 N.E.2d at 718; *Jarboe*, 644 N.E.2d at 12. The Indiana Supreme Court has held that if the long standing employment-at will rule is to be changed, the change must come from the legislature and not from the courts. Morgan Drive Away, Inc. v. Brant, 489 N.E.2d 933, 934 (Ind. 1986).

Subsection examines the several federal laws that regulate employees' access to personnel and medical records.[83] The second Subsection analyzes the state laws that regulate employees' access to employment records.[84] State laws are of particular importance because private-sector, non-unionized employees must look to state law or company policy for their right to examine their personnel files.[85] Lastly, the final Subsection examines the status of Indiana laws that impact employment record maintenance and reveals why Indiana employees face significant obstacles in accessing their employment records.[86]

A. *Federal Laws Regulating Access to Employees' Personnel and Medical Records*

This Subsection presents the federal laws that regulate employee access to employer-maintained personnel and medical records. These federal acts vary widely in scope and application. Unfortunately for many employees, these federal laws apply only in limited circumstances and offer far fewer rights to private-sector employees than federal employees.[87]

1. The Americans with Disabilities Act of 1990

Under the Americans with Disabilities Act[88] (ADA), which primarily functions to prohibit discrimination against any "qualified individual with a disability," employers are required to maintain employee medical records in a file separate from the employee's personnel file.[89] However, the ADA

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[83] *See infra* notes 87-127 and accompanying text for discussion of federal laws regulating access to personnel and medical records.

[84] *See infra* notes 128-49 and accompanying text for discussion of state laws regulating access to personnel and medical records.

[85] FELIU, *supra* note 12, at 83.

[86] *See infra* notes 150-59 and accompanying text for discussion of Indiana laws regulating access to personnel and medical records.

[87] FELIU, *supra* note 12, at 84. Furthermore, unionized employees may have access to review their personnel records, pursuant to a clause in a collective bargaining agreement, regardless of state law or company policy. Whitaker, *supra* note 15, at E4. The National Labor Relations Act gives unions access to files so that they can represent their members effectively. 29 U.S.C. §§ 158(a)(1), 158(a)(2) (1994); NLRB v. New York Tel. Co., 930 F.2d 1009 (2d Cir. 1991). Workers in unions may review their personnel files regardless of state law. Michele Himmelberg, *Employers May Limit Review of Personnel Files*, THE ORANGE COUNTY REGISTER, May 12, 1997, at D6.

[88] Americans With Disabilities Act of 1990, 42 U.S.C. § 12101 (1994).

[89] 42 U.S.C. § 12112(c)(3)(B) (1994). *See also* FELIU, *supra* note 12, at 83; Nickloy & Creveling, *supra* note 8, at 14. Until Congress passed the Americans with Disabilities Act, individuals with physical or mental disabilities were unprotected within the context of private employment. Lowell P. Weicker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 TEMP. L. REV. 387, 389 (1991).

does not require that employers give employees access to their medical records.[90] Employers may only require a medical examination after the employer has made a conditional offer of employment, and the examination must be a requirement for all entering employees in the same job category.[91] Furthermore, in order for an employer to legally withdraw a conditional offer of employment, the employer must base the withdrawal on a job-related reason that is consistent with business necessity.[92] Employers may only require current employees to submit to medical examinations when the examination is necessary to determine the employee's fitness for duty, or when the employee has demonstrated evidence of a performance or safety problem.[93] Under the ADA, employers may neither question potential employees if they are HIV positive, nor test a potential employee for HIV, unless the HIV testing is shown to be job-related and consistent with business necessity.[94] Thus, the ADA prohibits employers from using medical examinations as a pretense for discriminating against protected groups and mandates that employers assess potential employees on merit alone.[95] In summary, the ADA affects employees' access to medical records by requiring that employers maintain

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[90] FELIU, *supra* note 12, at 83.

[91] Gary P. Scholick, *Issues of Workplace Privacy*, 803 PRAC. L. INST. 157, 164-65 (1993); FUNDAMENTALS, *supra* note 12, at 149. Facially neutral selection criteria that have a discriminatory effect are prohibited by the ADA. JOHN G. TYSSE & EDWARD E. POTTER, THE LEGISLATIVE HISTORY OF THE AMERICANS WITH DISABILITIES ACT 7 (1991). Testing must measure job skills and not the extent of impairment. *Id.* at 6. Furthermore, employers must make a reasonable accommodation for qualified individuals with disabilities unless the employer can show that the accommodation would require significant difficulty or expense. *Id.* at 7-8.

[92] Scholick, *supra* note 91, at 164. Reasonable accommodation is not required if the accommodation results in "undue hardship" to the employer. ROTHSTEIN ET AL., HUMAN RESOURCES, *supra* note 14, at 151. An individual may be medically unqualified for a particular job if the individual poses a direct safety or health threat to the individual, co-workers, customers or the public. *Id.* Four factors are considered in determining whether the individual poses a direct threat: the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm. *Id.*

[93] FELIU, *supra* note 12, at 106. A widely used example is that an employer would not be required to hire a blind bus driver. TYSSE & POTTER, *supra* note 91, at 4. Thus, an employer may inquire regarding such things as lifting abilities, ability to stand for long periods, or possession of a driver's license if such questions are related to the required skills for the job. REPA, *supra* note 9, §§ 8/42-8/43.

[94] JOEL, *supra* note 7, at 179. The ADA includes victims of AIDS and HIV as qualified disabled individuals that are entitled to protection against discrimination under the ADA. Hoepfl v. Barlow, 906 F. Supp. 317, 319 n.7 (E.D. Va. 1995); United States v. Morvant, 898 F. Supp. 1157, 1161 (S.D. La. 1995); Howe v. Hull, 873 F. Supp. 72, 78 (N.D. Ohio 1994). Furthermore, the chances of the issue regarding AIDS or HIV being job-related and consistent with business necessity is extremely slim. *See also* JOEL, *supra* note 7, at 179.

[95] Stacy J. Bagley, *Enough Is Enough? Congress and the Courts React to Employers' Medical Screening and Surveillance Procedures*, 99 DICK. L. REV. 723 (1995).

medical records separate from employees' personnel records and by regulating employers' collection of medical information.

2. Occupational Safety & Health Act, Access to Employee Exposure and Medical Records Standard

In addition to the ADA's protection, employees may gain protection under the Occupational Safety and Health Act of 1970 (OSHA).[96] OSHA is the principal federal law regulating private-sector workplace safety and health.[97] OSHA covers private-sector employment in every state but does not apply to state or local governments.[98] The Occupational Safety and Health Administration of the United States Department of Labor is responsible for enforcing OSHA.[99] OSHA permits employee access to results of medical examinations provided for employees that work with potentially hazardous materials.[100] In addition, OSHA mandates employee access to medical records pertaining to the employee's exposure to toxic substances or harmful physical agents to which the employee has been exposed.[101] Furthermore, OSHA requires that employers retain such records for thirty years after the employee has left the employer.[102]

OSHA also requires that employers provide employees who work with potentially hazardous materials access to their medical records within fifteen days of the employee's request.[103] The employees are entitled to access the records at a reasonable time and place and in a reasonable manner.[104] The employer is also obligated under OSHA to provide a copy of the employee's medical file and exposure records to the employee when requested or to permit the employee to copy the files.[105] Congress included a requirement for access to employee exposure and medical records in

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[96] 29 U.S.C. §§ 651-678 (1994).
[97] ROTHSTEIN ET AL., HUMAN RESOURCES, *supra* note 14, at 277.
[98] *Id.* Note, also, that Indiana has enacted the Indiana Occupational Safety and Health Act (IOSHA) requiring that Indiana employers notify any employee who is being consistently exposed to toxic materials or harmful agents and permit employee access to records of exposure. IND. CODE ANN. § 22-8-1.1-17.1(c) (West Supp. 1996).
[99] ROTHSTEIN ET AL., HUMAN RESOURCES, *supra* note 14, at 277.
[100] *See* 29 C.F.R. § 1910.1020 (1997). Further, OSHA also requires employers to keep records regarding all employee injuries and illnesses. 29 C.F.R. § 1904.2 (1997).
[101] 29 C.F.R. § 1910.1020 (1997); PHILIP D. DICKINSON, EMPLOYEE PRIVACY RIGHTS & WRONGS 60 (1996). *See also* 29 C.F.R. §§ 1904.6, 1904.7 (1997) for guidelines regulating the collection of, maintenance of, and access to gathered information.
[102] 29 C.F.R. § 1910.1020 (1997).
[103] *Id.*
[104] *Id.* § 1910.1020(e).
[105] *Id.* § 1910.1020.

OSHA in order to improve the detection, treatment, and prevention of occupational disease.[106] Moreover, while employees may obtain access to their exposure and medical records pursuant to OSHA, some federal employees may also have extensive rights of access to other information recorded in their personnel records. One such federal act that assists federal employees in accessing a significant amount of their own personnel information is the Privacy Act of 1974.[107]

3. The Privacy Act of 1974

The Privacy Act of 1974 applies to federal government employees only.[108] Thus, private-sector employers are not required to follow any of the provisions of the Privacy Act.[109] The Privacy Act provides government employees with extensive rights of access by requiring federal government agencies to provide federal employees access to their personnel records.[110] The Act further provides that federal government agencies may only collect personal employee information if such information is relevant and necessary to accomplish an agency purpose.[111]

The Privacy Act states that government employees are also entitled to know how and by whom the information is used.[112] Furthermore, the Privacy Act permits federal employees to copy their personnel records, as well as request that the government agency make changes to the records when employees detect an error in the files.[113] If the agency denies the requested change, employees may prepare a statement of disagreement that will be placed in their personnel file.[114] This statement of disagreement is then included with the file at any future time that the personnel record is disclosed.[115] More generally, the Privacy Act prohibits most disclosure of personal information about government employees without the employee's consent.[116] Finally, while the Privacy Act only permits an individual to access his or her own record maintained within a government agency's

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[106] *Id.* § 1910.1020(a).
[107] 5 U.S.C. § 552(b) (1994).
[108] *Id.*
[109] *See, e.g.*, IRA MICHAEL SHEPARD ET AL., WORKPLACE PRIVACY 295-298 (2d ed. 1989).
[110] HUNT & STRONGIN, *supra* note 63, at 46.
[111] *Id.*
[112] *Id.*
[113] 5 U.S.C. § 552a(d)(1) (1994).
[114] DEPARTMENT OF JUSTICE, PRIVACY ACT OVERVIEW: INDIVIDUAL'S RIGHT OF ACCESS 37 (1997) [hereinafter PRIVACY ACT].
[115] FELIU, *supra* note 12, at 84.
[116] SHEPARD ET AL., *supra* note 109, at 295. *But see* 5 U.S.C. § 552a(b) (1994) for several exemptions.

system of records, the Federal Freedom of Information Act of 1974[117] (FOIA) permits any person to seek access to any agency record that is not subject to any FOIA exemption.[118] Thus, often times the Privacy Act and FOIA may overlap or supplement one another.[119]

4. The Federal Freedom of Information Act of 1974

FOIA regulates access to government records, including personnel records.[120] Congress enacted FOIA in order to expose the administrative process to public scrutiny by allowing the public to access official information.[121] FOIA's central purpose is to ensure the functioning of a democratic society by providing Americans with the information necessary to check the government for corruption and to hold the government accountable.[122] FOIA seeks to balance public interest with government interest by disclosing information that is appropriate for public review, while also protecting certain information that must remain confidential in order to protect legitimate government functions.[123] FOIA provides for nondisclosure of preliminary drafts, notes, or inter-agency or intra-agency communications prepared by, or on behalf of, or for the use of, any agency.[124] A key consideration in ordering the disclosure is whether the

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[117] 5 U.S.C. § 552(b)(5) (1994).

[118] PRIVACY ACT, *supra* note 114, at 67.

[119] *Id.* at 72.

[120] HUNT & STRONGIN, *supra* note 63, at 47.

[121] *See* Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1 (1974); Parton v. United States Dept. of Justice, 727 F.2d 774 (8th Cir. 1984) (criticized on other grounds by Johnson v. United States Dept. of Justice, 739 F.2d 1514 (10th Cir. 1984)).

[122] *See* John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989); United States Dept. of Justice v. Tax Analysts, 492 U.S. 136 (1989); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978) (criticized on other grounds by United States Dept. of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749 (1989)).

[123] *See* Department of Air Force v. Rose, 425 U.S. 352 (1976); Administrator, Fed. Aviation Admin. v. Robertson, 422 U.S. 255 (1975); Environmental Protection Agency v. Mink, 410 U.S. 73 (1973).

[124] Andrea G. Nadel, Annotation, *What Constitutes Preliminary Drafts or Notes Provided by or for State or Local Governmental Agency, or Intra-Agency Memorandums Exempt From Disclosure or Inspection Under State Freedom of Information Acts*, 26 A.L.R.4th 639 (1981). An agency may refuse to disclose an agency record if it falls within any of the FOIA's nine exemptions. *See* 5 U.S.C. § 552 (1994). The exemptions protect against important government interests including the disclosure of information that would threaten national defense or foreign policy, privacy of individuals, and proprietary interests of business. DEPARTMENT OF JUSTICE, CITIZEN'S GUIDE TO THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT OF 1974 (1993) [hereinafter CITIZEN'S GUIDE]. When a record contains information that qualifies as exempt, the FOIA specifically provides that any reasonably segregable portions of the record must be provided after deleting the exempt portions. *Id.* This is an important requirement because it prevents government

particular record or report sought reflects factual material, matters of opinion, or policy.[125]

Although the above federal enactments provide for access to employment records in some narrow circumstances, in order for most private-sector employees to access their employment records, these employees must look to state law.[126] State statutes regulating employee access to employer-maintained personnel files and medical records both vary significantly by state and share some important similarities.[127]

B. *State Laws Regulating Employee Access to Employer-Maintained Personnel Files and Medical Records*

This Subsection examines state laws that provide employees access to their personnel files and medical records maintained by their employers. This Subsection begins by analyzing employees' access to their personnel files under state law.[128] Next, this Subsection addresses state laws that regulate employees' access to their employer-maintained medical records.[129] Lastly, this Subsection presents some of the methods that states utilize to enforce the regulation of employment records.[130]

1. Employee Access to Personnel Files Under State Law

Many states have enacted laws that address employees' access to their personnel files.[131] Although these laws vary widely in scope and

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agencies from withholding entire documents based on small portions of the document qualifying as exempt. *Id.*

[125] Nadel, *supra* note 124, at 639. The classification of the document as factual, versus policy or opinion, is the difference between access and restriction for the employee. *Id.* Employers may refuse access to opinions or policy materials, and thus may prevent employee access to some materials contained in the personnel or medical files of employees. *Id.*

[126] *See* ROTHSTEIN ET AL., PRACTITIONER TREATISE, *supra* note 5, § 5.9; Empl. Coordinator (RIA) EP-22,5501.

[127] SULLIVAN ET AL., *supra* note 31, at xliii.

[128] *See infra* notes 131-35 and accompanying text.

[129] *See infra* notes 136-43 and accompanying text.

[130] *See infra* notes 144-49 and accompanying text.

[131] These states include Alaska, California, Connecticut, Delaware, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, Oregon, Pennsylvania, Rhode Island, Washington, and Wisconsin. *See* ALASKA STAT. § 23.10.430 (Michie 1996) (giving employees or former employees the right to inspect and make copies of their personnel records); CAL. LAB. CODE § 1198.5 (West Supp. 1999) (requiring employers to permit employees at reasonable times and intervals to inspect their personnel files that are used or have been used in employment decisions; this section exempts employees' access to records regarding investigation of criminal offenses and letters of reference); CONN. GEN. STAT. ANN. §§ 31-128a to 31-128h (West 1997) (allowing employees to access personnel files and medical records

application, many state laws provide that the employer must inform the employees of the file's existence, permit the employees to review and copy their files, afford the employees the opportunity to correct any errors, and require that employers impose only reasonable time and place restrictions on employee access.[132] Many of these laws exclude employee access to sensitive portions of the personnel file.[133] Such sensitive portions of personnel files include, for example, letters of reference, recommended personnel actions, confidential internal management information, or investigation materials.[134] The state statutes vary on matters such as whether employees may access their employer-maintained medical records, which specific files are included in the term "personnel records," which files are exempted from employee access, the procedure that employees must follow in order to request access, the limitations employers may impose on employee access, the procedure for correction of disputed

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within reasonable time of written request); DEL. CODE. ANN. tit. 19, §§ 730-735 (1995 & Supp. 1998) (providing that employees may access personnel files or medical records at reasonable times); 820 ILL. COMP. STAT. ANN. 40/2 (West 1993) (requiring employers, on advance request, to permit employees to inspect personnel records used in making employment decisions); IOWA CODE ANN. § 91B.1 (West 1996) (mandating employee access to and permission to copy employee's personnel file maintained by employer); ME. REV. STAT. ANN. tit. 26, § 631 (West Supp. 1998) (granting employees, former employees, or employee's authorized representative the right to review and copy employer-maintained personnel files); MASS. GEN. LAWS ANN. ch. 149, § 52C (West Supp. 1998) (providing a procedure for employees to inspect, correct, or remove information from their personnel file); MICH. COMP. LAWS ANN. §§ 423.501-423.511 (West 1995) (allowing employees to review their personnel records at a reasonable time after requesting in writing); MINN. STAT. ANN. §§ 181.960-181.966 (West 1993 & Supp. 1999) (permitting employee access to and correction of their personnel file); NEV. REV. STAT. ANN. § 613.075 (Michie Supp. 1997) (providing employees access to their personnel file information regarding qualifications and disciplinary action); N.H. REV. STAT. ANN. § 275:56 (1987) (granting employees access to personnel files and permitting employees to correct or remove information from personnel files); OR. REV. STAT. § 652.750 (1989) (allowing employees, upon request, to have reasonable opportunity to inspect their personnel records); PA. STAT. ANN. tit. 43 §§ 1321-1324 (West 1991 & Supp. 1998) (giving employees the right to inspect their personnel file regarding qualifications for employment, promotion, pay raises, termination, or disciplinary actions); R.I. GEN. LAWS §§ 28-6.4-1 to 28-6.4-2 (1995 & Supp. 1998) (permitting employees to inspect their personnel record used in employment decisions and disciplinary action but prohibiting access to records prepared for criminal investigation, judicial or grievance proceedings records, reference letters, recommendations, managerial records, and confidential reports from previous employers); WASH. REV. CODE ANN. §§ 49.12.240-49.12.250 (West 1990) (providing employees access to their personnel files on request at reasonable times but exempting access for records regarding criminal investigation or pending litigation); WIS. STAT. ANN. § 103.13 (West 1997) (permitting employees' inspection of their personnel documents used in determining employment or disciplinary action).

[132] *See, e.g.*, DICKINSON, *supra* note 101, at 60; FUNDAMENTALS, *supra* note 12, at 153; ROTHSTEIN ET AL., CASES AND MATERIALS (1987), *supra* note 27, at 444.

[133] DICKINSON, *supra* note 101, at 60.

[134] *Id.*

or obsolete information contained in the records, and how frequently employees may inspect their records.[135]

2. Employee Access to Medical Records Under State Law

Few states permit employees to access their medical files maintained by their employers.[136] The states that do require disclosure of employer-maintained medical records often limit disclosure if the employer believes that disclosure to the employee would threaten the employee's health.[137] In such cases, the employer may only disclose the medical information to the employee's physician.[138] Some states have also imposed an extremely limiting provision by prohibiting employee access to employer-maintained medical records that the employee may obtain directly from the medical provider.[139]

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[135] *Id.* at 60-61. For example, Massachusetts explicitly defines what is included in the term "personnel record." *See* MASS. GEN. LAWS ANN. ch. 149, § 52C (West 1996 & Supp. 1998). However, Alaska has a more general statute that states that employees may inspect their personnel files and personnel information, without defining precisely what personnel files and personnel information include. *See* ALASKA STAT. § 23.10.430 (Michie 1996). Illinois explicitly states that an employer must comply with an employee's request to review his or her personnel file within seven working days. 820 ILL. COMP. STAT. ANN. 40/2 (West 1993). In contrast, California merely states that an employer must comply with an employee's request for review of his or her personnel file within a reasonable time period. CAL. LAB. CODE § 1198.5 (West Supp. 1999).

[136] FELIU, *supra* note 12, at 83. These states include Connecticut, Delaware, Massachusetts, Ohio, Rhode Island, and Wisconsin. *See* CONN. GEN. STAT. ANN. §§ 31-128c (West 1997) (requiring employers to, after receiving a written request, permit employees to inspect their medical records in the employer's possession); DEL. CODE. ANN. tit. 19, §§ 730-735 (1995 & Supp. 1998) (including medical records within the definition of personnel file and permitting inspection of personnel files); MASS. GEN. LAWS ANN. ch. 149, § 19A (West 1996) (compelling employers to furnish employees with a copy of their medical report when employer requires employee medical examinations); OHIO REV. CODE ANN. § 4113.23 (West 1995) (compelling employer to furnish employees with a copy of their medical report unless a physician concludes that it would result in serious medical harm); R.I. GEN. LAWS § 5-37.3-4 (1995 & Supp. 1998) (requiring an employer to transfer medical information to employee's physician if an employment decisions is made based on confidential health care information); WIS. STAT. ANN. § 103.13(5) (West 1997) (permitting an employee to inspect his or her medical records unless the employer believes that disclosure of the medical information will have a detrimental effect on the employee).

[137] *See, e.g.*, OHIO REV. CODE ANN. § 4113.23 (West 1995); WIS. STAT. ANN. § 103.13(5) (West 1997).

[138] *See, e.g.*, OHIO REV. CODE ANN. § 4113.23 (West 1995); WIS. STAT. ANN. § 103.13(5) (West 1997).

[139] *See, e.g.*, MICH. COMP. LAWS ANN. § 423.501(2)(c)(iii) (West 1995). Personnel records do not include "[m]edical reports and records made or obtained by the employer if the records or reports are available to the employee from the doctor or medical facility involved." *Id.*

One of the reasons that employees may be prohibited from accessing medical information from their employers is that, traditionally, no physician-patient relationship existed between an employee and a physician hired by an employer to conduct a medical examination of an employee.[140] Thus, employees may be restricted from directly accessing their medical information from the medical provider because no physician-patient relationship is formed.[141] No physician-patient relationship exists because no duty arises for the physician to relay information to the employee when the medical examination is being conducted for the benefit of the employer.[142] However, even in the absence of a physician-patient relationship, courts have held that a physician may owe a duty of care to an employee that is consistent with the physician's training and expertise.[143]

3. Enforcement of Employee Access to Records Under State Laws

State statutes generally give courts broad authority to order employers to produce employment records or make them available for inspection.[144] Many states also award damages and attorneys' fees to employees when their employers have improperly prohibited the employees from exercising their statutorily imposed right to review their own personnel or medical files.[145] For example, in the case of an employer's willful and knowing

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[140] MATTHEW W. FINKIN, PRIVACY IN EMPLOYMENT LAW 10-11 (1995); ROTHSTEIN ET AL., CASES AND MATERIALS (1994), *supra* note 35, at 181. Indiana courts have held that the examination of a job applicant or employee by a physician for the benefit of a prospective or actual employer creates a different relationship than between a treating physician and his or her patient. *See* Ahnert v. Wildman, 376 N.E.2d 1182, 1186-87 (Ind. Ct. App. 1978). Furthermore, some cases have gone so far as to conclude that no doctor-patient relationship exists between the examining physician and patient. *See* Hoover v. Williamson, 203 A.2d 861 (Md. 1964); New York Cent. R.R. Co. v. Wiler, 177 N.E. 205 (Ohio 1931). The Indiana Court of Appeals stated that there is no doubt that the decided cases limit the legal liability and duty of a physician who examines a person for the benefit of an employer. *Ahnert*, 376 N.E.2d at 1187.

[141] *But see* Cleghorn v. Hess, 853 P.2d 1260 (Nev. 1993) (interpreting state medical records access statutes broadly and holding that employee was entitled to health information resulting from an employer-required medical examination). The defendants in *Cleghorn* asserted that employee examinations performed as a condition of employment were similar to an independent medical examination performed during litigation discovery in which no physician-patient relationship exists. *Id.* at 1262.

[142] ROTHSTEIN ET AL., CASES AND MATERIALS (1994), *supra* note 35, at 181.

[143] *See, e.g.*, Green v. Walker, 910 F.2d 291 (5th Cir. 1990); McKinney v. Bellevue Hosp., 584 N.Y.S.2d 538 (N.Y. App. Div. 1992) (holding that the failure to inform an employee or prospective employee that his or her physical has detected a serious medical condition is an act of ordinary negligence). *See also infra* notes 210-13 and accompanying text.

[144] Indiv. Empl. Rts. Man. (BNA) ¶ 507:401.

[145] *See, e.g.*, ME. REV. STAT. ANN. tit. 26, § 631 (West Supp. 1998) (subjecting employers who fail to provide employees with the opportunity to review and copy their personnel files to a civil forfeiture of up to $500); MASS. GEN. LAWS ANN. ch. 149, § 52C (West 1996 & Supp. 1998)

violation of the Michigan records access statute, Michigan permits courts to assess actual damages and costs.[146] Some state courts are further permitted to impose fines and assess attorney fees.[147] Some states also provide injunctive relief.[148] Further, in a few states, criminal penalties may even be imposed on the employer.[149]

C. *Indiana's Regulation of Access to Personnel Files and Medical Records*

Indiana has done little to address employers' maintenance of employment records. Furthermore, as this Subsection discusses, Indiana has done even less to provide employees with access to their employment records. This Subsection addresses the status of Indiana's statutory regulation of employee access to personnel files and medical records maintained by Indiana employers.

1. Employee Access to Personnel Files in Indiana

Although Indiana law requires that all employers maintain personnel records including an employee's name, address, occupation, hours worked, and wages,[150] Indiana law does not require private-sector employers to permit employees to access their personnel records.[151] Indiana Code Section 5-14-3-1 provides public access to Indiana public records and places

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(permitting courts to punish employers by a fine of not less than $500 nor more than $2500 for failure to comply with personnel record access statute); R.I. GEN. LAWS § 28-6.4-2 (1995) (imposing a fine of not more than $100 on employers that violate the inspection of personnel file statute). *See generally* FELIU, *supra* note 12, at 82; FUNDAMENTALS, *supra* note 12, at 152-53.

[146] MICH. COMP. LAWS ANN. § 423.511 (West 1995).

[147] *Id. See also* 820 ILL. COMP. STAT. ANN. 40/12 (West 1993) (specifying that an employee prevailing in an action under the Act may be awarded actual damages plus costs, or, in the case of a willful or knowing violation by the employer, the employee may be awarded $200, reasonable attorney's fees, and actual damages); ME. REV. STAT. ANN. tit. 26, § 631 (West Supp. 1998) (providing that an employer may be required to reimburse the employee or former employee for costs of suit including reasonable attorney's fees if the employee receives a judgment in the employee's favor).

[148] For example, Maine permits that "[a]n employee or former employee may bring an action in the District Court or the Superior Court for such equitable relief, including an injunction, as the court may consider to be necessary and proper." ME. REV. STAT. ANN. tit. 26, § 631 (West Supp. 1998). *See also* DICKINSON, *supra* note 101, at 60.

[149] *See* CAL. LAB. CODE § 1175 (West 1989) (stating that any person violating employees' records statute is guilty of a misdemeanor); 820 ILL. COMP. STAT. ANN. 40/12 (West 1993) (stating that any employer who violates employees' records statute is guilty of a petty offense); OHIO REV. CODE ANN. § 4113.23 (West 1995) (stating that any employer who refuses to furnish reports to employee under statute is guilty of a misdemeanor). *See also* FELIU, *supra* note 12, at 82; Goldman & Foissote, *supra* note 10, at 23; Indiv. Empl. Rts. Man. (BNA) ¶ 507:406.

[150] IND. CODE ANN. § 22-1-1-15(b) (West 1991).

[151] *Answers*, *supra* note 12, at 1.

the burden of proof on any public agency that would deny access to those records.[152] This statute specifically permits public employees in Indiana to access their personnel files.[153] However, this leaves private-sector employees in Indiana without access to their records.

Thus, in Indiana no legal right exists for private-sector employees to review the information contained in their personnel files unless the right stems from the employers' policy or if legal process is issued, such as a subpoena.[154] In Indiana, personnel files are the property of the employer, and thus are not available to employees.[155] Although some private Indiana employers may voluntarily permit employees to review their personnel files, Indiana employers are under no legal obligation to do so and may impose unlimited restrictions on access.[156]

2. Indiana Employee Access to Medical Records

Access to medical records held by Indiana employers is also severely restricted. Private employees in Indiana do not have a legally mandated right to access medical records maintained by their employer, except in situations in which the employee has been exposed to toxic substances during the course of employment.[157] Indiana, as well as at least thirteen other states, have laws similar to the OSHA regulations that grant employees access to records regarding their exposure to toxic workplace substances.[158] The Indiana Occupational Safety and Health Act provides

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[152] IND. CODE ANN. § 5-14-3-1 (West Supp. 1997). Indiana Code Section 5-14-3-1 was enacted to provide full and complete information to the public based upon the fundamental philosophy that government is the servant of the people and not their master. *Id. But see* Eric J. Graninger, Note, *Indiana Opens Public Records: But (b)(6) May Be the Exemption That Swallows the Rule*, 17 IND. L. REV. 555 (1984) for a discussion of exemption (b)(6) which leaves disclosure to the discretion of the agency of public records containing advisory or deliberative material that are speculative or contain opinion.

[153] IND. CODE ANN. § 5-14-3-1 (West Supp. 1998).

[154] FELIU, *supra* note 12, at 81-82; FUNDAMENTALS, *supra* note 12, at 152-53; *Answers*, *supra* note 12, at 1; SAUTTER, *supra* note 12, at 212.

[155] *Answers*, *supra* note 12, at 1.

[156] *See* Nickloy & Creveling, *supra* note 8, at 16.

[157] *See* IND. CODE ANN. § 22-8-1.1-17.1(c) (West 1991).

[158] *See* ARIZ. REV. STAT. ANN. § 23-427(c) (West 1995); CAL. LAB. CODE § 6408(d) (West 1989); CONN. GEN. STAT. ANN. § 31-374(c)(3) (West 1997); D.C. CODE ANN. § 36-1213(d) (1997); HAW. REV. STAT. § 396-7 (1993); 820 ILL. COMP. STAT. ANN. 255/16 (West 1993); IND. CODE ANN. § 22-8-1.1-17.1(c) (West 1991); IOWA CODE § 88.6(3)(c) (1996); MD. CODE LAB. & EMPL. ANN. § 5-407 (1991); MICH. COMP. LAWS ANN. § 408.1061(2) (West Supp. 1998); MINN. STAT. ANN. § 182.663(3) (West 1993); NEV. REV. STAT. ANN. § 618.370 (Michie 1996); N.J. STAT. ANN. § 34:6A-40(c) (West Supp. 1998); N.M. STAT. ANN. § 50-9-11(B) (Michie 1988); N.Y. LAB. LAW § 27-a(3) (McKinney 1986 & Supp. 1998); N.C. GEN. STAT. § 95-143(c)(1989); R.I. GEN. LAWS § 28-20-11(c)

that the employer must notify the employee if he or she is "consistently" being exposed to excessive levels of toxic materials or harmful physical agents.[159]

Therefore, Indiana employees have an extremely difficult time gaining access to their employer-maintained medical records and personnel files. Indiana has neglected to address the interests of private-sector employees in accessing their personal information. Moreover, Indiana has failed to provide any incentive or guidance for private Indiana employers in the area of employment record access.

IV. EMPLOYER AND EMPLOYEE INTERESTS THAT MUST BE ADDRESSED WHEN FORMULATING AN EMPLOYMENT RECORD ACCESS STATUTE

In order to determine which requirements Indiana should impose on employers and employees in the dissemination of employment records, this Section examines the interests of both employers and employees. This Section begins by recognizing employers' interests that are affected when employment records may be accessed by employees. Secondly, this Section examines employees' interests in accessing their personnel and medical records. Traditionally, employer interests trumped those of employees, and thus the law did not require employers to disclose the contents of employer records for review by employees.[160] Furthermore, many of the concerns shared by employers are both legitimate and valid. Nevertheless, the interests of employers and employees do not necessarily always conflict.[161] Moreover, in conflicting situations, the interests of employers can be balanced with those of the employees.

A. *Employer Interests That Must Be Protected with Employee Access to Personnel and Medical Records*

In opening up employers' records for access by employees, employers have legitimate interests that should be protected. This first Subsection will address the employers' interests. First, employers have an interest in

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(1995); VT. STAT. ANN. tit. 21, § 228(c)(2) (1987); WASH. REV. CODE ANN. § 49.17.220(3) (West 1990); W. VA. CODE § 21-3A-8(c)(3) (1996); WIS. STAT. ANN. § 101.055(7)(b) (West 1997). *See also supra* notes 96-107and accompanying text for a discussion of OSHA.

[159] IND. CODE ANN. § 22-8-1.1-17.1(c) (West 1991).

[160] *See generally* FELIU, *supra* note 12, at 1; ROTHSTEIN ET AL., PRACTITIONER TREATISE, *supra* note 5, § 5.9; SULLIVAN ET AL., *supra* note 31, at xxxvii; Like, *supra* note 5, at 141. *See also supra* notes 39-53 and accompanying text.

[161] D. Jan Duffy, *Privacy vs. Disclosure: Balancing Employee and Employer Rights*, 7 EMP. REL. L. J. 594, 595 (1982).

maintaining the accuracy and integrity of their records.[162] Second, employers have an interest in privacy regarding such matters as internal investigation, management planning, and security proceedings.[163] Third, employers are concerned with potential litigation over their files when employees have access to employer records.[164] Fourth, as a business, employers seek to keep costs down and productivity up.[165] Finally, employers have concerns about maintaining positive employer-employee relations.[166]

Employers depend on the accuracy of employment records and seek to retain some control over the employer's records in order to ensure the integrity of those records.[167] Employers need accurate data in order to make employee selection decisions, to comply with government regulations, and to administer employee benefits.[168] Inaccuracies in an employer's records may lead management to make improper decisions or may impair an employer's position in litigation.[169] Allowing employees access to their personnel records may help ensure that the information contained in the personnel records is accurate.[170] However, with access to files, employers may also risk that their files will be altered if employees are permitted to review the files unsupervised.[171]

Furthermore, some courts have recognized employees' claims based on employers' negligent maintenance of personnel records.[172] This permits

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[162] *See infra* notes 167-75 and accompanying text.
[163] *See infra* notes 176-80 and accompanying text.
[164] *See infra* notes 181-87 and accompanying text.
[165] *See infra* notes 188-91 and accompanying text.
[166] *See infra* notes 192-94 and accompanying text.
[167] JOEL, *supra* note 7, at 161.
[168] Duffy, *supra* note 161, at 595.
[169] KAHN ET AL., *supra* note 8, at 9-34.
[170] Alan L. Rolnick, *Computerized Records: Handle with Care*, BOBBIN, July 1, 1996, at 68. *See also* Reidenberg, *supra* note 9, at 204.
[171] Rolnick, *supra* note 170, at 68. To prevent the alteration of employers' files, many states require that files be reviewed by employees under employer supervision on the employer's property. *See, e.g.*, DEL. CODE ANN. tit. 19, § 733 (1995 & Supp. 1998) (permitting employers to protect personnel files from loss, damage, or alteration by supervising employees during inspection on the employers' premises); R.I. GEN. LAWS § 28-6.4-1(a) (1995) (requiring that employee inspection take place in the presence of the employer or the employer's designee and on business premises).
[172] *See, e.g.*, Quinones v. United States, 492 F.2d 1269 (3d Cir. 1974) (allowing employee of federal government to maintain an action against his employer for negligent maintenance of employment records); Bulkin v. Western Kraft E., Inc., 422 F. Supp. 437 (E.D. Pa. 1976) (recognizing employee's action against his private-sector employer for negligent maintenance of employment records).

employees to sue their employers for maintaining inaccurate information in the employees' personnel files.[173] Employers have also been sued for defamation and invasion of employees' privacy.[174] Thus, the accuracy and integrity of employee records is also very important in order for employers to avoid litigation.[175]

In addition, employers have an interest in the privacy of their records. Certainly, situations occur in which the employer's interest in privacy will prevail over the employees' interests in accessing information contained in the employers' files.[176] Employers have a legitimate business need for confidentiality.[177] Employers need to conduct internal investigations, make managerial plans, and keep some information confidential. Many courts have recognized that internal company communication made in good faith regarding an employee's performance is privileged and protected from a

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[173] In *Quinones*, the Third Circuit Court of Appeals held that Pennsylvania courts would recognize a duty of employers to use due care in keeping and maintaining employment records. *Quinones*, 492 F.2d at 1278. The court further held that employees may have a cause of action against their employers if the employer breaches this duty to use due care in maintaining employment records when the employee is proximately injured by the employer's negligence. *Id.*

[174] Duffy, *supra* note 161, at 600-01. Liability for defamation arises when an employer communicates false information to a third party that is injurious to the reputation of the employee. *Id.* at 600. Liability for invasion of privacy arises when an employer discloses private facts about an employee to the public. *Id.*

[175] *Id.* at 603-07. An equitable and balanced solution has been implemented in some states that ensures that personnel files remain accurate by permitting employees to review and make written objections to the contents of their file. *See, e.g.*, CONN. GEN. STAT. ANN. § 31-128(e) (West 1997) (permitting employees to make corrections to or deletions of personnel file or medical records if agreed upon by employer, and requiring employers to include written statements in files, and to third parties if file is disclosed, if employer and employee cannot agree on correction or removal); DEL. CODE ANN. tit. 19, § 734 (1995 & Supp. 1998) (allowing employees to make corrections to their personnel file if agreed upon by employer, and requiring employers to include written statement of employee in the file, and to third parties if file is disclosed, if employee and employer cannot agree upon correction); WIS. STAT. ANN. § 103.13(4) (West 1997) (permitting employees to request removal or correction of personnel file information with which they disagree). By enacting a statute that permits employees access to their employment files, employees may object to those items with which they do not agree. *See* Steven A. Meyerowitz, *Save Your Business Client From a Wrongful Discharge Suit*, 71 A.B.A. J., Aug. 1985, at 69. Thus, the employer may actually be protected from more harmful action by the employee if these disagreements are addressed by the employer following the employee's access to the employment record. *Id.* If the employee's objection is valid, this may avoid significant legal liability for the employer. *Id.* Even if the employer finds that the objection is not valid, the investigation and explanation may discourage the employee from starting unwarranted action against the employer. *Id.*

[176] Duffy, *supra* note 161, at 603.

[177] *See, e.g.*, Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979) (holding that the employer's express commitment of confidentiality was a legitimate reason to refuse disclosure of testing program information).

defamation action.[178] Employers are also concerned that employees' access to their personnel files may impede the ability of supervisory personnel to make honest or forthright assessments of employees.[179] Nonetheless, an employer is not excused from providing information simply by raising a claim of confidentiality.[180]

Litigation involving the subject of the personnel records is also a concern for employers. Employers fear that by exposing employer records to employees, employees may use the records in lawsuits against the employers.[181] Employers, in turn, may be hesitant to place some information in employee files.[182] No state statute should discourage employers from placing important information regarding its employees in their files.[183] Employers may be fearful of the potential litigation

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[178] KAHN ET AL., *supra* note 8, at 9.05[4].

[179] Duffy, *supra* note 161, at 607.

[180] Charlene Sherwood & David Turner, *Employee Privacy Rights and a Union's Right to Information*, 12 LERC MONOGRAPH SERV. 39, 46 (1993). Many states that have enacted personnel record access statutes have sought to protect certain employer records from disclosure by enacting exemptions to the statute. *See, e.g.*, CONN. GEN. STAT. ANN. § 31-128(a) (West 1997) (exempting stock option records, management bonus plan records, medical records, letters of reference from third parties, materials used by employer to plan future operations, information contained in separately maintained security files, and documents which are being prepared for use in civil, criminal, or grievance procedures from employee personnel file access); DEL. CODE ANN. tit. 19, § 731 (1995 & Supp. 1998) (exempting records related to investigation of possible criminal offenses, letters of reference, materials which are used by the employer to plan for future operations, and documents which are being developed or prepared for use in civil, criminal, or grievance procedures from inspection under Right to Inspect Personnel Files Act); 820 ILL. COMP. STAT. ANN. 40/10 (West 1993) (exempting letters of reference, test documents, materials relating to employer's staff planning, investigatory records, security records, and records relevant to pending claims from inspection by employees).

[181] *See supra* notes 172-74 and accompanying text.

[182] *See supra* note 170 and accompanying text.

[183] In Fort Lauderdale, Florida, a disgruntled ex-employee slaughtered five former co-workers in February of 1996. Howard Kleinberg, *How Can Society Cope with Problem Workers? There are Thousands of Clifton McVrees Out There, and Frankly, We Don't Know What to Do with Them*, TAMPA TRIB., Feb. 14, 1996, at 11. There was indication prior to the killing spree that this employee had been recognized as troubled and dangerous by his employers. *Id.* However, it is likely that although employers had recognized this employee's potential for violence, employers were too fearful to record their observations for fear of litigation. *Id.* Likely, in this situation, concerns were conveyed to inquiring potential employers orally, rather than transmitted in writing. *Id.* Employers also often convey neutral information to inquiring potential employers to avoid litigation by the former employee. Carrie Mason-Draffen, *Employees Not Entitled to See Personnel Files*, THE DES MOINES REG., May 5, 1997, at 11. Furthermore, if employers require drug or psychological testing of its potential employees or transmit personnel file information that is damaging to the employee, there is a possibility of a civil rights action. *Id.* This illustrates a difficult situation. If information is being transmitted orally to avoid the fear of written records, access to the employee's personnel file may not assist

repercussions of placing written cautions, performance appraisals, credit checks, and disciplinary records in personnel files.[184] Moreover, misinformation that is included in employment records can seriously impair an employer's position in litigation.[185] Furthermore, if an employer is faced with a lawsuit alleging discrimination or retaliatory discharge, the employer will want written records, a "paper trail," regarding the employee to justify the employer's negative employment actions.[186] If employers exclude certain information from an employee's personnel record, that information may not be admissible in later litigation.[187]

Employers undoubtedly have an interest in cost and productivity. Employers may be opposed to the costs associated with opening up their records.[188] From a purely economic perspective, employers are primarily concerned with the production of goods, profits, and efficiency.[189] Industry is concerned with costs that may be associated with legal constraints placed

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the employee in reviewing the accuracy of the employer's information. Alternatively, if information is not being conveyed, as in the case of neutral information on previous employees, the public may be in danger. Furthermore, what are employers, and society in general, to do with those employees who really are dangerous and should legitimately have damaging information in their personnel file?

[184] Kleinberg, *supra* note 183, at 11. In order to avoid defamation lawsuits for negative references, an estimated 65% of employers in 1995 implemented strict policies to supply only dates of employment, job title, and final salary to any inquiring future employers. REPA, *supra* note 9, § 11/14.

[185] KAHN ET AL., *supra* note 8, at 10-48. *See also infra* note 187 and accompanying text.

[186] DICKINSON, *supra* note 101, at 59; JOEL, *supra* note 7, at 161.

[187] Goldman & Foissote, *supra* note 10, at 22. This illustrates the catch-22 that employers face in maintaining records. Employers want to reduce their exposure by omitting information from employee files, but employers also want to have a thorough paper trail in the event of litigation. If employers place all possible information in the employee files, employees may sue the employer based upon some information in the file with which the employees disagree. If employers do not place certain information in the employee files, employees may initiate a lawsuit in which employers are unable to assert certain records in their defense if the employers have failed to place the documents in the employees' files. This could occur when employers are prohibited from using information in proceedings when the information was of the type that should have been in the file but was not. *See, e.g.*, MICH. COMP. LAWS ANN. § 423.502 (West 1995) (prohibiting employer from using personnel record information that was not included in the personnel record, but should have been included, in judicial or quasi-judicial proceedings unless the information was not intentionally excluded and employee has had reasonable time to review information); MINN. STAT. ANN. § 181.963 (West 1993) (prohibiting omitted information from employees' personnel records from use by employer in administrative, judicial, or quasi-judicial proceeding, unless the employer did not intentionally omit the information and the employee is given a reasonable opportunity to review the omitted information prior to its use).

[188] Reidenberg, *supra* note 9, at 239.

[189] ROTHSTEIN ET AL., CASES AND MATERIALS (1987), *supra* note 27, at 1.

on the processing and disclosure of personal information.[190] Unfortunately, in this particular situation, employers' interests may be in conflict with employees' needs.[191]

Lastly, employers have an interest in maintaining positive relations with employees. The relationship between employers and employees is arguably enhanced through a policy that gives employees access rights to their personnel files.[192] However, inaccuracies in employment files can seriously damage employee-employer relationships if the errors become known.[193] Nonetheless, permitting employees to review the materials contained in their personnel files promotes good employer-employee relations.[194]

B. *Employee Interests That Must be Protected Through Access to Personnel and Medical Records*

Employees have strong interests in accessing their personnel and medical records. First of all, employees have an interest in the accuracy of their employment records[195] because these records may have a far-reaching impact on their employment future.[196] Second, employees also have an interest in correcting any errors in their employment records.[197] Third, employees have a need to access their medical information that is maintained by their employers.[198] Finally, employees have an interest in protecting their privacy.[199]

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[190] Reidenberg, *supra* note 9, at 239. Some states have imposed statutes that regulate costs associated with disclosing personnel and medical records. *See, e.g.*, DEL. CODE ANN. tit. 19, § 732 (1995) (allowing employers to require employees to inspect personnel records on free time of employee); 820 ILL. COMP. STAT. ANN. 40/3 (West 1993) (permitting employer to charge a fee for providing copies of personnel information); MICH. COMP. LAWS ANN. § 423.503 (West 1995) (permitting employees to review their personnel records not more than two times per calendar year).

[191] Employee privacy interests cannot always outweigh the competing considerations of employers' cost and productivity. Duffy, *supra* note 161, at 603.

[192] *See* Linowes & Spencer, *supra* note 78, at 619. Bank of America has stated that its policy of permitting employees access rights to their personnel files is the best way to instill employee confidence. *Id.* at 620. *See also* PERSONAL PRIVACY, *supra* note 8, at 254-55; Rolnick, *supra* note 170, at 68.

[193] KAHN ET AL., *supra* note 8, at 10-48.

[194] Rolnick, *supra* note 170, at 68.

[195] *See infra* notes 200-04 and accompanying text.

[196] *See supra* notes 13, 15 and accompanying text.

[197] *See infra* notes 205-08 and accompanying text.

[198] *See infra* notes 209-16 and accompanying text.

[199] *See infra* notes 217-20 and accompanying text.

Employees have an interest in ensuring the accuracy of their employment records because employers frequently base promotions or other employment decisions upon written documentation in an employee personnel file.[200] As seen with the opening illustration involving Mr. Ellis, employers sometimes make employment decisions based on incorrect information that is contained in an employee's personnel file.[201] Misinformation that is recorded in a personnel file can drastically affect an employee's future with his or her current employer or even future employers.[202] Further, release of incorrect information to a third party could result in a tarnished career such as Mr. Ellis's.[203] In the absence of a statute guaranteeing employees the right to review their personnel records, inaccurate personnel information could materially affect the employees' futures without the employee ever having the opportunity to correct the inaccuracies.[204]

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[200] PERSONAL PRIVACY, *supra* note 8, at 254-55. Employees also have an interest in confirming that any information that is included in their personnel file is strictly job-related and based on business necessity. JOEL, *supra* note 7, at 161.

[201] Linowes & Spencer, *supra* note 78, at 596. Furthermore, drug tests can sometimes falsely indicate the presence of drugs which can have devastating consequences for the employee if the results remain in the employee's file uncorrected. *Id.* at 601.

[202] Himmelberg, *supra* note 87, at D6; Sessions, *supra* note 15, at D1; Whitaker, *supra* note 15, at E4. However, even if incorrect information, such as innuendoes, misrepresentations, or outright lies, is permitted to be corrected, the process of correction in itself may cause more harm than good. Sessions, *supra* note 15, at D1. Furthermore, if an employer is conscious of an employee's access to his or her file, this may encourage employers only to maintain "appropriate" documents in the employee file. *See* Meyerowitz, *supra* note 175, at 69. In this context, "appropriate" means those documents that an employer decides are suitable for employees to view; whereas, "inappropriate" documents would be those documents that the employer is consciously trying to withhold from employees. Thus, employees would think that they were accessing all information that has been recorded by their employer pertaining to themselves, while, in reality, the employer is maintaining a separate, secret record of employee information. This could lead employers to consciously hide information from employees. This hiding of secret documents should not be tolerated. *See* Cleghorn v. Hess, 853 P.2d 1260, 1263 (Nev. 1993). In the event that employers fail to allow employees access to information that should have been included in the personnel record, or violate the statute which required the employer to maintain complete and accurate records, the omitted information may later be inadmissible in litigation. *See supra* note 187.

[203] Linowes & Spencer, *supra* note 78, at 596.

[204] *See, e.g., Cleghorn*, 853 P.2d at 1263. In *Cleghorn*, an employee and a union brought a lawsuit against the employee's employer and a psychologist. *Id.* at 1261. The employee and the union sought a declaratory judgment entitling them to the results of the employee's psychological testing that had been performed to determine the employee's suitability for employment with the employer. *Id.* The employer and psychologist argued that no physician-patient relationship existed between the psychologist and the employee because the testing was performed for the sole benefit of the employer. *Id.* at 1262. The Supreme Court of Nevada held that the employee was entitled to his test results under the Nevada statute requiring providers

Because errors are inevitable in the collection of massive amounts of information, employees have an interest in reviewing their personnel information in order to make corrections to any incorrect or misleading information contained in their records.[205] Without access to their personnel records, employees have no opportunity to correct inaccurate material contained in their personnel file.[206] Employees' access to their personnel files may also assist the employees in assessing their standing with their employer.[207] Further, if employees are concerned that incorrect information is being added to their personnel files, or suspicious that their personnel files are being altered, a periodic review of the file will serve to ensure accuracy.[208]

Employees have a strong interest in accessing information regarding their medical conditions. However, when employers hire physicians to conduct a medical examination of the employer's employee, the physician's ultimate allegiance is to the employer.[209] Employees who undergo a medical examination for employment purposes are arguably neither patients, for the purposes of state medical record access statutes, nor in a physician-patient relationship.[210] Thus, employees using the medical services offered by the employer may compromise the traditional confidential relationship typically enjoyed between a patient and his or her doctor.[211] Although the employer-hired physician has a duty to inform the employer when the physician detects a condition in an employee that could adversely affect the employer or other employees, the physician may not provide the employee-patient with this information.[212] Furthermore, a physician-patient relationship may not exist between an employee and the

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of health care to make health care records available to the patient for inspection. *Id.* at 1263-64. The court explained that, although Nevada had not enacted any statute requiring private employers to permit employees to examine their own personnel files, many states had enacted this type of legislation to prevent the injustice that occurs when employers deny employees access to their personnel files. *Id.* at 1263.

[205] Reidenberg, *supra* note 9, at 204.

[206] Yosh Golden, *Worker Access to Personnel Files Cut Off by Ruling*, CHICAGO DAILY L. BULL., Nov. 16, 1987, at 1.

[207] REPA, *supra* note 9, §§ 10/8-10/9.

[208] *Id.* § 10/9.

[209] Linowes & Spencer, *supra* note 78, at 612.

[210] 1 BARRY R. FURROW ET AL., HEALTH LAW §§ 4-31 (1995).

[211] *See, e.g.*, Keene v. Wiggins, 69 Cal. App. 3d 308 (Cal. Dist. Ct. App. 1977) (holding that no physician-patient relationship existed between doctor and employee when doctor conducted examination for sole benefit of employer in workers' compensation claim); Tumblin v. Ball-Incon Glass Packaging Corp., 478 S.E.2d 81 (S.C. Ct. App. 1996) (holding that preemployment physical examination did not give rise to a physician-patient relationship).

[212] Linowes & Spencer, *supra* note 78, at 612.

physician when the physician only administers tests, rather than providing treatment and care.[213]

Rarely will an employer be legally entitled to screen a potential employee for HIV or AIDS.[214] However, if an employer is permitted to test a potential employee for HIV or AIDS, the employer should be required to obtain voluntary, informed consent from the potential employee, should guarantee that the test results will remain confidential between the health care facility and the potential employee, and should ensure that the potential employee is provided with a full explanation of the results.[215] Moreover, if an employer's physician detects a life threatening or serious medical condition in the employee, the employee should receive this information. However, in some situations it may be in the employee's best interest for an employer to refuse employee access to medical information that would result in serious harm to the employee.[216]

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[213] Lori B. Andrews & Ami S. Gaeger, *Confidentiality of Genetic Information in the Workplace*, 17 AM. J.L. & MED. 75, 89 (1991). *See also* ROTHSTEIN ET AL., CASES AND MATERIALS (1994), *supra* note 35, at 181. Note, however, that whether a physician-patient relationship exists is extremely fact-sensitive. *See, e.g.*, Green v. Walker, 910 F.2d 291 (5th Cir. 1990) (holding that a physician who examines an employee during an employment physical has a duty to conduct the examination at a level of care consistent with the physician's training and expertise, and to take reasonable steps to make medical information available to the employee of any findings that pose imminent danger to the employee's physical or mental well-being); Hoover v. Williamson, 203 A.2d 861 (Md. 1964) (holding that employee had cause of action against employer-hired physician who wrongfully represented seriousness of employee's condition).

[214] The federal Center for Disease Control (CDC) has determined that HIV and AIDS testing is unnecessary even in the case of health care workers who have invasive contact with patients. DICKINSON, *supra* note 101, at 42-44. The guidelines published by the CDC make it extremely difficult for any employer to establish a bona fide occupational qualification or business necessity for HIV or AIDS testing. *Id.* at 44. *See also supra* notes 91-94 and accompanying text.

[215] DICKINSON, *supra* note 101, at 42-43. Most states have enacted statutes that require consent for HIV and AIDS testing. *Id.* For example, a Delaware statute requires informed consent, explanation of the test's voluntary nature, the purpose and potential uses and limitations of the test, the meaning of the test results, and information on the test procedures, the nature of AIDS, and risk-increasing behaviors. DEL. CODE ANN. tit. 16, § 1202 (1996).

[216] *See, e.g.*, N.C. GEN. STAT. § 122C-158(c)(1) (1997) (permitting the employer to refuse disclosure of medical information to an employee when a prudent physician would not divulge the medical information); OHIO REV. CODE ANN. § 4113.23 (West 1995) (requiring disclosure of medical records unless a physician determines that the disclosure would result in serious medical harm to the employee); WIS. STAT. ANN. § 103.13(5) (West 1997) (permitting the employer to refuse disclosure of medical records if the employer believes disclosure would have a detrimental effect on the employee). For example, in some instances, psychiatric information that would be detrimental to the employee-patient or medical information that would adversely affect the general health of the person may be withheld. WILLIAM H. ROACH, JR. ET AL., MEDICAL RECORDS AND THE LAW 100 (2d ed. 1994).

Finally, employees have an interest in protecting their private and personal information that is included in personnel records.[217] However, employee privacy in the workplace is limited, because employers have broad discretion to monitor employees while at work, to collect information on employees, and to use the data collected for business purposes.[218] Furthermore, employers have an interest in personal information regarding their employees to ensure that their employees are honest, physically fit, and mentally stable.[219] Employees, nonetheless, have a privacy interest in reviewing their personal information that has been gathered by their employer.[220]

In summary, a statute requiring employers to permit employees access to their personnel and medical records attempts to remedy the imbalance of power between employers and employees.[221] Without a statute ensuring access to such records, employees may not be privy to records that can heavily impact their lives.[222] Public policy requires that employees have access to this vital data and that they have this access without undue burden.[223]

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[217] This Note does not address employee privacy as it relates to third party access to personnel information. Although this is an important issue as well, especially with the recent health care reform bill that calls for a central database of medical information, this Note concentrates exclusively on the employees' rights to see their own personnel and medical information that is kept in their personnel file maintained by their employer.

[218] DICKINSON, *supra* note 101, at 1.

[219] *Id.* at 2. Employer medical testing also raises issues of employees' personal privacy. Drug testing conducted by employers may actually reveal more information to employers than simply whether the employees have been using illegal drugs. Urinalysis can reveal such health information as whether an employee is being treated for a heart condition, depression, epilepsy, diabetes, or asthma. Roger S. Glass, *Testing: Are You Next?*, PUB. SERV. REP., July/Aug. 1987, at 1, 5. Urine screens can also reveal if a female employee is pregnant. *Id.* Thus, urinalysis may actually serve as a device to screen an employee's off-the-job activities rather than testing for job performance. *Id.* Furthermore, labor leaders have viewed genetic testing as infringing on personal privacy because the testing may lead to labeling individuals as "high risk." Linowes & Spencer, *supra* note 78, at 605. Genetic testing may be helpful to employers in determining whether an individual has a predisposition to violent behavior, or may reveal some abnormality, disease, or condition that could affect performance on the job. DICKINSON, *supra* note 101, at 40. However, genetic testing raises serious personal privacy questions because the tests show only a predisposition to a disease or a condition, rather than any actual illness or disability. *Id.* Some states, such as Iowa and Wisconsin, have enacted statutes to protect against abuse of genetic testing in employment relationships. *See* IOWA CODE § 729.6 (1996); WIS. STAT. ANN. § 111.372 (West 1997).

[220] *See, e.g.*, DICKINSON, *supra* note 101, at 1-4.

[221] *See* Landwer v. Scitex Am. Corp., 606 N.E. 2d 485, 488 (Ill. App. Ct. 1992).

[222] *Id.*

[223] *Id.*

V. A MODEL INDIANA STATUTE

The national trend in employment law has been towards providing employees a more equal and fair playing field with their employers.[224] Indiana, however, has neglected to advance or even address the most basic interests of Indiana employees.[225] Furthermore, Indiana has failed to encourage reasonable behavior on the part of employers.[226] Nevertheless, Indiana is now at an advantage because it can learn from the mistakes and accomplishments of other states. Indiana can make use of other states' experiences to construct a balanced, fair Indiana statute that addresses employees' access to information contained in employees' employment records.

Any statute regulating employees' access to personnel or medical files maintained by their employer must be concise and should clearly state which documents are subject to disclosure and which documents may be withheld from an employee.[227] In addition, all material terms should be clearly defined in the statute.[228] Furthermore, not all information contained within employees' personnel files is appropriate for employee access.[229] When an employee seeks access to information that may compromise the privacy of another individual or threaten the confidentiality of the employer, that information may be withheld from the employee in some circumstances.[230]

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[224] *See generally* FELIU, *supra* note 12, at 1-5.

[225] There is a strong public policy interest in providing employees with a right to access their personnel records because these records may heavily impact employees' lives. *Landwer*, 606 N.E.2d at 488. "Some rights are so important to our citizens that they may not be prospectively waived." *Id.*

[226] *See generally* PERSONAL PRIVACY, *supra* note 8, at 1-6.

[227] *See* Spinelli v. Immanuel Evangelical Lutheran Congregation Inc., 515 N.E.2d 1222, 1228 (Ill. 1987). In *Spinelli*, the Supreme Court of Illinois held the Illinois statute mandating disclosure of personnel records unconstitutionally vague finding that an employer of ordinary intelligence could not determine with reasonable certainty which personnel documents were subject to disclosure. *Id.* *Spinelli* involved a teacher who brought an action against her employer, a private school, to require it to disclose certain documents in her personnel file. *Id.* at 1225. The employer refused to permit the employee access to the letters received from parents and teachers that were in the employee's file stating that the statute excluded "management planning" documents relating to personnel assignments. *Id.* The employee argued that she was entitled to access the letters because they included matters relating to promotion. *Id.*

[228] *See, e.g.*, Beitman v. Department of Labor & Indus., 675 A.2d 1300 (Pa. Commw. Ct. 1996) (examining definition of "employee" as used in the act that permitted employee inspection of his or her own personnel files).

[229] *See supra* note 180 and accompanying text.

[230] *See, e.g.*, Board of Trustees v. Superior Court, 174 Cal. Rptr. 160 (Cal. Ct. App. 1981). For example, in California, when an employee sought access to his personnel file, the court

Furthermore, as discussed in Section IV of this Note, the interests of Indiana employers and employees are not always in conflict.[231] Where employer and employee interests do conflict, their interests may be balanced to achieve a just result.[232] The following statute offers a detailed model, incorporating many of the achievements of other states and addressing difficulties that other states have encountered. The model statute seeks to balance the rights of employers with the rights of employees in accessing their employment records by permitting employees' access to both their medical records and personnel information, while also providing exemptions under certain circumstances. The proposed model Indiana statute explicitly defines each material term used in the model statute. Employees include persons currently employed and persons who were employed within the past two years.[233] The model statute requires employees to submit a written request for inspection of their employment records. In addition, the proposed model statute permits employees to inspect their employment records up to twice per year. Further, the proposed statute specifically explains the procedure for inspection. The model statute also permits employees to request photocopies of their employment records and provides that employers may charge up to twenty-five cents for each page photocopied. Furthermore, the model statute provides employees the opportunity to correct their employment records or submit a written statement if the employee and employer cannot agree on the correction. The model statute also prohibits employers from using information that was intentionally omitted from an employment record against employees in judicial proceedings. Finally, the model statute provides remedies that employees may seek through civil action if their employers have violated the statute.

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balanced the employee's right of access to private information about himself with the rights of the individuals who had submitted confidential letters of reference included in the personnel file. *Id.* Although the statute in California explicitly exempted letters of reference from employee access, the court found no compelling state purpose in maintaining the confidentiality of the information included in the letters. *Id.* at 168. Rather, the court required that any information disclosing the author of the letters be deleted to preserve the right of privacy of the person who furnished the reference information. *Id.* The court ultimately concluded that the proper balance demanded disclosure of the letters of reference to the employee, but the court required that certain portions of the letters be deleted to protect the identity and privacy of those who had furnished the information. *Id.* at 168-69.

[231] *See supra* note 161 and accompanying text.

[232] Illinois enacted its statute permitting employees access to employers' personnel records to remedy the imbalance of power between employers and employees. *Id.*

[233] *See infra* notes 235, 241 and accompanying text.

Title 22: LABOR AND INDUSTRIAL SAFETY
Article 6: LABOR RELATIONS
Chapter X: Employee Access to Employment Records
Section 1: Definitions
As used in this Chapter:

(a)"Employer" means any individual, partnership, association, limited liability company, corporation, business trust, the state, or other government agency or political subdivision that has one (1) or more employees.[234]

(b)"Employee" means: (1) any person currently employed by the employer for wages or salary or, (2) any person who was employed by the employer for wages or salary within the past two (2) years.[235]

(c)"Requesting Employee" means the employee requesting access to his or her employment record.

(d)"Personnel File" means all documents and electronic data[236] *containing the requesting employee's name or referring to the requesting employee in any way*[237] *which have been or are intended to be used in determining the requesting employee's qualifications for employment, promotion, transfer, compensation, discharge, or other disciplinary action.*[238]

(e)"Medical Records" means all medical documents and electronic data pertaining to the requesting employee that are in the employer's possession.[239]

(f)"Employment Records" means employer records containing an employee's personnel file and/or medical records.[240]

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[234] *See* IND. CODE ANN. § 22-9-2-1 (West 1991 & Supp. 1998); IND. CODE ANN. § 22-2-2-3 (West 1991 & Supp. 1998).
[235] *See* IND. CODE ANN. § 22-9-1-3(i) (West 1991). Pursuant to Indiana Code Section 34-11-2-1, all employment-related actions in Indiana shall be brought within two years of the date of the act or omission complained of. IND. CODE ANN. 34-11-2-1 (West Supp. 1998).
[236] Computers are increasingly being used to store employee information. Nickloy & Creveling, *supra* note 8, at 14.
[237] *See, e.g.*, 5 U.S.C. § 552 (1994) (permitting an employee's access to information that includes the employee's name or personal identifier).
[238] *See, e.g.*, 820 ILL. COMP. STAT. ANN. 40/2 (West 1993).
[239] *See, e.g.*, CONN. GEN. STAT. ANN. § 31-128c (West 1997).

Commentary:

Section 1 clearly defines the material terms that have, in the other states, created disagreements.[241] Employment records are defined broadly and specifically. They include all documents and electronic information relating to the individual employee seeking access, as well as medical information maintained by the employer. Employer is defined to include all potential employers in Indiana, including both public and private-sector employers. Although some public and private-sector employees will be provided access to their records under other statutes, this model statute provides uniform access to all Indiana employees. Thus, some employees in Indiana may have more than one statute under which they may request access, but all employees will at least have access under the proposed model statute. Finally, employee is defined clearly to include all persons currently employed, as well as persons who were employed within the past two (2) years. The two (2) years following termination of employment will provide ample time for employees to access their records after termination, while also giving employers a clear date on which they may restrict access.

Section 2: Employee Access to Employment Records

Every Indiana employer shall, upon written request from an employee, permit the requesting employee to inspect any employment records pertaining to the requesting employee,[242] *except as provided in Section 5. No employer shall be required to permit an inspection of any employee's employment record*

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[240] Similarly, Connecticut provides access to both an employee's personnel files and an employee's medical records. CONN. GEN. STAT. ANN. § 31-128c (West 1997). Maine specifically allows access to any formal or informal employee evaluations and reports relating to the employee's character, credit, work habits, compensation and benefits, and nonprivileged medical records and nurses' station notes relating to the employee which the employer has in its possession. ME. REV. STAT. ANN. tit. 26, § 631 (West Supp. 1998).

[241] *See, e.g.*, Beitman v. Department of Labor & Indus., 675 A.2d 1300 (Pa. Commw. Ct. 1996) (addressing the definition of employee in a case where a previous employee was requesting access to her personnel file two and one-half years after her termination.); Spinelli v. Immanuel Lutheran Evangelical Congregation, Inc., 515 N.E.2d 1222 (Ill. 1987) (holding that the Illinois act permitting employees to review their personnel records was so vague and uncertain that it violated the employer's constitutional right to due process.); Landwer v. Scitex Am. Corp., 606 N.E.2d 485 (Ill. App. Ct. 1992) (discussing the definition of open records subject to disclosure upon request of employees).

[242] The Privacy Act of 1974 similarly permits access only to information pertaining to the individual requesting the access. 5 U.S.C. § 552a(d)(1) (1994). *See also* ALASKA STAT. § 23.10.430 (Michie 1996) (permitting access to employee's personnel file and other personnel information maintained by the employer concerning the employee).

on more than two (2) occasions in any calendar year,[243] *unless otherwise provided for in a collective bargaining agreement. The employer shall provide the requesting employee with the inspection opportunity within seven (7) working days after the employee's written request or, if the employer can reasonably show that such deadline cannot be met, the employer shall have an additional seven (7) working days to comply. The inspection shall take place at the location where the employment records are maintained and during normal office hours unless, at the employer's discretion, a more convenient time and location for the employee are arranged.*[244] *Nothing in this Chapter shall be construed as a requirement that an employee be permitted to remove any part of such employment records from the place on the employer's premises where it is made available for inspection.*[245] *Each employer shall retain the right to protect the employer's employment records from loss, damage, or alteration to ensure the integrity of the records.*[246]

Commentary:

The purpose of Section 2 is to permit employees access to their medical and personnel information maintained by their employer. This Section also refers to exemptions that are provided in Section 5. Section 2 explicitly sets out the procedure that employers and employees must follow when employees seek access to their employment records. Unlike many state statutes that merely use a standard of reasonableness,[247] this model statute specifies precisely when, where, and how often access is permitted in order to define the necessary steps for both the employee and employer.

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[243] *See, e.g.*, CONN. GEN. STAT. ANN. § 31-128b (West 1997); 820 ILL. COMP. STAT. ANN. 40/2 (West 1993).

[244] *See* ME. REV. STAT. ANN. tit. 26, § 631 (West Supp. 1998).

[245] *See, e.g.*, DEL. CODE ANN. tit. 19, § 733 (1995 & Supp. 1996).

[246] *See, e.g.*, 820 ILL. COMP. STAT. ANN. 40/2 (West 1993). *See also supra* note 171 and accompanying text.

[247] *See, e.g.*, CAL. LAB. CODE ANN. § 1198.5 (West Supp. 1998) (permitting access at reasonable times and at reasonable intervals); CONN. GEN. STAT. ANN. § 31-128b (West 1997) (allowing employees access to their personnel file within a reasonable time after submitting a written request to the employer); DEL. CODE. ANN. tit. 19, § 732 (1995 & Supp. 1996) (permitting employees to inspect employees' own personnel file at a reasonable time after requesting inspection).

Section 3: Photocopies

> *After the inspection provided in Section 2, the requesting employee may obtain a photocopy of the information or part of the information contained in the requesting employee's employment record, except those materials that are exempted pursuant to Section 5.*[248] *An employer may charge no more than twenty-five (25) cents per page for each page of photocopied information.*[249]

Commentary:

Section 3 requires that employers provide employees with a photocopy of the employee's employment record when requested.[250] A precise fee limit is indicated so that there will be no dispute over the costs of photocopying. This Section allows employees to receive a hard copy of their files so that they may more thoroughly review them without supervision. This Section also permits employers to receive reimbursement for their photocopying costs.

Section 4: Correction of Employment Records

> *If the requesting employee disagrees with any information contained in the requesting employee's employment record, a removal or correction of that information may be mutually agreed upon by the employer and the requesting employee. If an agreement cannot be reached, the employee may submit a written statement explaining the employee's position. The employer shall attach the employee's statement to the disputed portion of the employment record. The employee's statement shall be included whenever that disputed portion of the employment record is released to a third party. The inclusion of any written statement attached in the record without further action by the employer shall not imply or create any presumption of employer agreement with its contents. If either the employer or the employee knowingly places in the employment record information that is false, the employer or*

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[248] *See, e.g.*, ALASKA STAT. § 23.10.430 (Michie 1996); CONN. GEN. STAT. ANN. § 31-128g (West 1997); 820 ILL. COMP. STAT. ANN. 40/3 (West 1993); MASS. GEN. LAWS ANN. ch. 149, § 52C (West 1996).

[249] *See* OHIO REV. CODE § 4113.23(B) (Banks-Baldwin 1995).

[250] *See supra* notes 105-06 and accompanying text.

employee, whichever is appropriate, shall have remedy through legal action to have information expunged.[251]

Commentary:

Section 4 permits employees to make corrections to their employment records.[252] First of all, information may be removed or corrected by the employer if the employee and employer can agree on the amendment. If no agreement is reached, the employee may submit a written statement that will be included with the employment record.[253] Section 4 further provides that the employer, by placing the written statement in the employment record, is not agreeing with the written statement. Lastly, Section 4 provides that incorrect information that is intentionally placed in the employment record, by the employer or by the employee, may be expunged pursuant to a court order.

Section 5: Exemptions

The right of the requesting employee to review his or her employment records does not apply to:

(a) Investigatory or security records maintained by an employer to investigate criminal conduct by an employee or other activity by an employee which could reasonably be expected to harm the employer's property, operations, or business or could by the employee's activity cause the employer financial liability, unless and until the employer takes adverse personnel action based on information in such records.[254]

(b) Any portion of a letter of reference that identifies the identity of the source.[255]

(c) Any portion of a test document, except that the requesting employee may see a cumulative score for either a section of the test document or for the entire test document.[256]

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[251] *See, e.g.*, CONN. GEN. STAT. ANN. § 31-128e (West 1997); DEL. CODE. ANN. tit. 19, § 734 (1995 & Supp. 1996); 820 ILL. COMP. STAT. ANN. 40/6 (West 1993).

[252] *See supra* notes 205-08 and accompanying text for a discussion of employees' interest in correcting their employment records.

[253] *See supra* notes 113-14, 175 and accompanying text.

[254] *See, e.g.*, 820 ILL. COMP. STAT. ANN. 40/10 (West 1993 & Supp. 1998); OR. REV. STAT. § 652.750 (1997); WIS. STAT. ANN. § 103.13(6)(a) (West 1997).

[255] *See* Board of Trustees of Leland Stanford Junior Univ. v. Superior Court, 174 Cal. App. 3d 516 (Cal. Ct. App. 1981). *See also supra* note 124 and accompanying text.

(d) Materials relating to the employer's staff planning, such as matters relating to the business' development, expansion, closing or operational goals, where the materials relate to or affect multiple employees, provided, however, that this exception does not apply if such materials are, have been, or are intended to be used by the employer in determining the requesting employee's qualifications for employment, promotion, transfer, or additional compensation, or in determining the requesting employee's discharge or discipline.[257]

(e) Information of a clearly personal nature about a person other than the requesting employee if disclosure of the information would constitute a clearly unwarranted invasion of the other person's privacy.[258]

(f) 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. However, a record concerning an occurrence or fact about an employee kept pursuant to this subparagraph may be entered into an employment record if entered no more than six (6) months after the date of occurrence or the date the fact become known.[259]

(g) Medical information that a physician concludes would result in serious medical harm to the requesting employee, in which case a copy of the medical information shall be given to a physician designated in writing by the requesting employee.[260]

(h) Records relevant to any other pending claim between the employer and the requesting employee which may be discovered in a judicial proceeding.

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[256] *See* 820 ILL. COMP. STAT. ANN. 40/10 (West 1993 & Supp. 1998); WIS. STAT. ANN. § 103.13(6)(c) (West 1997).

[257] *See* 820 ILL. COMP. STAT. ANN. 40/10 (West 1993); WIS. STAT. ANN. § 103.13(6)(d) (West 1997). *See also supra* notes 176-80 and accompanying text.

[258] *See* Board of Trustees of Leland Stanford Junior Univ. v. Superior Court, 174 Cal. App. 3d 516 (Cal. Ct. App. 1981). *See also* 820 ILL. COMP. STAT. ANN. 40/10 (West 1993 & Supp. 1998); MICH. COMP. LAWS ANN. § 423.501(2)(iv) (West 1995); WIS. STAT. ANN. § 103.13(6)(e) (West 1988); JOEL *supra* note 7, at 162.

[259] MICH. COMP. LAWS ANN. § 423.501(2)(viii) (West 1995).

[260] OHIO REV. CODE § 4113.23 (Banks-Baldwin 1995).

Commentary:

The purpose of Section 5 is to balance the employers' interests with the employees' need for access to their employment records. Section 5 provides exemptions to employees' access to their employment records. This Section seeks to preserve some employer privacy and confidentiality. Section 5 also protects third parties' privacy by exempting portions of letters of reference that identify the source of the letter, and other third party information that is of a personal nature. This Section allows employers to keep investigatory and security investigations confidential. Further, test documents are protected so that employers may use the same or similar examinations for testing future employees. Business planning documents are also protected so long as the documents are also not used to determine the individual employee's employment future. Records that are privately maintained by an executive, administrative, or professional employee are not accessible by employees. However, these privately maintained records may not be added to an employee's employment record after six months. This ensures that any information that may be used against an employee must reach the employment record within six months, or it will be barred from use by the employer in any proceedings.[261] Medical information that is part of an employee's employment record that could be harmful to the employee must be given to a physician chosen by the employee.[262] Lastly, records pertaining to a pending claim between the employer and employee are exempt and thus must be accessed through discovery rather than pursuant to the statute.

Section 6: Use of Information in Proceedings

> *Employment record information that was not included in the employment record but should have been as required by this Chapter shall not be used by an employer in any judicial or quasi-judicial proceeding. However, employment record information that, in the opinion of the judge in a judicial proceeding or the hearing officer in a quasi-judicial proceeding, was not intentionally excluded from the employment record, may be used by the employer in the proceeding if the employee agrees or has been given reasonable time to review the information. Information that should have*

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[261] *See infra* section 6 of model statute. *See also supra* note 187 and accompanying text.
[262] *See supra* note 216 and accompanying text.

been included in the employment record shall be used at the request of the employee.[263]

Commentary:

Section 6 ensures that employees' employment records are complete and prevents employers from hiding information from employees. This Section prevents an employer from using information against an employee that was not included in the employee's employment record and was thus not subject to employee access. This Section also allows a judge or hearing officer to make concessions in the case of a good faith mistake. If the information was excluded from the employment record unintentionally, the judge or hearing officer may permit the information to be used in a proceeding if the employee agrees to the use or if the employee has sufficiently reviewed the information. Finally, the judge or hearing officer must permit employees to use any excluded information that should have been included in the employment record.

Section 7: Remedies

In addition to other remedies provided by law,[264] *if an employer violates a provision of this Chapter, the employee may bring a civil action to compel compliance and for the following relief:*[265]

(1) For a violation of this Chapter, actual damages plus costs.[266]

(2) For a willful and knowing violation of the Chapter, $500.00 plus costs, reasonable attorney's fees, and actual damages.[267]

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[263] *See* 820 ILL. COMP. STAT. ANN. 40/4 (West 1993 & Supp. 1998).

[264] Notwithstanding this Chapter, other civil actions are also available such as defamation. *See supra* notes 172-174 and accompanying text.

[265] *See* MINN. STAT. ANN. § 181.965 (West 1993).

[266] *See, e.g.*, 820 ILL. COMP. STAT. ANN. 40/12 (West 1993); MICH. COMP. LAWS ANN. § 423.511 (West 1995). *See also supra* note 146 and accompanying text.

[267] *See, e.g.*, CAL. LAB. CODE § 1174.5(a) (West Supp. 1998); 820 ILL. COMP. STAT. ANN. 40/12 (West 1993 & Supp. 1998); ME. REV. STAT. ANN. tit. 26, § 631 (West Supp. 1998); MICH. COMP. LAWS ANN. § 423.511 (West 1995). *See also supra* note 147 and accompanying text.

Commentary:

Section 7 provides the remedies available to an employee in the event that an employer violates the statute. In addition to other remedies that may be available to the employee, the employee may initiate a civil action to compel disclosure of the employment record, as well as sue for actual damages and costs. If the employer is found to have willfully or knowingly violated the statute, the employee may collect $500, costs, reasonable attorney's fees, and actual damages. This Section seeks to provide an incentive to employers to carefully comply with the statute.

Section 8: Severability

> *If any portion of this Chapter or the application of this Chapter to any person or circumstance is held invalid, that invalidity shall not affect other portions or applications of this Chapter which can be given effect without the invalid provision or application.*[268]

Commentary:

Section 8 declares this statute to be severable. Thus, in the event any part of the statute is held invalid, it will not be construed as to render invalid the remaining portions of the statute.

VI. CONCLUSION

Indiana employees must have access to their personnel and medical files maintained by their private-sector employers in Indiana. Employees should be entitled to access information in their personnel and medical file, within reasonable limitations, in order to ensure accuracy and integrity of employment record information, foster employee cognizance of medical information, protect employee privacy, safeguard employer confidentiality, discourage litigation, and promote positive employer-employee relations. The Indiana legislature has been slow to adopt fair, reasonable statutory law to place employees on a level playing field with their employers. This model statute balances the interests of both Indiana employees and Indiana employers in the private-sector.

RaeLee Cunningham Hudson

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[268] *See, e.g.*, R.I. GEN. LAWS § 28-6.5-3 (1995).