

# FLASHPOINTS (ARCHIVED 2022)

## EMPLOYMENT & LABOR LAW FLASHPOINTS OCTOBER 2022

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### First District Appellate Court Concludes Personnel Record Review Act Does Not Require Employers To Provide Copies of Records to Employee's Legal Representative

On September 16, 2022, the Illinois First District Appellate Court affirmed the granting of judgment on the pleadings for an employer in a suit brought by a terminated employee under the Illinois Personnel Record Review Act, 820 ILCS 40/0.01, *et seq.* The decision, [Scanlon v. Ignite, Org., 2022 IL App \(1st\) 211441](#), is an important holding for employers to be cognizant of when receiving and responding to requests from attorneys for the personnel records of employees (current or former) that they represent.

#### *The Illinois Personnel Record Review Act*

At issue in *Scanlon* was the Illinois Personnel Record Review Act, which requires all Illinois employers with five or more employees to grant employee requests to inspect their personnel documents. 820 ILCS 40/2. Employers shall grant employee records inspection requests at least twice in a calendar year when the requests are made in reasonable intervals. The inspection opportunity is to be provided within seven working days after the employee makes the request or, if the employer can reasonably show that this deadline cannot be met, after an additional seven days. The inspection shall take place at a location near the employee's place of employment and during normal working hours, but the employer may allow the inspection to take place at a different time or place if that would be more convenient for the employee. If an employee demonstrates that he or she is unable to review the personnel record at the employing unit, the employer shall, upon the employee's written request, mail a copy of the requested record to the employee. *Id.*

Section 3 of the Act goes on to provide that following the aforementioned record inspection time, "an employee may obtain a copy of the information or part of the information contained in the employee's personnel record" and the employer may charge a fee for providing a copy. 820 ILCS 40/3. Finally, §5 of the Act provides that for employees involved in a current grievance against the employer, they may "designate in writing a representative of the employee's union or collective bargaining unit or other representative to inspect the employee's personnel record which may have a bearing on the resolution of the grievance" and such inspection shall be permitted in the same manner as if the employee was inspecting the record. 820 ILCS 40/5.

Should an employee believe his or her employer has violated the Act, he or she may commence an action in the circuit court to enforce the Act's requirements and compel compliance. 820 ILCS 40/12(c). An employee prevailing in an action pursuant to the Act may be awarded actual damages plus costs and, in the case of willful and knowing violations, may be awarded a \$200 penalty plus costs, reasonable attorneys' fees, and actual damages. 820 ILCS 40/12(d).

#### *Scanlon's Personnel Record Request*

Following the termination of plaintiff Kenneth Scanlon's employment with Ignite in May 2021, Scanlon signed a request for his personnel record and authorized his legal counsel to send this request directly to Ignite. 2022 IL App (1st) 211441 at ¶3. The request authorized Scanlon's legal counsel to receive his personnel record and pay Ignite for copies, as Scanlon intended to move to Florida. *Id.*

Over one month after the record request was mailed by Scanlon's attorney, Ignite acknowledged receipt and refused to comply with the production of any of Scanlon's personnel records to the attorney. 2022 IL App (1st) 211441 at ¶4. In response, Scanlon's attorney informed Ignite that Scanlon could not review his personnel

records in-person because he had moved to Florida, which was the reason why it was requested that the records be sent directly to the attorney. *Id.* Notwithstanding the explanation, Ignite continued to refuse to grant the records request made by Scanlon through his attorney. *Id.*

Scanlon filed a complaint with the Illinois Department of Labor (IDOL), alleging that Ignite violated the Act by refusing to comply with the request for his personnel records. 2022 IL App (1st) 211441 at ¶5. IDOL dismissed the complaint and determined it would not commence an action in the circuit court to address the complaint. *Id.* Scanlon then filed a complaint in the Circuit Court of Cook County, arguing that the request for Ignite to mail a copy of his personnel records to his attorney was valid under the Act. 2022 IL App (1st) 211441 at ¶13. Scanlon specifically alleged that he was “uniquely prejudiced” by Ignite’s denial as he requested his personnel file in order to evaluate a possible retaliatory discharge case against Ignite and was further prejudiced as the statute of limitations for such a case was not tolled as he awaited review of his personnel records. 2022 IL App (1st) 211441 at ¶6. Scanlon requested the trial court order Ignite to produce a complete copy of Scanlon’s personnel records, pay a \$200 penalty, and pay Scanlon’s attorneys’ fees. *Id.*

In response to the complaint, Ignite filed a motion for judgment on the pleadings, arguing that the Act permits the employee to request to inspect their personnel documents. 2022 IL App (1st) 211441 at ¶7. Ignite noted that the request at issue was made by Scanlon’s attorney as opposed to Scanlon himself, therefore rendering the request noncompliant with the express terms of the Act. Ignite further noted that Scanlon’s request was for a mailed copy of the personnel record, not for an in-person inspection opportunity as provided under the Act. According to Ignite, the Act “does not call for this sort of lawyer initiated and conducted fishing expedition.” *Id.* The trial court granted Ignite’s motion for judgment on the pleadings but did not provide its reasoning in the written order. 2022 IL App (1st) 211441 at ¶9. Scanlon then appealed. 2022 IL App (1st) 211441 at ¶10.

#### *Appellate Court’s Decision To Affirm Grant of Judgment on Pleadings for Ignite*

After citing to the relevant provisions of the Act, the appellate court unanimously affirmed the trial court’s judgment in favor of Ignite, noting that while the Act does provide that an employee’s representative may conduct an inspection of personnel records, it requires the employee’s representative to inspect the personnel records in-person. 2022 IL App (1st) 211441 at ¶16. Per the plain language of the Act, the process required does not include an employer mailing copies of a personnel file to an employee’s attorney. *Id.*

While the court acknowledged that the Act does obligate an employer to mail a copy of a requested personnel record to an employee who demonstrates they are unavailable to inspect in person, it noted that Scanlon did not actually assert his unavailability for an in-person inspection but rather simply stated that he was moving to Florida in a manner that did not provide a time frame for the move. 2022 IL App (1st) 211441 at ¶17. Scanlon’s request also did not explain why his legal representative could not inspect the records in person. *Id.* Per the court, Scanlon’s request did not strictly or even substantively comply with the requirements of the Act; therefore, his pleadings, taken as true, established that his request for personnel records was not made in compliance with the Act. 2022 IL App (1st) 211441 at ¶¶17, 18. As such, the court held that Scanlon’s complaint did not establish that Ignite violated the Act when it did not mail copies of his personnel records to his attorney. 2022 IL App (1st) 211441 at ¶18.

#### *Key Takeaway*

Illinois employers are often faced with personnel record requests from legal representatives on behalf of current and former employees. In most instances, employers have complied with these requests on the assumption that said compliance was legally required under the Act. The court’s decision now allows employers to consider alternate options available to them when reviewing a personnel record request from an employee’s legal representative and provides a compelling legal justification to require an employee’s strict adherence to the statutory language when submitting such a request, which includes an initial in-person inspection opportunity.

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