

How to Respond to a Subpoena for an Employee's Records

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Instances Where Records Might be Sought

- **Employment dispute**
 - Compensation
 - Wrongful termination
 - Discrimination
 - Harassment
- **Personal injury**
 - Workers' compensation
 - Auto accident
- **Medical malpractice**
- **Criminal matter**
- **Family matter**
 - Divorce
 - Child support
- **Administrative proceeding**

Types of Records

- **Earnings records**
- **Schedule/hours worked**
- **Tax information**
- **Benefits**
- **Job application materials**
- **HR issues**
- **Performance reviews**
- **Accommodations: requested/implemented**
- **Medical records**
- **Documentation of training/experience**

Methods of Requests

- Informal request
- Authorization for release
- Subpoena Duces Tecum
- Court Order

Considerations

- Who is making the request?
- Who/what is the subject of the request?
- Who is the recipient of the production?
- What is the deadline for production?
- Am I required by law to make the production?
- Am I legally prohibited from making the production?
- What are the alternatives to production?

Authorizations

- Subject of the records requested gives authorization to release information
- Who has presented the authorization?
 - Subject of the request
 - Individual potentially adverse to the subject
- Consider whether production pursuant to an authorization is sanctioned by law
 - Example: Medical records

Health Insurance Portability and Accountability Act of 1996 (HIPAA)

- **Purpose: Protect health and medical records of employees participating in an employer-sponsored healthcare plan.**
- **Personal Health Information (PHI) - 45 CFR §164.530**
 - Demographic and contact information
 - Medical records
 - Payments made for provision of health care
- **Application**
 - Covered entities
 - Healthcare providers
 - Health plans
 - Employer-sponsored health plans
 - Business affiliates
 - If possess employee PHI, assume you need to comply with HIPAA

Elements of a HIPAA Compliant Authorization

- **Description of information to be disclosed**
- **Name of person/entity authorized to make the disclosure**
- **Identification of the recipient of the information**
- **Description of the purpose of the disclosure**
 - “At request of the individual” sufficient when individual has initiated request
- **Expiration date or event (related to the individual)**
- **Signature of individual or personal representative and date**
- **Statements**
 - Right to revoke in writing at any time
 - Treatment, benefits, enrollment, eligibility not conditioned on signing
 - Information disclosed may be re-disclosed by recipient and no longer protected

Subpoena Duces Tecum

- **Procedural Rules – Rule 45 of Mass.R.Civ.P. / Fed.R.Civ.P.**
 - Allows for inspection/production of documents only
- **Action:**
 - Produce
 - As kept in ordinary course of business or organized/labeled per subpoena – Rule 45(f)(1)(A)
 - Originals not required unless specifically requested – Rule 45(f)(1)(A)
 - Electronically stored information – Rule 45(f)(1)(B)
 - Form requested
 - Ordinarily maintained
 - Reasonably usable form

Subpoena Duces Tecum (Cont.)

- **Object – Rule 45(d)(1)**
 - In writing
 - Within 10 days of service or before date for production in subpoena
 - **Bases for objections**
 - Vague, ambiguous, not stated with particularity
 - Overly broad
 - Unduly burdensome (time/expense)
 - Irrelevant/immaterial
 - Confidential information/privacy interests
 - Privileged information
 - **Claiming privilege or protection – Rule 45(f)(2)(A)**
 - Privilege
 - Material prepared in anticipation of litigation
 - **Requestor Motion to Compel – Rule 45(d)(1)**

Subpoena Duces Tecum (Cont.)

- **Move to Quash or Modify – Rule 45(b)**
 - Unreasonable or oppressive
- **Move for Protective Order – Rule 45(f)(3) & Rule 26(c)**
 - Good cause: Prevention of annoyance, embarrassment, oppression, undue burden or expense
 - **Court can:**
 - Order certain matters off limits
 - Limit the scope
 - Order measures to protect trade secret or other confidential research, development, or commercial info
 - Seal discovery
- **Subpoenas for Medical Records Under HIPAA - 45 C.F.R. § 164.512(e)(1)(ii)-(iii)**
 - Notice requirement
 - Must include statement that no objection raised or objections resolved
- **Failure to respond to subpoena – Rule 45(g)**

Court Order

- **Compliance not optional**
- **Statute or Rule cited in Order**
 - Process followed?
- **Motion for Reconsideration of Court Order**
- **Motion for Protective Order**
- **Are redactions appropriate?**

Best Practices for Production

- Educate your people
- Communicate with the requesting party
- Review the production
- Don't interpret the scope of the request any broader than necessary
- Redact the production as necessary
 - Personal Identifiable Information (PII)
 - Name, address, SSN, telephone number, email address, etc.
 - Information permitting the physical or online contacting of individual
 - PHI
- Produce securely
- Involve outside counsel as appropriate
 - Ongoing litigation
 - Potential litigation
 - Appropriateness of disclosure is questioned

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