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Navigating NY's New Access to Personnel Records Law

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NY Labor Law § 210-b

- **What it does**: a free copy of the personnel record, notice of negative information, and retention rules
- **Who is covered**: current and former employees; virtually all employers and their agents, with no minimum headcount
- Effective November 8, 2026
- **Still evolving**: a chapter amendment is anticipated; the DOL and Attorney General may also issue guidance; the statute as written controls until then

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Key Obligations, Enforcement, and Anti-Retaliation

- **Copy on request**: free, within 5 business days of a written request
- **Review cap**: no more than 2 per year; a negative-information review does not count
- **Notice**: within 10 days of placing negative information in the file
- **Disputes**: correct by agreement or add the employee's rebuttal; knowingly false information may be expunged
- **Retention**: keep the complete record, no deletions, from hire to 3 years after separation
- **Enforcement**: Attorney General, $500 to $2,500 per violation; no private right of action except expungement
- Anti-retaliation, including immigration-status threats; CBAs with substantially similar access are not superseded

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What Belongs vs. What to Keep Out

Belongs in the file

- Name, address, DOB, title; pay; start date; application and resume
- Evaluations; written warnings; probationary lists
- Signed waivers; dated termination notices; discipline documents; rebuttals

Keep out (maintain separately)

- Investigation files and witness statements (keep a closing summary)
- Routine business records, unless and until used for discipline
- Medical, FMLA, ADA, HIPAA – separate confidential file
- Privileged: physician QA and credentialing, NPDB/OPMC

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Audit and Compliance Checklist

- Audit and consolidate records across all locations, including vendors
- Designate intake staff to log and answer requests within 5 business days
- Confirm vendor readiness; build the deadline into vendor contracts
- Incorporate the 10-day notice into performance and discipline processes/procedures
- Build a rebuttal-receipt and third-party-disclosure procedure
- Review/Update retention schedules to ensure compliance with 3-year floor
- Train managers, supervisors, and HR; update handbooks
- Monitor for the amendment and DOL/Attorney General guidance

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Access Requests:
The Former Employee's Request

Scenario: A worker who separated in August 2027 emails HR on Sept. 13, 2027 asking for "everything you have on me." Pay history sits with the PEO. She already got copies in March and June 2027; the June review followed a negative-information notice.

- Is an email a "written request"?
- When is the copy due? Does a copy request count toward the two-review cap, and does the June review count?
- May the employer decline? Must PEO-held and pre-Nov. 8, 2026 records be produced?

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Access Requests:
The Request During Litigation

Scenario: A current employee files an EEOC charge, then submits a written § 210-b request the next week. Counsel wants to route everything through the litigation team and produce only in discovery.

- Does a pending charge or lawsuit suspend the 5 business day obligation?
- May the employer withhold attorney-client or work-product material? Is it part of the "personnel record" at all?
- How should the response avoid a retaliation claim? How does a litigation hold interact with the no-deletion rule?

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Access Requests: The Subpoena for the File

Scenario: In October 2027 a plaintiff serves a subpoena duces tecum for the complete file of a current employee who is a non-party witness. The file holds a 2027 written warning and her rebuttal. The same week, she submits her own § 210-b request. HR plans to produce to the subpoenaing party without telling her, and to file the subpoena and production.

- Does the subpoena affect the 5 business day deadline on her own request, or her access to the records?
- Must the employee be notified before the employer responds?
- Is producing records under subpoena a transmittal "to a third party" that requires the rebuttal to accompany the warning?
- Does placing the subpoena or production in the file "place" negative information that triggers the 10-day notice?
- Should privileged, medical, or third-party privacy materials be withheld or redacted, and who decides?

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Access Requests: Staffing Firm Dispute

Scenario: A warehouse worker placed by a staffing firm requests his file from the client company. The client says the firm is the employer and holds records; the firm says the client keeps performance and discipline documentation.

- Who is the "employer," and does "agents of such employer" reach either entity?
- Does the client's contract with the firm make the firm's records part of the client's personnel record?
- Who must respond within 5 business days if each points to the other? What contract terms should they add?

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Access Requests:
The Long Departed Former Employee

Scenario: An employee who left in 2021 requests her file in 2027. HR denies it, reasoning the 3-year retention period expired so she is no longer covered. The company still has her file in off-site storage.

- Is she an "employee"?
- Does the 3-year rule limit who may request, or only how long records must be kept?
- If the records still exist, must they be produced? What if they were destroyed after the retention period? What should the denial letter have said?

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Negative Information: The "Friendly Reminder" Email

Scenario: A manager emails an employee a "friendly reminder" about missed deadlines and copies HR. Two weeks later she is passed over for promotion, and the promotion memo cites the email.

- Was the email negative information when sent, or only once relied on?
- When was it "placed" in the record, and when did the 10-day clock start?
- What notice practice would be defensible?

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Negative Information: The Missed Notice

Scenario: A supervisor files a written warning on March 1, 2027 but no one notifies the employee. She finds it in May when she requests her file and complains to the Attorney General.

- Is the failure to notify a violation even though she eventually saw the warning? What fine range applies?
- Does the review prompted by her discovery count toward her two-review cap?
- Can the employer cure the violation? What workflow fix prevents recurrence?

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Disputes:
The Rebuttal and the Reference

Scenario: An employee disputes a "below expectations" rating and submits a two-page statement. Six months later a prospective employer requests a reference, and the employer sends the evaluation.

- Should the evaluation be sent in the first instance?
- Must the statement accompany the evaluation?
- If the employer agrees the rating was wrong, may it simply remove it?
- What if the employee contends the manager knew the evaluation was false?

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Disputes:
The Union Grievance

Scenario: A CBA lets employees review files once a year with a union rep present. The employee asks for a free copy under § 210-b; the employer says the CBA governs. The employee also wants a disputed warning expunged, and the union grieves.

- Does the CBA provide "at least substantially similar access"? If not, which rule controls?
- Does the once-a-year review interact with the statutory two-review cap?
- Is the grievance the proper path for expungement? Should the grievance file be part of the personnel record?

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Retaliation:
The Immigration Remark

Scenario: After an employee requests her file, her supervisor remarks that "people who make trouble should remember their visa paperwork."

- Is this a threat under subdivision 8?
- What corrective steps and training should follow?
- What is the employer's exposure?

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Scope:
Desk Files and Working Files

Scenario: A department head keeps a personal folder of notes on each direct report and consults it when recommending transfers. Separately, an audit reveals that a regional office keeps "working files" with copies of performance reviews and handwritten notes on discipline. Neither set of files ever reached HR.

- Are these files a "personnel record" because they "may affect or be used relative to" transfer or discipline decisions?
- Does the employer "keep" records its managers and offices keep?
- Consolidate or segregate? How does the no-deletion rule constrain cleanup?
- How should the employer handle notes that may have been negative information placed more than 10 days ago without notice?
- How would the anticipated amendment change the analysis?

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Scope:
The Attendance Tracker

Scenario: A shift supervisor's spreadsheet logs late arrivals for the whole team. HR later relies on it to issue one employee a written warning.

- Was the spreadsheet part of anyone's personnel record before the warning?
- Afterward, what portion belongs in that employee's file?
- Does placing it there trigger the 10-day notice?

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Investigations:
Substantiated Harassment Complaint

Scenario: HR investigates a complaint against a team lead, interviews four coworkers, substantiates it, and issues a final written warning. The team lead then requests his file.

- Which documents does he receive: the warning, the summary, the witness statements?
- Does the third-party privacy exclusion protect the coworker statements?
- How should the summary record steps and outcome without breaching confidentiality? Does the warning trigger the 10-day notice?

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Investigations: Unsubstantiated, No Action Taken

Scenario: Same facts, but the complaint is not substantiated and no action is taken. HR drafts a closing summary: complaint received; complainant, respondent, and four witnesses interviewed; finding unsubstantiated; no action taken.

- Does any record of the investigation belong in his file, given it was not used relative to qualifications, promotion, transfer, pay, or discipline?
- Where should the closing summary be kept? Is a record of an unsubstantiated complaint "negative information"?
- What changes if a manager later cites the complaint when evaluating him for promotion?

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Medical:
FMLA and ADA Documents in the File

Scenario: During an audit, HR finds an employee's FMLA certification and an ADA accommodation request with a physician's note in her personnel folder. She has a pending access request.

- Produce or relocate?
- Does relocating the documents now conflict with the no-deletion rule?
- Where does the memo approving the accommodation belong?

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Privileged:
The Employed Physician

Scenario: A hospital-employed physician whose clinical privileges were restricted requests her personnel file. The medical staff office holds her credentialing application, an NPDB query response, and peer-review minutes; HR holds her employment agreement and compensation records.

- Which documents are produced under § 210-b?
- Which remain protected under Education Law § 6527(3) and Public Health Law § 2805-m?
- How should the two offices coordinate to meet the 5 business-day deadline?

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Compliance:
The 20-Year-Old Files

Scenario: A pre-audit review finds files dating to 2005 — current employees with decades of reviews, outdated benefit forms, misfiled medical notes, and coworkers' documents, plus employees who separated 10 to 20 years ago. One long-separated employee has a pending age-discrimination suit; a current employee has an open EEOC charge. HR proposes shredding everything older than three years before November 2027.

- How long must personnel records be kept, and how do other federal and state rules compare?
- For current employees, may anything older than three years be purged?
- May the files of employees who separated more than three years ago be destroyed?
- What is the difference between relocating misfiled documents and "deletion or expungement" of the record?
- Once an employee has requested the file, received a negative-information notice, or submitted a rebuttal, what changes?

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Marianne Monroy, Chair of Garfunkel Wild's Employment Law Practice Group, has more than 30 years of experience representing private corporations, non-profits, and individual clients in connection with a broad range of employment law matters including age, disability, race, sexual harassment, wage and hour, benefits, audits, defamation, restrictive covenants, and breach of contract claims. Her practice also includes litigation of a wide variety of commercial and business issues, including contract disputes, managed care, and judicial review of agency and other administrative determinations and has defended clients against claims under the Americans With Disabilities Act, Family and Medical Leave Act, Fair Labor Standards Act, False Claims Act, New Jersey Law Against Discrimination and the Conscientious Employee Protection Act.

Marianne defends clients throughout the tri-state area in state and federal courts, as well as before administrative agencies, including, among others, the Equal Employment Opportunity Commission, the New York State Division of Human Rights, the New York City Commission of Human Rights, the New Jersey Civil Rights Commission, and the Connecticut Commission on Human Rights and Opportunities. Marianne has particular experience in counseling clients concerning general human resources issues and compliance with state and federal employment laws. She regularly conducts employee complaint investigations, drafts employee policies, develops employee on-boarding procedures and documentation, represents clients during agency audits (e.g. DOL audits), advises on employee benefit and COBRA issues; creates and implements reduction in force programs, and drafts and negotiates separation agreements. She also provides employee leadership training programs, as well as sexual harassment, wage and hour and disability training programs aimed at protecting clients from potential claims, increasing employee engagement and productivity, and reducing staff turnover.

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Harpreet Kaur joined Garfunkel Wild, P.C. in 2020. She is a member of the firm's Litigation and Alternative Dispute Resolution Group, which advises clients on a host of litigation issues in both federal and state court.

Prior to joining Garfunkel Wild, Harpreet worked as a litigation associate at a defense litigation firm, where she focused her practice on the defense of general liability matters, with an emphasis on complex tort, general casualty, premises liability and transportation. Before that, Harpreet worked as a litigation associate at a mid-size law firm representing individuals, large and small businesses, insurance companies and school districts in a range of issues, including insurance defense, labor and employment, sexual harassment, discrimination, foreclosure and broker-client disputes. While in law school, she interned at the New York State Division of Human Rights, where she investigated cases involving alleged housing discrimination, and at the Fordham Tax Law Clinic, where she represented underprivileged taxpayers before the Internal Revenue Service and the New York State Department of Taxation.

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