



Record Keeping Requirements & Destruction

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Importance of Good Record Keeping

Businesses that employ others have significant and important statutory and regulatory responsibilities with respect to their records. Improper or faulty recordkeeping practices subject employers to enormous potential liabilities. On the other hand, good record keeping practices can reap significant benefits for an employer.

An employer's failure to preserve those records can lead to legal sanctions in a lawsuit brought against the employer for discriminatory conduct, such as being required to pay the opposing party's attorney fees. In other cases, litigants have been sanctioned millions of dollars for "spoliation of evidence" for destroying evidence in cases brought against them.

Other potential sanctions against an employer who fails to preserve documents include:

1. Exclusion of relevant evidence;
2. An inference that the documents destroyed were harmful to the employer;
3. Default judgment; or
4. Contempt sanctions.

There are several reasons to keep good and accurate employee records:

1. Records are often the best defense against claims brought by employees against employers.
2. Federal and local anti-discrimination laws require most employers to keep records of employee selection, promotion, demotion, reduction in force, and termination.

3. Labor and immigration statutes require an employer to keep proof of an employee's eligibility for employment in the United States.
4. Federal and local statutes require the maintenance and preservation of records of employee tax withholdings, payroll payments, salary and wage information, and tip income.
5. Accurate and careful records will show trends that an employer can use for strategic purposes.

Best Practices for Record Keeping

Protection from Damage or Loss

A. Protection from Damage or Loss

- Many statutes that require employers to keep records, state that requirement as a duty “to preserve” records or to keep the records “safe and accessible.”
- It is in the best interest of employers to adopt record maintenance and storage practices that would indeed have the effect of protecting the employers’ records.

The foundation principles for organizing and keeping records in archives are as follows:

- **The principle of provenance** – This principle requires that documents be grouped, organized, and maintained according to their transactional origin or source;
- **The principle of original order** – This principle requires that documents should be maintained in the same scheme or order and with the same designations they received in the course of business;

- **The chain of responsible custody** – This principle requires that an archivist or record manager show that the documents have been kept in such a way and by such people that they have not been damaged, altered or destroyed.

Following the foundation principles above allows an employer to see **how** a document was created, **why** it was created, and **what** the document means in a more satisfactory manner. Additionally, it will be able to prove that the documents have not been altered or changed.

The regulatory environment dictates that employers Take steps to protect their documents from destruction, damage, or loss. The following record management principles dictate best practices:

- **Risk Assessment** - Employers should first assess potential risks. They should identify risks, analyze whether the risk is probable and what effect it may have, prioritize the risks, and treat the risks.

- **Plan** - Employers should then plan for risks:
 - List vital records that are significant or vulnerable, list location, and person controlling documents.
 - List equipment and materials that would be available for document recovery.
 - List back-up resources.
 - Identify specific procedures for updating the plan
 - Provide simple instructions on how to handle damaged documents.

- **Protect** - Employers should establish procedures to:
 - Identify vital records or critical records that are being used in various offices.
 - Duplicate and disperse vital records
 - Ensure appropriate levels of fire and security protection
 - Store back-up copies off-site

Special attention should be given to determinations to store back-up copies of documents digitally or in computerized form. Many digital storage media have limited life spans. CDs can become damaged quickly and have short life spans. Digitally stored media may become obsolete.

Balance Access with Confidentiality

B. Balancing Access Issues with Safeguarding Confidentiality

Along with the employers' obligation to protect employee records from damage and loss comes the added responsibility that employers have to protect the confidentiality of and to limit access to many records that they keep.

Examples:

1. Americans with Disabilities Act (ADA)
2. Family and Medical Leave Act (FMLA)
3. Health Insurance Portability and Accountability Act (HIPAA)

Other statutes may not require separate forms and files, but an employer would be wise to prohibit access to certain information to most employees. For example, EEOC statistics and detailed payroll and benefits files.

Because of these confidentiality concerns, it is important that employers establish a document access policy that limits access to personnel records. Of course, these restrictions should be balanced against the need of employers to have ready access to information necessary.

Establishing or Revising Record Keeping Policies

(1) Document Retention Policies

These policies are useful to (a) increase business efficiency; (b) aid in litigation; and (c) necessary to assure the employer complies with all statutory and regulatory requirements.

* Employers should regularly review policies (at least annually) and follow them.

A comprehensive document retention policy will:

- Include a single authority who is designated to manage the recordkeeping policy.
- Identify documents, including electronic documents, that the business produces.
- Identify the appropriate time periods for the retention of each category of document.
- Identify the proper method and time of destruction of documents.

- Identify a specific yearly date for review of the document retention policy, periods of retention, and company adherence to the policy.
- Explicitly prohibit certain types of recordkeeping.
- Inconsistent recordkeeping practices should be discouraged.

(2) Record Access Policy - Employers should establish a personnel records access policy regarding whether an employer will permit access to employment records.

In formulating a record access policy, employers should consider the following:

- Will employee access be an absolute right or a discretionary privilege?
- Will employees be permitted to make copies of the material in their files?
- Will employees be permitted to challenge materials found in their files?

Records that Must (or Should) be Stored Separately

D. Records that Must (or Should) Be Stored Separately

Certain statutes or good practice mandate that certain employment records be kept separate from other records.

Employers should have essentially five separate recordkeeping systems for five categories of records:

1. Personnel Files
2. Medical Records Files
3. Equal Employment Opportunity Data
4. I-9 Records
5. Payroll and Benefits Data

Personnel Files

The records that should be included in a personnel file are:

- Application material (application, resume, recommendation letters, and other records related to the hire)
- Job-related test results (not medical tests)
- Records related to promotion, demotion, raises, transfers, etc.

Personnel Files

- Education and training records
- Supervisor/Performance appraisals or reports
- Awards/Commendations
- Disciplinary records
- Lay-off or termination records
- Basic compensation information

Medical Records File

The medical records files should include:

- Pre-employment drug screen results
- Post-employment physical exam results
- Family and Medical Leave Act documentation
- Return-to-work releases
- Requests for reasonable accommodation

Medical Records Files

- Documentation regarding a disability or accommodations
- Workers' compensation documentation
- Insurance claims documents
- Physicians' notes
- Any other records that reveal or relate to an employee's medical condition, history, or treatment

EEO Data Files

Equal Employment Opportunity Data

Certain employers are required to compile annual statistics on the race, gender, ethnic background, veteran status, disability, etc., of its job applicants and employees. These files should include only the information that the employer is required to compile by the EEOC's regulations.

I-9 Employment Verification Files

I-9 Records

Federal law requires that an employer verify (and keep records of verification) that an employee is authorized to work in the United States.

Payroll and Benefits Files

Payroll records should include:

- An employee's full name and social security number
- Address, including zip code
- Birth date for minors
- Sex and occupation
- The time and day of the beginning of the employee's workweek
- The hours worked each day

Payroll and Benefits Files

- Total hours worked each workweek
- Basis for employee's payment
- Hourly pay rate (regular)
- Total regular earnings for day or week
- Total overtime earnings for workweek
- All deduction from employee wages
- All benefits
- Total wages paid

Payroll and Benefits Files

- Pay period
- Date of payment

Disposal of Records

Businesses have a choice of records disposal methods. Where paper records are concerned, businesses can use a more secure method such as burning or shredding.

In choosing among these disposal methods, employers typically weigh cost, convenience, business risk and legal risk.

GUIDELINES AND TIMING OF RETENTION AND DISPOSAL OF RECORDS

STATUTE	RETENTION PERIOD	RECORD
<p>AGE DISCRIMINATION ACT OF 1967 (ADEA)</p> <p>The ADEA includes a broad ban against age discrimination and also specifically prohibits:</p> <ul style="list-style-type: none"> • Discrimination in hiring, promotions, wages, or termination of employment and layoffs. • Statements or specifications in job notices or advertisements of age preference and limitations. • Denial of benefits to older employees. An employer may reduce benefits based on age only if the cost of providing the reduced benefits to older workers is the same as the cost of providing full benefits to younger workers. • Since 1986 it has prohibited mandatory retirement in most sectors, with phased elimination of mandatory retirement for tenured workers, such as college professors, in 1993. 	<p>1 year from date of personnel action (29 U.S.C. § 626; 29 C.F.R. § 1627.3(b))</p> <hr/> <p>1 year after plan is no longer in effect (29 C.F.R. § 1627.3(c))</p> <hr/> <p>3 years (29 C.F.R. § 1627.3(a))</p>	<ul style="list-style-type: none"> • Job advertisements • Job applications, resumes, any other form of employment inquiry in response to advertised job openings • Records related to promotion, demotion, transfer, selection for training, layoff, recall, or Discharge • Job orders submitted to employment agencies or unions • Results of employer tests • Physical exams used in making personnel decisions <hr/> <p>Benefit plans</p> <p>Seniority/ Merit systems</p> <hr/> <p>Name Address Date of Birth Occupation Rate of pay Weekly compensation</p>

STATUTE	RETENTION PERIOD	RECORD
<p>AMERICANS WITH DISABILITIES ACT OF 1990 (ADA)</p> <p>The ADA is a wide-ranging civil rights law that prohibits, under certain circumstances, discrimination based on disability. It affords similar protections against discrimination to Americans with disabilities as the Civil Rights Act of 1964, which made discrimination based on race, religion, sex, national origin, and other characteristics illegal.</p>	<p><u>Public employers</u> - 2 years from date of making of record or personnel action involved, whichever is later. (29 C.F.R § § 1602.31, 1602.40)</p> <p><u>Private employers</u> - 1 year from date of recordation or personnel action involved, whichever is later. (29 C.F.R § § 1602.31, 1602.14)</p> <hr/>	<p>Job applications, resumes, and other hiring-related documents</p> <p>Documents relating to demotion, promotion, and transfer</p> <p>Requests for reasonable accommodations</p> <hr/>
<p>REHABILITATION ACT OF 1973</p> <p>The Rehabilitation Act prohibits discrimination on the basis of disability in programs conducted by federal agencies, in programs receiving federal financial assistance, in federal employment, and in the employment practices of federal contractors. The standards for determining employment discrimination under the Rehabilitation Act are the same as those used in title I of the Americans with Disabilities Act.</p>	<p><u>Public employers</u> – 2 years from date of termination. (29 C.F.R § § 1602.31, 1602.40)</p> <p><u>Private employers</u> - 1 year from date of termination. (29 C.F.R § § 1602.31, 1602.14)</p> <hr/> <p>EEO-1 As long as is current. (29 C.F.R §§ 1602.31, 1602.7)</p> <p>EEO-4 & EEO-5 – 3 years (29 C.F.R §§ 1602.31, 1602.430, 1602.39)</p>	<p>Records relating to involuntary termination</p> <hr/> <p>Employer information Reports</p>

STATUTE	RETENTION PERIOD	RECORD
<p>EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (ERISA)</p> <p>Federal law that establishes minimum standards for pension plans in private industry and provides for extensive rules on the federal income tax effects of transactions associated with employee benefit plans. ERISA was enacted to protect the interests of employee benefit plan participants and their beneficiaries by:</p> <ul style="list-style-type: none"> • Requiring the disclosure of financial and other information concerning the plan to beneficiaries; • Establishing standards of conduct for plan fiduciaries; • Providing for appropriate remedies and access to the federal courts. 	<p>6 years (29 U.S.C. § 1027)</p>	<p>Employee benefit plan documents</p> <p>Summary plan descriptions</p> <p>Form 5500</p>

STATUE**RETENTION PERIOD****RECORD****CONSOLIDATED OMNIBUS
BUDGET RECONCILIATION ACT
OF 1985 (COBRA)**

Among other things, mandates an insurance program giving some employees the ability to continue health insurance coverage after leaving employment.

Regulations under COBRA do not offer any explicit guidance for the length of time records must be kept. Under ERISA, it was generally accepted that records should be maintained for six years from the date of their creation. Because COBRA amended many aspects of ERISA and is essentially an expansion of ERISA, it is broadly accepted that records created pursuant to COBRA should be maintained for the same six-year period as records retained in accordance with ERISA mandates.

STATUTE	RETENTION PERIOD	RECORD
<p>EQUAL PAY ACT OF 1963</p> <p>Federal Law amending the Fair Labor Standards Act, aimed at abolishing wage disparity based on sex.</p>	<p>3 years (29 C.F.R. § 516.5)</p>	<ul style="list-style-type: none"> • Definition of the work week • Number of hours each employee works • Pay rates • Total wages • Total deductions
<p>FAIR LABOR STANDARDS ACT OF 1938 (FLSA)</p> <p>Records may be kept at the place of employment or in a central records office, but must be available for inspection by the Department of Labor within 72 hours of DOL notice to inspect. (29 C.F.R. § 516.7)</p>	<p>2 years from date of last entry (29 C.F.R. § 516.6)</p>	<ul style="list-style-type: none"> • Records supporting hours, basis for wage determinations, and wages paid • Records supporting additions or withdrawals from wages
	<p>2 years after last effective date (29 C.F.R. § 516.6)</p>	<ul style="list-style-type: none"> • Wage rate tables • Work time schedules

STATUE	RETENTION PERIOD	RECORD
<p>Equal Pay Act of 1963</p> <p>Fair Labor Standards Act of 1938 (FLSA)</p>	<p>3 years from date of last entry (29 C.F.R. § 516.5)</p> <hr/> <p>3 years after last effective date (29 C.F.R. § 516.5)</p>	<ul style="list-style-type: none"> • Name found on social security card and complete home address • Date of birth (if under age 19) • Sex and occupation • Day and time of beginning of employee workweek • Regular rate of pay for overtime weeks, basis for determining rate, and payments excluded from rate • Hours worked each workday and workweek • Regular and overtime earnings • Additions and deductions from wages for each pay period • Total wages paid for each pay period • Date of payment and pay period <hr/> <ul style="list-style-type: none"> • Collective bargaining agreements • Certificates authorizing employment of minors, students • Total sales volume and goods purchased

STATUTE	RETENTION PERIOD	RECORD
<p>FAMILY AND MEDICAL LEAVE ACT OF 1993 (FMLA)</p> <p>Federal law requiring covered employers to provide employees job-protected and unpaid leave for qualified medical and family reasons. Qualified medical and family reasons include: personal or family illness, family military leave, pregnancy, adoption, or the foster care placement of a child.</p>	<p>3 years (29 U.S.C. § 2616(b); 29 C.F.R. § 825.500)</p>	<p>Basic employee and payroll data as required by the Fair Labor Standards Act</p> <p>Dates FMLA leave is taken Hours worked in the previous 12 months</p> <p>Hours of FMLA leave for FLSA exempt employees</p> <p>Copies of employee notices furnished to employer</p> <p>Copies of general and specific notices given to employees</p> <p>Documents describing employee benefits or policies regarding paid and unpaid leave</p> <p>Documents verifying premium payments of employee benefits</p> <p>Records of FMLA disputes</p>

STATUTE	RETENTION PERIOD	RECORD
<p>IMMIGRATION REFORM AND CONTROL ACT OF 1986 (IRCA)</p> <p>The act required employers to attest to their employees' immigration status; made it illegal to knowingly hire or recruit illegal immigrants' legalized certain seasonal agricultural illegal immigrants, and; legalized illegal immigrants who entered the United States before January 1, 1982 and had resided there continuously with the penalty of a fine, back taxes due, and admission of guilt; candidates were required to prove that they were not guilty of crimes, that they were in the country before January 1, 1982, and that they possessed minimal knowledge about U.S. history, government, and the English language.</p>	<p>3 years after hire date or 1 year after the date of termination, whichever is later (8 U.S.C. § 1324a(b)(3))</p>	<p>Form I-9</p>

STATUTE	RETENTION PERIOD	RECORD
INTERNAL REVENUE CODE	4 years after tax is due or tax is paid, if later (26 C.F.R. § 31-6001.1(e)(2))	<ul style="list-style-type: none"> • Employee name, address, occupation and Social Security number • Total amount and date of each payment of compensation fair market value of noncash payments • Total withheld for taxes or otherwise • Amount of compensation subject to withholding for federal income, Social Security, and Medicare taxes, and amounts withheld • Pay period covered by each Payment • Reason why total compensation and taxable amount for each tax is different • W-4 • Beginning and ending dates of employment • Employer-provided fringe benefits and any substantiation • Employer requests for cumulative method of wage withholding adjustment or settlement of taxes • Copy A of employee Forms W-2 • Amounts and dates of tax

STATUE	RETENTION PERIOD	RECORD
<p>OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 (OSHA)</p> <p>Applies to Employers with more than 10 employees who establishments are not classified as partially exempt.</p>	<p>3 years (29 C.F.R. § 1910.1030(h)) It is important to note that there is no general training record document retention schedule. The training record retention requirements for the identified regulation is the longest currently required by regulation.</p> <hr/>	<p>Training records related to health and safety</p> <hr/>
	<p>5 years (29 C.F.R. § 1904.33)</p> <hr/>	<p>Records of occupational injuries and illnesses</p> <hr/>
	<p>30 years (29 C.F.R. § 1910.1020(d)(ii)-(iii))</p> <hr/>	<p>Records of employee exposure to hazardous materials and blood-borne pathogens</p> <hr/>
	<p>Duration of employment plus 30 years (29 C.F.R. § 1910.1020(d)(i))</p>	<p>Employee medical records</p>

STATUTE	RETENTION PERIOD	RECORD
<p>EMPLOYEE POLYGRAPH PROTECTION ACT OF 1998 (EPPA)</p> <p>Generally prevents employers from using polygraph (lie detector) tests, either for pre-employment screening or during the course of employment, with certain exemptions.</p> <p>The Act permits polygraph tests to be administered to certain applicants for job with security firms (such as armored car, alarm, and guard companies) and of pharmaceutical manufacturers, distributors, and dispensers.</p>	<p>3 years (29 C.F.R. § 2001-2009)</p>	<p>Statement of reason for conducting examination</p> <p>Copy of statement given to examinee about time and place of examination</p> <p>Polygraph test records</p>

DOCUMENT RETENTION FOR IMMIGRATION RECORDS

Immigration Document	How Long Should Document be Kept?	Where Should Document be Stored?
I-9 EMPLOYMENT ELIGIBILITY VERIFICATION	<p>Three years after the date of hire, or 1 year after the date employment is terminated, whichever is later.</p> <p>For example, if an employee retires after 15 years, his or her Form I-9 will be stored for a total of 16 years.</p>	<p>I-9s can be retained in paper, microfilm, microfiche, or electronic formats. Employers may retain completed paper forms onsite, or at an off-site storage facility, as long as you are able to present the Forms I-9 within 72 hours of a DOL inspection request. Employers may also use any electronic recordkeeping, attestation, and retention system that complies with Dept. of Homeland Security standards.</p>
LABOR CONDITION APPLICATION (LCA) PUBLIC INSPECTION FILE	<p>An employer must retain copies of the LCA and the public inspection file for 1 year beyond the end of the period of employment specified on the LCA or 1 year from the date the LCA is withdrawn, except in the case of DOL enforcement action.</p>	<p>The inspection file should be kept at either the employer's principal place of business or the location where the employee works.</p>

Immigration Document	How Long Should Document be Kept?	Where Should Document be Stored?
EMPLOYMENT-BASED NONIMMIGRANT VISA PETITION	<p>The petitions should remain on file for as long as the petition is valid. In addition, while there is no legal requirement to do so, employers should consider retaining petitions until the employee has attained permanent resident status or is no longer employed.</p>	<p>Recommend that petitions be stored on-site in the event of a worksite inspection. They may be stored either electronically or in paper format.</p>
PERM LABOR CERTIFICATION AND PERM AUDIT FILE	<p>The employer is required to retain the labor certification application and all supporting documentation for 5 years from the date of filing the ETA Form 9089.</p> <p>The DOL can begin the process of revoking labor certification beyond 5 years. Thus, the employer may wish to consider retention beyond the 5 year period, in the event that it may need to defend against a revocation proceeding.</p>	<p>It is not necessary for an employer to keep its PERM files onsite. They can be retained by the employer's lawyers. The employer should be able to access the files if needed.</p>

Immigration Document	How Long Should Document be Kept?	Where Should Document be Stored?
I-140 IMMIGRANT PETITION FOR WORKER	While there is no retention requirement, employers should consider retaining petitions until the employee has attained permanent resident status.	Recommend that petitions be stored on-site in the event of a worksite inspection. They may be stored either electronically or in paper format.



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