

DOCUMENT RETENTION POLICIES ARE NOT JUST FOR LARGE COMPANIES

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As we reach the beginning of a new year it is a perfect time to review document retention policies or, to the extent that you don't have a formal document retention policy, the time to adopt one. The reason to do so is not just related to cost of retention of records (whether they are electronically stored or mounds of paper cluttering your office and storage units) but, the legal costs that you will incur when information has to be collected, searched and reviewed by attorneys in the event employment claims arise.

In connection with that policy there is a significant need for employers to consider how long they actually need to keep paper and electronically stored information ("ESI") as it relates to applicants and employees, and to develop record retention policies that will ensure that only information actually needed is retained. One other motivating factor in the timely and planned destruction of documents according to a record retention policy is that it avoids the need to collect, search and review records that were unnecessarily retained and in some cases may be hurtful to your legal position.

There are a number of federal statutes that expressly impose recordkeeping requirements on employers, and there are additional requirements imposed on federal contractors (and subcontractors). In addition, many states have statutory provisions that require employers to maintain records on employees working in that state, which may be in addition to the federal requirements. While it is not possible to discuss the recordkeeping requirements of all 50 states in this article, in most states the longest statute of limitation period for common law and statutory claims is six years.

Some of the mandated time periods are relatively short. For example, Title VII and the ADA state that covered employers must retain personnel and employment records for a period of one year from the date the record was made or from when the personnel action was taken (e.g., failure to hire or termination), however, many of these same records are required to be kept for three years under the ADEA and the United States Supreme Court in Jones v. RR Donnelly & Sons ruled that the statute of limitations for race discrimination claims brought under 42 U.S.C. § 1981 was four years, and not the two year statute that applies to Title VII race discrimination cases. In short, there is no single, clear answer on many of these overlapping statutes. Given the fact that most companies want to have their records available to defend themselves in the event that a complaint of discrimination is brought, prudence would require that records be kept for a sufficient period of time to comply with legal requirements and also provide management with the reasonable ability to defend itself against claims that can be brought. Therefore, the chart provided below takes a conservative approach to records retention.

As noted, there are competing interests at play in this situation. The first is to ensure that the company keeps all records where there is a legal duty so that the company can provide the required information when requested by a federal or state agency if there is an audit, an investigation or an onsite inspection. Unfortunately there is no one set of statutes that you can rely upon to decide what needs to stay and what can go. The second is that you don't want to have available an endless supply of documents that require collection, review and disclosure when those documents could have and should have been eliminated through a document retention regimen.

We suggest that each business set up a regular cycle for auditing its HR records for retention, and have a planned destruction policy tied to these audits. This type of plan will help ensure that the employer has a legitimate explanation for why it destroyed records when it did, and to help fend off spoliation claims. With the volume of records that are needed in a staffing environment, in order to make the process manageable, we suggest that a review be done either at the end of each calendar quarter (March 31, June 30, September 30 and December 31), or twice a year at times that fall outside other normal reporting periods (i.e., March 1 and September 1). We find a once a year review tied to a year end trigger date results in the process getting lost in the various other year end activities and priorities. It is also imperative that when destroying any HR records (including application materials from applicants who were never hired) after the retention date, the printed documents must be destroyed by shredding.

In spite of the preceding sentence, it is imperative that in connection with writing and maintaining a record retention policy that the policy provide for an effective “litigation hold” provision. This requirement prohibits destruction of records when the retention period provided for in the policy expires if the company has been put on notice that there is a pending claim or a reasonable likelihood that litigation may arise which makes the records relevant. In these situations, all relevant materials must by law be preserved until the matter is finally resolved.

In closing, it is imperative that a formal written record retention policy be adopted by every staffing company to allow for the proper handling and disposal of records. The failure to do so, could ultimately be a costly error. However, having the policy is not enough unless it is actually followed. We recommend that you seek the assistance of your employment attorney to prepare or review your policy prior to implementation. If you would prefer, Gentry Locke is available to assist you in preparation or review of your policy.

Overview of Record Retention Periods Recommendations

Type of Documents	Specific Documents	Retention
Pre-Employment Information	Job advertisements, applications. Resumes and related employment materials interview notes and records, background checks. Preliminary drug test results, driving records. Employment verifications, letters of reference. All records relating to selection procedures and tests administered.	1 year for those not hired. (Those hired all information will be shifted to the General Personnel Records.)
I-9 Forms	I-9 forms and copies of supporting documents.	Longer of 3 years from hiring or 1 year after termination – note these should be maintained in a separate file.

Employee Medical Records	Doctor notes, FMLA forms, fitness for duty and other medical exams, drug tests, etc. – possibly workers compensation files.	4 years after termination – unless workers compensation files are not segregated. Medical records should be maintained in a separate file with access on a need to know basis only. Workers' Compensation records should be segregated into a separate file as they need to be kept for 30 years after the employee is separated in order to ensure compliance with OSHA.
Compensation Records	Federal and state payroll taxes, FLSA and EPA records, wages, benefits, bonuses, etc.	4 years after termination. (While certain documents are only required for 3 years, the fact that tax information is required for 4 years will allow consistency.)
Benefit Plan Records	Plan documents, election forms, eligibility determination records, notices, etc.	6 years as required by ERISA.
General Personnel Records	All other records related to employment, personnel evaluations, disciplinary records, etc.	3 years, unless written employment contract. If contractual, then you must comply with the statute of limitations in your state related to contracts (generally up to six years).
Government Compliance Reports	EEO-1, VETS 100 Affirmative Action Plans OSHA related records	Four years after filing. 2 years after close of the applicable year. 5 years after the year to which the records relate. This includes OSHA Forms 101/200/300/300A – 30 years if employer is required to conduct medical examinations, monitor for exposure to hazardous materials or chemicals or

	<p>Benefit Plan Reports – IRS Form 5500</p> <p>Tax Reports</p> <p>Motor Carrier Safety Testing</p>	<p>monitor significant adverse reactions to health of employees, those records must be kept for the duration of employment plus 30 years.</p> <p>6 years</p> <p>4 years from the date the tax is due or paid.</p> <p>5 years unless otherwise specified for controlled substance and alcohol use testing program for its commercial drivers</p>
Training, Selection Materials, Handbooks, Policies		6 years beyond period in use
Litigation Hold Matters		No statutory requirement regarding retention after a formal complaint (i.e., a complaint that involves either a federal agency, an arbitration or a court action) is resolved, it is our recommendation that records relating to these “concluded” suits only be kept for a period of five years after the resolution of the complaint.

This article should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only. You are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. For further information about the contents of the outline, please contact the author at (540) 983-9396 or diane.geller@gentrylocke.com (Copyright 2008, Gentry Locke Rakes & Moore, LLP and Diane J. Geller, Esquire)