SPECIAL REPORT

Critical HR Recordkeeping
From Hiring to Termination
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Employee record retention is a daunting task for employers because there are so many different requirements based on a variety of criteria. For example, virtually every federal employment law, ranging from the Americans with Disabilities Act to Title VII of the Civil Rights Act, stipulates certain record-retention rules for all private sector employers. In addition, many state and local jurisdictions impose additional requirements.

Record retention is complex and time consuming. However, in addition to complying with various federal and state laws, keeping good, well-organized records can be very helpful in documenting and supporting an organization’s employment actions. The best way to ensure that your records are in good order is to establish and publish a record-retention policy. It’s wise to consult with legal counsel, and you may want to engage the services of record-retention specialists who can help you customize your record-retention policies and practices to fit your specific situation.

Recordkeeping also assists in managing human resources by providing hard data on the effectiveness of policies and procedures. For example, records of accidents in the workplace help identify why accidents are occurring and how to prevent them. Records also help prove compliance with government regulations. For example, documentation of equal employment opportunity practices can help show that an employer is in compliance with Title VII of the Civil Rights Act. Records provide documentation to defend—and even drive—employment decisions. They can help when defending against a lawsuit brought by an employee or employees under one of the employment laws.

Responsible recordkeeping practices begin long before a job candidate walks through the door and extend long after an employee leaves an employer, according to Allen Kato of Fenwick and West LLP and Charles “Trey” Wichmann of Winston and Strawn LLP. Their years of experience practicing employment law provide valuable insight on organizing your records legally and effectively. In this special report, we will outline their approach to recordkeeping to keep you out of court.

According to Attorney Kato, litigation is the ultimate test of the adequacy of an employer’s recordkeeping practices. There are a whole host of laws that require employers to keep certain records on their employees for various lengths of time, and even after the employment relationship has terminated.

As a practical rule of thumb, the attorneys recommend that employers keep employees’ records for the duration of the employment relationship, plus an additional 5 years. This satisfies the requirements of every record-retention law except:

1. Pension and welfare benefit plan records, which must be kept for 6 years after the termination of the employment relationship; and
2. Safety and toxic chemical exposure records, which must be kept for 30 years after the termination of the employment relationship.
Attorneys Kato and Wichmann break HR recordkeeping into three categories:

1. Hiring;
2. Employment relationship; and
3. Termination.

This provides a practical and organized way to approach recordkeeping requirements.

### Hiring Records

Responsible recordkeeping practices begin during the hiring process, including job posting, applications, interviews, offer letters, conducting reference and background checks, verification of authorization to work, drug and alcohol testing, physical exams, employee invention assignments and proprietary information agreements, and employee handbook acknowledgements.

### Job Postings

The language an employer uses in their job postings is not only important in attracting the right applicants, but can also be used against the employer in lawsuits by people who are not chosen for the open positions. To avoid a discrimination claim, job postings should not include any language suggesting limitations or exclusions based on race, sex, age, or any other protected characteristics. Also, the employer should be careful not to accidentally alter the at-will status of the employment relationship through promises or descriptions contained in a job posting.

Employers should ensure that job descriptions and job postings identify the essential functions of the job. This is important for two reasons. The first relates to disability discrimination under the Americans with Disabilities Act (ADA) and any related state laws. One goal of the hiring process is to make sure the employer finds people that can perform the essential functions of the job with or without reasonable accommodation.

Secondly, with respect to overtime laws, job descriptions can be important evidence to help a company defend against claims that an employee has been improperly classified as exempt or nonexempt.

With respect to outlining the minimum qualifications of employees, employers will want to pay specific attention to educational or license requirements or anything else that may be used to disqualify someone from the position.

### Job Applications

Job applications and interview notes should hold relevant information on the basis of hiring decisions and should document the valid reasons for selecting or rejecting applicants.
A best practice for job applications is to require a signed application from all candidates, and not just a submitted résumé. This gives the employer the chance to establish a few things up front and help head-off potential litigation.

There are four main types of potential lawsuits to keep in mind when designing an employment application:

1. Discrimination claims
2. Claims for wrongful termination
3. Defamation
4. Invasion of privacy

Employers can fend off these types of claims by taking a few precautions:

- Include a statement that employment is at will (that is, either the employee or the employer may terminate the employment relationship at any time and for any reason, other than an illegal reason).

- Require a signature from the applicant that all of the information the applicant supplies on the application is true, and that any omission or false information will be grounds for rejection of the application or grounds for later termination if the person is hired.

- Include an authorization to check references. Checking references prior to hiring is important because an employer can be held liable for negligent hiring if the employer fails to do so and there is some significant problem in the employee’s background.

- Include an arbitration agreement if your company has chosen to go the arbitration route with employees.

The applicants should initial each provision in addition to signing the application as a whole. Employers should keep applications from nonhires at least 2 years and retain applications from hires the length of employment plus at least 2 years. Employers are not required to keep unsolicited applications, and those can be sent back to the applicant with a note stating that there are no open positions.

**Interviews**

For the interview itself, the face-to-face interview remains a crucial part of the process. Meeting an applicant in person allows an employer the opportunity to assess the applicant’s personality, skills, and suitability for the position. During the interview, an employer should do two things:

1. Gather the relevant information for making the hiring decisions; *and*
2. Document valid reasons for selecting or rejecting applicants.

The key is to avoid exposing the company to liability. The following interview tips should assist the employer in this pursuit:

1. Ask only job-related questions—not questions that request any information concerning protected categories, such as marital status, national origin, date of graduation from high school, etc.
2. Avoid statements that undermine at-will status. Train the interviewers to never make any promises about the length of future employment. Avoid buzz words such as “secure,” “permanent,” “long-term opportunity,” or “looking for someone who will grow with the company through the years.” These buzz words may expose the company to a claim of implied contract of employment for a certain period of time.

3. Write down the interviewee’s responses to the questions asked. Ensure interview notes are legible, don’t use discriminatory language, and make sure the notes are not open to misinterpretation from sloppy drafting or odd use of abbreviations. Computerized forms can be good for these purposes because this gives the company a central location for interview notes in a legible form that HR can easily access and monitor.

4. Request specific, objective examples of the applicant’s best work, as well as mistakes they’ve made on the job.

5. Ask why he or she left or is leaving their previous employment.

**Offer Letter**

Once an employer makes the decision to hire an applicant, the next important record is the offer letter. The offer letter should establish the initial terms and conditions of employment such as salary and bonus eligibility.

An offer letter should also confirm the at-will status of the employee. A statement should be included that employment can be terminated by either party, with or without notice, with or without cause, or for any reason or no reason at all.

It is also prudent to include a statement that the at-will status of employment can only be changed in a written document signed by a particular company officer, for example, the president or the CEO. Many states have allowed employers to rely on these types of statements to prevent a future plaintiff from arguing that they were given oral assurances of future employment.

**Conducting Reference and Background Checks**

There are two kinds of checks. There are checks that trigger various reporting and notice requirements, and there are those that don’t. General reference checks don’t require all of the hoops, but, nonetheless, employers should get written authorization for extra protection. With general reference checks, an employer can check the applicant’s dates of employment with the company, the last position held, the names of their previous supervisors, the reason for separation, and the applicant’s strengths and weaknesses.

Many employers won’t provide much information about an employee in a reference check in order to avoid defamation claims. When providing information, the employer should make sure it is truthful and limit the information to the bare minimum to prevent the likelihood of a defamation claim.
Fair Credit Reporting Act Requirements

If an employer goes beyond mere reference checks, looks into criminal history, and obtains more detailed investigative reports, the federal Fair Credit Reporting Act (FCRA) will come into play, as well as any comparable state laws. FCRA distinguishes between two forms of reports, consumer reports and investigative consumer reports. Consumer reports such as credit checks provide general financial and personal data about an individual's payment history, overall indebtedness, addresses of record, etc. Investigative consumer reports provide in-depth information about an individual's character, general reputation, personal characteristics, mode of living, etc., that may be obtained through searches of public records and/or interviews with neighbors, friends, professional associates, and other acquaintances.

Due to the more “intrusive” nature of investigative consumer reports, FCRA requires employers who request this type of report to comply with additional notice and disclosure requirements. When an employer seeks employment references, driving records, and criminal background information, it is requesting an investigative consumer report.

Before obtaining a report, the employer should inform the applicant that the employer may request such a report. It needs to be an express written, signed authorization and typically has to be on a separate form that is not part of the job application. Once the report is actually requested, within 3 days the employer must notify the applicant that the report has been requested and include the name of the consumer reporting agency, the nature and scope of the inspection, and the applicant's rights with respect to inspecting that agency's files.

The employer must send a certification to the consumer reports agency that the required disclosures have been made, and any additional required disclosures will be made. Next, upon an applicant’s request, the employer must supply information on the investigation within 5 days of receiving the report. If the employer decides to take adverse action on the contents of the report, the employer must send the applicant a pre-adverse action notice of the preliminary decision to reject him or her based on that information. This should include a summary of rights under FCRA and the name and address of the agency that prepared the report. If the applicant doesn’t dispute this within 2 days, the employer can send the applicant a notice of the final decision.

I-9 Verification of Authorization to Work

The Immigration Reform and Control Act requires employers to retain Employment Eligibility forms (INS Form I-9) for 3 years after the worker is hired or 1 year after termination, whichever is later. Within 3 days of work, the employer must furnish proof of the employee’s identity and authorization to work in the United States. The employer must allow the employee to produce the requisite document or documents required, but leave it up to the employee which forms he or she will produce to meet that requirement. The employer cannot require a specific document that states the employee was born in the United States. The list of allowable documents is on the I-9 form itself.
Employers often make a copy of the documents that the employee submits. Making a copy of the documents is not legally required, but it is a good practice in order to corroborate that the employee did in fact provide the documents to the employer for inspection.

If copies are kept, copying of documents should be done consistently for all employees and should be filed with the I-9 Form. Because I-9s contain age and citizenship information, it is probably best to retain them in a locked file, separate from other personnel files. To avoid “pattern or practice” violations, multiplant operations should not centralize I-9 recordkeeping. Employee name changes should be recorded on the form by lining through the old name, printing the new name and the reason (e.g., marriage), and dating or initialing the changes; do not erase the old name.

**Drug/Alcohol Testing and Physical Exams**

Drug and alcohol testing and physical exams implicate a number of laws, including the ADA, as well as state disability and privacy laws. Under the ADA, employers must wait until after they have made a documented job offer to an individual before requesting a physical exam. As a result, it is important to document that an offer was made before the applicant was required to submit to a physical exam.

Some state privacy laws require employers to protect medical records from unauthorized access. To protect employee privacy, keep the medical records in a separate, locked, confidential file away from the employee’s general personnel file. Also, keep these medical records in a locked location.

**Employee Invention Assignment and Proprietary Information Agreement**

Employers often require a new employee to sign an agreement that assigns inventions to the employer that the employee may invent during the employment relationship and imposes restrictive covenants both during and after the employment relationship. Restrictive covenants include agreements to protect the employer’s proprietary information from disclosure, agreements not to compete against the employer, and agreements not to solicit away the employer’s employees and consultants after the employment relationship is terminated. All of these provisions must be in writing.

**Employee Handbook Acknowledgement**

Employers should obtain a written acknowledgement from employees that they have received the employee handbook upon hire, have read it, and will contact Human Resources with any questions they might have.

The acknowledgement should also contain an at-will provision that reiterates the employment relationship is at will (that is, either the employee or the employer may terminate the employment relationship at any time and for any reason, other
than an illegal reason). Having the written acknowledgement is critical in any type of subsequent litigation where the employee claims he or she never received or read the employee handbook or was unaware of some employee policy that is outlined in the handbook.

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**Experts agree**—an up-to-date legal handbook is essential to avoid expensive legal problems. [HR.BLR.com](http://HR.BLR.com) has all the news, checklist, and guidance you need to develop an employee handbook that will keep you out of court—**start your free trial now!**

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**Employment Relationship**

The next stage of the recordkeeping process involves records that relate to the employment relationship itself. These records have to do with personnel files, payroll and compensation, benefits, medical, vacation and sick time, promotions, transfers, and progressive discipline.

**The Personnel File**

It is important to include both positive and negative information in the personnel file so that it is a balanced file—this helps employers fend off charges that the employer only keeps negative information in the personnel file in case of litigation. Records an employer should keep in the personnel file include:

- Notices of commendations and awards
- Written warning or documentation of verbal warnings
- Performance appraisals
- Attendance and absence records
- Any forms signed by the employee expressing adherence to the employer’s policies
- Training records, particularly training required by law

To the extent the employer has files with medical information or other sensitive information, it should be maintained in a separate, locked, confidential file to which no one has access, except for a legitimate business need related to that file.

Many states have laws that give employees the right to inspect certain records in their personnel files. In most cases, an employer can require an employee to give reasonable advanced notice of their desire to inspect their personnel file. The employer can also, generally, request a reasonably convenient time for the
inspection. Depending on the state, the employer may also be able to limit the inspection to reasonable intervals—for example, the employee may request to view the file every week, which the employer may deem unreasonable. The employer, depending on the state, may also be able to exclude from the inspection certain sensitive or confidential documents, including letters of reference or documents related to a pending criminal investigation. The employee may or may not be able, under state law, to obtain a copy of his or her personnel file. It is prudent for an employer to know the law on access to personnel files in the state where the company resides.

One trap for the unwary, however, is that some state law extends the inspection right to all the records the employer maintains and not just those records in the personnel file. Therefore, files that individual supervisors may have regarding the employee’s performance, either in hard copy or e-mail form, may be subject to inspection under the laws of certain states.

Finally, someone from HR should monitor the inspection to make sure that the employee does not remove or alter anything in the personnel file.

**Payroll and Other Compensation Records**

Under federal and state laws, an employer should keep records regarding employee wages and hours for at least 4 years. Employers, depending on the state, must provide information to employees about their pay, apart from personnel file laws, such as their right to inspect or copy payroll records. Employers must also be aware of state laws regarding what information must or may not be provided on a pay stub, including the employee’s name and Social Security number, explanation of gross wages and total hours worked, or any deductions from pay, such as taxes and insurance. Penalties for failing to provide the above information to employees can be steep.

Employers should note that many states, to prevent identity theft, no longer allow employers to put full Social Security numbers on pay stubs.

**Benefit Records**

Records required to be kept under the Employee Retirement Income Security Act (ERISA) must be retained for 6 years. Employers must give reasonable notice to employees whenever they cancel a benefit program, like health or long-term disability insurance.

Attorney Allen suggests that employers keep medical records, such as those related to ADA reasonable accommodation, workers’ compensation, Occupational Safety and Health Act (OSH Act), and the Family and Medical Leave Act (FMLA) compliance, in a separate file in a locked location to protect from unauthorized access.

The ADA and parallel state laws require an employer to engage in an interactive process to determine whether there are reasonable accommodations that may enable the employee to perform the essential functions of the job. The interactive process is an independent obligation that may result in a legal violation, even if the employer otherwise complies with the ADA. Therefore, it is very important
to document the interactive process by creating a written record of any verbal discussion and saving copies of letters and e-mails that demonstrate that the employer engaged in a thorough and good-faith interactive process to determine whether the employee’s disability may be reasonably accommodated.

Workers’ compensation laws vary by state, but in general a work-related injury will trigger a whole host of documents that must be generated and maintained. It is a good idea to consult with local counsel to ensure compliance with the state workers’ compensation laws.

Similarly, federal and state OSHA laws require documenting safety programs and disclosure of unsafe and unhealthy conditions and recording internal audit activity that the employer is conducting to ensure compliance. If there are hazards, such as exposure to dangerous chemicals, the laws require employers to create and maintain records about any employees’ exposure to these hazards.

The federal FMLA triggers a number of recordkeeping obligations related to communications between the employer and the employee about the leave request and the reinstatement of the employee after leave to the job. The employer, under federal law, must provide 12 weeks of leave. Some states provide a longer leave time.

In certain circumstances, the leave must be given to the employee intermittently in less than full-day increments. The employer must carefully record the notice given to the employee regarding notice, leave certification, return to work, and tracking of leave usage.

**Vacation, Sick Time, and Other Time-Off Records**

Vacation time, sick time, and other time-off records should be, and in some states must be, carefully documented. In some states, accrued unused vacation must be paid out at termination, so it becomes very important to record both the vacation accrual and usage.

**Personnel Management Records—Promotions, Transfers, and Progressive Discipline**

When it comes to positive employment actions such as promotions and transfers, employers sometimes become more relaxed about documentation because they think “what employee is going to complain about a positive action like a promotion?”

However, promotions and transfers often become legal issues. For example, it might not be the employee who is promoted who files the lawsuit, but perhaps another employee who was denied the promotion and claims the employee who received the promotion did so for discriminatory reasons. Therefore, it is important to document the reasons why the employee was given the promotion over other candidates.

Even the person who was promoted may use the promotion records in his or her own lawsuit against the company at some point in the future. For example, in a lawsuit after termination, the employee may argue that the employment was not at will, but terminable only for good cause based on the theory of an implied contract of employment that resulted from various factors, including the promotions
that the employee received during the employment relationship. Accordingly, even a notice or promotion should contain an at-will provision.

Even when an employment relationship is at will, when possible, employers should give written notice of performance deficiencies. This should be done in a progression, beginning with a verbal notice, then a written warning, then a final probation period. Although this may not be legally required since it is an at-will relationship, a written record of progressive discipline makes it much more difficult for an employee to challenge the termination as discriminatory or otherwise unlawful.

**Termination Records**

Termination records include reductions in force records, WARN Act records, separation and release agreements, and COBRA records.

**Reductions in Force**

A reduction in force (RIF) also requires documentation, such as notices. Employers should also document the selection criteria for layoff and retain records related to the adverse-impact analysis.

Employers should establish selection criteria for RIF around business needs, document the reasons for the RIF, and perform an analysis to see if there are any red flags for discrimination on the basis of race, gender, or age. Establish criteria in advance as opposed to on an ad hoc basis, carefully document why specific individuals were selected for or spared from termination. And, if layoffs are performance-based, an employer may want to consider a forced-ranking of employees. Forced-rankings are more difficult to challenge as discriminatory if the criteria are measurable and objective.

Once the initial selections are made, employers should perform a quick statistical analysis to examine at least the factors of age, race, and gender. This is often done with counsel to keep the analysis covered by the attorney/client privilege. The purpose of the analysis is to see if there are any obvious problems, such as one group of people being selected for termination much more often than another group. If the initial analysis raises any red flags, the employer should work with counsel, and perhaps hire a statistician, to develop a more detailed analysis before making any final decisions on who is selected for the RIF.

**WARN Notice Records**

The Worker Adjustment and Retraining Notification (WARN) Act requires employers to provide 60 days’ advanced notice to employees if there is going to be a plant closing or mass layoff. Not every employer is subject to WARN. Employers must have at least 100 employees that work at least 4,000 hours a week.
Certain states have their own laws, similar to WARN, that cover smaller employers. The notice must be in writing and cover whether the mass layoff or plant closing is going to be permanent or temporary, whether it pertains to the entire plant, the estimated date of the action, when the employee would be terminated, and the name and phone number of the person to contact within the company who can provide the employee with more information. In addition, employers have to notify certain governmental agencies.

There are certain exemptions from the notice requirement, although those are fairly narrow and should not be relied on without talking to counsel. These exemptions include the faltering company exception, the unforeseeable business circumstances exception, and the natural disaster exception.

There are substantial penalties for violating the WARN Act. An employer violating the law would have to provide back wages and benefits to each affected employee for each day of the violation, to the maximum of 60 workdays. In addition, there can be penalties for failing to notify the local government officials.

Separation and Release Agreements

Once an employer has made the decision to terminate an employee, separation and release agreements are the next records to be kept. To obtain a valid and binding release, the employer has to offer the departing employee something the employee is not otherwise entitled to, such as severance. However, if the employee’s employment agreement states that the employee is entitled to severance upon termination, the employer will have to provide the employee with an additional benefit in order to create a binding release agreement.

There is a special requirement for obtaining a release for employees over 40 years of age. Under the Age Discrimination in Employment Act (ADEA) and the Older Workers Benefit and Protection Act (OWBPA), employees cannot validly release age claims unless certain requirements are met.

In individual terminations, the requirements are that the release be part of a written agreement calculated to be understood by the average person (not overly legalistic), that the release specifically refers to the ADEA, that it cannot waive future claims, that it must provide some new consideration to the employee for the release, and that it must suggest that the employee consult with an attorney about the agreement.

Also, the employer must provide the employee with 21 days to consider the agreement before signing it. This requirement can be waived if the employee wants to sign it within a shorter period of time. After signing the agreement, an employee is given 7 days to revoke the agreement. Therefore, an employer should set up the agreement so that severance pay is not distributed until after the 7-day revocation period is over.

In the context of reductions in force, there are some additional requirements for employers to follow. First, the employer must give the employee 45 days, rather than 21, to sign the agreement. Second, employers must provide employees with certain information about the people being terminated.
COBRA Records

The Consolidated Omnibus Benefit Reconciliation Act (COBRA) does not have any specific recordkeeping requirements. However, if an employer’s compliance with COBRA is questioned, the burden of proof falls on the employer. Absent appropriate records, the employer will not be able to show it complied with the law. An employer should work with their plan administrator to make sure all proper notices are provided. To this end, some best practices are:

1. The employer should provide the plan administrator with details regarding every qualifying event for each employee.
2. The employer should set up and publish explicit and reasonable procedures for employees to use to provide the employer with their COBRA notice qualifying event.
3. When a qualifying event takes place, the employer should make sure to send the election notices to both the employee and his or her spouse.
4. If an individual is not eligible for COBRA coverage after a qualifying event, the employer must send them an unavailability notice.
5. If COBRA coverage terminates for some reason before the end of the maximum coverage period, the employer must send a termination notice to the affected beneficiaries.

Litigation Issues and Electronic Information Management Issues

Common recordkeeping traps include:

- Failing to keep complete records
- Keeping complete records, but including inaccurate records or a “smoking gun,” such as proof of discrimination
- Continuing sloppy recordkeeping practices, so that records are not retrievable when needed

Businesses today are able to move away from keeping records on paper to electronic forms of data storage; however, it does the employer little good in the litigation context if the employer cannot access those records in an efficient and organized manner.
Attorneys Kato and Wichmann offer the following tips for better recordkeeping:

1. Have a written policy on recordkeeping that outlines what documents are to be created, by whom, what records are to be retained, for how long and by whom, and where those records are to be stored.
2. Create a map or index to retrieve the records when necessary.
3. Devote the time and resources to implement the policy.
4. Train managers about the recordkeeping policy.

List of Legal Requirements

The following information highlights some of the more important recordkeeping requirements that apply to most employers, regardless of industry. Employers should keep in mind that the time period for retaining records set forth in the various statutes are minimums. Since these records are critical to the employer if its compliance with federal or state law is questioned or if it must defend itself against employment-related litigation, employers may want to retain employment-related records for much longer periods of time. In addition, some states have specific laws related to the maintenance of personnel files and other documents that may require longer retention periods.

Age Discrimination in Employment Act (ADEA)

Covered employers: Employers with 20 or more employees.

Required: Payroll or other records for all full-time, part-time, and temporary employees that include each employee’s name, address, date of birth, occupation, rates of pay, and weekly compensation.

To be retained: 3 years.

Required: In addition, employers must retain records related to job applications, résumés, and other forms of job inquiries; promotions, demotions, and transfers; selection for overtime, training, layoff, recall, or discharge; job orders submitted to employment agencies; candidate test papers for any position; physical exam results if used in employment decisions; job ads or internal notices relating to job openings; and employee benefit plans.

To be retained: 1 year from the date of action or after termination of the benefit plan.
After action started: If a charge of age discrimination or a lawsuit has been filed against the employer under the ADEA, all relevant records must be kept until final disposition of the matter.

(29 USC 626(a), 29 CFR 1627.3)

The best way to ensure that your records are in good order is to establish and publish a record-retention policy. Visit HR.BLR.com to get started today with your free trial!

ADEA Amendment—Older Workers Benefit Protection Act (OWBPA)

Covered employers: Employers with 20 or more employees.

Required: Payroll or other records for all full-time, part-time and temporary employees that include each employee's name, address, date of birth, occupation, rates of pay, and weekly compensation.

To be retained: 3 years.

Recommended, not required: Settlement or severance agreements that include signed waivers of employee ADEA rights to sue for age discrimination along with all related documents.

To be retained: At least 1 year from the date employment is terminated.

(29 USC 626(a), 626(f))

Americans with Disabilities Act (ADA)

Covered employers: Employers with 15 or more employees.

Required: Job résumés, application forms, notes on interviews, and notes on reference checks; records of promotion, demotion, transfer, layoff, termination, rate of pay or other compensation; selection for training or apprenticeship, including application forms and test papers; applications for disability benefits; and requests for reasonable job accommodation. Note that information from medical exams is confidential, must be maintained separately, and access must be limited to the employee’s supervisors and managers; safety workers; and workers’ compensation, or other insurance carrier.

To be retained: 1 year from making the record or taking the personnel action.

After action started: If a charge of disability discrimination or a lawsuit has been filed against the employer under the ADA, all relevant records must be kept until final disposition of the matter.

(29 CFR 1602.20)
Civil Rights Act of 1964, as Amended in 1991 (Title VII)

Covered employers: Employers with 15 or more employees.

Required: Résumés; application forms; interview notes; notes on reference checks; tests and test results; job advertisements and postings; all records related to hiring, promotion, demotion, transfer, layoff, and termination; payroll records including rate of pay and other compensation; requests for accommodation; and records related to selection for training or apprenticeship.

To be retained: 1 year from making the record or taking the personnel action.

Note: Apprenticeship records must be kept for 1 year from the date an application for an apprenticeship is received or from when a successful apprenticeship ends, whichever is later.

Consolidated Omnibus Budget Reconciliation Act (COBRA)

Covered employers: All employers with 20 or more employees who offer employees group health insurance benefits.

Required: COBRA does not have specific recordkeeping requirements. However, if an employer's compliance with COBRA is questioned, the burden of proof is on the employer and, absent appropriate records, the employer will not be able to show that it complied with the law. Therefore, as a best practice, employers should keep lists of employees covered by a group health plan along with their addresses; records related to any qualifying event (i.e., terminations, hour reductions, leaves of absence, deaths of employees, divorce, Medicare eligibility, or disability status); records related to retirees covered by the group health plan; records of COBRA premium payments; records of changes made to the group health plan; records of employees denied coverage and the reasons for each denial; copies of notices both general and specific informing employees of their rights under COBRA; evidence that required notices were sent and received by employees and/or covered beneficiaries (i.e., copies of return receipt cards); and completed election forms.

To be retained: Even though employees are only eligible for COBRA for the 18-month period following a qualifying event, employers should retain records for at least 3 years in the event a claim is filed by an employee claiming the employer did not notify them of their rights to continue coverage or terminated coverage before the 18-month period had expired.

Davis-Bacon Act

Covered employers: Employers that are federal contractors or subcontractors.

Required: Payroll records containing name; address; Social Security number; gender; date of birth; occupation; job classification; rate of hourly, daily, and weekly pay; rates of contributions or costs anticipated for fringe benefits or cash equivalents; hours worked; deductions; and actual pay for each employee.
Note: Contractors employing apprentices or trainees under approved programs must maintain written evidence of the registration of the apprenticeship programs and certification of trainee programs, the registration of apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.

To be retained: 3 years from completion of the contract.

(29 CFR 5.5)

Employee Polygraph Protection Act

Covered employers: All employers.

Required: For each employee required to submit to a polygraph test, a copy of the statement provided to the employee informing him or her of the specific incident under investigation and the basis for the testing; any records identifying the employer's loss that is being investigated; records identifying the nature of the employee's access to the person/property being investigated; a copy of any notice given the examiner identifying the person(s) to be examined; a copy of any reports, questions, lists, and other records given the employer by the examiner.

To be retained: 3 years from the date the polygraph test was administered or, if the employee did not take the test, from the date it was scheduled. Records should be kept in a confidential location at the employee's place of employment. Disclosure of test results should be limited to the examinee, employer, court, or government agency subject to an order of the court.

(29 CFR 801.30, 29 CFR 801.35)

Employee Retirement Income Security Act (ERISA)

Covered employers: All employers who maintain employee benefit plans that are subject to ERISA.

Required: Annual reports; summary plan descriptions (SPD); records supporting data in SPDs; notices of plan changes, amendments, or termination; and related welfare and pension reports.

Note: Records needed to determine a participant's eligibility for benefits must be retained as long as relevant.

To be retained: 6 years.

Equal Pay Act (EPA)

Covered employers: All employers.

Required: Payroll or other records for all full-time, part-time, and temporary employees that include each employee's name, gender, occupation, job title, rate of pay, and weekly compensation. In addition, the company must obtain documents related to job evaluations and wage rates, job descriptions, description of merit or
seniority systems, and other explanations of wage differentials for employees of
different genders.

To be retained: 3 years.

**Equal Employment Opportunity Form (EEO-1)**

Covered employers: Employers with 100 or more employees and federal contractors with 50 or more employees.

Required: Form EEO-1 for each location, unit, and/or the company headquarters. The completed EEO-1 forms must be filed annually with the Equal Employment Opportunity Commission.

To be retained: A copy of the current EEO-1 Report must be retained by the employer.

Covered employers: Employers with more than 50 employees and more than $50,000 in government contracts.

Required: Affirmative Action plans and all supporting evidence of good-faith efforts to comply with affirmative action laws.

To be retained: 2 years.

After action started: If a charge of discrimination or a lawsuit has been filed against the employer under Title VII, all relevant records must be kept until final disposition of the matter.

(29 CFR 1602.14, 29 CFR 1602.21)

**Executive Order 11246/Office of Federal Contract Compliance Programs (OFCCP) Rules**

Covered employers: All employers that are federal contractors or subcontractors.

Required: Records relating to hiring, assignment, promotions, demotions, transfers, termination, pay rates, wage increases, and other compensation terms; selection for training or apprenticeship; reasonable accommodation requests; physical exam requests; job advertisements and postings; applications, résumés, tests and test results; interview notes; and affirmative action plans for the current and prior year including utilization analyses, applicant logs, and other supporting documents.

To be retained: Affirmative action plans must be updated annually and retained for 2 years. Covered employers with 50 or more employees must maintain records for 2 years. Covered employers with fewer than 150 employees or government contracts that are less than $150,000 must maintain records for 1 year.

After action started: If an investigation by the OFCCP has commenced or a charge of discrimination or related lawsuit has been filed against the employer, all relevant records must be kept until final disposition of the matter.

(60 CFR 741.80(a) and 60 CFR 741.80(b); 60 CFR 60-1.12)
Fair Labor Standards Act (FLSA)

Covered employers: All employers.

Required: Employee information, including name, address, occupation, birth date (if under the age of 19), and gender; complete payroll records, including hours worked, overtime, and wage deductions; certificates; union agreements; written training agreements; sales and purchase records; and certificates of age for each employee under the age of 18.

To be retained: 3 years.

Required: Basic employment and earnings records, wage rate tables, actual work completed, additions to/deductions from wages, wage differential payments to employees of the opposite sex/same job, evaluations, job descriptions, and merit or seniority systems.

To be retained: 2 years.

FLSA/Equal Pay Act

Required: Collective bargaining agreements; employee and payroll information; explanation of merit or seniority systems; employee time sheets or cards.

To be retained: 3 years after agreement ends or after records are made, except that explanations of merit or seniority systems and employee time sheets or cards must only be retained for 2 years.

(29 USC 206; 29 CFR 1620.32)

FLSA/Tipped Employees

Covered employers: Employers with employees who receive tips as part of their required wages.

Required: The following records must be kept:

- Time paid for hours worked each day in a tipped position.
- Time paid for hours worked each day in a nontipped position.
- Tips received and accounted for or turned over to employer in a weekly or monthly amount.

To be retained: 3 years from the date the record is made.

(29 USC 211; 29 CFR 516.5, 29 CFR 516.6)

Family and Medical Leave Act (FMLA)

Covered employers: All employers with 50 or more employees as defined by the FMLA.
Required: Detailed payroll and employee identification data; records showing dates of FMLA leave taken by eligible employees and, for intermittent leave, hours of leave taken; copies of all employee notices and documents describing FMLA and policies related to benefits and unpaid leaves; records related to premium payments made by employees on FMLA leave; copies of requests for leave and notices to employees responding to requests for leaves and designating leaves as FMLA leaves; records of any dispute regarding the designation of a leave as FMLA.

Important Note on Confidentiality: Employee medical records and the medical records of family members must be kept in a separate, secure location in conformance with ADA requirements. The only exceptions are that supervisors and managers may be informed of necessary restrictions on work; first aid and safety personnel may be appropriately informed, if necessary; and government officials investigating pertinent law may be provided relevant information. Records may be kept on computers as long as they are available for transcription or copying.

To be retained: 3 years.

(29 CFR 825.500)

Federal Unemployment Tax Act (FUTA)

Covered employers: All employers.

Required: Basic employee data, including name, address, Social Security number, and birth date; records showing pay periods, daily and weekly hours, overtime, deductions from pay, payments for fringe benefit, and amounts and dates of wage payments; copies of employee withholding forms (Form W-4 or W4-E); annual records showing total wages for each employee and amounts of taxable pay; documents showing the reason taxable pay does not equal total pay; amount paid into state unemployment fund, including deductions from employee pay; and experience rating data.

To be retained: 4 years after tax is due or paid.

Freedom of Information Act (FOIA) and Privacy Act

Covered employers: Public employers.

Required: Public employers must maintain public records and make them accessible both to employees and the public as required by law. Even though these laws do not apply to private employers, many states have laws requiring private employers to retain documents that are part of the personnel file and to permit employees to inspect and copy their personnel files.
Health Information Privacy (Health Insurance Portability and Accountability Act (HIPAA))

**Covered employers:** All employer-sponsored group health plans except self-insured plans with 50 or fewer than 50 participants.

**Required:** U.S. Department of Health and Human Services has developed a regulation governing privacy of individual's health records and information, and access to medical records. All protected health information (PHI) that includes any individually identifiable health information is protected, including electronic and paper records and oral communications. The standards are aimed at ensuring the privacy of PHI (i.e., information that can be associated with a specific individual).

The regulation applies to health plans, healthcare clearinghouses, and healthcare providers. Employers who self-insure or are heavily involved in the administration of their health plans are directly affected. Any employer that sponsors a health plan will be at least indirectly affected.

Healthcare providers must obtain consent to disclose PHI for reasons other than treatment, payment, or healthcare operation purposes. Employer-sponsored health plans must also obtain an individual's specific authorization to use and disclose any PHI for any reason other than treatment, payment, or healthcare operations. PHI may be disclosed without authorization where required by law. Health plans may disclose PHI to plan sponsors only if the sponsor certifies that it will use the information in accordance with the standards. Plan documents must be amended to provide that disclosure will be limited to that permitted by the standards. Disclosures other than for treatment must limit PHI to the minimum necessary for the intended purpose. Covered entities must establish procedures to limit access to PHI to employees who have a need for such access. A privacy official must be named to administer the entities' privacy policy. All employees who will have access to PHI must be trained in privacy policies and procedures.

Individuals must be able to see and obtain copies of their records, request amendments to the records, and be given a history of most disclosures on request. Healthcare providers must receive patient authorization to disclose information. Individuals must be given detailed written information concerning their privacy rights. Employers that sponsor health plans may not use PHI held by the plan for employment-related purposes.

Homeworker Regulations (FLSA)

**Covered employers:** All employers.

**Required:** Payroll records; dates when work was distributed and submitted; amount and kind of work; for each lot, the hours worked and piece rates paid; name and address of agent or distributor and of each homeworker. Employers should also retain the journal in which homeworkers record their daily/weekly hours worked and related business expenses.

**To be retained:** 2 years.

(29 USC 211)
Immigration Reform and Control Act (IRCA)

Covered employers: All employers.

Required: Employee Eligibility Verification forms (INS Form I-9) completed and signed by each newly hired employee and the employer. It is recommended that employers keep copies of the supporting documentation presented by each employee as proof of eligibility to work in the United States. Since the U.S. Department of Labor may inspect the I-9 forms at any time, it is recommended that these be kept in a separate file and not as part of each employee’s personnel file.

To be retained: 3 years after the worker is hired or 1 year after termination, whichever is later.

(8 CFR 274a (2)(A))

Internal Revenue Service (IRS) Regulations

Covered employers: All employers.

Required: Basic employee data, including name, address, Social Security number, and birth date; records showing pay periods, daily and weekly hours, overtime, tips, deductions from pay, taxes withheld, payments for fringe benefits, and amounts and dates of wage payments; copies of employee withholding forms (Form W-4 or W4-E); annual records showing total wages for each employee and amounts of taxable pay; documents showing the reason taxable pay does not equal total pay; amount paid into state unemployment fund, including deductions from employee pay; and experience rating data.

To be retained: 4 years after payment, deduction of taxes, or due dates of returns.

Note: Retention can be extended by the IRS as long as records are material to a tax filing; therefore, keeping records indefinitely is safest.

Occupational Safety and Health Administration (OSHA)

Covered employers: All employers with 10 or more employees.

Required: The following documents must be maintained by employers subject to OSHA:

- Form 301: Injury and illness incident report
- Form 300A: Annual injuries and illness report

Note: Records of all legally required medical examinations, including records of employee exposure to potentially toxic material or harmful physical agents, must be available to employees for inspection. An equivalent form may be used in place of Form 301 (such as a report of first injury made for purposes of workers’ compensation) but the form must include statements related to employee access and employer penalties.
To be retained: 5 years.

Note: The old OSHA 200 and 201 forms must be retained for 5 years following the year to which they relate.

Privacy concern cases: Employers with a privacy concern case may not enter the employee’s name on the logs, but rather should enter “privacy concern case” in place of the name. Privacy cases are injuries or illnesses to an intimate body part or the reproductive system; a sexual assault injury or illness; mental illness; HIV infection, hepatitis, or tuberculosis; needlestick injuries; cuts from objects contaminated with blood or other infectious material; and employee requests for privacy. Employers must keep a separate, confidential list of case numbers and employee names so that cases may be identified and updated.

(29 CFR 1904.1 et seq.)

Required: Records of any medical examination required by OSHA or records related to employee exposure to toxic or hazardous agents.

To be retained: 30 years after termination of employment.

(29 CFR 1910.1020(d))

Caution: OSHA has many standards for specialized occupations that have record retention requirements.

Personal Responsibility and Work Opportunity Reconciliation Act of 1996

Covered employers: All employers.

Required: Every employer is required to report the hiring or rehiring of each employee to a state directory of new hires within 20 days of hiring. The state must then report to the federal Department of Health and Human Services.

Rehabilitation Act of 1973

Covered employers: Public employers and federal contractors or subcontractors.

Required: Employment records, including records related to filling job vacancies, training, promotions, and demotions; positions for which workers and applicants were considered; reasons for rejection; and accommodations considered, rejected, or made; records of complaints.

To be retained: 2 years for contractors with more than 150 employees or a government contract of $150,000 or more; 1 year for employers with fewer than 150 employees or a government contract of $150,000 or less.

After action started: Once a discrimination action is begun, the employer must retain all records regarding the employee until final disposition of the action.

(41 CFR 60-741.80(a) and 41 CFR 60-741.80(b))
Social Security Act (Federal Insurance Contributions Act (FICA))

Covered employers: All employers.

Required: Each employee's name; address; Social Security number; date, amount, and period of services paid for; amount of pay taxable as wages; reasons for discrepancies; amount of tax collected; date; details of adjustment or settlement of taxes; tips reported; and employer filing records.

To be retained: 4 years.

FICA: Tipped Employees

Required: The following records must be kept:

- All tips reported for 4 years from the tax due date or payment date, whichever is later
- Total wages paid to each employee separating withholding, amount of pay subject to tax, and reason for it, if the amount isn't equal to total pay

To be retained: 4 years from the tax due date or payment date, whichever is later.

Vietnam Era Veterans’ Readjustment Assistance Act (VEVRAA)

Covered employers: Federal contractors and subcontractors with contracts of $100,000 or more.

Required: Creation and maintenance of an affirmative action plan for covered veterans, i.e., disabled veterans, veterans who served on active duty in the armed forces during a war or in a campaign or expedition for which a campaign badge has been authorized, veterans who, while serving on active duty in the armed forces, participated in a U.S. military operation for which an armed forces service medal was awarded pursuant to Executive Order 12985, and recently separated veterans. Documentation is required, detailing: (1) the number of employees in the contractor's workforce, by job category and hiring location, who covered for veterans; and (2) the number of covered veterans hired during the previous 12 months. This information must be reported annually and must also be recorded on the VETS-100 Report.

To be retained: For employers with fewer than 150 employees or a government contract at less than $150,000: 1 year; for employers with more than 150 employees or a government contract of at least $150,000: 2 years.

(41 CFR 60-250.80 and 60-250.81)
Walsh-Healy Public Contracts Act

Covered employers: Federal contractors or subcontractors.

Required: Certificates of age for minors employed on public contracts; title and address of the office issuing the certificate; date of issuance; number of certificate; and name.

To be retained: 3 years from date of entry.

(41 USC 35 et seq.)

Required: Wage and hour records, including the rate of wages, amount paid each pay period, hours worked daily and weekly, the period during which the employee was engaged on the government contract, and the identification number of such contract. Name, address, sex, occupation, and birth date for employees under the age of 19.

To be retained: 3 years.

Required: Employment and earnings record, employer documents on which are entered daily starting and stopping times of employees (or units produced when these determine pay period earnings), wage rate tables (i.e., employer tables providing the rates used in computing earnings), and work-time schedules.

To be retained: 3 years.
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