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Files, Files and More Files: Retention, E-Files and more!

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Employment & Labor Law Solutions Worldwide™

Overview

- **Personnel Files**
- **Medical Records**
- **Payroll Records**
- **OSHA Requirements**
- **Preparing for Potential Litigation**

What Are Employee Records?

- Job Applications/Resumes
- Letters of Reference
- Interview Notes
- Tax Forms (W-2, W-4)
- I-9 Forms
- Offer Letters
- Contracts & Agreements
- Checklists
- Performance Evaluations & Discipline Records
- Disciplinary Documents
- Payroll Records/Direct Deposit Forms
- Workers' Compensation Files
- OSHA/Safety Data
- Wage Garnishments
- Emergency Contacts, Address and Phone
- Time and Attendance Records
- Vacation, Time, Leave Requests
- Doctor's Notes/Medical Records
- Drug Test Results
- Background/Credit Checks
- Wage & Salary Histories
- Licenses & Registrations
- Training Files
- Signature Forms for Receipt of Policies and Property
- Investigation Files
- Internal/External Complaints
- Employee Benefits Applications/Forms
- Payroll Deduction Forms
- Letters of Termination/Resignation
- Exit Interviews/Checklists
- Wage Theft Prevention Act Notices

Duty to Keep Records

- **Number of Federal laws that require duty to keep records:**

- Title VII
- Civil Rights Act
- ADA
- ADEA
- EO
- DBRA
- Rehabilitation Act
- VEVRAA
- FLSA

- **Must make available upon 72 hours' notice**

Duty to Keep Records

- **Federal record keeping obligations include:**

job descriptions/criteria, ads, notices to public and employees regarding job openings, training programs and written training agreements, documents related to hiring, firing, transferring, assignment, demotions, employee handbooks, notice of and criteria for selection for training or apprenticeship programs, evaluations, accommodation requests, applicant data, etc.

EEO -1 Reporting

- **Employer with 100+ employees**
- **Government Contractors w/50+ employees, prime/first tier contractor & contract \$50k+**
- **Data re: gender, race and ethnicity in certain job groupings**
- **Pay data was contemplated – stayed for now**
- **Sept 30 prior date – now March 30**
- **Keep all applicant info for one year**

Federal Retention

- Retention under Federal law – varies up to 4 years
- I-9s: 3 years or 1 year from term (whichever is later)
- 2-3 years for payroll
- 3 years for benefit plans/CBA records
- 1 year from date of the personnel action (including decision not to hire)

Federal Retention

- DOT testing – up to 5 years
- Special rules for Government Contractors (including thru OFCCP) - up to 3 years from completion of contract.
- OSHA records – once reportable present year plus 5 following years (toxic exposures employment + 30 years)
- Certain exceptions can be granted upon request to U.S. Dept of Labor – Wage & Hour

Duty to Keep Records

- AS 23.05.080 – requires employer to keep an accurate record of the name, address, and occupation of each person employed, of the daily and weekly hours worked by each person, and of the wages paid each pay period to each person. The record shall be kept on file for at least three years.

Duty to Keep Records

Alaska Statutes 23.10.100

(a) An employer shall keep for a period of time of at least three years at the place where an employee is employed a record of the name, address, and occupation of each employee, the rate of pay and the amount paid each pay period to each employee, the hours worked each day and each workweek by each employee, and other payroll information that the commission may require.

What Form?

- Generally there is no specific form required
- Paper, electronically on microfilm....
- As long as reasonably maintained & accessible
- Secured server, reasonably backed up, password protected, complete, etc.
- As long as reproductions can be clearly read

Electronic Records

Two categories of laws regulate electronic HR data around the world:

1. **New tech-conscious laws expressly designed to regulate electronic data:**
 - data security laws
 - data breach laws
 - data privacy/data protection laws

Electronic Records

2. Old-school pre-tech laws presupposing paper documents and wet-ink signatures:
- Laws requiring employers to generate specific HR documents and to file HR documents with government agencies
 - HR-context document retention requirements—and their interplay with document purging requirements
 - Employee signatures in the electronic HR recordkeeping context

Electronic Signatures

New York Times, April 8, 2018

Credit Card Signatures Are About to Become Extinct in the U.S.

By Stacy Crowley

"The signature, a centuries-old way of verifying identity, is rapidly going extinct."

* * *

"The signature has really outrun its useful life," said Linda Kirkpatrick, MasterCard's head of business development in the United States."



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Electronic Signatures

Distinction #1:

Wanting a memorialized
employee assent

vs.

needing a commercially-binding
employee execution



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Electronic Signatures

Distinction #2:

Simple, permissive, minimalist employee assent

vs.

advanced, mandatory, digital employee execution



Example: *California* Civil Code § 1633.9(a): “electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner....”

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Electronic Signatures

1. Identify which employee-executed documents around the world need a commercially-binding employee execution, which merely need a memorialized employee assent—and which do not need a signature at all “*accept*” click vs. intranet submissions vs. emails vs. DocuSign
2. Develop company-wide protocols for memorializing *informal* employee assents —and use them consistently, around the world, for all employee electronic signatures except those that need an advanced/mandatory/digital signature
3. As to employee signatures that must get a *commercially-binding* employee execution, learn about and use locally-legal advanced/mandatory/digital signatures, or fall back on wet-ink signatures and storing paper

Duty to Produce Records

Alaska Statute 23.10.100

(b) the commissioner or an authorized representative of the commissioner may copy the employer’s records at any reasonable time. An employer shall furnish to the commissioner or the representative on demand a sworn statement of the employer’s records, and the commissioner may require that the sworn statement be made upon forms the commissioner has prescribed or approved.

Access to Personnel Files

Alaska Statute 23.10.430

(a) An employer shall permit an employee or former employee to inspect and make copies of the employee's personnel file and other personnel information maintained by the employer concerning employee under reasonable rules during regular business hours. The employer may require employee... to pay the reasonable cost of duplication.

CBA terms govern

What is a "Personnel File"?

- There is no federal definition/regulation
- The definition varies widely by state
- Alaska: 8 AAC 15.910(d) defines "personnel file and information"

AK Personnel File

(d) As used in [AS 23.10.430](#), "personnel file and other personnel information" means all papers, documents, and reports pertaining to a particular employee that are used or have been used by an employer to determine that employee's eligibility for employment, promotion, additional compensation, transfer, termination, disciplinary or other adverse personnel action; "personnel file and other personnel information" (1) includes

- (A) applications;
- (B) notices of commendation, warning or discipline;
- (C) authorization for withholding or deductions from pay;
- (D) leave records;
- (E) formal and informal employee evaluations;
- (F) reports relating to the employee's character, credit, work habits, compensation, and benefits;
- (G) medical records; and
- (H) letters of reference or recommendations from third parties, including former employers

Doesn't Include

8 ACC 15.910(d) confirms that it does *not* include:

- (A) information of a personal nature about a person other than the employee if disclosure of the information would constitute an unwarranted invasion of the other person's privacy;
- (B) information relating to an ongoing investigation of a violation of a criminal or civil statute by an employee; or
- (C) an employer's ongoing investigation of employee misconduct.

Medical Records

A medical record is a compilation of your medical history; your family medical history; information about your lifestyle; physical examination and laboratory results; medications prescribed; diagnoses and prognoses; results of treatment and procedures undergone; allergies and other risk factors; disabilities and limitations; results of genetic testing, etc.

Separation is a Must

- All medical records must be kept separate
- Maintain confidentiality, restrict access and keep secure
- I-9s should be with payroll and not personnel file
- I-9s should not be seen by hiring decision makers or supervisors

Payroll Records

- “Payroll record keeping” = system an employer uses to calculate, track and report employee pay.
- Key obligations: Know legal requirements
 Accuracy
 Timely payment/reporting

Payroll Obligations

- Alaska Statute 23.05.140(a) – requires employers to establish at least a monthly or semi-monthly pay period
- Have a timesheet or record of time worked for *each* employee during pay period
- Know employee’s pay rate
- Have I-9 and W-4 forms
- Know of/process any special withholdings

Payroll Obligations

- Alaska Statute 23.05.160 – requires employers to provide written notice of pay rate and pay periods
- AS 23.10.105 – requires employers to post the Dept of Labor’s summary of wage laws in workplace:
www.labor.state.ak.us/lss/forms/sum-wh-act.pdf

Payroll Obligations

- **Payment statements each pay period must include:**
 - dates for pay period
 - rate of pay & hours worked (reg & OT)
 - earnings (gross/net)
 - deductions for tax, Social Sec., FICA, etc.
 - any costs or advances
 - any other authorized deductions

Lilly Ledbetter Fair Pay Act

- **Equal Pay Act: any records that justify pay differentials between men & women – 2 years**
- **Ledbetter v. Goodyear Tire & Rubber Co. (2007)**
 - U.S. Supreme Court (5-4) pay discrimination claims must be filed within 180/300 days of a pay decision
- **LLPA – reverses *Ledbetter* - new illegal act occurs with each instance of discriminatory compensation**
- **Normal 180/300 day filing period inapplicable**

Lilly Ledbetter Fair Pay Act

- **LLFPA does *not* change requirements under Title VII**
- **But, employers fixated on recordkeeping because of potential for a plaintiff to reach back to initial pay decision.**
 - Remember: A plaintiff must point to **both** a discriminatory compensation decision or other practice **and** the current effect of that decision.
- **Examine and consider revising record retention policies**
 - Consider maintaining payroll records, time sheets/cards for the length of employment plus 5 years.
- **Review and update pay and performance management practices, policies, and record**
- **Train managers on new risks (tighter controls on management discretion in compensation decisions)**
- **Conduct compensation self-audits under attorney-client privilege**

Keep in Mind

- 2011 – U.S. DOL released a smartphone app for employees to use to track their work time (Available in English & Spanish)
- U.S. DOL now has staff here in AK
- Federal & state posting requirements are non-negotiable
- Statutory recordkeeping fines can be up to \$10k
- Biggest penalty – Litigation risks

Litigation Discovery

- Notice of potential claim triggers additional retention requirements, *i.e.*, when employer “reasonably anticipates litigation”
- Retention and preservation issues should be addressed at earliest opportunity
- If a claim is made – preserve, preserve, preserve

Litigation Discovery

- Notify all “custodian of records” informally and formally
- Take steps to stop auto-delete functions
- Stop any “recording over” functions
- Maintain records until dispute is over or statute of limitations has expired
- Proactively protect ongoing communications with attorney-client privilege

What Are Relevant Documents?

- **Anything relating to plaintiff's claims or employer's defenses**

- Any document that “is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.”

Relevant Documents (cont'd)

- **Plaintiff's employment records relevant to the claims**

- Plaintiff's personnel file
- Application and hiring documents
- Promotion documents
- Disciplinary records
- Evaluations
- Transfers and changes
- Training records
- Payroll records
- Medical records

Relevant Documents (cont'd)

- **Other documents relevant to plaintiff's claims**

- Relevant policies
- Handbooks
 - Attestations that employee read and agrees to follow handbook provisions
- Trainings: especially harassment, antidiscrimination
- Arbitration Agreements and Dispute Resolution Policies
- Job postings and descriptions
- Records of complaints
- Investigation notes and documents
- Supervisor notes and records

Relevant Documents (cont'd)

- **Employment records regarding other employees, which may be relevant to claims**
 - Plaintiff's supervisors
 - Individuals treated the same as plaintiff under similar circumstances
 - Plaintiff's other alleged comparators
 - Alleged harasser/wrongdoer

Relevant Documents (cont'd)

- **Employer's Defenses**
 - Policies prohibiting discrimination and harassment
 - Employee handbooks
 - Handbook and policy receipts
 - Training records – plaintiff, supervisors, HR personnel, alleged harasser/wrongdoer
 - Decision-making documents
 - Records that would reflect any complaints made (and would reflect that plaintiff did not complain)

Risks

- **Inability to rebut claims or prove part of defense**
- **Attorneys' fees and costs**
- **Exclusion of evidence**
- **Adverse inference in jury instructions—rebuttable presumption that lost evidence would have been helpful to plaintiff**

Example

- **Company receives demand letter from former employee's attorney**

- Plaintiff worked in sales department; terminated for poor performance
- Plaintiff alleges her young manager, John Smith, terminated her because of her age
- Letter threatens litigation if Company does not reinstate her and pay her back pay

Example (cont'd)

- **Existing documents that must be retained**

- Former employee's personnel file and all documents concerning her employment
- All documents relating to her job description, performance metrics, evaluations, and discipline
- John Smith's personnel file and all documents concerning his employment
- Personnel file and documents concerning employment of replacement

Example (cont'd)

- **Additional documents that might need to be retained or that you want to retain**

- Documents reflecting demographic make-up (age) of the sales department
- Documents relating to other terminations in sales department, particularly if for performance

Who May Have Relevant Documents?

- Supervisors (up through chain of command)
- Former Employee (check work area and computer)
- Co-workers
- Human Resources and Accounting Personnel
- Third-Party Contractors (payroll company)

E-Discovery — An Overview

- Electronic methods of collecting and storing data are prevalent – *paperless/paperlight* initiatives
- Changes to Federal Rules of Civil Procedure effective December 1, 2015

Potential E-Discovery Issues

- Storing electronic data for basic document retention purposes and for litigation
- Locating relevant electronic data
- Preserving electronic data
- Reviewing electronic data for relevance and privilege
- Producing electronic data – format and cost

Amendments to Rule 26(b)(1)

Previous Version

"Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense."

New Version

"Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense **and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.**"

Amendments to Rule 37(e)

Previous Version

"Absent exceptional circumstances, a court may not impose sanctions . . . for failing to provide [ESI] lost as a result of the routine, good-faith operation of an electronic information system."

New Version

"If [ESI] that should have been preserved in the anticipation of litigation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court [various enumerated sanctions]."

Data Breaches

- **Federal law doesn't address notification requirements**
- **Best practice is to give notice & identity protection services**
- **Notice and these services may be required under state law**
- **These services (benefits) are usually not a taxable event but must be reported in W-2 or 1099**

Data Breaches

- Alaska's Personal Info Protection Act - Chapter 45.48
- Applies to "covered entities"
- Disclosure is *excused* only if, after a reasonable investigation and after *written* notification to AK's Attorney General Office, the entity determines that there is not a "reasonable likelihood of harm" to consumers has resulted or will result

AK's Protection Act

- Record of determination/notice must be kept for 5 years and is considered a "public" record
- Covered entities include any person that owns or licenses unencrypted data that includes personal information
- SS#, DL #, Account #, Passwords, etc.
- Bottom line: Usually employers

AK Protection Act

- Written notice to last known address or electronic if common way of communicating
- Substitute notice can be approved if cost of required notice would cost > \$150k or >300,000 people or entity doesn't have sufficient contact info to provide notice
- Notice – as expedient as possible without unreasonable delay (unless it would impeded criminal investigation)

Few "To Dos"



- Adopt conservative recordkeeping practices
- Adopt a document retention policy & follow it
- Self-audit & cure issues
- EEOC/OSHA online account
- All posters up (not just W&H)

Use Your Resources

State of Alaska Dept of Labor & Workforce
<http://labor.state.ak.us/lss/whhome.htm>

U.S. Dept of Labor (Fact Sheet No. 21):
<https://www.dol.gov/whd/regs/compliance/whdfs21.pdf>

Questions?




