

Record Retention Policies for Human Resources Departments

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The need for a records retention policy has always been great; today, the need is greater than ever.

EVERY HOUR OF every business day, human resources departments generate or receive records, lots and lots of records. These records—dozens, hundreds, or thousands—range from resumés, interview notes, testing data, contracts, wage and hour reports, job evaluations and Byzantine forms demanded from everyone

from corporate management to the Equal Employment Opportunity Commission to the Department of Labor to the Internal Revenue Service.

Record retention policies are necessary for businesses in general and human resources departments in particular. They facilitate the effi-

cient operation of the business, protect against allegations of spoliation, and preserve significant historical accomplishments. They also provide a basis for the defense when employees—or former employees—bring claims against the employer.

As everyone realizes, the nature of what constitutes a “record” has changed. It no longer means a roomful of file cabinets filled with paper. It now encompasses electronic records in their many forms. And as everyone has come to appreciate, rounding up electronic records can be an ever bigger challenge than keeping track of the paper versions.

This proliferation of records and information creates basic questions that we address in this article. How do you manage the cost of managing this documentation? How do you store it? How do you keep track of it? How is it retrieved when needed? How much redundancy is needed to safeguard the interest of the business? And on the most basic level, what kinds of “records” should be retained?

WHAT IS A RECORD? • The International Standards Organization defines a record as, “information created, received, and maintained as evidence and information by an organization or person, in pursuance of legal obligations or in the transaction of business.” The Federal Records Act goes even further by defining a record as, “all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form, made or received by an agency in connection with the transaction of public business as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the government.” If a record is, “any information created during and maintained as evidence of business transactions, irregardless of format,” then a records retention policy is the efficient and systematic control of the creation,

receipt, maintenance, use, and disposition of records, including processes for capturing and maintaining evidence of and information about business activities and transactions in the form of records.

Double-Edged Sword

The digital age has produced new types of records. Thirty years ago, computer databases of employee information did not exist in all but the largest human resources departments. Back then, only science fiction aficionados dreamed of e-mail. Veteran managers in “personnel” departments have witnessed a passing stream of microfilm, microfiche, computer tapes, floppy disks, CD-ROMs and now TIFF images become the preferred format for storing data.

WHERE DO YOU START? • Attorneys are increasingly being asked to assist records and information managers develop procedures for human resources departments to review record keeping practices and limit business risk in times of audit and litigation. Some of the questions attorneys need to ask include:

- What is the scope of the records management policy and plan?
- Who are the employees who are responsible for assuring records are maintained according to the business’s policy and practices?
- Does the business have a centrally managed or network-managed model?
- Are the responsibilities of the employees who are charged with maintaining the human resources records clearly defined; and
- (Perhaps most importantly) do the employees who have the responsibility for maintaining the policy have the authority to assure it is uniformly enforced?

The decision to implement a records retention policy involves the balancing of po-

tentially competing interests. These include, but are not limited to, legal obligations, efficiency considerations and pre-litigation concerns.

Establishing a workable records retention policy is neither a quick or easy process. It will require a lot of thought and a lot of work but the eventual rewards will exponentially outweigh the cost.

Enlist Professional Help

A records retention policy for the human resources department should be established by a team of professionals who are well versed in the needs of the business. Team members should include an executive who has enough authority to make sure the policy ultimately sticks, a human resources professional, a management information systems liaison, the present “custodian of records” and most importantly, legal counsel. Larger departments have professional staffs who are often members of such organizations as the Association for Information Management Professionals (“ARMA”) or one of its affiliates to manage a businesses’ handling of documents.

Begin with a Hierarchical Inventory

The team should inventory the documents which are presently being generated, received, or kept. The goal is to establish an exhaustive and accurate listing of the records which are presently on hand. This does not mean that you must describe every paragraph of every page of every record. It does mean that the inventory is hierarchical, and should include locations, file drawers, or box labels. Do not stop with the obvious; initially require searching through every nook of every cranny. The time-worn “garbage in/garbage out” warning still applies when creating the inventory.

OUTLINES OF A BASIC POLICY • According to the American Corporate Counsel Association’s Records Retention Manual, a reasonably responsible retention policy should include consideration of the following elements:

- All records are retained for at least the minimum period stated in any applicable statutes or regulation;
- All records concerning obligations of the company are retained for a period of time assuring their availability when needed;
- Records are made and maintained substantiating compliance with relevant laws;
- Document destruction occurs pursuant to a standard policy developed for business reasons so that the company cannot be accused of deliberately destroying records in anticipation of a specific problem;
- Destruction procedures include a mechanism which permits management to halt the destruction of records (a) upon receipt of service of legal process requiring production of documents (b) upon learning of a relevant government inquiry, or (c) during the course of voluntary cooperation with government authorities;
- Vital records are identified and safe guarded; and
- The privacy and security of records are appropriately assured.

These considerations are especially vital for human resources department since the privacy of employee records are a paramount concern.

TO KEEP OR NOT TO KEEP, AND FOR HOW LONG? • Human resource departments need retention schedules which reflect current legal, operational, and historical requirements. A myriad of federal, state and sometimes even local statutes and regulations dictate the minimum period for which certain human resources records should be maintained. The records re-

tention policy should be a tool that adds value; so it should permit quick location of the documents that the company needs, and prompt disposal of the ones it does not need. The policy should also reflect the reality that, in a human resources department, some documents need to be maintained long after the minimum period required by statute. While there are often no bright-line guides to establish how long human resources records should be retained, pragmatic and economic considerations dictate that records should not be maintained forever. Attorneys should assist their clients in developing a document retention program which involves the systematic review, retention, and destruction of documents received or created in the course of business.

Attorney Input

A document policy may be deemed a mitigating factor in litigation when a human resources department destroys documents pursuant to it, while a human resources department's failure to have a coherent policy may be an aggravating factor which will increase the risk of being found liable and multiply the amount of damages. It cannot be overemphasized that if an investigation or litigation is taking place or even contemplated, lawyers are under an ethical and legal obligation to advise their clients to maintain any potentially relevant documents even if it means maintaining them well in excess of the minimum periods dictated by the records retention policy. However, it also cannot be overemphasized that if an investigation or litigation is not taking place and is not contemplated the records retention policy must be followed to a fault. Every attorney who advises businesses knows that the Achilles heel in almost every employment case involves paper found in the business's own file. Businesses must understand that maintenance of records for longer than necessary can preserve evidence of potential violations of the law which might

have otherwise gone unnoticed. Those who believe that self-interest rules the world can encourage clients to adopt and enforce an efficient records retention policy by reminding them that by doing so we can reduce the chance of the discovery of a nettlesome document in the midst of a lawsuit.

Establishing a Timeline

Once the documents have been inventoried, a timeline should be established for the eventual destruction of documents. Federal, state, and local statutes and regulations should only be the starting point. As an example, a business would be remiss if it were to allow the destruction of a document before the expiration of the applicable statute of limitations for any cause of action which may be related to that document. If we move outside of the human resources arena, we can appreciate the importance of retaining a lease through the period of the leasehold whether it is a 20-year lease or a 99-year lease.

Retention Schedule

An integral part of the records retention policy is the retention schedule. The schedule expresses the retention period of each file category. Once this is done, one of the many procedures which may be used to facilitate the policy's operation is to have a color code that corresponds to the year which the file should be reviewed for destruction. As an example, a purple label could indicate the file is to be reviewed for destruction in 2004; a blue label could indicate the file should be reviewed for destruction in 2005, and so on.

Decimal Format

An alternative method for categorizing files involves using a Dewey Decimal system format. As an example, a file's categorization could be 100.200.001.2004, where 100 indicates the file belongs to Human Resources, 200 indicates the

file consists of employment applications, one indicates the file belongs to the first applicant and 2004 indicates the year the file should be reviewed for destruction.

Reviewing the Policy

Record retention policies should be reviewed annually. If the client is small enough to only destroy records annually, this would be an excellent time to review the policy. Once again, a final modicum of thought needs to be employed before the final shredding takes place. Files should be quickly perused to make sure they were labeled accurately and they are indeed ready to be destroyed. Even with the best record retention policy in place, weeding out documents to be destroyed is never a mindless process.

Identify the Privileged Documents Before they Go Into the System

One of the biggest headaches counsel faces occurs when privileged documents are intermixed with personnel records or other potential discovery. Without begging the question of asking how the documents became intermingled to begin with, most would concede that having a well-informed person such as an attorney or paralegal comb through the collection to isolate privileged documents can be a budget breaker. Everyone knows that privileged communications should be clearly marked. As an additional safeguard, privileged documents should be produced on a uniquely colored paper. If privileged documents arrive in the human resources department on standard stock, they should be photocopied onto the colored paper and the original should be destroyed. The color selected should be distinct enough to achieve the desired purpose but discrete enough to maintain the decorum of the human resources department.

THE ISSUE OF SPOILIATION • Counsel needs to make clear to the human resources department that once an investigation or litigation is imminent the destruction schedule should be suspended. Defending a claim for spoliation is an aggravation no one needs. As we have recently learned, spoliation is the destruction, loss, or significant alteration of evidence, whether it is a document, software, or a tangible piece of property or equipment. Although the law is both unsettled and rapidly evolving, violators can be subjected to civil and in some instances criminal penalties. Although preservation of information is not specifically covered by the Federal Rules of Civil Procedure, case law has developed the rule that when it is reasonably foreseeable that a claim may be asserted, a party must preserve relevant information.

Penalties

In the past, spoliation of evidence was punishable as discovery abuse. Evidence destruction by a plaintiff could lead to dismissal of the complaint. Defendants who were found to have committed spoliation could have had defenses stricken or could have faced monetary sanctions. Now, in some jurisdiction, spoliation is recognized as an independent tort or criminal claim, even against people or entities who are not parties to the underlying litigation.

Routine Destruction Pursuant to Policy is Not Spoliation

As the underlying theme of this article suggests, even considering the issue of spoliation, the duty to preserve records is not boundless. Parties owe a duty of care to preserve evidence if a reasonable person in his or her position should have foreseen that the evidence was material to a potential action.

Courts are usually forgiving when records are destroyed during the normal course of business. To prove that the destruction was a routine

business event, and not spoliation, businesses must have retention schedules and destruction list which were approved by management before the event in controversy occurred. Even with this, destroying documents when there is even a threat of litigation is dangerous.

A conservative course of action is to keep any record if the sole purpose of destroying it would be to prevent a potential litigant from discovering it. Once there is a concern that a document could expose a party to liability, it is effectively too late to get rid of it, whether or not a lawsuit has been filed.

ENFORCING THE POLICY • Typically, the problem with records retention problems is not with their creation, it is with their enforcement. Brad Jordan is the managing partner of the Jordan Lawrence Group, a records management consulting firm in Ellisville, Missouri. In a recent article in the *St. Louis Post-Dispatch*, Jordan said, "Most companies have great policies and procedures. They just don't enforce them. Regular disposal of unneeded documents should be as routine as paying employees. It should be an integral part of a company's program of classifying and storing records....If you

need records, you want to have them and be able to find them," Jordan said. "If you don't need them, you should get rid of them and save the storage costs." A large bank had more than 1 million boxes in storage in 40 cities when Jordan's firm was retained. The boxes were stored under 300,000 different categories, although many banks generally have only 800 to 1,200 types of records. Companies run into trouble when they have a huge number of names for things rather than a standard classification.

CONCLUSION • Several prominent businesses have faced disgrace if not ruin as a result of prematurely destroying business records. In many cases, the records that were destroyed or lost related to workplace issues. The businesses that suffered the effects of the destruction of records might well have been able to defend themselves from the underlying claims relatively easily. To avoid having its best defenses hampered at the outset, your client should have a carefully crafted and vigorously enforced records retention policy in place. Once a policy is in place the job does not stop there—it will have to be reviewed and amended regularly to take account of new commercial practices, new methods of storage and changes in the law.

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**PRACTICE CHECKLIST FOR
Record Retention Policies for Human Resources Departments**

There is no universal records retention policy that is right for every business. However, a records retention policy should aim to comply with current statutory, legal, and regulatory requirements on retention and data protection, and at the same time minimize retention costs, and improve operational efficiency.

- A business should take charge of its record retention policy rather than simply relying on storage vendors, who have no incentive to reduce the number of records they store.
- Once the records retention policy is in effect, it must be enforced. In lawsuits, businesses need to be able to show that they consistently enforced their policy.
- The names for stored records must be standardized. Companies should have a few dozen or a few hundred names for records, not several thousand.
- Businesses should consider setting up a distinct program for managing electronic records, which may be harder to inventory than physical records.
- Businesses should test their records retention policy by trying to circumvent it. Internal audits or tests should be performed before outsiders get a chance to do so.
- The records retention policy should require that all routine record disposal is frozen as soon as the business is advised of pending litigation or a relevant document request.
- Businesses should determine how much redundancy is necessary. Key documents should be backed up or copied in an alternative format and archived away from the primary storage site.
- Business clients should be cautioned that there is no one-size-fits-all approach to documents retention. No matter how good guidelines may appear, businesses must accept the responsibility to tailor them to their own unique needs and requirements.

APPENDIX

Illustrative Federal Requirements for Record Retention

- Affirmative Action Executive Order, implemented by the Office of Federal Contract Compliance Program of the U.S. Department of Labor, 41 C.F.R. 60-1.12

__Any personnel or employment record made or kept by the contractor. Two years.

Age Discrimination in Employment Act (ADEA), 29 C.F.R. §1627.3

__Payroll or similar records showing each employee's name, address, date of birth, occupation, rate of pay and weekly compensation. Three years.

__Records and documents relating to recruitment job advertising, job orders submitted to employment agencies or unions, screening, interviewing, testing, hiring, training, transfer, promotion/demotion/layoff/recall, discharge and other personnel decisions. One year.

__Employee benefit plan documents. Duration of the plan plus one year.

- Employee Retirement Income Security Act (ERISA), 29 USC §§1001, et seq.; ERISA sections 107, 209, 29 U.S.C. §§1027, 1059.

__Records used to prepare disclosures required by ERISA, including vouchers, worksheets, receipts and resolutions. Six years from the Date Disclosure was due.

Fair Labor Standards Act (FLSA) and Equal Pay Act, 29 C.F.R. §§516 and 1620.32

__Records containing employee information, payrolls, employment contracts or collective bargaining agreements, certificates and notices of the Wage and Hour administrator, sales and purchase records. Three years.

__Daily time cards and sheets, wage rate tables, work time schedules, order, shipping and billing records, records of additions to or deductions from wages paid, any documents pertaining to differences in wages, salaries or benefits paid to employees of the same establishment based on sex. Two years.

- Family and Medical Leave Act (FMLA), 29 C.F.R. §825.500

__Basic payroll and employment data, dates of any FMLA leaves taken by employees, written notices, descriptions of benefits and records of any FMLA disputes. Three years.

Federal Mine and Safety Act, 30 U.S.C. §801, etc.; 30 C.F.R. §50.40

__Records of employee exposure to toxic materials and harmful physical agents. Not specified.

__Records of accidents, injuries, illnesses and related investigations. Five years.

- Immigration Reform and Control Act, 8 U.S.C. Sec. 1324a et seq.; 8 C.F.R. §274a.2(b)(2)(i)(A)

__I-9 forms. Duration of employment plus one year, minimum of three years.

- Labor Management Disclosure and Reporting Act, 29 U.S.C. §§431-41; 29 C.F.R. §405.9

__Information regarding the financing of any effort to persuade employees to exercise or not exercise their right to organize. Five Years.

- Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. Sec. 1801 et seq.; 29 C.F.R. §§40.51(k) and 40.53

__Employee records, including hours worked, wage rates, piecework units earned, piecework rates, total pay period earnings, withholdings and the reasons, net pay. Three Years.

- Occupational Safety and Health Act (OSHA), 29 U.S.C. §651, et seq.; 29 C.F.R. §1904 et seq.

__Log and Summary (Form 200) and supplementary record (Form 101) of occupational illnesses and injuries. Five years.

__Required medical exam. Thirty days longer than employment.

__Employee medical records concerning exposure to potentially toxic or hazardous substances. Duration of Employment plus 30 years.

- Service Contract Act, 41 U.S.C. §351-58; 29 C.F.R. §§4.6(g)(1) and 5.5(a)(3)

__Name, address, social security number, job classification, rate of pay and benefits, total daily and weekly work hours and compensation and deductions for each employee. Three years.

Title VII (including Americans with Disabilities Act), 42 U.S.C. Sec. 2000e et seq.; 29 C.F.R. §§1602 and 1607

__Any personnel or employment record made or kept by the employer, including applications. One year.

__Personnel records relevant to any complaint the charging party and all other employees holding similar positions, including application forms and tests completed by all candidates for the same position, successful or otherwise. Until final disposition of the complaint or action.

__Annual reports of number of applicants, hirings, promotions, and terminations, broken down by race, sex, national origin, specific record keeping requirements for labor organizations, state and local governments, elementary and secondary school systems, and colleges and universities. Not specified.

- Vietnam Era Veterans' Assistance Act; 41 C.F.R. §60-250.80

__Records of any complaints or actions taken under the act. One year.

__Application or personnel form for each covered applicant or employee, showing reasons for adverse decision. Not specified.