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Counsel for the Veterinary Profession

Employee Files & Records ©

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Overview

What types of employee records do you have to maintain? How long do you have to retain copies of various employee records? Are there certain documents you need to save longer than others? Can you keep all employee records in one file? Should medical doctor notes or I-9 employment eligibility documents be kept in the employee's "personnel file"? What about payroll and tax records? How about correspondence and records generated during an internal investigation? At what point can you start destroying records? When and how must documents be destroyed? Are there specific laws pertaining to document shredding?

The simple answers to all these questions are..... **there are no simple answers.** These are some of the difficult questions facing practice owners and managers responsible for interpreting and ensuring proper compliance with the dozens of federal and state laws governing employee records retention. Most of us realize it would be impossible to retain every employee record forever. One would need to devote a separate building just to store these records. While there is considerable debate about how long various employee records should be kept, employers should err on the side of retaining any employee records they think might be needed in future. It is also advisable to establish a schedule for auditing your practice's record keeping, including employee files, as well as a consistent program for records destruction. However, be cautious that even with such a schedule in place, if a discrimination charge or lawsuit is filed against your practice, all records relevant to the charge must be kept until "final disposition" of the charge or lawsuit. Examples of individual employee documents that may be needed in a lawsuit include:

- Official Employee Folders
- Application & hiring records
- Promotion documents
- Disciplinary records
- Performance reviews
- Training records
- Payroll records
- Medical records
- Policies & procedures
- Job descriptions
- Employee grievance & complaint records



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- Job postings/advertisements
- Supervisor's notes & records

There are other records and documents pertaining to all employees in the practice that should also be retained, including:

- policies prohibiting discrimination & harassment
- handbooks
- handbook & policy acknowledgements
- training records (for all)
- decision-making documents

Why Retain Employee Documents

Several statutes & regulations require employers to create and/or retain various types of employment records for varying periods of time. It is interesting, and confusing, to note that requirements for retaining the same or similar records are often required under more than one law. Unfortunately, the periods of time required to retain this information may vary from federal to state law or between one law and another. This paradox merely adds to the confusion over how long to retain employee records. Here is a listing of some of the laws that require employers to retain various employee records:

Equal Pay Act (EPA)

Fair Labor Standards Act (FLSA)

Title VII of the Equal Rights Act

Age Discrimination in Employment Act (ADEA)

Family Medical Leave Act (FMLA)

Employee Retirement & Securities Act (ERISA)

Occupational Safety & Health Act (OSHA)

Lilly Ledbetter Fair Pay Act (LLFPA)

Uniform Guidelines on Employee Selection Procedures (UGESP)

Immigration

Reform & Control Act (IRCA)

Federal Insurance Contribution Act (FICA)

Federal Unemployment Tax Act (FUTA)

Lilly Ledbetter Fair Pay Act

One piece of recent legislation has thrown a “monkey wrench” into figuring out how long to retain employee records. The Lilly Ledbetter Fair Pay Act, passed by President Obama during his first few days in office, extends the window of opportunity for a current or former employee to bring suit against an employer for perceived discriminatory pay practices. Lilly Ledbetter, a former Goodyear Tire & Rubber Company employee, filed a discrimination suit against her former employer based on her gender. Specifically, Ms. Ledbetter claimed Goodyear lowered her performance reviews which resulted in smaller merit increases for years. This case made it all the way to the US Supreme Court which upheld her claim, but limited the judgment award to



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discriminatory practices that occurred within the previous 180/300 days. However, in light of the passage of the Act, employees are now allowed to file suit for discriminatory pay practices that were instituted years prior. Thus, an employer may now need to produce employee records that go back for many, many years to refute the charge. If no documentation is available, the practice may not be able to rebut claims or provide an adequate defense for its actions. This will most likely result in the practice losing the claim and also having to be responsible for attorney's fees & costs. Further, some evidence may be excluded without the proper and legal supporting documentation. Finally juries may think records that are not available would have only supported the claim made by the plaintiff.

What to Do

What does this new law mean for practices and their recordkeeping requirements? In light of recent legislation, there is no longer a universal answer for how long to keep records. Each practice should develop its own records retention strategy based upon its own culture, risk tolerance, and available resources. Since the retention requirements of various laws overlap, employers should err on the side of retaining any employee records they think might be needed in future. As a minimum, each practice should take the following steps:

- Develop, examine &/or revise its record retention policies and stick to them; decide how long each piece of documentation should be kept, how it will be stored, and, ultimately, how it will be destroyed.
- Establish separate files for employee records, as follows:
 - Official Employee Folder-one file for each employee
 - Individual Employee Medical Folder- one file for each employee
 - I-9 Folder-one file for current employees and one for terminated employees by year
 - Health & Safety Training Folder (OSHA)-one file for each employee
- Review &/or update pay and performance management policies to ensure there are no indications of discrimination or unfair labor practices ensure electronic records policy is consistent w/hard copy records policy.
- If you retain records electronically, ensure your electronic records policy is consistent with your hard copy records policy since electronic signatures can represent enforceable agreements if they clearly & explicitly deliver terms of agreement.
- Train managers and supervisors on the new risks of unfair pay practices.
- Conduct an annual audit of all employee records

Developing a Records Retention Schedule

A records retention schedule will help a practice ensure that it keeps the records it needs, for as long as they may be needed, and then destroys them when they're no longer useful. However, you have to know what you have and how long to keep it—legally and for your own business purposes—before you can establish an efficient records management system. That's why it's important to inventory your records and develop a schedule. Here are some guidelines for establishing your own records retention schedule:



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<u>Records</u>	<u># Yrs</u>
Recom: all HR-related records	6
Any record to support pay diff: men vs women	3
Payroll records, incl comp p/week	3
IRS tax-related payroll info	4
FMLA/USERRA	3 after term
I-9	3 after DOH or 1 after term
Pension & welfare plan documents	6
OSHA logs & summary of recordable injuries	5
Employee exposure to toxic substances, incl MSDS	30
Employee workers compensation claims	duration of employment + 30
Resumes & applications	1-2
Polygraph test results	3

Remember, retaining employee records is something every employer is required to do. What, how and for how long you save is dictated by law. While developing and adhering to your records retention policies may be cumbersome, think of it as insurance for your practice. Without having the proper records, you may become vulnerable to unfounded claims by former employees that could cost you considerable time and money. That's why a little effort along the way can save you lots of headaches in the future.