

EFFECTIVE RECORDKEEPING

31st Annual Employment Law Conference

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INTRODUCTION

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DOCUMENTATION AND RECORDKEEPING – INTRODUCTION

- What will we cover today?
 - How to prepare critical employment-related documents and understand how to use them to your advantage
 - What goes in, and what should stay out of, a personnel file
 - How long to keep various types of employment records
 - How to develop appropriate document retention policies

EMPLOYMENT APPLICATIONS

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EMPLOYMENT APPLICATIONS – TIPS

- Maintain for all employment applicants
- Include practical considerations such as education, experience, licenses, certifications, degrees, etc.
- Ask whether applicant has ever been terminated or asked to resign
- Ask whether applicant has ever signed a non-compete, non-solicitation, confidentiality, or other agreement with a restrictive covenant
- Include authorization for Employment Reference and Release of Information
- Do not ask citizenship status unless required for the job (i.e. – defense contractors)
 - Can ask if they require sponsorship
- Ask for arrest/convictions only if job-related
 - State law considerations

EMPLOYMENT APPLICATIONS – OTHER CONSIDERATIONS

- Use application to establish employment at-will relationship
- Include waiver of statutory time limitations for filing actions and add a shorter limitations period
- Refer to drug testing if applicable
- Include certification that all information provided is accurate

POST-HIRE RECORDS

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POST-HIRE RECORDS – INTRODUCTION

- I-9 Forms and E-Verify
- Other Hiring Paperwork
- EEO-1 Reports
- Job Descriptions
- Essential Written Policies

FORM I-9 BASICS

- Revised form effective May 2013
- Required for every employee
- Should be completed after “hire” not with application
- Employee must complete section 1 of form on or before 1st day of hire
- Entire form must be completed for every employee, within 3 days of the date of hire

OTHER HIRING PAPERWORK

- W-4s
- State and local tax withholding forms
- Direct deposit authorization
 - Michigan law – may have to be voluntary and in writing
- Acknowledgment of receipt of employee handbook
- Other deductions from wages
- Consider:
 - Non-competition and/or non-solicitation agreement
 - Confidentiality agreement
 - Arbitration agreement

JOB DESCRIPTIONS

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JOB DESCRIPTIONS – ELEMENTS

- Job title and classification
- Purpose
- Key accountabilities
- Specific duties/responsibilities
- Essential functions
- Minimum qualifications

ESSENTIAL WRITTEN POLICIES

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ESSENTIAL WRITTEN POLICIES – IMPORTANCE

- Communicates expectations to employees
- Ensures consistency in employment practices
- Provides admissible evidence of employer practices in litigation
- Establishes business-related reasons for an employment action

ESSENTIAL WRITTEN POLICIES – EXAMPLES

- Employment At-Will
- Equal Employment Opportunity
- Anti-Harassment/Complaint Procedures/Non-Retaliation
- Document/Recordkeeping
- Electronic Communications and Social Media
- Leaves of Absence/FMLA
- Michigan Social Security Privacy Act
- Any other policies or notifications that may be legally required for certain employers

ESSENTIAL WRITTEN POLICIES – DISTRIBUTION

- Have employee execute and date standard documents
 - Acknowledgments of receipt of handbook, work rules, attendance guidelines, training
- Make sure the employees sign, date and understand policies
- Keep acknowledgments in employee's personnel file
- Obtain additional acknowledgments when distributing amended or revised policies
- Ensure policies are distributed to all employees

DISCIPLINARY AND TERMINATION RECORDS

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WHY DOCUMENTATION IS IMPORTANT

- Consistent documentation of performance discussions and discipline can help an employer defend against an employee's discrimination claim
 - Similarly-situated employees disciplined in similar manner is evidence against discrimination
 - Showing employee was disciplined in the same manner before and after protected activity can show employee's protected activity was not causally connected to adverse employment action
 - Documents signed by employee can show notice
 - Consistent documentation can help successive supervisors

WHAT SHOULD BE DOCUMENTED?

- Coaching/counseling sessions
 - Timely address issues with employees
- All disciplines
- Reports/complaints from employees

HOW TO DOCUMENT PERFORMANCE AND DISCIPLINARY ISSUES

- All parties' names and the dates actions were taken
- Take notes contemporaneous with actions and events
- Take accurate notes
- As detailed as necessary

SHARING DOCUMENTATION WITH THE EMPLOYEE

- Do I have to share the document with the employee?
 - If discipline, yes
 - If coaching/counseling, not necessarily
 - If documenting an employee complaint, no

TIPS FOR DOCUMENTING PERFORMANCE AND DISCIPLINARY ISSUES

- Create procedures and guidelines for a formal performance appraisal program
- Managers and supervisors should work with human resources in completing performance evaluations
- Supervisors should be cautioned to be both fair and accurate
- Should not grade higher solely in effort to motivate the employee to work harder
- Be aware of and understand major EEO, ADA and FMLA issues
- Be aware of and understand all company policies

TIPS FOR DOCUMENTING PERFORMANCE AND DISCIPLINARY ISSUES

- Document as soon as possible after they occur
- When faced with significant employee misconduct, obtain written statements from other employee witnesses as soon as possible
- Disciplinary documentation should include the date imposed, a description of the incident (include date), the work rule or policy violated, discipline imposed, and future consequences
- Give a copy of all written discipline and performance counseling to employee and request his/her signature
- Document termination meeting and have a witness present

THE PERSONNEL FILE

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BULLARD-PLAWECKI RIGHT-TO-KNOW ACT

- Michigan law that provides employees with the right to access their personnel files
- Defines “personnel files”
- Specifies certain information that must be excluded from personnel files
- Does not require employer to create any specific records

PERSONNEL FILES – DEFINITION

- A record that identifies the employee and is used to determine or affect an employee's qualification for employment, promotion, transfer, raises, or discipline
- Need not be kept in a single "file," but to the extent documents are kept, they are "personnel records" under the Act
- Examples:
 - Attendance records
 - Performance evaluations
 - Disciplinary write-ups

PERSONNEL FILES – DEFINITION

- Examples of what is NOT a personnel record:
 - Letters of reference
 - Company staff planning materials, which identify other employees (including documents regarding salaries, bonuses, promotions, and job assignments)
 - Medical reports and records
 - Personal information about a person other than the employee if disclosure of the information would be clearly an unwarranted invasion of the other person's privacy
 - Documents pertaining to grievance investigations that are kept separately and not used for decisions relating to promotion, transfer, compensation, or discipline

PERSONNEL FILES – EMPLOYEE ACCESS

- Employee may review own personnel file periodically
- Review no more than twice per year
- Review should be at a location convenient to the employee's workplace and during normal office hours
- Employer may also mail a copy to employee
- Employee is entitled to a copy after reviewing
 - Employer may charge for copying

CHALLENGING THE CONTENTS OF FILES

- Employee may challenge the contents of his or her own personnel file
- If employee disagrees with information in the file, he or she may request that the material be corrected or removed
- If employer and employee do not agree that such material should be corrected or removed, employee may submit written objections
 - Must be added to personnel file and retained for as long as the disputed document is retained
 - Objection may not exceed 5 sheets of 8-1/2-inch by 11-inch paper
- If employer or employee knowingly places false information in personnel file, both have legal remedy to have false information expunged

DISCLOSURE OF FILE CONTENTS

- Discipline records, letters of reprimand or other disciplinary action about an employee cannot be disclosed to a third party unless written notification is sent to employee's last known address
 - Exceptions:
 - Employee has waived requirement of notice in employment application
 - Documents have been ordered in a legal action (subpoenas)
 - Disclosure has been requested by government agency (i.e. – EEOC)
 - Disclosure is to the employee's labor organization
- Before disclosing personnel files to anyone, employer must remove disciplinary records more than four years old

PERSONNEL RECORDS IN LEGAL PROCEEDINGS

- Employers may not use personnel records which were excluded from an employee's personnel file in judicial or quasi-judicial proceedings
- If the record was not excluded intentionally, it may be used upon permission of the employee
- If employee argues material should have been included, it must be admitted

DOCUMENT RETENTION POLICIES

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WHAT IS A DOCUMENT RETENTION POLICY?

- Provides for systemic review, retention and destruction of documents created or received in the course of business
- Identifies documents that need to be maintained, the length of time and provides guidelines for destruction
- Provides for suspension of normal destruction procedures when litigation is reasonably anticipated

DOCUMENT RETENTION POLICIES – CONSIDERATIONS

- No one-fits-all approach
- Employers should consider:
 - Appointment of record retention team
 - Uniform application of policy
 - Laws and regulations dictating policy
 - Issues relating to pre-litigation and active litigation
 - Education and training
 - Dealing with privileged, proprietary or highly sensitive materials
 - Dealing with electronic media
 - Periodic auditing for compliance

DOCUMENT RETENTION POLICIES – ELEMENTS

- Purpose of the policy
- Scope of the policy
- Record Retention Schedule
 - What to keep and for how long
 - Statutory requirements
 - Litigation – statutes of limitations
 - Business practicalities
 - Ease of administration
- Litigation Hold Policy and Procedures

LITIGATION HOLD PROCEDURES

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LITIGATION HOLD POLICIES

- Employers have duty to preserve relevant information when litigation is “reasonably anticipated” and must place a litigation hold on relevant information
- Employers should have an internal litigation hold policy and procedure in place and ready to implement when necessary
- Employers should train managers, supervisors, and other key individuals to understand litigation holds

FAILURE TO PRESERVE RECORDS IN LITIGATION

- Sarbanes-Oxley
 - Federal law with criminal penalties for various violations related to document retention
- Doctrine of Spoliation
 - Common law doctrine where a presumption or inference may arise that non-produced evidence would have been adverse to the offending party

DOCUMENT RETENTION TIME GUIDELINES

Accounting Records

Document Type	Years	Other Retention Period
Accounts Receivable	10	
Annual Financial Reports		Indefinitely
Bank deposits slips	5	
Bank Statements	5	
Budgets	2	
Business Income Tax		Indefinitely
Cancelled Checks - Taxes (Payroll Related)	3	
Dividend Checks		Indefinitely
Employment Security Tax		4 years after date return is due or filed, the later of the two
Financial - General Ledger		Indefinitely
Financial Statements - Annual		Indefinitely
Financial Statements - Auditor Reports		Indefinitely
Financial Statements - Monthly (and supporting documents)	7	
Insurance - Business Insurance Policies		Indefinitely
Payroll	4	
Promissory Notes	7	10 years if issued by State of Michigan, city, village, school district, county, township, special assessment or public or quasi-public corporation in State of Michigan.
Purchases - AP Invoices (including petty cash vouchers)	7	Indefinitely for Assets
Purchases - Employee expense reports	7	
Taxes - Depreciation Records		Indefinitely
Taxes - Pension/profit sharing informational returns	6	
Taxes - Sales and use tax returns		4 years after date return is due or filed, the later of the two

DOCUMENT RETENTION TIME GUIDELINES (CONT.)

Employment/Personnel Records

Document Type	Years	Other Retention Period
§6047(b) Trust or Retirement Plan Contribution		Until distribution
Documents required under the Family Medical Leave Act	4	
Employee Manuals/Handbooks		Indefinitely
Employment and Wage Hour Records	4	
Employment Tax Records; Wage Contribution Plan, Sick Payments; FICA Records; Social Security; Federal Unemployment Tax		4 years after date return is due or filed, the later of the two
Form I-9 Employment Eligibility Verification		3 years after the date of hire or 1 year after termination, whichever is longer.
H-1B Labor Conditions Application Public Access File		1 year after last date on which any H-1B non-immigrant is employed under the LCA, or if no non-immigrant was employed under the LCA, then 1 year from the date the LCA expired or was withdrawn.
Interviewer Records and Notes		1 year (2 years for Affirmative Action Employees)
Job Advertisements		1 year
Job Applications		3 years after rejection or 6 years after termination
Personnel Files		Indefinite for current employees, 6 years for former employees.
Unemployment Insurance	6	
Withholding Tax Statements		4 years after due date of tax or date tax paid
Workers' Compensation		3 years after occurrence of injury

DOCUMENT RETENTION TIME GUIDELINES (CONT.)

Employee Benefit Plans

Document Type	Years	Other Retention Period
Documents filed subject to the Labor-Management Reporting and Disclosure Act of 1959		5 years from filing date
Employee Benefit Plans		6 years after filing or 1 year after plan termination, whichever is longer
ERISA Plan Descriptions and Related Documents		7 years after filing

Corporate Records

Document Type	Years	Other Retention Period
Annual Reports	7	
Bylaws, Charter & Minute Books		Indefinitely
Dividend Records		Indefinitely
Cancelled Stock Certificates		Indefinitely
Copyright & Trademark Registrations		Indefinitely
Documents Affecting Title to Real Estate		15 years beyond the date of ownership
Government Contracts & Subcontracts		3 years after final payment unless contract terms require longer
Patents & Patent Licenses		26 years after filing
Records of Liquidation of Subsidiaries		Indefinitely
Reorganization Records		Indefinitely
Written Contracts	7*	*after termination or expiration

QUESTIONS?

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Thank You



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