

# EFFECTIVE RECORDKEEPING

31<sup>st</sup> 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

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# 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

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# 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

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# 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

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# 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

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# 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

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# WHAT SHOULD BE DOCUMENTED?

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

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# 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

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# 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

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# 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

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# 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

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## 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

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# 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

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## 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

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# 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

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# 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

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# 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

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# 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

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# 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

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# 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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