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Materials

# HR Recordkeeping: Practical Strategies for Maintaining an Accurate and Efficient Records Trail

Presented by:

**Jason Ritchie**  
**Holland & Hart LLP**

Wednesday, May 8, 2013  
1:30 p.m. to 3:00 p.m. Eastern  
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11:30 a.m. to 1:00 p.m. Mountain  
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## **HR Recordkeeping: Practical Strategies for Maintaining an Accurate and Efficient Records Trail**

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### **About Personnel Files**

- ❑ Not required, but you need a secure location to keep all the information you use to make employment decisions.
  - Personnel files are business records.



## About Personnel Files

- There should only be **one** official personnel file.
  - Beware of supervisor “desk files.”
  - Supervisor notes should just be reminders.
  - Originals always go in the official file.
    - There should only be one original.
    - It should be dated and signed!!!

## About Personnel Files

- If your company is sued, the first thing the lawyer for the employee will request is the personnel file—and the lawyer will want all the personnel files, including any “informal” or desk files.



## What Should Be In The Personnel File?

- Data about the employment relationship
  - Application, resume, cover letter, job description, offer letter, employment contracts
  - Transcripts or certificates showing qualifications
  - Emergency contacts
  - Equipment or assets issued to the employee
  - Acknowledgement forms for handbooks, policies, trainings, etc.
  - Form W-4 (or in separate payroll file)

## What Should Be In The Personnel File?

- Information regarding employment decisions
  - Evaluations, disciplinary actions, and promotions
  - Raises and changes in job title or job duties
  - Company-generated commendations, honors or merit awards
  - Certificates of completion for work-related training or attendance at safety meetings

## What Should Be In The Personnel File?

### ■ Termination documents

- Reasons why the employment was terminated
- Exit interview notes/forms
- COBRA forms

### ■ **But not attorney-client communications**

- Attorney-client communications about an employee may be confidential and privileged, but storage among non-privileged documents may weaken the protection.



## What Should Not Be In The Personnel File?

- Draft performance evaluations
- Memos or letters regarding disciplinary measures that were never implemented
- Emails between supervisors regarding how to deal with an employee
- References to an employee's private life, such as caregiving responsibilities, political beliefs or religion
- Good rule of thumb: Don't put anything in the personnel file that you would not want a jury to see.

## Special Situations

- Documents that should be retained, but **not** in the personnel file
  - Medical information must be stored in separate, secure files.
    - Employment decisions do not generally involve the use of employee medical information.
    - Accusations of discriminatory motive can be bolstered if sensitive medical information is in the personnel file.

## Special Situations

- A number of laws mandate that medical information be kept in separate private files.
  - ADA, FMLA, GINA, state health care privacy laws
  - Most employers not covered by HIPAA privacy rules
  - Documents relating to workers' compensation claims



## Special Situations

- EEO self-identification forms
  - For affirmative action and EEO reporting purposes, employers are authorized to collect information about age, race, ethnicity, disability and veteran status through invitations to self-identify.
  - These records should be kept separately from other personnel records and in a location not accessible to those responsible for personnel decisions.

## Special Situations

- Investigation files
  - Should be separate from personnel files.
    - Put all witness statements, notes regarding investigations, etc., in this file, not in the personnel file.
  - Include a section entitled “Privileged Attorney-Client Communications” in the investigation file.
    - Put attorney communications in this file, not in the personnel file.
  - Keep investigation files locked up.

## Special Situations

- Unemployment documents, discrimination charges and legal claims and demands
  - Do not put demand letters, claims, charges or litigation pleadings in the personnel file. Create a claims file for these documents.
  - Maintain a “privileged” section in the claims file for attorney-client communication.
  - Lock it up and limit access.

## Special Situations

- I-9 forms
  - For all new employees, and current employees hired after November 7, 1986.
  - Keep for 3 years after the date of hire or 1 year after the employee terminates, whichever is later.
  - Must be able to produce forms within 3 days of an official request for production.
  - May keep them in individual personnel files, but it's probably best to keep all the I-9 forms together in one file.



## Special Situations

- Safety training records
  - Because OSHA may ask to review all records of employee safety training, it might make sense to store training records apart from other personnel records so that those records can be promptly produced without extraneous information.

## Special Situations

- Garnishments
  - It's best to send garnishment documents to payroll for storage in the payroll file.
  - Many states have laws prohibiting termination of employees because of wage garnishments.
  - Sometimes it means nothing more than a court has ordered child support to be paid through payroll withholding.

## Who Should See The File?

- The short answer is that only those who “need to know” should be allowed to review the entire file. Others should simply be given the information they need to do their jobs.
  - Personnel files should be in a locked cabinet and access should be limited.

## Who Should See The File?

- Privacy concerns
  - Employees have a reasonable expectation that their personnel file will be confidential. It is likely to contain personal information about family, previous employment, financial issues, personal problems, etc.
  - You need to guard against identity theft.
    - Social Security numbers
    - Driver’s license information
    - Other personal information

## Who Should See The File?

- Employee requests to review personnel file
  - This is governed by state law, so check with your local counsel.
  - Generally speaking, the personnel file belongs to the employer and the employer controls access.
  - Some states have laws requiring employers to allow inspection and copying. Some require only inspection. Some have no laws regarding the subject.
  - Some states give greater rights to public employees.
  - Regardless of legal obligations, consider the fact that refusing to allow the employee to review the file may unnecessarily raise suspicions and create animosity.

## Who Should See The File?

- If you do allow access, control the circumstances.
  - Have the employee review it in the HR office with someone else present.
  - If you make copies, number the pages of both the original and the copy, so nothing can be added or removed.
  - Place a memo in the file noting the date of production and the number of pages produced.
  - You can have a procedure for the employee to challenge the contents, but employee challenges should be limited to factual inaccuracies.

## Who Should See The File?

- Former employees
  - Again, check state law.
  - Some states allow former employees to see the file for a limited period of time.
  - If you do provide a copy, follow the procedure for employees. It is very important to number each page, and keep a copy of the numbered set, so you can prove what was originally in the file and defend against any effort to claim that other materials were in the file.
  - Be particularly wary as this may mean the former employee is contemplating a lawsuit against you.

## Who Should See The File?

- Third-party requests
  - You may receive requests for personnel files as part of employees' outside litigation, such as domestic relations or child custody matters, or lawsuits arising from traffic accidents.
  - Do not provide the file to third parties without a release signed by the former employee or a valid subpoena.
  - Public employers – release of records may be governed by open records laws designed to give the public wide access to government records; consult local counsel.

## File Maintenance

- Files should be kept in a central location and someone, usually HR, should be the designated custodian.
  - Only the custodian should put things in the file or take them out.
  - Supervisors should send all personnel documents to HR for filing.

## File Maintenance

- Records retention
  - **Best practice: Keep all records until termination plus ten\* years.**
    - Well-kept files are your friend.
    - Regulatory retention periods are established for agencies' convenience, not for employers' purposes.
    - You cannot anticipate when a historical record will become relevant, if only for informational purposes.
    - Lawsuits or claims may make the entire employment history relevant and useful.
    - Statutes of limitations for state law contract claims can extend to eight or ten years.

## File Maintenance

- The Lilly Ledbetter Fair Pay Act creates an indefinite challenge period for employment decisions.
  - Employees now can sue their employers based on alleged discriminatory decisions made at any time during their employment. An employee simply has to prove that his paycheck continues to be negatively impacted by a past discriminatory employment decision.
  - Hiring at a reduced wage, demotion, failure to promote, failure to grant leave, etc., years ago may continue to have an impact throughout the entire term of employment.

## File Maintenance

- Employers may need to keep documents, particularly those that reflect the basis for compensation decisions.
  - Such documents may include: applications for original employment and new positions applied for during employment; employee evaluations; job descriptions or internal memoranda discussing job qualifications and any associated pay premiums; and all documents showing the reason for an original pay rate and all changes in pay.
  - The entire file should be kept until long after an employee terminates, or all “employment decision documents” should be taken out before the files are discarded or destroyed.

## File Maintenance

- Other “comparator” employees could be identified by the plaintiff to prove someone outside the protected class was paid better than the plaintiff for a discriminatory reason, or could be offered by the employer as proof that the plaintiff was fairly paid.
  - “Comparator” employee records are often necessary to support the non-discriminatory business reason why the comparator was being paid more than the plaintiff.
  - The identities of all appropriate “comparator” employees may not be known until several months or even years into a lawsuit.

## File Maintenance

- Federal statutory retention periods
  - Advertisements, postings, offer and hiring records must be kept for 1 year.
  - Documents relating to requests for accommodation must be kept for 1 year.
  - Payroll records, time cards, time sheets, wage rate tables and records of wage deductions must be kept for 2 years.
  - Employment contracts and collective bargaining agreements must be kept for 3 years.
  - FMLA leave documents must be kept for 3 years.
  - Payroll tax data must be kept for 4 years.
  - ERISA plan records and documents must be kept for at least 6 years.
  - Records of employee exposure to toxic substances must be kept for 30 years.
- States have varying document retention requirements.

## File Maintenance

- Purging employment files
  - Employers should have a written records retention policy.
    - Such a policy protects you against “spoliation” claims in litigation.
    - It also serves as a guide for the individual tasked with personnel file maintenance.

## File Maintenance

- The record retention policy should have the following minimum components:
  - Define what documents constitute official business records that are subject to the record retention policy.
  - Include a provision that computer and electronic records are official business records and are subject to the record retention policy.
  - Identify the person or department within the organization that is responsible for the business record.
  - Include your record retention schedule(s).
  - Include how records should be used, stored, transmitted, archived and destroyed to protect the security of official business records.
  - Include an auditing function to ensure compliance with the record retention policy.



## File Maintenance

- Reviewing and cleaning personnel files
  - Establish a periodic schedule for the review and/or destruction of file material.
  - If the file of an active employee is missing important documentation, try to replace it, i.e. no signature for the handbook? Go get one.
    - State law may influence effectiveness of “late” signatures.

## File Maintenance

- Shred old materials in compliance with your organization’s record retention policy.
- If you have a policy or contractual obligation not to consider disciplinary actions after a certain period of time, you should mark stale disciplinary records with an “inactive” notation of some variety.
  - Consider changing the policy.
- Take reasonable measures to protect against unauthorized access to or use of employees’ consumer information.
  - Fair and Accurate Credit Transactions Act (FACTA) contains disposal rules for documents such as credit reports and background checks. Shredding is the best practice.

## Electronic Records

- Just because a record is electronic doesn't mean it's not a record or a "file."
  - ▣ If you are sued, you will have to produce electronic records.
  - ▣ **Just like paper records, if you are sued, you must keep everything and destroy nothing even if your record retention policy would allow you to do so.**

## Electronic Records

- Electronically stored information (ESI) includes email, web pages, word processing files, email servers and archival systems, instant messaging servers, voice mail systems, backup systems, imagery document scanning systems, hand-held storage and communication devices, cell phones, fixed storage devices (for example, hard drives on network servers, backup systems, individual work stations, and laptop computers), and portable storage devices (for example, CDs, DVDs, and memory sticks).

## Electronic Records

- Know where ESI is and how it is stored **before** it has to be produced.
- ESI must be handled properly.
  - The law requires that when it is merely “reasonably foreseeable” that employment litigation may occur, the employer must begin retaining and preserving every document that may be pertinent to the potential litigation.

## Electronic Records

- Factors indicating litigation is foreseeable include:
  - A subpoena is received.
  - A complaint is filed starting a lawsuit.
  - A government agency gives notice of an investigation, including the filing of a charge.
  - A lawyer or third-party investigator requests information relating to an accident or workplace dispute.
  - An incident resulting in injury occurs.
  - An employee makes a formal complaint to management.
  - An employee threatens litigation against a company representative.

## Electronic Records

- When one of these occurs, the obligation to identify and preserve documents and other information is triggered.
- Failure to preserve and produce information can cause big problems for your company.



## Electronic Records

- “Litigation holds”
  - Your lawyer should help you work out the details.
  - You have to notify everyone to keep all records related to the litigation.
  - The litigation hold prohibits modification or destruction of records **no matter what**.

## Electronic Records

- Train supervisors to use electronic communications as carefully as they use paper.
  - ▣ Think how it will read in court.
  - ▣ Business-like and no jokes.
  - ▣ Do not let emails become a complete substitute for memos and letters.

## Electronic Records

- You must take steps to guard employee information.
  - ▣ Limit access.
  - ▣ Password protect.



## Going Paperless

- State laws generally permit electronic personnel files as long as your system is secure, accurate, reliable and easily-accessible.
  - Most laws do not require records to be kept in any particular format, but you must be able to retrieve the records quickly and produce legible hard copies if necessary.
- Before going paperless, consider the pros and cons of electronic files.
  - Be aware of additional obligations placed on employers that use paperless files, i.e., additional requirements for electronic I-9 systems.

## Going Paperless

- If you decide to go paperless:
  - Establish security protocols to ensure that only authorized users can access files.
  - Determine which types of records cannot be accurately or completely transferred to an electronic system and retain hard copies of those records.
  - Create a process for ensuring the destruction of unneeded hard copies, and the destruction of electronic records per your organization's record retention policy.

## Going Paperless

- Segregate medical records and other confidential information from the personnel file, just as you would if you maintained paper files.
  - Create separate databases with separate access procedures.
- Establish a procedure for suspending the scanning and destruction of relevant documents once a charge or lawsuit is filed.
  - A paperless system will not relieve you of your obligation to maintain documents in their original form after receiving notice of impending litigation.
- Ensure your electronic storage system is protected by adequate backup and restoration processes.

## Common Questions

- Can an employer make rules about when and where employees can see their files?
  - Sure, as long as your rule does not conflict with state law.
  - It can be disruptive if an employee abuses the privilege.

## Common Questions

- What should an employer do with items that have no employment-related use?
  - ▣ Give it to the employee.
  - ▣ Post compliments on the bulletin board.
  - ▣ Shred it.

## Common Questions

- Does the employer have to give the employee copies of documents put into the file?
  - ▣ No, but it is a good idea to provide copies of important ones.
  - ▣ Juries don't like "secret" memos or files.



## Common Questions

- Should we allow employees to put items in the file?
  - Not necessarily. If it is something you would not use to make decisions, it does not belong in the file, even if the employee thinks it should.
  - It is a good idea to allow employees to comment on performance reviews and disciplinary documents.

## Your Questions

Time for your questions.



## Summary of Record Retention Requirements

RECORDS	APPLICABLE STATUTES AND/OR REGULATIONS	RETENTION PERIOD
Hiring documents, including position requisitions, job descriptions, advertisements and postings, applications and resumes, interview questions, notes, test papers, correspondence, background and reference check materials, post-offer medical exam reports, drug test results, etc.	Civil Rights Act of 1964 (Title VII), Americans With Disabilities Act (ADA), Genetic Information Nondiscrimination Act (GINA) and Age Discrimination In Employment Act (ADEA)	One year from date of making record or hiring decision, whichever is later (29 C.F.R. § 1602.14; 29 C.F.R. § 1627.3)
Records relating to promotion, discipline, demotions, selection for layoff, recall or termination	Title VII, ADA, GINA, ADEA; state statutes of limitations	One year from date of personnel action (29 C.F.R. § 1602.14; 29 C.F.R. § 1627.3)

## Summary of Record Retention Requirements

RECORDS	APPLICABLE STATUTES AND/OR REGULATIONS	RETENTION PERIOD
Requests for accommodation, and related documents	ADA, Title VII (accommodation of religious practices)	At least one year after decision (29 C.F.R. § 1602.14)
All documents relating to an employee who has filed a charge of discrimination or lawsuit (including all records regarding employee and others holding similar positions)	Title VII, ADA, GINA, ADEA; spoliation of evidence	Until charge or lawsuit is <u>finally</u> resolved or time to file has expired (29 C.F.R. § 1602.14)
Annual EEO-1	Title VII	No specific guidance, but must retain most recent EEO-1

## Summary of Record Retention Requirements

RECORDS	APPLICABLE STATUTES AND/OR REGULATIONS	RETENTION PERIOD
Records of applicants to apprenticeship programs, including names, gender, minority status	Title VII	Two years from date of application or date of applicant's successful completion of apprenticeship, whichever is later (29 C.F.R. § 1602.21)
All documents relating to the payment of wages and the establishment of wage rates, particularly documents that explain differences in wages between men and women, including all records required by the Fair Labor Standards Act, and job evaluations, job descriptions, merit systems, seniority systems, collective bargaining agreements, and other documents regarding pay classifications	Fair Labor Standards Act and Equal Pay Act	Two or three years, depending on type of information (29 C.F.R. § 1620.32; 29 C.F.R. §§ 516.5, 516.6)

## Summary of Record Retention Requirements

RECORDS	APPLICABLE STATUTES AND/OR REGULATIONS	RETENTION PERIOD
I-9 Forms	Immigration Reform and Control Act	Three years from date of hire or one year after termination, whichever is later (8 U.S.C. § 1324a)
Employee polygraph test results, statement of incident, records relating to loss or injury under investigation, statement of basis for testing each tested employee	Employee Polygraph Protection Act	Three years from date polygraph is conducted (29 C.F.R. § 801.30)

## Summary of Record Retention Requirements

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## Summary of Record Retention Requirements

RECORDS	APPLICABLE STATUTES AND/OR REGULATIONS	RETENTION PERIOD
Family and medical leave information, including basic payroll and employee data, dates leave is taken, hours of leave if taken in increments less than full day, employee notices furnished to employer, general and specific notices given to employees, descriptions or policies relating to employee benefits and taking of paid or unpaid leave, premium payments of employee benefits, records and correspondence about disputes regarding designation of FMLA leave, medical certifications	Family and Medical Leave Act	Three years (29 C.F.R. § 825.500)

## Summary of Record Retention Requirements

RECORDS	APPLICABLE STATUTES AND/OR REGULATIONS	RETENTION PERIOD
For federal government contractors, basic employee data, payroll data, and job-related injury or illness logs	Davis Bacon Act, Services Contract Act, Walsh-Healy Public Contracts Act	Three years from end of government contract (29 C.F.R. § 5.5; 29 C.F.R. §§ 4.6(g), 4.185; 41 C.F.R. § 50-201.501)
Payroll tax data, including basic employee data, compensation records and tax records	Internal Revenue Code	Four years from date tax is due or tax is paid, whichever is later (26 C.F.R. § 31.6001-1)
Logs of injuries and illnesses, incident report forms, annual summaries and privacy lists, including OSHA Forms 300 and 301	Occupational Safety and Health Act (OSHA)	Five years beyond end of calendar year covered by document (29 C.F.R. §§ 1904.33, 1904.44)

## Summary of Record Retention Requirements

RECORDS	APPLICABLE STATUTES AND/OR REGULATIONS	RETENTION PERIOD
Employee benefit documents, including summary plan descriptions, annual reports, notices of reportable events and plan termination documents	Employee Retirement Income Security Act	Minimum of six years (29 U.S.C. 1027)
Records of significant adverse reactions to health of employees	Toxic Substances Control Act	30 years from date reaction reported to or otherwise known by person maintaining records (15 U.S.C. § 2607)
Records of monitoring exposure to hazardous substances	OSHA	30 years (29 C.F.R. § 1910.1020)
Documents relating to legally-required medical exams	OSHA	30 years after employment ends (29 C.F.R. § 1910.1020)



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**HR Recordkeeping: Practical Strategies for Maintaining an Accurate  
and Efficient Records Trail  
May 8, 2013**

Presented by Jason S. Ritchie  
Holland & Hart LLP – Billings, Montana

- I. About personnel files
  - A. You're not required to have them, but you need a secure location to keep all the information you use to make employment decisions.
    - 1. Personnel files are business records.
    - 2. Personnel files should contain all the data about the employment relationship and all the information you may use to make business decisions about employees. Business decisions include hiring, promoting or demoting, determining salary or wages, transfers, etc.
    - 3. As business records, they should be well-organized and properly-stored.
  - B. There should only be one official personnel file.
    - 1. If supervisors keep "desk files," you need to know about them, and train supervisors about what to keep in desk files and what to forward to the personnel file.
    - 2. Supervisor notes should just be reminders and should be destroyed or sent to HR once the information is transferred to an official evaluation or disciplinary document.
    - 3. **Originals always go in the official file.**
      - a. **There should only be one original.**
      - b. **It should be dated and signed!!!!**

- C. If your company is sued, the first thing the lawyer for the employee will request is the personnel file—and the lawyer will want all the personnel files, including any “informal” or desk files.
- II. What should be in the personnel file?
- A. Data about the employment relationship
    - 1. Application, resume, cover letter, job description, offer letter, employment contracts
    - 2. Transcripts or certificates showing qualifications
    - 3. Form W-4
    - 4. Emergency contacts
    - 5. List of equipment or assets issued to the employee
    - 6. Acknowledgement forms for handbooks, policies, trainings, etc.
  - B. Information regarding employment decisions
    - 1. Evaluations, disciplinary actions, and promotions
    - 2. Raises and changes in job title or job duties
    - 3. Company-generated commendations, honors or merit awards
    - 4. Certificates of completion for work-related training or attendance at safety meetings
    - 5. Termination documents
      - a. Reasons why the employment was terminated
      - b. Exit interview notes/forms
      - c. COBRA forms



e) **But not attorney-client communications**

- (1) Attorney-client communications about an employee may be confidential and privileged, but storage among non-privileged documents may weaken the protection.

III. What should not be in the personnel file?

- A. Draft performance evaluations
- B. Memos or letters regarding disciplinary measures that were never implemented
- C. Emails between supervisors regarding how to deal with an employee
- D. References to an employee's private life, such as caregiving responsibilities, political beliefs or religion
- E. Good rule of thumb: Don't put anything in the personnel file that you would not want a jury to see.

IV. Special situations: documents that should be retained—but not in the personnel file

- A. Medical information must be stored in separate, secure files.
  1. Employment decisions do not generally involve the use of employee medical information. Accusations of discriminatory motive can be bolstered if sensitive medical information is in the personnel file, i.e. HIV positive status, past alcohol treatment, etc.
  2. A number of laws, state and federal, mandate that medical information be kept in separate private files.
    - a. ADA, FMLA, GINA, state health care privacy laws
      - (1) Recent EEOC opinion letter warns that keeping employees' personal and occupational health information in one file "presents a real possibility" of ADA and/or GINA violation.
    - b. Note: most employers are not covered by HIPAA privacy rules.

- (1) HIPAA covers health care providers, insurance companies, health plans.
    - (2) If you aren't one of these, and if you don't self-administer health insurance claims, then you aren't covered.
    - (3) But you should still protect health information from disclosure.
  3. Documents relating to workers' compensation claims.
- B. EEO self-identification forms
  1. For affirmative action and EEO reporting purposes, employers are authorized to collect information about age, race, ethnicity, disability and veteran status through invitations to self-identify.
  2. These records should be kept separately from other personnel records and in a location not accessible to those responsible for personnel decisions.
- C. Investigation files
  1. Investigative materials should be separate from personnel files.
    - a. Put all witness statements, notes regarding investigations, etc. in this file, not in the personnel file.
  2. Include a section entitled "Privileged Attorney-Client Communications" in the investigation file.
    - a. Put attorney communications in this file, not in the personnel file.
    - b. Attorney-client privilege applies to communications to and from counsel for the purpose of getting legal advice.
    - c. Mark as "privileged" only those documents that meet this definition, or which your counsel advises you to mark as privileged.
  3. Keep investigation files locked up.

- D. Unemployment documents, discrimination charges and legal claims and demands
  - 1. Do not put demand letters, claims, charges or litigation pleadings in the personnel file. Create a claims file for these documents.
  - 2. Maintain a “privileged” section in the claims file for attorney-client communication.
  - 3. Lock it up and limit access.
- E. I-9 forms
  - 1. You must have an I-9 form in your files for each new employee, and current employees hired after November 7, 1986.
  - 2. You must keep them in your files for 3 years after the date of hire or 1 year after the employee terminates, whichever is later.
  - 3. You can store them at the employee’s worksite or at corporate headquarters.
  - 4. You must be able to produce them within 3 days of an official request for production.
  - 5. You may keep them in the personnel file, but if you have a lot of employees, it would be very difficult to go through every file and dig out the I-9 forms within the 3-day deadline. Also, when government agents come to inspect the forms, you don’t want them looking through the rest of the employee’s personnel file. So overall it’s probably best to keep all the I-9 forms together in one file rather than in individual personnel files.
- F. Safety training records
  - 1. Because OSHA may ask to review all records of employee safety training, it might make sense to store training records apart from other personnel records so that those records can be promptly produced without extraneous information.

G. Garnishments

1. It's best to just send garnishment documents to payroll for storage in the payroll file.
2. Many states have laws prohibiting termination of employees because of wage garnishments.
3. Sometimes it means nothing more than a court has ordered child support to be paid through payroll withholding.

V. Who should see the file?

A. The short answer is that only those who "need to know" should be allowed to review the entire file. Others should simply be given the information they need to do their jobs.

1. Personnel files should be in a locked cabinet and access should be limited.

B. Privacy concerns

1. Employees have a reasonable expectation that their personnel file will be confidential. It is likely to contain personal information about family, previous employment, financial issues, personal problems, etc.
2. You need to guard against identity theft.
  - a. Social Security numbers
  - b. Driver's license information
  - c. Other personal information

C. Employee requests to review personnel file

1. This is governed by state law, so check with your local counsel.
2. Generally speaking, the personnel file belongs to the employer and the employer controls access.

3. Some states have laws requiring employers to allow inspection and copying. Some require only inspection. Some have no laws regarding the subject.
  4. Some states give greater rights to public employees.
  5. Regardless of legal obligations, consider the fact that refusing to allow the employee to review the file may unnecessarily raise suspicions and create animosity.
  6. If you do allow access, control the circumstances.
    - a. Have the employee review it in the HR office with someone else present.
    - b. If you make copies, number the pages of both the original and the copy, so nothing can be added or removed.
    - c. Place a memo in the file noting the date of production and the number of pages produced.
    - d. You can have a procedure for the employee to challenge the contents, but employee challenges should be limited to factual inaccuracies.
- D. Former employees
1. Again, check state law.
  2. Some states allow former employees to see the file for a limited period of time.
  3. If you do provide a copy, follow the procedure for employees. It is very important to number each page, and keep a copy of the numbered set, so you can prove what was originally in the file and defend against any effort to claim that other materials were in the file.
  4. Be particularly wary as this may mean the former employee is contemplating a lawsuit against you.

E. Third-party requests

1. You may receive requests for personnel files as part of employees' outside litigation, such as domestic relations or child custody matters, or lawsuits arising from traffic accidents.
2. Do not provide the file to third parties without a release signed by the former employee or a valid subpoena.
3. Public employers – release of records may be governed by open records laws designed to give the public wide access to government records; consult local counsel.

VI. File maintenance

A. Files should be kept in a central location and someone, usually HR, should be the designated custodian.

1. Only the custodian should put things in the file or take them out.
2. Supervisors should send all personnel documents to HR for filing.

B. Records retention

1. **Best practice: Keep all records until termination plus ten\* years.**

- a. Well-kept files are your friend, if you are otherwise in compliance with employment laws and regulations.
- b. Regulatory retention periods are established for agencies' convenience, not for employers' purposes.
- c. You cannot anticipate when a historical record will become relevant, if only for informational purposes.
- d. Lawsuits or claims may make the entire employment history relevant and useful.
- e. Statutes of limitations for state law contract claims can extend to eight or ten years.

- f. The Lilly Ledbetter Fair Pay Act creates an indefinite challenge period for employment decisions.
  - (1) Employees now can sue their employers based on alleged discriminatory decisions made at any time during their employment. An employee simply has to prove that his paycheck continues to be negatively impacted by a past discriminatory employment decision.
    - (a) Hiring at a reduced wage, demotion, failure to promote, failure to grant leave, etc., years ago may continue to have an impact throughout the entire term of employment.
  - (2) Employers may need to keep documents, particularly those that reflect the basis for compensation decisions.
    - (a) Such documents may include: applications for original employment and new positions applied for during employment; employee evaluations; job descriptions or internal memoranda discussing job qualifications and any associated pay premiums; and all documents showing the reason for an original pay rate and all changes in pay.
    - (b) The entire file should be kept until long after an employee terminates, or all “employment decision documents” should be taken out before the files are discarded or destroyed.
  - (3) Other “comparator” employees could be identified by the plaintiff to prove someone outside the protected class was paid better than the plaintiff for a discriminatory reason, or could be offered by the employer as proof that the plaintiff was fairly paid.
    - (a) “Comparator” employee records are often necessary to support the non-discriminatory business reason why the comparator was being paid more than the plaintiff.

- (b) The identities of all appropriate “comparator” employees may not be known until several months or even years into a lawsuit.

2. Federal statutory retention periods

- a. Advertisements, postings, offer and hiring records must be kept for 1 year.
- b. Documents relating to requests for accommodation must be kept for 1 year.
- c. Payroll records, time cards, time sheets, wage rate tables and records of wage deductions must be kept for 2 years.
- d. Employment contracts and collective bargaining agreements must be kept for 3 years.
- e. FMLA leave documents must be kept for 3 years.
- f. Payroll tax data must be kept for 4 years.
- g. ERISA plan records and documents must be kept for at least 6 years.
- h. Records of employee exposure to toxic substances must be kept for 30 years.

3. States have varying document retention requirements.

C. Purging employment files

- 1. Employers should have a written records retention policy.
  - a. Such a policy protects you against “spoliation”<sup>1</sup> claims in litigation.
  - b. It also serves as a guide for the individual tasked with personnel file maintenance.

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<sup>1</sup> Yes, we will tell you what “spoliation” is.



2. The record retention policy should have the following minimum components:
  - a. Define what documents constitute official business records that are subject to the record retention policy.
  - b. Include a provision that computer and electronic records are official business records and are subject to the record retention policy.
  - c. Identify the person or department within the organization that is responsible for the business record. (“Responsibility for ownership and maintenance of active and inactive records rests with the department that has decision-making authority over the records regardless of where the records are stored.” or “The workgroup with the greatest contact with a document should keep the official records relating to that document.” or “The Controller is responsible for implementation of this policy.”)
  - d. Include your record retention schedule(s).
  - e. Include how records should be used, stored, transmitted, archived and destroyed to protect the security of official business records.
  - f. Include an auditing function to ensure compliance with the record retention policy.
3. Reviewing and cleaning personnel files
  - a. Establish a periodic schedule for the review and/or destruction of file material.
  - b. If the file of an active employee is missing important documentation, try to replace it, i.e. no signature for the handbook? Go get one.
    - (1) State law may influence effectiveness of “late” signatures.
  - c. Shred old materials in compliance with your organization’s record retention policy.

- d. If you have a policy or contractual obligation not to consider disciplinary actions after a certain period of time, you should mark stale disciplinary records with an “inactive” notation of some variety.
  - (1) Consider changing the policy.
- e. Take reasonable measures to protect against unauthorized access to or use of employees’ consumer information.
  - (1) Fair and Accurate Credit Transactions Act (FACTA) contains disposal rules for documents such as credit reports and background checks. Shredding is the best practice.

VII. Electronic records

- A. Just because a record is electronic doesn’t mean it’s not a record or a “file.”
  - 1. If you are sued, you will have to produce electronic records.
  - 2. **Just like paper records, if you are sued, you must keep everything and destroy nothing even if your record retention policy would allow you to do so.**
- B. Electronically stored information (ESI) includes email, web pages, word processing files, email servers and archival systems, instant messaging servers, voice mail systems, backup systems, imagery document scanning systems, hand-held storage and communication devices, cell phones, fixed storage devices (for example, hard drives on network servers, backup systems, individual work stations, and laptop computers), and portable storage devices (for example, CDs, DVDs, and memory sticks).
- C. Know where ESI is and how it is stored *before* it has to be produced.
- D. ESI must be handled properly.
  - 1. The law requires that when it is merely “reasonably foreseeable” that employment litigation may occur, the employer must begin retaining and preserving every document that may be pertinent to the potential litigation.

2. Factors indicating litigation is foreseeable include:
    - a. A subpoena is received.
    - b. A complaint is filed starting a lawsuit.
    - c. A government agency gives notice of an investigation, including the filing of a charge.
    - d. A lawyer or third-party investigator requests information relating to an accident or workplace dispute.
    - e. An incident resulting in injury occurs.
    - f. An employee makes a formal complaint to management.
    - g. An employee threatens litigation against a company representative.
  3. When one of these occurs, the obligation to identify and preserve documents and other information is triggered.
  4. Failure to preserve and produce information can cause big problems for your company.
  5. "Litigation holds"
    - a. Your lawyer should help you work out the details.
    - b. You have to notify everyone to keep all records related to the litigation.
    - c. The litigation hold prohibits modification or destruction of records no matter what.
- E. Train supervisors to use electronic communications as carefully as they use paper.
1. Think how it will read in court.
  2. Business-like and no jokes.

3. Don't let emails become a complete substitute for memos and letters.
- F. You must take steps to guard employee information.
1. Limit access.
  2. Password protect.
- VIII. Going paperless
- A. State laws generally permit electronic personnel files as long as your system is secure, accurate, reliable and easily-accessible.
1. Most laws don't require records to be kept in any particular format, but you must be able to retrieve the records quickly and produce legible hard copies if necessary.
- B. Before going paperless, consider the pros and cons of electronic files.
1. Be aware of additional obligations placed on employers that use paperless files, i.e., additional requirements for electronic I-9 systems.
- C. If you decide to go paperless:
1. Establish security protocols to ensure that only authorized users can access files.
  2. Determine which types of records cannot be accurately or completely transferred to an electronic system and retain hard copies of those records.
  3. Create a process for ensuring the destruction of unneeded hard copies, and the destruction of electronic records per your organization's record retention policy.
  4. Segregate medical records and other confidential information from the personnel file, just as you would if you maintained paper files.
    - a. Create separate databases with separate access procedures.

5. Establish a procedure for suspending the scanning and destruction of relevant documents once a charge or lawsuit is filed.
  - a. A paperless system will not relieve you of your obligation to maintain documents in their original form after receiving notice of impending litigation.
6. Ensure your electronic storage system is protected by adequate backup and restoration processes.

IX. Common questions

- A. Can an employer make rules about when and where employees can see their files?
  1. Sure, as long as your rule does not conflict with state law.
  2. It can be disruptive if an employee abuses the privilege.
- B. What should an employer do with items that have no employment-related use?
  1. Give it to the employee.
  2. Post compliments on the bulletin board.
  3. Shred it.
- C. Does the employer have to give the employee copies of documents put into the file?
  1. No, but it is a good idea to provide copies of important ones.
  2. Juries don't like "secret" memos or files.
- D. Should we allow employees to put items in the file?
  1. Not necessarily. If it's something you would not use to make decisions, it does not belong in the file, even if the employee thinks it should.
  2. It is a good idea to allow employees to comment on performance reviews and disciplinary documents.

E. Time for your questions.

### SUMMARY OF RECORD RETENTION REQUIREMENTS

Federal laws and regulations often impose specific retention periods for documents generated through the employment relationship. The following table provides a general summary of several of these requirements.

RECORDS	APPLICABLE STATUTES AND/OR REGULATIONS	RETENTION PERIOD
Hiring documents, including position requisitions, job descriptions, advertisements and postings, applications and resumes, interview questions, notes, test papers, correspondence, background and reference check materials, post-offer medical exam reports, drug test results, etc.	Civil Rights Act of 1964 (Title VII), Americans With Disabilities Act (ADA), Genetic Information Nondiscrimination Act (GINA) and Age Discrimination In Employment Act (ADEA)	One year from date of making record or hiring decision, whichever is later (29 C.F.R. § 1602.14; 29 C.F.R. § 1627.3)
Records relating to promotion, discipline, demotions, selection for layoff, recall or termination	Title VII, ADA, GINA, ADEA; state statutes of limitations	One year from date of personnel action (29 C.F.R. § 1602.14; 29 C.F.R. § 1627.3)
Requests for accommodation, and related documents	ADA, Title VII (accommodation of religious practices)	At least one year after decision (29 C.F.R. § 1602.14)
All documents relating to an employee who has filed a charge of discrimination or lawsuit (including all records regarding employee and others holding similar positions)	Title VII, ADA, GINA, ADEA; spoliation of evidence	Until charge or lawsuit is <u>finally</u> resolved or time to file has expired (29 C.F.R. § 1602.14)
Annual EEO-1	Title VII	No specific guidance, but must retain most recent EEO-1

Records of applicants to apprenticeship programs, including names, gender, minority status	Title VII	Two years from date of application or date of applicant's successful completion of apprenticeship, whichever is later (29 C.F.R. § 1602.21)
All documents relating to the payment of wages and the establishment of wage rates, particularly documents that explain differences in wages between men and women, including all records required by the Fair Labor Standards Act, and job evaluations, job descriptions, merit systems, seniority systems, collective bargaining agreements, and other documents regarding pay classifications	Fair Labor Standards Act and Equal Pay Act	Two or three years, depending on type of information (29 C.F.R. § 1620.32; 29 C.F.R. §§ 516.5, 516.6)
I-9 Forms	Immigration Reform and Control Act	Three years from date of hire or one year after termination, whichever is later (8 U.S.C. § 1324a)
Employee polygraph test results, statement of incident, records relating to loss or injury under investigation, statement of basis for testing each tested employee	Employee Polygraph Protection Act	Three years from date polygraph is conducted (29 C.F.R. § 801.30)



Family and medical leave information, including basic payroll and employee data, dates leave is taken, hours of leave if taken in increments less than full day, employee notices furnished to employer, general and specific notices given to employees, descriptions or policies relating to employee benefits and taking of paid or unpaid leave, premium payments of employee benefits, records and correspondence about disputes regarding designation of FMLA leave, medical certifications	Family and Medical Leave Act	Three years (29 C.F.R. § 825.500)
For federal government contractors, basic employee data, payroll data, and job-related injury or illness logs	Davis Bacon Act, Services Contract Act, Walsh-Healy Public Contracts Act	Three years from end of government contract (29 C.F.R. § 5.5; 29 C.F.R. §§ 4.6(g), 4.185; 41 C.F.R. § 50-201.501)
Payroll tax data, including basic employee data, compensation records and tax records	Internal Revenue Code	Four years from date tax is due or tax is paid, whichever is later (26 C.F.R. § 31.6001-1)
Logs of injuries and illnesses, incident report forms, annual summaries and privacy lists, including OSHA Forms 300 and 301	Occupational Safety and Health Act (OSHA)	Five years beyond end of calendar year covered by document (29 C.F.R. §§ 1904.33, 1904.44)
Employee benefit documents, including summary plan descriptions, annual reports, notices of reportable events and plan termination documents	Employee Retirement Income Security Act	Minimum of six years (29 U.S.C. 1027)

Records of significant adverse reactions to health of employees	Toxic Substances Control Act	30 years from date reaction reported to or otherwise known by person maintaining records (15 U.S.C. § 2607)
Records of monitoring exposure to hazardous substances	OSHA	30 years (29 C.F.R. § 1910.1020)
Documents relating to legally-required medical exams	OSHA	30 years after employment ends (29 C.F.R. § 1910.1020)



## **Jason Ritchie**

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Attorney Jason S. Ritchie is a partner at Holland & Hart LLP where he successfully represents clients involved in virtually all types of labor and employment disputes. Businesses trust Mr. Ritchie to achieve positive results when their reputations are on the line. He represents and advises clients in several areas, including claims of wrongful discharge, harassment, discrimination, breach of employment contract, response to state and federal investigations and claims arising under the Americans with Disabilities Act, Montana Human Rights Act, Family and Medical Leave Act, and the National Rehabilitation Act. Mr. Ritchie advises clients on employment matters, and has given a number of seminars on labor and employment related topics. Mr. Ritchie has also represented various commercial clients in contract disputes, real estate litigation, construction disputes, natural resource litigation, and environmental litigation.