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## CONTRIBUTORS

# Dotting the I's and Crossing the T's — Employment Records You Must Retain

Many different state and federal laws govern which records companies need to create, how long records need to be kept, and even how those records must be disposed of.

Richard D. Alaniz, JD • Mar. 04, 2016



Last June, Crothall Services Group Inc. was sued by the U.S. Equal Employment Opportunity Commission (“EEOC”) for failing to maintain proper records on its employees. The EEOC alleged that the provider of janitorial and facilities management services violated federal law requiring it to keep records that would disclose how its methods for selecting employees would impact equal employment opportunities.

According to the EEOC’s complaint, Crothall used criminal background checks and criminal history assessments when making hiring decisions, but did not make and keep required records that would disclose the impact those checks would have on people identifiable by race, sex, or ethnic group. The EEOC claimed that failure violated Title VII of the Civil Rights Act of 1964.

“Federal record-keeping requirements ensure that certain employers make and keep records that disclose the impact of their selection procedures,” said Regional Attorney Debra Lawrence of the EEOC’s Philadelphia District Office in a statement when the lawsuit was announced. “EEOC’s enforcement of the record-keeping requirements is important to the agency’s commitment to eliminating discriminatory barriers in the workplace.”

As the Crothall lawsuit shows, companies have significant responsibilities to create and maintain employee records, from the time they apply to the time they leave the company—and for years afterwards. Record keeping laws can be complicated and can even conflict with one another, but failure to comply can expose the company to government investigations, lawsuits, and monetary penalties.

## **Record-Keeping Responsibilities**

Many different state and federal laws govern which records companies need to create, how long records need to be kept, and even how those records must be disposed of.

For example, the Americans with Disabilities Act requires employers to maintain records such as application forms, requests for reasonable accommodation, promotions, transfers, terminations, and compensation for one year after making the record or taking the action described, whichever is later. Under the Age Discrimination in Employment Act, employers must retain payroll records for three years for all employees. The Occupational Safety and Health Act requires that companies keep logs and reports of work-related injuries and illnesses for five years.

And companies that are governed by the Employee Retirement Income Security Act must store records for six years.

Other federal regulations that mandate employee record retention include the Consolidated Omnibus Budget Reconciliation Act, the Fair Labor Standards Act, the Family and Medical Leave Act, the Federal Unemployment Tax Act, the Lilly Ledbetter Fair Pay Act, and others.

Some states also have their own requirements for maintaining and destroying employee records. For example, Massachusetts requires companies to destroy records that include some personal information. On the other hand, Minnesota requires companies to keep documents for eight years after employees have been terminated. Only by reviewing your state's requirements will you be certain of what records are covered and how long they must be retained.

## **Keeping Employee Files, Not a Single File**

In order to comply with regulations and be able to find information quickly when necessary, employers should actually keep several different files for all their employee records. Typically, those files should be:

- The Personnel File

This file should only contain information that relates to an employee's job and job-related decisions, such as applications, performance reviews, promotions, and any disciplinary measures. This file should not contain any information about an employee's age, medical disabilities, race, national origin, or background checks.

- The I-9 File

Under federal law, every employer must complete an I-9 form, the Employment Eligibility Verification, for each employee. This form helps to confirm an employee's identity and authorization to work in the United States. Each employee must have an I-9 form on record as long as he or she works for the company, and it must be kept in its own folder. Once an employee has been terminated or left the company, the form must be kept for three years from the date an employee was hired or one year after the worker's employment ended, whichever is longer. After that, the I-9 can be destroyed.

- The Medical Information File

Companies are required to maintain employee medical information in its own file. This file should contain information about medical history, medical evaluations, Americans with Disabilities Act accommodations, workers' compensation claims, Family and Medical Leave Act requests, and any other information that could relate to health and medical history.

- **The Investigative File**

Investigative notes for serious issues, such as sexual harassment, allegations of theft, and similar conduct matters should not be included in the official personnel file. Instead, these files should be kept separate and access should be limited to only key personnel and HR staff.

- **The Supervisor's Working File**

The company and HR personnel should remember that supervisors often keep files on personnel, which are most often separate and apart from the official personnel file. These files should be submitted to HR whenever an employee transfers or leaves a department, for proper inclusion or destruction.

- **Payroll and Related Records**

Companies generally maintain payroll and all related information within the separate payroll department records.

## **How to Stay in Compliance**

With so many different laws to abide by and factors to consider, employers need to think carefully about how they can maintain the records they need to, find those records when they need them, and destroy the files at the appropriate time.

- **Why Proper Record Keeping Is Important**

First-and-foremost, it is important to remember why record keeping is so critical. In addition to the legal requirements that certain records be maintained for a certain period of time, there are practical considerations as well. Most employment-related lawsuits hinge on company records. If the company does not have time records, discipline forms, applications, interview notes, pay records, OSHA 300 logs, or other documents, it is almost impossible to defend against a wage and hour lawsuit, discrimination claim, hiring claim, or other employment-related lawsuit. For example, wage and hour lawsuits under the Fair Labor Standards Act are now the

most common employment-related claims. Without proper time records, most employers have virtually no defense.

- **Conduct an Audit**

In today's digital world, even identifying a "record" is not as simple as it used to be. Companies need to understand how all their records can be created and in what format they may be stored. Employers should periodically audit their own practices and procedures, in order to ensure that records are properly being kept, stored, and are accessible when needed. Similarly, records that are no longer required to be maintained should be destroyed. If available, they may become evidence against the company. With 2016 only just beginning, now is a good time to conduct an internal audit of your company's record retention policies and practices.

- **If Necessary, Update Records Retention Policies**

Following the company-wide audit, the company should analyze whether its policies and procedures are compliant with state and federal law, as well as whether its policies sufficiently ensure documents are properly retained and accessible. If a company has a need to update its records retention policies, the company should immediately begin that process.

- **Work with All the Company's Stakeholders**

Employee records retention touches on many different departments, including records management, IT, HR, and legal. Each department should have the opportunity to provide input into the records retention policies, and those policies should reflect each group's concerns and priorities.

Experts such as HR, in-house attorneys, and outside counsel can also help employers understand where their specific vulnerabilities lie. For example, if companies handle hazardous materials or do business with the government it can impact the types of records that need to be kept and for how long.

- **Provide Training**

While the HR department may have a great deal of responsibility around handling employment records, all supervisors and managers need to understand the company's records retention policies and what they need to do in order to abide by the proper procedures for creating, retaining, archiving, and destroying files. Those

who oversee employment records need special training on how to handle and classify records.

Completing and filing paperwork can be a tedious task. But failing to do it properly can open companies up to legal and regulatory liability. That's why it is important for companies to understand their obligations regarding employee record keeping, develop policies that will keep them in compliance, and make sure the rules are followed.

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