

RECORDS MANAGEMENT

Expanding technology, legislation, litigation make records management critical

More than ever before, employers and legal counsel need to take stock of records management and retention policies and practices. It's no surprise that with an ailing economy and associated business closings, downsizings and employee layoffs, there has been a substantial increase in the number of lawsuits filed by employees.

Add to that the expansion of claims that employers may be required to defend against as a result of the passage of the Americans with Disabilities Amendments Act of 2008, the Genetic Information Nondiscrimination Act of 2008 (GINA), and the Lilly Ledbetter Fair Pay Act of 2009 — which enables employees to bring actions for discriminatory pay practices that may have originated years or even decades ago — and it is clear that records management and retention are critical.

If that's not reason enough, there is the explosion of electronically generated information and the willingness of courts to impose sanctions — millions of dollars in some cases — against parties who ignore or circumvent legal obligations to preserve and disclose such information. Employers' legal counsel may face sanctions as well. And don't forget that juries may be permitted to draw adverse inferences about what destroyed records may have shown, thereby weighting the scales of justice unfavorably for the offending party.

Inside

In this issue of *Insight*, employment-related document management, storage and retention policies and practices are discussed by:

- **Alice O'Brien Berquist**, of the law firm Felhaber, Larson, Fenlon & Vogt, PA, Minneapolis, MN. Berquist, who has practiced employment law for 30 years, has also worked in-house as the lead employment law counsel for large insurance and health care organizations.



Taking a holistic viewpoint

Employers should consider records management, retention and storage practices holistically, according to Attorney Alice O'Brien Berquist, of Felhaber, Larson, Fenlon & Vogt, PA. The Minneapolis attorney outlined several factors that employers should keep in mind when developing a records management and retention policy.

Compliance. Obviously, a primary consideration in policy development is compliance, Berquist advised. Employers must comply with several laws containing specific requirements for retention of employment-related records, which are discussed in greater detail below.

Employee privacy. Employers should consider the privacy needs of employees when determining who will have access to employment-related records, Berquist said. Under the Americans with Disabilities Act (ADA), for example, supervisors and managers may not be allowed access to an employee's medical information, she pointed out. Employers should also take measures to ensure the privacy of employees' social security numbers, often mandated by state law.

Data storage costs. The cost of storage is a third significant factor that employers should take into account in developing a records retention policy. "The amount of electronic data that employers and employees are generating through the use of e-mails, Blackberrys, instant messaging, and data recorders is growing exponentially," Berquist observed. "Not only are the costs of physical storage increasing dramatically, the cost of reviewing and providing this information to opposing counsel if there is litigation can be enormous."

Accessibility. Fourth, employers should ensure that information is easily accessible, or productivity will suffer, Berquist suggested. "Many employers have decided to maintain nearly all of their employment records, including applications, personnel files, appraisals and benefit information electronically because of their easy accessibility," she noted.

Litigation. Finally, Berquist urged employers to consider the impact of litigation on records retention practices. Employers must maintain records that are relevant to a lawsuit or a potential lawsuit for the duration of the claim. "Due to the sheer volume of electronic information and the increase in class

action lawsuits, the document retention expenses associated with litigation can be extremely burdensome,” Berquist said. All of these factors must be considered by employers when developing records management programs.

Legal issues impacting records retention

Employers’ records retention policies should take into account the recordkeeping requirements of state and federal laws under which the employer is considered a covered entity. Berquist noted that most employers choose to retain employment-related records beyond the period required by record retention statutes so that the records are available to defend against any lawsuits brought by employees. She recommended retaining these records for the statute of limitations period for breach of contract claims, which is generally six years.

Federal law requirements. Title VII of the Civil Rights Act of 1964, GINA and the ADA all require that any employment record made or kept by an employer be preserved for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later, Berquist pointed out, citing 29 CFR §1602. According to proposed regulations at 29 CFR Part 1635, this requirement will apply to GINA as well.

Similarly, the Age Discrimination in Employment Act (ADEA) requires that records relating to employment actions such as hiring, promotion and discharge be maintained for a period of one year from the date of the personnel action to which any records relate, while payroll and compensation records must be retained for three years, Berquist advised, citing 29 CFR §1627.3.

As to government contractors, 41 CFR 60-1.12 (a) of the regulations implementing Executive Order 11246, requires any personnel or employment record made or kept by the contractor to be “preserved” by the contractor for a minimum of two years, Berquist noted.

Like the ADEA, the Fair Labor Standards Act requires that payroll and compensation records be maintained for three years, as does the FMLA for records regarding leaves, Bernquist said.

Ledbetter Fair Pay Act. Berquist noted that records retention policies are significantly impacted by the enactment earlier this year of the Lilly Ledbetter Fair Pay Act. That law amended Title VII of the Civil Rights Act to provide that the statute of limitations for filing a lawsuit alleging pay discrimination resets with each new discriminatory paycheck, rather than running from the date on which the compensation practice was implemented.

“As a practical matter, this means that an employee could bring a lawsuit based on a compensation policy or program that was put in place years, if not decades, prior to the time a lawsuit is filed,” Berquist explained. In order to defend against the lawsuit, employers need to keep detailed documentation explaining why the particular decision was made. “As a result of this law, employers are well advised to keep accurate records of their compensation practices *indefinitely*,” she said.

Unionized workforce. When an employer’s workforce is unionized, collective bargaining agreements, notes of bargaining history, grievance settlements and arbitrations should be retained indefinitely, Berquist recommended. She noted that “when an employee brings a grievance based on a violation of the collective bargaining agreement, an employer will want to be able to refer to these documents to determine bargaining history, contractual intent and how these issues have been resolved in the past.”

Electronic discovery obligations. The amendments to the Federal Rules of Civil Procedure relating to e-discovery had a significant impact on document retention practices. “Unlike paper documents, electronic records are routinely overwritten or deleted as a result of the normal operation of the electronic systems,” Berquist explained.

“Rule 37(f) is a ‘safe harbor’ provision which states that, absent exceptional circumstances, a court may not impose sanctions on a party for failing to provide electronically stored information lost or destroyed as a result of the routine, good-faith operation of an electronic information system,” Berquist advised. “This safe harbor provision makes it imperative that employers establish a comprehensive document retention system that includes electronic as well as paper documents.” She warned that employers that fail to develop a document retention system will be unable to take advantage of the safe harbor provided under the federal rules.

Compliance audits. As to compliance auditing issues, Berquist cautioned that internal audits are discoverable by outside third parties, unless those audits are subject to the attorney-client privilege or the work product doctrine. This means that any compliance issues identified by the audits can be used against the employer in lawsuits brought by employees or the government. “Employers should take great care to ensure that audits are undertaken at the request of counsel and the documents should be clearly marked as being subject to the attorney-client privilege and/or the work product doctrine,” Berquist advised.

Employers should also keep in mind that, under sections 103(a) and 802(a) of the Sarbanes Oxley Act, public companies are required to maintain audit work papers, documents that form the basis of an audit or review, and all information supporting conclusions for at least seven years, Berquist said.

Confidentiality. Berquist discussed several statutes with confidentiality provisions that employers should take into account when developing records retention policies:

- The ADA requires that an employer retain an employee’s confidential medical information in a separate file that is not accessible by supervisors or managers. (Supervisors and managers may have access to information about work restrictions, not medical information.)

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- FMLA regulations provide that all records and documents relating to medical certifications of employees or employees' family members be maintained as confidential medical records.
- GINA requires that employers maintain genetic information about employees as confidential medical records, similar to an employer's obligations under the ADA.
- The Health Insurance Portability and Accountability Act of 1996 (HIPAA) mandates that employers maintain the confidentiality of protected health information kept by the employers.
- Regulations promulgated pursuant to the Fair and Accurate Credit Transactions Act of 2003 (FACTA) require that employers obtaining information in a consumer report take reasonable measures to dispose of personal information.

Categorizing records

It's important that employers distinguish between personnel files, medical files, confidential files and other files when developing records retention policies and practices. Berquist emphasized that employers should categorize employee records to ensure that there is a clear understanding, *for each type of document*, of the purpose of maintaining the record, to whom access should be given, where the record should be maintained and how long it should be maintained.

For example, employees and supervisors should have access to an employee's performance history and compensation. But

if the employee has submitted any medical information, that information must be maintained in a separate file that is not accessible to supervisors or managers, Berquist said. If the employee has filed a discrimination complaint, those records should also be retained as confidential documents, with access provided to human resource professionals. The employee benefits area should also maintain separate files for employees that contain information about their benefits elections.

Proprietary information. Records retention policies and practices also must address preservation of employers' proprietary information, such as trade secrets and customer lists. Berquist advised that if employers fail to take reasonable steps to maintain the secrecy of such information, they will not be protected from disclosure. Courts consider an employer's efforts to protect the secrecy of such information in determining whether the information has "trade secret" status. Failure to address such proprietary issues would represent a lack of the required "reasonable efforts to maintain secrecy" and could result in the information losing its value by becoming generally known, she explained.

The records retention policy should state that trade secret information must be kept for the life of the trade secret. If protected, a trade secret can potentially last forever, noted Berquist, citing the formula for Coca Cola, which as one of the best known examples of a trade secret, has been protected since 1886.

Identifying records for retention

What are the best policies and practices for identifying which records should be retained by employers?

In determining which records to retain, employers should consult with legal counsel and human resource professionals, as well as resources such as the *Guide to Record Retention Requirements in the Code of Federal Regulations* [CCH 2006], according to Berquist. As to records retention needs that are specific to an employer's business, employers should research industry requirements.

Berquist also suggested that employers establish schedules pertaining to each type of document and list the specific statutory requirement for each document. The policy should cover electronic records as well as paper documents, and both types of records should have the same retention requirements. "A program is only as effective as the employees who enforce it, so employers should ensure that employees are adequately trained on the requirements of the program," Berquist urged. When the retention period ends, the documents should be destroyed.

How long should employers retain records? That depends on the type of document. Berquist recom-

mends the following retention periods for particular types of records:

- **Personnel records:** Generally, the longest statute of limitations for employment law claims is for breach of contract. Although there are different laws in each state, six years is the most common statute of limitations period for this type of claim. Employers should maintain personnel files for the length of time applicable to breach of contract claims in their state.
- **Employee medical records:** Since an employee's medical records may be relevant to an employment law claim brought by the employee against the employer, these records should be maintained for as long as the personnel records are retained.
- **Other confidential employee records:** Any confidential documents relating to a specific employee should be maintained for the same period as the employee's personnel records.
- **Proprietary information:** Records pertaining to employer proprietary information should be kept indefinitely.
- **Records relevant to litigation:** Records pertaining to pending or potential litigation must be kept until the final disposition of the claim. This could be for several years.

Keeping litigation-related obligations in mind

When the possibility of litigation arises, what steps should be taken to ensure compliance with federal discovery rules? “An employer is required to take steps to preserve relevant information at the time an employer receives notice of a lawsuit, discrimination charge, government investigation or any circumstances where there is a reasonable anticipation of litigation,” Berquist instructed. “However, before there is any threat of litigation, the employer should have assembled a response team consisting of information technology (IT), legal, human resources and business unit leaders.” The purpose of this group is to create a “data map” that is unique to each organization showing how electronically stored information (ESI) comes into the organization, and where and how long the information is stored.

When a lawsuit has been filed or litigation is reasonably anticipated, this same group should decide how to respond based on a case-by-case analysis of what information is relevant to the claim and where the information is located, Berquist advised. “In addition, according to the Federal Rules of Civil Procedure, a party should consider the degree of accessibility, whether the information exists in alternative formats with higher accessibility, and whether the cost or burden of production is excessive as compared to the relevance or value of the information,” she said.

Who should guide the process? Berquist believes the records retention process as it relates to litigation is more effectively guided by legal counsel, as opposed to human resource professionals, because counsel have been held accountable when spoliation – the intentional or negligent withholding, hiding, alteration or destruction of evidence – occurs. For example, in *Zubulake v UBS Warburg LLC* [85 EPD ¶41,728] (SDNY 2004), the court stated that counsel was responsible for ensuring that the client placed an effective litigation hold on relevant documents and that the documents were retained.

Moreover, a magistrate judge in *Qualcomm Inc v Broadcom Corp*, 2008 US Dist LEXIS 911 (SDCal, Jan 07, 2008), sanctioned six attorneys and referred them to the state bar for investigation of ethical violations for accepting client discovery responses without question. (The order was vacated in part on the ground that attorneys should have the ability to defend themselves by producing attorney-client privileged information, 2008 US Dist LEXIS 16897 (SDCal Mar 05, 2008)) “The case is a clear warning to attorneys who fail to take proactive steps to ensure that their clients have retained and disclosed relevant information,” Berquist said.

What’s at stake for employers? “Courts are typically unsympathetic to a party’s failure to preserve data,” Berquist advised. “While penalties for spoliation vary depending on the severity of the loss and the culpability of the party, they include monetary sanctions, awards of attorneys fees and costs, litigation consequences such as default judgments, dismissal of certain claims or defenses, or court instructions allowing a jury to draw adverse inferences about what the destroyed evidence would have shown.”

And the costs of spoliation are high, according to Berquist. For example, *Zubulake* involved a single plaintiff alleging employment discrimination. After determining that backup tapes contained relevant emails that key players at the company had deleted from their computers after the lawsuit was filed, the court instructed the jury that they could infer that the lost evidence would have been unfavorable to the employer. The jury awarded the employee \$9.1 million in compensatory damages and \$20.1 million in punitive damages.

In *Qualcomm*, the court ordered the offending company to pay more than \$8.5 million in attorney’s fees and sanctioned six attorneys from the law firm representing it for intentionally hiding or recklessly ignoring relevant documents, and for accepting, without independent investigation, that the company’s searches for these records were adequate.

In light of these discovery obligations, do most employers have effective records retention policies? “The most difficult component to an effective program is ensuring that the individuals who are responsible for implementing a litigation hold are aware of their specific obligations,” Berquist observed. “Many times, counsel will send out a litigation hold notice with statements about the necessity of retaining all relevant information. Yet, there are no follow-up meetings to ensure that anyone is actually following through on the requirements.”

Implementing litigation holds. When litigation or the threat of litigation arises, an employer should send a litigation hold to individuals within the organization who need to take affirmative steps to preserve physical documents, as well as ESI, in order to show that the employer took steps to prevent the spoliation of evidence, advised Berquist. “The litigation hold notice should contain very clear information about the steps that the recipient is required to take to preserve evidence, what evidence needs to be preserved, and for how long.”

As to managing the litigation hold, the best practice according to Berquist is to create a litigation log that includes what information is being held, who is responsible for holding it, and notes explaining why the information is being retained, according to Berquist. Periodic checks should be made to ensure that the responsible persons are still fulfilling their obligations. As people leave the organization, others should accept responsibility for the hold. Berquist suggested that the litigation hold process be managed by either outside or in-house attorneys since the attorneys will be held responsible if evidence is not retained.

Privileged information. Given the volume of electronic data that may be generated, employers sometimes inadvertently produce privileged information during discovery. Berquist pointed out that Federal Rule of Evidence 502(b), which became effective in 2008, is very helpful for employers who are involved in federal court litigation. That rule provides that inadvertent disclosure will not result in waiver “when the holder of the privilege ‘took reasonable steps to prevent disclosure’ and ‘promptly took reasonable steps to rectify the error,’” she said. ■