

TEXAS LITIGATION SOLUTIONS

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PERSONNEL FILES: SAVE IT OR SHRED IT?

The new year is a great time to reorganize, but with every effort to arrange, classify, or prioritize come countless decisions whether to retain or dispose of various types of information. Such decisions are complicated by potential legal ramifications, which require organizations to choose carefully how and where to store critical material. Among the most sensitive information in the files of the typical business are records regarding employees and work-related decisions impacting them. Employers must designate a specific location to store any employee information necessary to make work-related decisions. Although such information can be kept efficiently in personnel files, establishing and adhering to legally sound storage criteria remains an important consideration. For Texas entities, much of the information below constitutes sound advice only. With limited exception, Texas law does not dictate the contents of employees' personnel files.

As business records, personnel files must be organized

properly and stored in an appropriate location. There should be only one official personnel file for each employee, and that file should include all information used to make work-related decisions regarding the employee, including hiring, promoting or demoting, and determining

The destruction of these notes, however, should be pursuant to an officially adopted document management and retention policy, as discussed below.

What to Save

Generally, personnel files should contain all material



salary or wages. Supervisors should not keep their own employee files, but rather retain notes of information to be recorded in a single dated original document as soon as practicable. Once information is transferred to an official evaluation or disciplinary record, the supervisor's informal notes should be destroyed.

used to make employment decisions. Such material may include applications; transcripts; resumes; W-4 forms; benefit information; equipment or assets issued; evaluations and disciplinary actions; raises and changes in title or duties; signatures acknowledging receipt of handbooks (continued pg 2)

SUPREME COURT ARGUMENT OF INTEREST

A November 30 argument before the U.S. Supreme Court could affect all city, county, state, and private entities overseeing or running jails or prisons. On one side of the case involved, *Schwartzegger v. Plata*, are inmates

and prison guards, who support a California federal district court ruling that overcrowding in the state's prisons is the main cause of substandard medical and mental health care that violates prisoners' right to be free from

cruel and unusual punishment. On the other side is the state, which wants the ruling overturned. The Court will have to decide whether the judges overstepped in applying the federal Prison Litigation Reform Act.

PERSONNEL FILES (CONT'D)

or company policies; written directives, reprimands, or other documentation of employment counseling sessions; and termination documents. Because of the prevalent use of e-mail in today's business climate, special attention should be paid to e-mails containing directives, reprimands, or other employment-related communications. Such e-mails should be retained and printed for inclusion in the personnel file.

Special circumstances apply to some other forms of information, such as background checks, which generally should not be kept in personnel files; medical information, which should be kept in a separate and private file; investigative information (notes of investigations should be filed separately, while official records of disciplinary actions resulting from investigations should be kept in personnel files); information relating to legal claims, which should be placed in a separate litigation file; I-9 forms, which should be filed separately for ease of access; and garnishments, which should be sent directly to payroll. Attorney-client communications should never be kept in a personnel file. In addition, if Texas local governments have adopted Chapter 143 of the Local Government

Code, there are specific provisions relating to firefighters and police officers that dictate the required contents of their personnel files.

Who Should Have Access

To protect privacy, access to information stored in personnel files should be limited to those requiring it. If only certain information is required, only that information should be disclosed. Very rarely is review of an entire personnel file warranted. In Texas, while current public-sector employees or their representatives may review information in the employees' personnel files, private employees have no statutory right to examine or copy files.

How to Maintain Files

All personnel files should be kept in a central location, and one person, usually a member of Human Resources, should act as custodian. Only the custodian should place information in files or remove it, and supervisors should send all relevant personnel documents to the custodian for filing.

While most records in employees' personnel files should be retained for at least three years, some should be kept longer. If records involve litigation, they should be kept until well after the litigation ends, including appeals. If they relate

to injury or occupational illness, they should be kept for several years after the employee stops working for the organization. When employees are or may have been exposed to toxic substances, any applicable records should be kept for thirty years after termination. ERISA plan documents and records must be retained for six years. The time for retention of employment contracts varies by state, but in Texas most breach of employment contract lawsuits are governed by a four-year statute of limitations.

Like other states, Texas has rules regarding the retention of certain employee records. All local government employers, for instance, are specifically subject to the state's records retention law. With regard to wages and hours, Texas requires employers to keep accurate employment and payroll records for four years. There are no state-specific requirements regarding worker injuries, health, and safety or other employment records. Since different states have different retention periods, review of state law requirements is a necessary step in defining an employer's obligation regarding personnel file records.

Every organization should establish a written record-retention policy dictating the periodic review and cleaning out of personnel files. Such a policy not only

provides the custodian of records with necessary guidance, but also helps protect against spoliation claims in the event of litigation. At a minimum, the policy should define the documents subject to the policy, explain that electronic records are also subject, identify who is responsible for ownership and maintenance

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of specific types of records, explain the record retention and destruction schedules, indicate how records should be handled to protect their security, and include a mechanism for ensuring compliance with the policy. Generally, personnel files should be reviewed and cleaned often, missing items should be replaced, and old items should be destroyed. Electronic records must be treated with as much care and discretion as paper records. For a wider discussion of the significance of electronic records, particularly in the context of litigation holds, please see the October 2010 newsletter.

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