ESSENTIALS OF EMPLOYMENT RECORDKEEPING:

SAVING THOSE RECORDS MAY SAVE YOUR LIFE
(OR AT LEAST YOUR BUSINESS)

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The Fifth Annual Hospitality Law Conference
February 8-9, 2007

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Constangy, Brooks & Smith, LLC has counseled employers on labor and employment law matters, exclusively, since 1946. The firm represents Fortune 500 corporations and employers throughout the country. More than 100 lawyers partner with clients to provide cost-effective legal services and sound preventive advice to enhance the employer-employee relationship. Offices are located in Georgia, South Carolina, North Carolina, Tennessee, Florida, Alabama, Virginia, Missouri, and Texas.

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I. INTRODUCTION – ARE YOU PREPARED?

Scenario 1

It is 4:30 on a Friday afternoon. As you collect your things to leave, you receive a call from an Office of Federal Contract Compliance Programs ("OFCCP") Officer, who informs you that a complaint has been filed with his office and that an on-site review/investigation will be conducted first thing Monday morning. As part of his investigation, he wishes to examine the personnel records of all employees employed within the past two years. He bids you adieu and wishes you a nice weekend. Your plans for a relaxing weekend on the beach have suddenly metamorphosed into a stress-filled three days of preparation.

Scenario 2

A disgruntled employee has filed a charge with the Equal Employment Opportunity Commission ("EEOC"), alleging discrimination in promotion opportunities. The EEOC investigator calls and informs you that she would like to conduct an onsite visit to review the personnel file of the former employee and other relevant persons. The onsite visit is in four days.

These are not regular occurrences but in the event they do occur, are you prepared? Are the records contained in your personnel files accurate and properly maintained? Or do your personnel files contain information that could possibly subject your organization to liability? Do your personnel files contain any potentially damaging information, *e.g.* interview notes containing insensitive comments? Have you properly documented all employment activities? Are you confident that all of the documents contained in your personnel files can adequately defend your company's employment decisions? Accurate and up-to-date personnel files can assist you in tracking the workforce, organizing hiring and retention decisions and protecting your organization from liability. Failure to properly maintain the personnel files can subject your organization to unnecessary litigation. This presentation will provide helpful tools and practical guidelines to assist employers with properly maintaining their personnel files and other records from the beginning to the end of an employment relationship. Additionally, we will examine those documents that should *not* be included in a personnel file, as well as policy considerations regarding access to personnel files and the benefits of periodic file review.

II. DOCUMENTING THE EMPLOYMENT RELATIONSHIP

A. The Four Principles

1. Keep a "Litigation Perspective"

Employers should always ask, "What kind of impression would a judge or jury draw from this document?" Many of the documents contained in an employee's personnel file can potentially be subject to the scrutiny of both a judge and a jury, years after creation.

2. Ensure that documents maintain a degree of objectivity

A document commenting on an employee's performance against established goals is less likely to reflect supervisory bias than a document containing a subjective comment that the employee "has an attitude." Employers should always focus on specific job-related deficiencies of the employee that, whenever possible, can be objectively measured.

3. Be fact-driven, not conclusory

Factual statements are more legitimate and persuasive than conclusory statements. This is particularly true in cases of performance evaluations and the imposition of discipline. It is more persuasive to state an employee "was over 20 minutes late to work twice this week, on Tuesday and Thursday (listing specific dates) in violation of our tardiness and attendance policy," versus stating, an employee is "often late to work." By properly recording the facts, the employer makes its position clear, eliminating the need to later scramble to provide a basis for its employment decisions.

4. Ensure that documents are accurate

Mistakes can be costly. Improperly completing an EEO-1 report can result in an affirmative action audit by the federal government. Additionally, management's failure to obtain an employee's signature verifying receipt of the employer's sexual harassment policy can have adverse consequences in a later suit.

In addition to these four principles, every document produced and created should contain the date on which the document was created and/or amended, the name and signature of the document's author, page number and the names and signatures of any witnesses (if applicable).

B. Pre-Employment/Hiring Documentation

1. Pre-Employment Documentation

The relationship between employer and employee usually begins with pre-employment activities, *i.e.* completion and submission of an application, background checks and interview(s), if applicable. These pre-employment activities generate a number of documents. While retention of pre-employment documents for non-selected candidates is imperative, retaining some of these documents in a newly-hired employee's personnel file is a matter of policy. For example, it may not be a good practice to retain the background investigation and interview notes in the personnel file of a new employee. Placing these documents in a newly-hired employee's personnel file serves no real purpose, as they are not related to the employment relationship and only create a cluttered file. A better practice is to retain such information in a separate file, documenting the entire interview process. Moreover, by documenting the entire interview process, an employer may insulate itself from liability when a disgruntled applicant fails to obtain an interview or the position. It may provide evidence that the selection process is focused and fair and the person selected was the most qualified applicant.

2. Hiring Documentation

While the employment relationship begins during the pre-employment phase, the creation of the personnel file begins on the date of hire. The first day on any job usually involves an employee spending a good portion of their day completing paperwork, from benefit information to an I-9 form. However, are all of these documents to be filed in the new hire's personnel file? While there is no singular all-encompassing checklist of documents that must be included in an employee's personnel file, the documents retained should create a paper trail, detailing the steps taken by management in orienting a new employee to the organization. For example, at hiring the following documents should be placed in an employee's personnel file:

a. Job description for the position;
b. Offer of employment;
c. Job application;
d. Employee's resume (if provided);
e. IRS Form W-4;
f. Signed acknowledgement of receipt of employee handbook/standards of conduct/etc.;
g. Forms relating to employee benefits;
h. Forms providing next of kin and emergency contacts;

In addition to the above, it may also prove beneficial for an employer to include a checklist of those items presented to the employee at orientation. This checklist should similarly be reviewed and signed by the employee and placed in his or her personnel file. Such acknowledgments will provide protection to the employer

from the employee later claiming, in the midst of litigation, that he or she never received the company's anti-harassment policy or other crucial documentation.

3. I-9 Forms

New employees are required to complete an I-9 form, verifying that they are eligible to work in the United States. However, this document should **not** be retained in the personnel file. Many government agencies are authorized to inspect your I-9 forms if they visit your facility. By keeping the I-9 form in the employee's personnel file, the government is given the opportunity to rummage through entire personnel files. As such, an employer's files would be subject to much broader governmental scrutiny. Anything found in the files may be inspected and may raise additional issues or questions. By keeping a separate I-9 file, employers have the ability to hand an inspecting agency one file containing all I-9 forms, thereby maintaining control of records and substantially limiting the scope of the inquiry.

C. Documentation During Employment

While the hiring process definitely creates its share of paperwork, the bulk of the paperwork generated in an employment relationship is during an employee's tenure. One employee who has worked for an organization for 15 years can generate enough paperwork to keep a small army busy, let alone 20 employees with the same length of service. Proper maintenance of employee documents can be helpful in the event of a lawsuit. Improper maintenance, however, can be extremely harmful.

1. Compensation Records

Proper maintenance of employee compensation records is essential. The Fair Labor Standards Act ("FLSA") requires an employer to make, keep and preserve payroll records. The following lists the record retention requirements of the FLSA and the Equal Pay Act:

RECORDS TO BE RETAINED	STATUTE	PERIOD OF RETENTION	FORM OF RETENTION
Wage and hour records, summary payroll records	Fair Labor Standards Act	Three years	No particular form is specified
Basic time and earnings cards, work time schedules, records of additions to or deductions from wages	Fair Labor Standards Act	Three years	No particular form is specified
	Equal Pay Act	Three years	No particular form is specified

Failure to retain and properly maintain these records can prove to be costly. For example, a federal court denied an employer's summary judgment motion on the employee's FLSA claim because the employer failed to maintain time records of the hours the employee worked. The only evidence available was the sporadic records the employee kept and the employee's recollection of her hours. The court stated, "inexact or approximate evidence is enough to [support an employee's claims that the Act has been violated when] an employer . . . has failed in its statutory duty to keep accurate time records." *Templet vs. Hard Rock Construction Company*, 2003 WL 22717768 (E.D. La. Nov. 17, 2003). Assuming this employee had sufficient evidence to support having worked in excess of 100 hours of overtime with no compensation, her employer would have no documentation to refute her claim. Whether she received the full amount of her claimed damages would depend on whom the jury believed.

Similar to those documents retained during the hiring process, compensation documents should detail an employee's compensation history. Salary increases and/or decreases as well as denials of raises should be well documented. Additional compensation documents that should be in the personnel file include but are not limited to:

a. W-4 forms
b. Attendance Records
c. Pay Advance request records
d. Garnishment orders
e. Compensation History Record
f. Compensation Recommendations
g. Authorization to Release Payroll Information
h. Notification of wage and/or salary increases and/or decreases

It may also be beneficial to keep certain compensation documents in a separate folder, i.e. those documents detailing the actual pay rate of an employee, the daily/weekly time cards/sheets and the amounts and dates of payment. While these documents must be retained, placing them in a separate folder not only reduces the amount of paper in the file, but may also eliminate possible investigations arising from a governmental agencies "inspection" of your personnel files. Regardless of where these documents are kept, it is essential that all compensation records adhere to the basic recordkeeping principles outlined above.

2. Performance Evaluations

Performance evaluations are probably the most important tools an employer has when defending a wrongful termination suit. Proper documentation and retention of evaluations can mean the difference between ending a suit at summary judgment and being dragged into court and defending your organization before a jury.

First, it is important the evaluations be conducted in a timely fashion, whether it be quarterly, semi-annually or annually. Whatever the schedule, it should be followed consistently. It may be a good idea to document when these reviews will be conducted and have the employee sign an acknowledgement form, placing the same in the personnel file. If a follow-up session is scheduled after a review, an agenda for the session should be prepared, detailing those items/goals previously discussed. Any resolutions or decision reached during these sessions should similarly be documented, signed by both the reviewing supervisor and the employee, and placed in the personnel file.

When preparing an evaluation, it is imperative the evaluation be clear and concise, utilizing the four principles mentioned above – litigation ready, fact-laden, objective and accurate. Additionally, the evaluation should:

a. Identify the standard of behavior by which the employee is judged;
b. Make clear that the employee was aware of the standard;
c. Specify any violation(s) of the standard;
d. Afford the employee the opportunity to correct his/her behavior to conform to the appropriate standard; and
e. Specify what action will be taken if the employee fails to meet this standard.

Of course, the evaluation should also be fair and honest. NEVER give an employee an outstanding performance rating if his or her work performance has not truly been outstanding. Such inaccurate evaluations could later be used against an employer if this same "outstanding" employee is repeatedly denied a promotion or raise. For example, in *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493 (9th Cir. 2000), an $11.7 million judgment was entered against an employer in a sex discrimination suit after the employer consistently overrated an employee, giving her "outstanding" and "above average" ratings. The employer overrated the employee in an effort to placate her but failed to promote the employee despite her repeated applications, claiming that she was not the best candidate. While perhaps true, such facts will compel a court to allow a jury to determine the employer's true motivations for its promotion decisions.

Once the evaluation is completed, the employee should review the evaluation and be permitted to make any comments, whether positive or negative, about the evaluation. The evaluation should be signed and dated by the employee, acknowledging his/her receipt and review, and placed in the personnel file. Oral evaluations, whether positive or negative, should also be documented and placed in the file, again employing the four principles stated above.

3. Employee Discipline

Similar to performance evaluations, documents used in disciplining an employee, whether oral or written, can protect an employer against suits filed by a disgruntled employee alleging his or her termination, demotion or other action

was motivated by discrimination or retaliation. The disciplinary action, whether oral or written, must be properly documented at the time of the infraction. Postponing a discussion with an employee regarding disciplinary matters until the performance review increases the chance that the employee will contend that the discipline was pretext for either retaliation or discrimination. Additionally, properly documenting the disciplinary problem at the time of the occurrence eliminates any temptation to later rectify documentation deficiencies, a practice frowned upon by courts. In *Twyman v. Dilks*, 2000 WL 1277917 (E.D. Pa. Sept. 8, 2000), a federal district court permitted an employee's discrimination claim to proceed to a jury after noting that the employee's "performance issues" were not documented until after she was fired.

Disciplinary warnings, like performance evaluations, should be reviewed by the employee and signed, acknowledging that they have reviewed the notice/warning, and should be placed in the employee's personnel file. However, documents relating to internal confidential investigations, *e.g.* sexual harassment investigations, should be maintained in a separate file. By retaining these documents in a separate, confidential file, an employer can protect itself against invasion-of-privacy claims by the complaining employee or others whose conduct is discussed in the course of the investigation.

4. Additional Documentation

In addition to those documents detailed above, the following documents, if applicable, should also be included in the personnel file:

a. Training Records

(1) Training history records
(2) Training program applications/requests
(3) Skills inventory questionnaire
(4) Training evaluation forms
(5) In-house training notification letters
(6) Training expense reimbursement records
(7) Safety training/meeting attendance/summary forms

b. Benefits Records

(1) Life insurance application
(2) Vacation accrual/taken form
(3) Requests for non-medical/non-FMLA leaves of absences (maintain medical/FMLA documentation separately)
(4) Retirement application
(5) Payroll deduction authorization
(6) Hazardous substance notification and/or reports
(7) Tuition reimbursement application and/or payment records
(8) Annual benefits statement acknowledgement

c. Employee Relations Records

(1) Employee Assistance Program consent forms
(2) Commendations
(3) Completed employee suggestion forms/suggestion status reports

D. Documenting the End of the Employment Relationship

The end of an employment relationship can either be amicable or contentious. Depending on the way the relationship ends will determine what documentation needs to be placed in the employee's personnel file. In a typical employee separation, *i.e.* resignation, the documents placed in the personnel file should include the following:

1. Exit interview form;
2. Final employee performance appraisal;
3. Exit interviewer's comment form;
4. Record of documents given with final paycheck
5. COBRA documents

These documents, as others in the personnel file, should follow the four principles discussed above. When the employee is involuntarily terminated, the personnel file should contain convincing proof of a violation of a rule or policy for which the employee is being terminated. If the documents in the file cannot alone support a termination, termination may not be the appropriate action. In the case of a reduction in force, any business decision supporting the reduction needs to be adequately documented so those employees selected for layoff will not later use the lack of documentary support as favorable evidence in a discrimination suit. Failure to do properly document the reduction in force may result in your organization explaining its employment decision before a jury. In *Miranda v. BBI Acquisition Corp.*, 120 F. Supp. 2d 157 (D. Puerto Rico 2000), a pregnant employee who was laid off was permitted to proceed with her discrimination claim under the Pregnancy Discrimination Act after the employee established that the organization failed to properly document the business reasons for the elimination of her position.

While the information provided above is not exhaustive, it does provide a road map for determining which documents should be included in a personnel file. However, where should these documents be kept and how much access should an employee have to their personnel file? Further, are there any documents that should not be included?

III. DOCUMENT MAINTENANCE AND ACCESS

A. The Self Audit

Where should employers keep all the documents they are required to generate during the employment relationship? Should they all go in one file? If not, how many separate files? These questions can be difficult enough for small businesses and the task becomes more daunting as the business grows and employee numbers begin to rise. To make matters more complicated, the employment relationship is governed by several different governmental

regulatory agencies, each maintaining different priorities and compliance requirements. Many laws, covering such topics as discrimination, safety, and immigration, charge governmental regulatory agencies with specific objectives and require certain documents when regulating an employer's compliance with these laws. For that reason, an effective plan for limiting an employer's exposure to liability can protect employers from potentially devastating consequences resulting from either a governmental audit or the document request of a plaintiff's attorney.

For these reasons, periodic self-audits are important in avoiding legal landmines. While numerous laws make a self-audit increasingly complicated, the potential benefit of identifying and proactively addressing potential claims cannot be understated. Employers who fail to conduct periodic evaluations of their policies, procedures, and practices may find themselves with a multitude of legal liability. Consequently, the self-audit remains an important tool for employers. When conducting a self-audit of personnel files, an employer should ask the following questions:

1. Does the file reflect all of the employee's raises, promotions, and commendations?

2. Does the file contain every written evaluation of the employee?

3. Does the file show every warning or other disciplinary action taken against the employee?

4. If your policies provide that written warnings or other records of discipline will be removed from an employee's file after a certain period, have they in fact been removed?

5. If the employee was on a performance improvement plan, a probationary or training period, or other temporary status, has it ended? Has the file been updated to reflect the employee's current status?

6. If the employee handbook or company policies have been updated since the employee started working for you, does the file contain a receipt or acknowledgement of the most recent version?

7. Does the file contain current versions of every contract or other agreement between you and the employee?

B. Documents Not to Be Included in a Personnel File

It is recommended that employers carefully consider how to file each and every personnel document maintained. The law compels, and in some cases requires, that employers keep a separate file for medical records but a solid defensive strategy would also include separate files for other types of employee information.

1. Employment Eligibility Documents

As mentioned above, it is recommended that employers keep I-9 forms in a separate file. While an employer is permitted to photocopy the documents offered by an employee as proof of eligibility to work, such practice is not required. Employers who choose to photocopy and retain these documents should not retain the information in a personnel file. Such a practice can generate a resource of information for a plaintiff or regulatory agency seeking to investigate discriminatory employment practices.

2. Medical Records

Medical information, such as pre-employment physicals, medical surveillance information, injury reports, medical questionnaires, workers' compensation reports, drug testing results, etc. should be maintained separately from the employee personnel file. It is important for employers to limit access to medical information. A great deal of legislation as well as governmental regulations exists for employers to consider that specifically dealing with the maintenance and retention of medical records.

a. The Americans with Disabilities Act

The Americans with Disabilities Act (ADA) has special guidelines applicable to the gathering and maintenance of employee medical information. For example, prior to an employment offer, all disability related inquiries must be related to the job. The ADA has a narrow exception to the prohibition of pre-employment medical inquiries. An employer may condition an offer of employment on the results of a medical examination as long as (1) the examination is given to all entering employees; (2) the results are kept confidential; and (3) the examination is not used to discriminate against individuals with disabilities, unless the results make the individual unqualified for the particular job.

Additionally, the ADA imposes very strict rules for handling medical information obtained during employment. The ADA prevents employers from (1) requiring a medical examination; (2) inquiring as to whether an employee has a disability; or (3) inquiring as to the nature or severity of any disability unless the inquiry or examination is "job related and consistent with business necessity."

The results of any medical examination must be kept confidential and segregated from the personnel file. However, the ADA recognizes that employers may have a legitimate need to disseminate the results of medical tests or other medical information and allows confidential medical information to be shared with supervisors who need to arrange necessary work restrictions and make necessary reasonable accommodations; first-

aid and safety personnel, should emergency treatment be required; and government officials investigating compliance.

b. The Health Insurance Portability and Accountability Act

The Health Insurance Portability and Accountability Act (HIPAA) was enacted to fill the gaps left by a patchwork of state laws which sought to restrict private medical records. Under HIPAA, "Covered entities" may not use or disclose an individual's "protected health information" without the authorization of the individual unless specifically required or allowed by the privacy regulation.

While employers are NOT "covered entities," they are affected by the privacy rules based on their sponsorship of health plans and procedures for dealing with the health information of fifty or more participants. If an employer does not have fifty participants in its health plan, they generally did not need to be concerned with HIPAA restrictions. Effective April 14, 2004, HIPAA's privacy rules will become effective for sponsor "small health plans." A "small health plan" is one that paid premiums or claims of $5 million or less in their most recent plan year.

For employers subject to the privacy provisions of HIPAA, the requirements are more stringent for self-funded plans than they are for fully insured plans. This is because HIPAA assumes that if an employer has a fully insured plan, the employer generally does not have access to protected health information (PHI). In self-funded plans, employers who make initial or final claims determinations need PHI to make claims decisions. This information is protected under HIPAA.

c. The Family and Medical Leave Act

The release of confidential medical information is also affected under the Family and Medical Leave Act (FMLA), particularly if an employer requests medical certification or requires an employee to take a fitness-for-duty examination when returning from FMLA leave. It is crucial for employers to maintain any tests or results from a medical certification in a separate medical file, apart from the general personnel file.

3. Background Investigation Records

Background reports are sensitive and confidential by their very nature, and by law they must be restricted to those individuals who are directly involved in the hiring process. Every employer's ultimate goal is to hire and retain hardworking and productive employees. However, can employers effectively evaluate an individual's capabilities based on an application form and one or two interviews? A thorough reference and background investigation can determine if the applicant will become a welcome addition to the team or a threat to the employer, employees, and customers. Further, a court of law may determine an employer

has a duty to conduct a background investigation as an employer's duty, especially under circumstances where the failure to check can create a liability for negligent hiring or retention.

Under the Fair Credit Reporting Act (FCRA), employers must:

a. Clearly disclose to the applicant in a separate document that a report is being prepared by a third party;

b. Acquire a signed release before checking records such as criminal convictions or pending criminal case, driving records, credit reports, or educational credentials; and

c. Provide the applicant with a copy of the report and a notice of legal rights if the employer intends to deny employment based on the information in the report.

The FCRA is designed to balance an employer's interest in assessing a potential employee with the employee's right of accuracy and privacy regarding their credentials.

4. Safety Records

The Occupational Safety and Health Administration (OSHA) regulates and monitors workplace safety. Employers should maintain all safety-related records in a separate file for the same reason it should maintain all I-9 forms in a separate file, that is, to allow an OSHA auditor to see only OSHA-related records during an OSHA audit. This safety record file might also contain documentation relating to an employee's participation or involvement in an OSHA claim or investigation. Limiting access to such documentation would make it easier to keep the information from influencing possible adverse decisions against the employee that could in turn result in retaliation claims under OSHA.

C. Access to Records

Approximately half of all states have legislation touching upon the subject of personnel records. For example, some states have placed restrictions upon the use and release of personnel information with regard to child-care employees, sworn police officers and employees of the state's public and university school systems. Additionally, some states have laws requiring employers to allow employees to inspect and/or to obtain a copy of their personnel file. This is usually subject to some restrictions, *e.g.* inspection only in the presence of a management official or a prohibition against removal of information.

Most public sector employees have the right under state public records laws to examine their personnel file. Some states permit public sector employees to have such access at a "reasonable time." Public sector employers should have a policy in place (or defer to an official department policy) that defines the contours of "reasonable time" so

that employees can enjoy their right of access without unduly interfering with the employer's mission.

The reasons for limiting employee access to his or her file are not so much legal as they are practical. In certain instances, management may not want an employee to view some kinds of test results or criticisms of performance. In other cases, a disgruntled or unhappy employee may request to see his file and proceed to comb the entire record for the purpose of finding a basis for a suit against the employer. This is especially true of former employees. For this reason, granting access to former employees is not recommended unless legally required. In the event an employee asks a specific question about what is in his file, management should consider providing an answer or document relating to that specific question, or read the contents of the relevant document(s) to the employee, rather than turn over the entire file.

Review of an employee's personnel file by third parties should also be carefully controlled. Employees who feel damaged by improper disclosure or referral practices have filed defamation suits. Thus, many employers have adopted strict no disclosure rules or a policy of providing only "neutral references" and thereby only releasing the former employee's name, position and dates of employment.

In light of the growing number of defamation suits based on disclosure of personnel file information, some states have legislation providing that an employer will be immune from liability based on providing job performance information to a former employee's prospective employer unless it can be proven that the employer produced information that was knowingly false, provided with malicious purpose or violated a civil right of the former employee under state law. Notwithstanding such legislation, there is still ample room for lawsuits based on employer-provided references. For employers who have a policy of providing references to other employers, it would be wise to obtain a waiver from a current employee prior to his or her departure from employment. Generally, however, a strict non-disclosure rule may still be the safest option.

Often, human resources managers will receive a subpoena from a party in a lawsuit, requesting the production of documents (including personnel files) regarding a former employee. Because the subpoena requires compliance under authority of the court, producing the requested documents in this compelled manner will generally not subject the employer to defamation liability. In such a case, it is the burden on the other party in the lawsuit to object to the request if it is an improper one.

Federal law requires that records be maintained for job applicants, current employees, and former workers for certain prescribed lengths of time, so that government agencies will have material to review during investigations. See Appendix A for more information.

In addition to personnel information normally retained in the course of business, the Equal Employment Opportunity Commission, state and local EEO agencies, and other agencies require that once a complaint of an unlawful employment practice has been received, the employer must preserve all personnel records, production records and

other evidence which may pertain to the complaint until the matter has been resolved. Similarly, the breadth of an investigation into a complaint may extend beyond records relating to the charging party, and include records regarding all employees holding positions similar to the one held or sought by the charging party.

D. Auditing Wage and Hour Practices

An employer should periodically audit its wage and hour practices to detect any problems and promptly correct those problems. The following steps should be considered:

1. At the very least, an employer should regularly update position descriptions to ensure that these documents accurately reflect the duties of each employee. This practice is particularly important to verify that employees classified as exempt truly meet the test for the chosen exemption. The position description should be compared with the exempt employee's actual job duties to ensure that the description is accurate. In a recent case, the 11th Circuit held that a manager could not rely upon 20 year-old research to support a good faith defense to violations of the FLSA. In that case, the manager testified that he looked into whether an office manager position was exempt under the FLSA twenty years earlier and had not updated that research in the period since. The Court held that the manager's failure to review the company's compliance with the law was not objectively reasonable. *Friedman v. South Florida Psychiatric Assocs.*, 139 Fed. Appx. 183 (11th Cir. 2005). If upon review an employer determines that an employee does not qualify for an exemption, legal counsel should be consulted to determine whether the proper course of action is to reclassify the employee or to amend the job functions to fit within the chosen exemption.

Employers should consider reviewing position descriptions during an employee's annual performance review period. The employee should be consulted regarding the position description and should be asked to sign a statement certifying that the finalized description is an accurate reflection of current duties and responsibilities. Obtaining the employee's agreement with the position description will assist the employer in defeating any later claim asserted by the employee that he or she did not actually perform the exempt duties listed in the description and, thus, is non-exempt and entitled to overtime pay.

2. Employers should have their policies and procedures periodically reviewed to ensure that the policies do not present any wage and hour issues or violations. Employers who do not do so may not be able to rely upon their understanding of the law to cut off liquidated damages. The employer's review should include disciplinary policies, as well as policies pertaining to employee leave and deductions from pay for such leave. Generally, applicable policies pertaining to deductions from pay should be reviewed to ensure that the likelihood of an improper deduction does not exist with respect to exempt employees.

3. Employers should conduct a periodic document audit. Conducting the document audit will help to ensure that if there is a wage and hour dispute, the

employer will have an adequate record with which to dispute any employee's claims. Without an adequate record, the court may rely upon the employee's recollection of events to determine the existence of uncompensated overtime. *Mumbower v. H.R. Callicott*, 526 F.2d 1183 (8th Cir. 1975). This audit should include a random spot-check of employee files to ensure that the employer is accurately maintaining records of its payroll practices. An employer should also review its payroll practices and record-keeping procedures to ensure that the necessary records are being maintained for the appropriate time period, as required by the FLSA.

4. Employers should discuss their record-keeping policies with counsel and consider utilizing an attorney to conduct an internal wage and hour audit. By utilizing or involving legal counsel in an audit, an employer may argue that the results of the audit constitute confidential, attorney-client privileged information that is not subject to disclosure during an audit and/or litigation.

IV. ELECTRONIC RECORDS RETENTION

The marked increase in the use of remote e-mail and instant messaging (via handheld devices and the internet), combined with the ever-greater capabilities of the personal computer and the internet, have greatly improved the efficiency and flexibility of the workplace. However, recent cases have demonstrated the pitfalls of failing to adequately preserve "electronic evidence" such as e-mails and instant messages. In perhaps the most notable case, the employer's failure to preserve electronic evidence in a discrimination case entitled the plaintiff to an "adverse inference" jury instruction, that is, the judge told the jury to infer that the missing documents were favorable to the plaintiff. The verdict against the employer was $29 million. *Zubulake v. U.S. Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003). In the Spring of 2006, Morgan Stanley & Co. was hit with a verdict of $1.5 billion, in large part because of another "adverse inference" jury instruction given by the judge after the firm failed to comply with the court's orders regarding electronic discovery.

Ninety-eight percent of information created today is digital and stored electronically. The displacement of tangible documents by electronic counterparts has caused a great deal of confusion in the legal system, specifically in the practice and procedure of litigation. On December 1, 2006, new federal rules of civil procedure took effect with respect to the retention, production and other treatment of electronic evidence.

A. Primary Points to Remember About The New Rules

1. A Document is a Document

For litigation purposes, electronic documents are no different from any other documents. They must be maintained and produced during discovery just like tangible, paper documents.

2. Preserving Electronic Information Is Vital

The law imposes a duty to preserve information relating to a matter in litigation.

The duty arises as soon as one knows, or reasonably should know, that a dispute will result in litigation. The duty to preserve is particularly important in the electronic environment where documents, e-mail correspondence and other electronic information is subject to being altered or routinely purged from the host computer system. It is imperative that businesses implement procedures for placing a "litigation hold" on all e-documents, e-mail correspondence and other electronic information relating to any matter that may result in litigation to preserve it and exempt it from being automatically altered or deleted from the computer system. In that vein, a proposed "Preservation Protocol" is offered below.

3. Don't Wait to Be Sued

Don't wait until you get a lawsuit to start preserving electronic evidence. When an employee threatens to sue or files an administrative charge, that is the time to start preserving the evidence. Remember that the guideline is whenever the company knew or reasonably should have known that litigation would result.

4. "Everyday Format" Is Okay

Unless otherwise requested or ordered by the court, electronic information may be produced in the form in which it is maintained in the ordinary course of business or in a form that is reasonably usable.

5. Don't Procrastinate

When litigation begins, the rules require the parties to discuss electronic discovery issues early in the discovery process and to address any issues involving the discovery of electronic information in a joint discovery plan. In light of this requirement, parties must consult with counsel at the earliest possible opportunity about the nature and scope of electronic discovery issues raised by the litigation.

6. Don't Forget The Information Technology (IT) Folks

With all due respect to the legal profession, lawyers are not particularly well-equipped to know how to preserve and retrieve relevant electronic evidence. Therefore, any consultations about preserving electronic evidence should include the client's IT specialists and, if necessary, outside IT consultants. IT specialists should be integrated into the litigation team to provide access to the party's electronic data and technological support as appropriate during the course of the lawsuit.

7. A Word About Instant Messaging

Employers should be aware that instant messages are discoverable, too. Many employees will load their "private" instant messaging programs onto their workplace computers and send instant messages throughout the workday. Retrieval of instant messages through "private" programs may be difficult and

expensive. Moreover, instant message communications tend to be even more casual and more potentially "inappropriate" than e-mail communications. Employers have two good options for dealing with instant messaging by employees: (1) ban it completely and make sure the system blocks the operation of all such programs or (2) allow it, but make sure a system is in place to preserve all instant message communications and – most importantly – make sure all employees understand the risks involved in instant messaging, particularly about workplace topics.

8. The "Safe Harbor" Provision

The new rules have a "Safe Harbor" provision that protects against sanctions where a party has lost, altered, or destroyed relevant electronic evidence "in good faith." A court's inquiry into a party's good faith will focus on the party's knowledge that the information was relevant to the matter in litigation, the party's efforts to preserve the information and whether the information was lost, altered or destroyed despite the party's efforts to preserve it. Following the suggested preservation protocol steps will make it much more likely that your company will sail into the Safe Harbor.

B. Protocol For Preservation Of Electronic Evidence

1. When an employer becomes aware that litigation is likely (for example, an employee threatens to sue OR accuses the employer of acting illegally OR files an administrative charge or lawsuit), management should immediately notify in-house or outside counsel.

2. Counsel and Human Resources should work with management to identify the "Key Players." At a minimum, Key Players will always include the following:

   a. The employee(s) making the complaint
   b. All alleged discriminators/wrongdoers
   c. All witnesses to events that make up the employee's claim
   d. All decisionmakers, including upper-level managers who "rubber stamp" a decision, Human Resources and counsel.

Other individuals who do not fit into these categories may be Key Players, depending on the circumstances of the particular case.

3. A written "litigation hold" should be placed on any electronic files (including but not limited to e-mails and instant messages) from the key players, including the employee. The "hold" should warn recipients to preserve all such documentation regarding the employee and the relevant subject matter, and the consequences of failure to do so. Employees, including the key players, should be warned that failure to comply with the "litigation hold" may result in disciplinary action, up to and including discharge.

4. Counsel and Human Resources should meet with IT personnel to determine how to make the "litigation hold" as automatic as possible so that it is not necessary to rely on individuals, some of whom may not be "computer literate" or, worse, may have a vested interest in destroying documentation, to preserve relevant evidence. In the same meeting, counsel and HR should learn how the employer's system preserves documentation and take steps necessary to protect that. All Key Players should be warned to refrain from engaging in electronic gossip and warned that such material may have to be disclosed.

5. A separate meeting should be conducted with HR, counsel and the Key Players who are "decisionmakers." Management having to make decisions about the employee should make sure that their e-mails and (if applicable) instant messages are written with deliberation and judiciousness. Counsel should be consulted on any employment decisions relating to the employee. This will give the protection of "privilege" to many e-mails and will also ensure that management is acting in the employer's best interests.

6. Counsel should meet individually with each Key Player who is not adverse to the company, determine how they store e-mails and other electronic information, and obtain copies of all such electronic documents.

7. The employer's IT department or consultant, in consultation with counsel, should conduct a broad "search" for relevant files and then preserve the results. There is no need to go through these files at this time. Once the employee's attorney makes a request, a more narrow search can be performed using agreed-upon parameters in the "reserved" file.

8. Back-up tapes or disks with potentially relevant information should be stored separately and clearly marked so that they are not written over, or "recycled." Better yet, back-up tapes should be given to counsel.

9. At regular, "calendared" intervals, the list of Key Players should be updated based on developments in the case. Counsel should conduct all the steps described above with the new Key Players.

10. At regular, "calendared" intervals, the list of key search terms should be updated based on developments in the case, and IT should be directed to expand the search to include any new search terms.

11. ALL Key players should be reminded of their continuing obligation to preserve electronic evidence at these intervals IN WRITING. Ideally, this would be done once a month and should be done quarterly at a minimum.

12. If a lawsuit is filed in federal court, the attorneys for both parties will be required under the federal rules to meet and discuss how to handle

electronic discovery issues. Counsel for the defendant should update the above protocol as needed based on discussions with the employee's attorney.

13. This protocol should be followed with respect to all litigation and quasi-litigation (e.g., a threat or a charge) until one of the following occurs:

    a. Final judgment is rendered in a lawsuit AND the appeal time expires;
    b. The case is settled;
    c. Final judgment is rendered in a lawsuit AND all avenues of appeal have been exhausted; or
    d. In the case of quasi-litigation in which no suit is filed, the longest applicable statute of limitations has expired.

As this protocol suggests, the process may last years. For efficiency, large companies may want to deal with electronic discovery issues for all pending litigation and quasi-litigation matters in a single meeting conducted quarterly or more frequently. Companies that make minimal use of e-mail or instant messaging may be able to do less than this.

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	STATUTE	RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
1.	Fair Labor Standards Act (29 CFR § 516.2, 516.3, 516.4, 516.5, 516.6, 516.7, 570.6) (generally employers with 2 or more employees handling goods that have moved in commerce)	Employee's full name (as used for Social Security record purposes), I.D. number or symbol (if used), home address including zip code, birthdate (if under age 19), sex and occupation, hour and day when employee's workweek begins, hours worked each workday (for employees under § 7(k) of the Act) and each workweek, basis on which wages are paid (e.g., $6 an hour, or commission rate), regular hourly rate for any overtime work, amount and nature of payment excluded from the regular rate, total daily or weekly straight-time earnings, total overtime earnings for workweek, all wage additions or deductions and total wages paid each pay period, dates of payment and of pay period.	Three years: Summary payroll records, relevant union or individual employment contracts, plans, trusts, collective bargaining agreements, applicable certificates and notices of Wage-Hour Administrator, sales, and purchase records, and any other written agreements or memos summarizing the terms of oral agreements or understandings under section 7(g) or 7(j). Two years: Basic time and earnings cards, wage rate tables, worktime schedules, order, shipping and billing records, records of additions to or deductions from wages, basis for payment of any wage differential to employees of the opposite sex in the same establishment. (See Equal Pay Act.)	No particular form is specified. Microfilm is permissible if employer is willing to make any required transcripts. Punched tape is permissible if records can be readily converted to reviewable form.

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STATUTE	RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
Employers subject to child-labor provisions of the Fair Labor Standards Act	Certificates of age and written training agreements; include: name, address, place of birth, signature, & sex of minor; name & address of employer; industry of employer, occupation of employee; signature of issuing officer; date and place of issuance. Name and address of minor's parent or a person standing in that position.	Certificates of age until termination of employment and written training agreements for duration of training program.	Federal or state certificate of age form.

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	STATUTE	RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
2.	Title VII of the Civil Rights Act of 1964 (29 CFR § 1602.14, 1602.20, 1602.21, 1602.7) (employers engaged in interstate commerce with 15 or more employees)	Any personnel or employment record made or kept by an employer, such as requests for reasonable accommodations, application forms and records involving hiring, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship.	One year from date of making the record or taking the personnel action involved, whichever occurs later. If involuntary termination of employee, the personnel records of the individual terminated shall be kept for a period of one year from the date of termination. (This requirement does not apply to application forms and other pre-employment records of applicants for temporary or seasonal jobs.)	No particular form is specified. Records as to racial or ethnic identity may be obtained either by visual survey or by maintenance of post-hire records where permitted by state law.
	NOTE: All employers are subject to The Civil Rights Act of 1866, 42 U.S.C. §1981, which governs claims of race discrimination. Maintain all records for race claims for 4 years.	Personnel records relevant to charge of discrimination or any action brought by EEOC or the Attorney General against employer, including records relating to aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person and application form or test papers completed by unsuccessful applicant and by all other	Until final disposition of charge or action (otherwise, plaintiffs will be entitled to a presumption that prematurely destroyed documents would have helped their case).	Such post-hire records should be kept separate from employee's basic personnel records available to those responsible for personnel decisions.

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	STATUTE	RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
		candidates for same position as that for which aggrieved person applied and was rejected.		
2.	Title VII of the Civil Rights Act (Cont.)	Those required to file apprenticeship reports shall maintain: (1) chronological list of names and addresses of all applicants, including dates of application, sex, and minority-group identification; or (2) file of written applications containing same information. In lieu of maintaining the chronological list referred to above, persons required to compile the list may maintain on file written applications for participation in the apprenticeship program, provided that the application form contains a notation of the date the form was received, the address of the applicant, and a notation of the sex, and the race, color, or national origin of the applicant.	Application form or lists shall be retained for 2 years from date of application, or if annual report is required by Commission, 2 years or period of successful applicant's apprenticeship, whichever is longer; other records made solely for purpose of completing reports to EEOC shall be retained for 1 year.	No particular form is specified.
		Employees with 100 or more employees must file copy of EEO-	Current report must be retained indefinitely; otherwise 6 months.	EEO-1 Employer Information Report.

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STATUTE	RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
1 Employer Information Report.			

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	STATUTE	RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
3.	Age Discrimination in Employment Act (29 CFR § 1627.2, 1627.3, 1627.4, 1627.5)	Payroll or other records containing each employee's name, address, date of birth, occupation, rate of pay and compensation earned each week.	Three years.	No particular form specified.
	(employers engaged in interstate commerce with 20 or more employees)	Personnel records relating: to (1) job applications, resumes, or other replies to job advertisements or other notice of existing or anticipated job openings, including records pertaining to failure to hire; (2) promotion, demotion, transfer, selection for training, layoff, recall, or discharge; (3) job orders submitted to employment agency or labor organization; (4) test papers in connection with employer-administered aptitude or other employment test; (5) physical examination results; or (6) job advertisements or notices to employees regarding openings, promotions, training programs, or opportunities for overtime work.	One year from date of personnel action to which record relates.	No particular form specified.

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STATUTE	RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
	Employee benefit plans, written seniority or merit rating systems.	Full period during which plan or system is in effect plus one year after termination.	If plan or system is not in writing, summary memorandum shall be kept. No particular form is specified.
Age Discrimination In Employment Act (Cont.)	Records relevant to enforcement action under Act including claimant's personnel records and the records of similarly situated employees.	Until final disposition of charge or action.	No particular form is specified.

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	STATUTE	RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
4.	Equal Pay Act (29 CFR § 1620.32, § 516) (generally employers with 2 or more employees engaged in interstate commerce or the production of goods for commerce)	Records concerning employees' wages, hours and other terms and conditions of employment; all records made in the regular course of business which relate to the payment of wages, wage rates, job evaluations, job descriptions, seniority and merit systems and collective bargaining agreements.	Three years.	No particular form is specified.
		Explanation of any wage differential between sexes and any other substantiating records.	Two years.	No particular form is specified.

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	STATUTE	RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
5.	Rehabilitation Act of 1973 (Section 503) (41 CFR 60-741.80) (employers with government contracts in excess of $10,000)	For federal contractors, sub-contractors: (a) for handicapped applicants and employees, complete and accurate employment records (pertaining to hiring assignment, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship, and other records having to do w/ requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications and resumes, tests and test results, and interview notes); (b) written affirmative action programs and supporting documentation, including required workforce analysis and utilization evaluation; and (c) records regarding complaints and actions taken under the Act.	(a) One year for government contractors with 50 or more employees and a government contract of $50,000 to $150,000. (b) Two years for government contractors with 150 or more employees and a government contract of $150,000 or more. If an employee is involuntarily terminated, then all personnel records must be maintained for two years after the date of termination. Upon notice of an enforcement action, must keep all personnel records relevant to the complaint, compliance evaluation or action until the final disposition thereof.	No particular form is specified.

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	STATUTE	RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
6.	Vietnam Era Veteran's Readjustment Assistance Act of 1974 (employers with government contracts of $25,000 or more) (41 CFR §60-250.80)	For federal contractors, sub-contractors: (a) copies of reports made to state employment service regarding number of individuals and Vietnam Era veterans hired during the period and related documentation such as personnel records (relating to requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications and resumes, tests and test results, interview notes, and other records having to do with hiring, assignment, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship) regarding job openings, recruitment, and placement; and (b) records of complaints and actions taken under the Act.	(a) One year for government contractors with 50 or more employees and a government contract of $50,000 to $150,000. (b) Two years for government contractors with 150 or more employees and a government contract of $150,000 or more. Upon notice of an enforcement action, must keep all personnel records relevant to the complaint, compliance evaluation or action until the final disposition thereof.	No particular form is specified. Effective 3/88, form VETS-100 must be filed annually with the U.S. Department of Labor listing by job category and hiring location the number of full and part-time Vietnam Era and disabled veterans hired during the 12-month period covered by the report.

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STATUTE	RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
7. Occupational Safety and Health Act (29 USC §§ 657-658; 29 CFR §§ 1904.7, 1904.29, 1904.32, and 1904.44)	Employers of 11 or more employees (except for employers in certain low hazard retail, service, finance, insurance, or real estate industries as specified at 1904.2) must record employee injuries or illness if they result in: death (regardless of length of time between injury and death), one or more days away from work, restriction of work or motion, loss of consciousness, transfer to another job, or medical treatment (other than first aid as defined in regulations). Also record work-related cases of cancer, chronic irreversible disease, a fractured or cracked bone, or a punctured ear drum when diagnosed by a physician or other licensed health care professional (*i.e.*, "significant" diagnosed injuries or illnesses as defined at 1904.7). Record employee name (or confidential number if a privacy case); job title; date of injury or onset of illness; description of injury or illness, parts of body affected, and object	Five (5) years following the end of the year to which the records relate. All entries must be made within seven (7) calendar days.	OSHA Form 300 (Log of Work-Related Injuries and Illnesses), or equivalent form. OSHA Form 300-A (Summary of Work-Related Injuries and Illness) or equivalent form must be completed, certified, and posted in the establishment from Feb. 1 to April 30 of the year following the year covered by the records.

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STATUTE	RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
	or substance that directly injured or made the person ill; fatality, if any; number of calendar days (up to 180) away from work; number of calendar days (up to 180) of restricted work activity or temporary transfer to another job (stop counting days if the transfer becomes permanent or if the employee is terminated for reason unrelated to injury or illness); and type of illness (OSHA Form 300 prompts of all these responses).		
	Employers of 11 or more employees (except for employers in certain low hazard retail, service, finance, insurance, or real estate industries as specified at 1904.2) must record injured or ill employee's name, address, age, and gender; name and address of physician or other health care professional who provided treatment; whether the employee was treated in an emergency room and/or hospitalized as an in-	Five (5) years following the end of the year to which the records relate. All entries must be made within seven (7) calendar days.	OSHA Form 301 (Injury and Illness Incident Report) or equivalent form.

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	patient; and date, time, and description of injury or illness, how it occurred, and what the employee was doing just before the incident (OSHA Form 301 prompts all of these responses).		
	All employers must retain employee medical records, or analyses thereof, pertaining to employees exposed to toxic substances or harmful physical agents.	Duration of employment, plus 30 years.	No particular form is specified.
	All employers must retain employee exposure records, or analyses thereof, pertaining to employees exposed to toxic substances or harmful physical agents (includes records of any personal or area monitoring of occupational exposure to hazardous materials).	Thirty (30) years.	No particular form is specified.

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	STATUTE	RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
8.	McNamara-O'Hara Service Contract Act of 1965 (29 CFR §.6(g)) (employers with federal government contracts greater than $2,500 involving the use of service employees)	For each employee working on service contract, name, address, work classification, social security number, rate of monetary wages and fringe benefits provided or rates of fringe benefit payments in lieu of benefits, total daily and weekly compensation, daily and weekly hours worked, any deductions, rebates, or refunds from compensation, list of wages and benefits for those classes of service employees not included in wage determination for each contract, and list of the predecessor contractor's employees furnished to the contractor..	Three years from completion of contract.	No particular form is specified. Records must be made available for transcription and should be kept for each service worker for each workweek during contract.

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	STATUTE	RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
9.	Executive Order 11246 (41 CFR 60-1.12)	Written Affirmative Action Programs (currently and for the preceding year) and supporting documentation including required utilization analysis and evaluation, in addition to records and documents relating to compliance with applicable non-discrimination and affirmative action requirements, including records pertaining to hiring, assignment, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship, and other records having to do w/ requests for reasonable accommodation the results of any physical examination, job advertisements and postings, applications and resumes, tests and test results, and interview notes; gender, race, and ethnicity of each employee and applicant, and personnel records relevant to complaint, compliance	Records must be maintained for two years. Exception: Records must be maintained for one year, for employers with less than 150 employees or that have no government contracts in value of $150,000.00 or more. Employers who are required to develop written affirmative action plans must maintain the actual plans for two years. .	Not specific.

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STATUTE	RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
	review or action until final disposition of complaint, compliance review or action. Personnel records of individuals involuntarily terminated.		
10. Immigration Reform and Control Act of 1986 (all private employers with respect to prohibition on hiring unauthorized aliens; only employers with more than 3 employees covered with respect to prohibitions against national origin and citizenship discrimination)	Employment Eligibility Verification Form (I-9).	For persons not hired, record MUST be maintained for three years from date of recruitment or referral. For persons hired, the record must be maintained for three years from date of hire or one year from date of termination, whichever is later.	Form I-9 signed by new hire and employer.

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STATUTE	RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
11. Employee Polygraph Protection Act of 1988 (29 CFR § 801.30) (all private sector employers engaged in or affecting commerce or in the production of goods for commerce)	Any statement concerning the activity or incident, with specifics, under investigation and the basis for testing the particular employee; all opinion reports, charts, written questions, lists and other records relating to the test furnished to the employer by the examiner relating to any examination; records identifying the loss or injury and the access of the examinee to the loss or injury; and the identity of persons to be examined pursuant to any of the exemptions under Section7(d), (e), or (f) of the Act, as well as a written statement of the time and place of the examination and a recognition of examinee's right to consult with counsel. Also, records of the number of examinations conducted during each day in which one or more tests are administered as well as the duration of those tests.	Three years from the date of the examination (or from the date the examination is requested if no examination is conducted).	No particular form is specified. However, must be at the place of business or a central recordkeeping office and made available within 72 hours of notice.

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STATUTE	RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
12. Employee Retirement Income Security Act (29 USCS § 1027, 29 CFR § 2520.107-1) (all administrators of any pension or welfare benefit plan, including health, life, severance, disability, scholarship and apprenticeship plans)	All vouchers, worksheets, receipts, applicable resolutions and other basic information used to file or certify any required governmental report or make any required disclosure to a plan participant or beneficiary. This includes information that will be used to make decisions on benefit entitlement or other plan administration matters.	Not less than six years after the filing date (or would be filing date of a report subject to an exemption) of the reports based on such information; information that will be used to make benefit eligibility or other plan administration decisions should be maintained at least six years after the date of the relevant decision.	No particular form is specified. Effective 10-09-02, electronic record-keeping systems are satisfactory if: the system has controls to ensure the integrity, accuracy, authenticity, and reliability of the records, the records are maintained in order in an accessible place, and are easily convertible into legible, readable paper copy.

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STATUTE	RECORDS TO BE RETAINED	PERIOD OF RETENTION	FORM OF RETENTION
13. Family and Medical Leave Act of 1993 (5 CFR 630.1211; 29 CFR § 825.500) (employers with 50 or more employees)	All records pertaining to compliance with FMLA's general requirements for leave, including basic payroll data, the dates and hours of FMLA leave taken (including any paid leave substituted for leave without pay), copies of employer notices, documents describing employee leave benefits and policies, premium payments of employee benefits, the occupational series for the employee's position, the legal reason leave was taken and records of disputes with employees over FMLA benefit. Beginning and ending dates of employees 12-month period. The employer must also provide a former employee's new employer with information regarding FMLA leave.	Three years.	No particular form is specified. Microfilm is acceptable provided transcriptions are available upon request. Medical histories of employees and their family members are to be maintained in separate files and treated as confidential medical records.

5th Annual Hospitality Law Conference
Presents

Essentials of Employment-Related Recordkeeping: Saving Those Records May Save Your Life

Presented by:
David Wiley

David Wiley

- Member of Constangy Brooks & Smith
- His practice areas emphasize defense of and counseling in all types and aspects of employment discrimination claims and workers' compensation claims
- He has defended cases involving claims of sexual harassment and discrimination, retaliatory discharge, disability, age, religion, and race discrimination, equal pay and Family and Medical Leave Act (FMLA) violations
- David assists employers in preventing and, if necessary, resolving employment issues ranging from the most common to the most complex

Essentials of Employment Recordkeeping: Saving Those Records May Save Your Life
(Or At Least Your Business)

David T. Wiley

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INTRODUCTION

Are You Prepared?

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DOCUMENTING THE EMPLOYMENT RELATIONSHIP

The Four Principles

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DOCUMENTING THE EMPLOYMENT RELATIONSHIP

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DOCUMENTING THE EMPLOYMENT RELATIONSHIP

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DOCUMENTING THE EMPLOYMENT RELATIONSHIP

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PRE-EMPLOYMENT/HIRING DOCUMENTATION

1. Pre-Employment

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PRE-EMPLOYMENT/HIRING DOCUMENTATION

2. Hiring

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PRE-EMPLOYMENT/HIRING DOCUMENTATION

A. Job Description
B. Offer of Employment
C. Job Application
D. Resume
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PRE-EMPLOYMENT/HIRING DOCUMENTATION

3. I-9 Forms

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DOCUMENTATION DURING THE EMPLOYMENT RELATIONSHIP

1. Compensation Records

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DOCUMENTATION DURING THE EMPLOYMENT RELATIONSHIP

RECORDS TO BE RETAINED	STATUTE	PERIOD OF RETENTION	FORM OF RETENTION
Wage and hour records, summary payroll records	Fair Labor Standards Act	Three years	No particular form is specified
Basic time and earnings cards, work time schedules, records of additions to or deductions from wages	Fair Labor Standards Act	Three years	No particular form is specified
	Equal Pay Act	Three years	No particular form is specified

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DOCUMENTATION DURING THE EMPLOYMENT RELATIONSHIP

A. W-4 Forms
B. Attendance Records
C. Pay advance requests
D. Garnishment orders
E. Payroll History
F. Compensation Recommendations
G. Authorization to Release Payroll Info
H. Notification of Wage Increase/Decrease

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2. Performance Evaluations

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DOCUMENTATION DURING THE EMPLOYMENT RELATIONSHIP

3. Employee Discipline Documentation

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4. Additional Documentation
   a. Training Records
   b. Benefits Records
   c. Employee relations records

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DOCUMENTING THE END OF THE EMPLOYMENT RELATIONSHIP

A. Exit Interview Form
B. Final Performance Appraisal
C. Exit Interviewer's Comment Form
D. Record of documents provided with final paycheck
E. COBRA Documents

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DOCUMENT MAINTENANCE AND ACCESS

A. The Self-Audit

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DOCUMENT MAINTENANCE AND ACCESS

B. Documents Not to Be Included in the Personnel File

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DOCUMENTING THE EMPLOYMENT RELATIONSHIP

1. Employment Eligibility Documents
2. Medical Records
3. Background Investigation Records
4. Safety Records

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DOCUMENTING THE EMPLOYMENT RELATIONSHIP

C. Access to Records

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DOCUMENTING THE EMPLOYMENT RELATIONSHIP

D. Auditing Wage & Hour Practices

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ELECTRONIC RECORDS RETENTION

1. A Document Is a Document
2. Preservation is Vital
3. Don't Wait to Be Sued
4. "Everyday Format" Is Okay

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ELECTRONIC RECORDS RETENTION

5. Don't Procrastinate
6. Don't Forget IT
7. Instant Messaging
8. The "Safe Harbor" Provision

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ELECTRONIC RECORDS RETENTION

Protocol For Preservation of Electronic Evidence

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ELECTRONIC RECORDS RETENTION

1. Notification of Claim
2. Identify "Key Players"
3. Impose a "Litigation Hold"
4. Meet With IT
5. Meet With Decisionmakers

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ELECTRONIC RECORDS RETENTION

6. Meet With "Key Players"
7. Conduct a File Search
8. Separate/mark backup records
9. Regularly update list of Key Players and key search terms
10. Remind Everyone of Obligations

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ELECTRONIC RECORDS RETENTION

11. If lawsuit is filed, update protocol as needed after meeting with plaintiff's counsel
12. Continue to Follow Protocol Until:
    a. Final judgment entered/appeal expires or is exhausted; or
    b. Case is settled; or
    c. Where no lawsuit is filed, until longest applicable statute of limitations has expired

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DOCUMENTING THE EMPLOYMENT RELATIONSHIP

QUESTIONS?

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