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Recordkeeping Part I

Who, What, Why . . .

Who does it apply to: In this edition, it varies according to the requirements of the particular law identified below. I am taking a short two-part break from my regular format to bring you the record keeping requirements under Texas and Federal law.

Fair Labor Standards Act (FLSA): The FLSA is applicable to virtually all employers. It requires retention for three years of payroll records, specifically including:

- Employee's full name and social security number;
- Address, including zip code;
- Sex and occupation;
- Time and day of week when employee's workweek begins;
- Hours worked each day (not required for employees exempt from overtime – See the prior edition on Exemptions from Overtime for more information);
- Total hours worked each workweek (not required for exempt employees);
- Basis on which employee's wages are paid (e.g., "$9 per hour", "$440 a week", "piecework"); (not required for exempt employees);
- Regular hourly pay rate (not required for exempt employees);
- Total daily or weekly straight-time earnings (not required for exempt employees);
- Total overtime earnings for the workweek;
- All additions to or deductions from the employee's wages;
- Total wages paid each pay period;
- Date of payment and the pay period covered by the payment; and
- Records of all sales and purchases of the business, i.e. dollar volume of sales or business, total volume of goods purchased or received, in the form usually kept by the employer.

And two years of:

- Time and earning cards or sheets;
- Records regarding the amount of work accomplished by the employees;
- Wage rate schedules, including those for straight and overtime calculations and piece rates;
- Originals or copies of all customer orders, shipping, billing and delivery records, but not including individual sales slips or register tapes; and
- Records supporting all deductions from pay or reflecting the dates, amounts, and nature of any deductions.

Equal Pay Act: The Equal Pay Act is applicable to virtually all employers and has the same requirements as the FLSA, but also requires records be kept for two years which describe or explain the basis for payment of a wage differential for persons of the opposite sex, including: wage rates, job evaluations, job descriptions, merit systems, seniority systems, collective bargaining agreements, and description of practices.

Family Medical Leave Act (FMLA): FMLA has limited applicability to Employers with 50 or more employees for 20 or more work weeks in the current or past calendar year. Employers must provide benefits, but only to employees: (1) with at least 1250 hours (including overtime) in the past 12 months, and (2) who work within 75 miles of a location with 50 or more employees. It requires employers keep all the records required under the FLSA for two and three years (see above), plus the following records for three years:

- Dates FMLA leave is taken (or hours if less than a full day);
- Records indicating leave is designated as FMLA leave;
- Notices furnished to employee by employer regarding FMLA leave;
- Documents reflecting all employee benefits, policies or practices regarding the taking of unpaid leave;
- Premium payments of employee benefits;
- Records of disputes between employees and employers regarding FMLA leave including all investigative documents; and
- Records and documents kept regarding certification, recertification or medical histories of employees or their family members created for purposes of documenting FMLA leave (such records must be maintained in a separate file as a confidential medical record).

Title VII (anti-discrimination), Americans with Disabilities Act, and Genetic Information Protection Act: Employers with 15 or more employees are required to keep all personnel or employment records, including but not limited to, requests for reasonable accommodation, forms submitted by applicants for employment and other records having to do with hiring, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship for one year, and one year from termination for all employees involuntarily terminated. Employers with more than 100 employees are also required to keep the most recently filed EEO-1 report provided to the EEOC for one year.

Age Discrimination in Employment Act: Employers with 20 or more employees are required to maintain the following information regarding employees for three years: name, address, date of birth, occupation within the organization, rate of pay and compensation earned which is already required under the FLSA. Additionally, these employers are required to keep the following items for one year from the date they are created:

- Job applications, resumes, or any other form of employment inquiry whenever submitted in response to an advertisement or other notice of existing or anticipated job opening, including records pertaining to the failure or refusal to hire any individual;
- Promotion, demotion, transfer, selection for training, layoff, recall, or discharge of any employee;
- Job orders submitted to an employment agency for recruitment of employees;
- Test papers and results of any aptitude or other test considered by the employer in connection with any personnel action;
- Results of any physical examination considered by the employer in connection with any personnel action; and
- Any advertisements or notices to the public or to employees relating to job openings, promotions, training programs, or opportunities for overtime work.

The following must be kept in place for one year after termination: documents regarding any employee benefit plans such as pension and insurance plans, as well as copies of any seniority systems and merit systems which are in writing. Note, if the plan is not in writing, a memorandum fully outlining the terms of such plan or system and the manner in which it has been communicated to the affected employees, together with notations relating to any changes or revisions thereto, shall be kept on file.

Employee Polygraph Protection Act: See the previous edition on the EPPA for the limited circumstances where a test can be administered. When properly administered the following information must be kept for three years from the later of the date the test is requested or conducted:

- The statement setting forth the specific activity under investigation and the basis for testing that particular employee;
- Records identifying the loss in question and the nature of the employee's access to the person or property subject to the investigation, if the test is related to the manufacture, distribution, or dispensing of controlled substances;
- The written statement setting forth the time and place of the examination and the examinee's right to consult with counsel;
- The written notice to the examiner identifying the person to be examined; and
- All opinions, reports or other records furnished by the examiner related to the examination.

Note: Employers in a union environment may have different or additional record-keeping requirements.

What should I do:

Simplified retention guidelines will follow at the end of the Recordkeeping Part II edition.

Michael Kelsheimer is a Shareholder in the employment law section at Looper Reed & McGraw where he is joined by a number of employment law attorneys with experience in all areas of employment and labor law. Michael recognizes that the cost and expense of litigation makes resolving employment disputes challenging. To help avoid these concerns, he utilizes his experience in and out of the courtroom to prevent or quickly resolve employment disputes through proactive employer planning and timely advice. When a dispute cannot be avoided, Michael relies upon his prior experience as a briefing attorney for the United States District Court and his extensive experience in employment and commercial lawsuits to secure favorable resolutions for his clients.

This guide is one in a series. For more information, or to receive the entire collection contact Michael Kelsheimer by email at mkelsheimer@lrmlaw.com or by phone at 469.320.6063.