



Proper Documentation, Retention & Destruction

War Stories: Cautionary Tales and Lessons Learned



Scenario #1

No Documentation – No Documentation of Poor Performance

Scenario #2

Poor Documentation – “Can’t Teach An Old Dog New Tricks”

Scenario #3

Missing/Discarded Documentation – Interview Answers But No Questions





TOPICS

- Why documentation matters
- Best practices
- Retention requirements
- Litigation holds
- Secure destruction
- Risk reduction & implementation
- Case studies



Why Documentation Matters

- **Supports consistent decision-making and reduces liability**
- **Provides contemporaneous evidence in audits and litigation**
- **Refreshes memories and lends credibility in disputes**
- **Demonstrates fair, equitable treatment of employees**





Documentation Lifecycle



Hiring

Applications,
resumes, offer
letters



Onboarding

I-9, tax forms,
policies



Employment

Performance
reviews, training



Discipline

Warnings,
investigations



Separation

Exit interviews,
termination



Best Practices



Do's

- Record objective facts (who, when, where)
- Maintain consistent forms & formats
- Reference policies and provide backup
- Allow employee acknowledgement & feedback
- Proofread, date and sign

Don'ts

- Include personal feelings or opinions
- Record protected characteristics
- Use legal jargon or absolute terms
- Embellish or sugar-coat the facts
- Back-date documents



Additional Documentation Tips



- **Act promptly when issues arise**
- **Review past behaviors and patterns**
- **Discuss issues privately with employee**
- **Explain the impact and relevant policies**

- **Document names, dates and key facts**
- **Standardize formats and templates**
- **Securely store records with controlled access**
- **Encourage feedback to improve processes**



Federal Record Retention Requirements



Employment records	Duration	Federal Law
Wage computations (time cards, schedules)	3 years	FLSA
Personnel/employment records	1 year	EEOC / Title VII
I-9 Forms	3 years after hire or 1 year after termination	Immigration Reform & Control Act
Benefit & seniority plans	Duration + 1 year	ADEA
Pay difference explanations	2 years	Equal Pay Act
FMLA records	3 years	FMLA
Exposure records	30 years	OSHA 29 CFR 1910.1020
Medical records	Duration of employment + 30 years	OSHA 29 CFR 1910.1020





State Record Retention Requirements

Employment records	Duration
Employment applications and selection records (<u>all</u> records that document the selection process)	4 anniversary years after selection
Employee counseling	1 year
I-9 Forms	3 years after hire or 1 year after termination
Payroll records	5 fiscal years
Attendance and leave records (including FMLA)	3 fiscal years
Employee discipline records	5 years
Labor grievance records	3 fiscal years after settlement



Litigation Holds: What & When



Trigger

Reasonable anticipation of litigation, agency investigation or complaint



Scope

Identify individuals with relevant information (HR, IT, managers, employees)



Preservation

Suspend routine destruction of paper and electronic records

A litigation hold is an internal instruction to preserve relevant documents and data once litigation or an investigation is reasonably anticipated.

It ensures that evidence — including emails, texts, voicemails and backup tapes — remains available for review.





Litigation Hold Process

1 Recognize

Detect complaints, demand letters or agency inquiries

2 Scope & Custodians

Identify relevant custodians and records

3 Issue Notice

Send clear hold instructions; suspend routine destruction

4 Preserve Data

Collect emails, texts, documents and backup systems

5 Monitor & Update

Follow up to ensure compliance; modify scope as the case evolves

6 Release Hold

Lift the hold and resume destruction once litigation concludes



Managing Text Messages & Personal Devices



- **Business-related texts often live on personal phones**
- **Employees reluctant to turn over devices**
- **Policies: require official systems (email, Teams, Slack, etc.)**
- **Provide alternatives: work phones or secure apps**
- **Litigation holds: preserve relevant texts, avoid broad device imaging**





Secure Destruction Methods

Paper Records

- Burning, pulping or pulverizing
- Cross-cut shredding or macerating
- Prevent reconstruction of sensitive information

Electronic Media

- Physical destruction of disks or tapes
- Digital shredding or high-level overwriting
- Degaussing or demagnetizing drives



Risk Reduction & Implementation



- **Develop a comprehensive retention schedule and audit compliance regularly**
- **Train managers and HR staff on documentation standards and confidentiality**
- **Use secure HRIS platforms with role-based access controls**
- **Separate confidential medical records from personnel files**
- **Issue litigation holds promptly and document the process**
- **Adopt secure destruction policies and verify vendor practices**
- **Stay abreast of federal and state requirements**



Case Law: Failures in Recordkeeping



Tynes v. Florida Dept. of Juvenile Justice (11th Cir. 2023)

- Employer lacked any prior negative performance reviews or reprimands for the employee, leading a jury to find the termination reasons pretextual in a race and sex discrimination case. Verdict for employee affirmed on appeal.

Alvarez v. Royal Atlantic Developers, Inc. (11th Cir. 2010)

- Employer's shifting and inconsistent explanations for termination, without consistent contemporaneous documentation of performance issues, created an inference of pretext in a retaliation claim linked to discrimination complaints. Summary judgment for the employer reversed.

E.E.O.C. v. GMRI, Inc. (S.D. Fla. 2017)

- In an age discrimination case, the employer's failure to preserve relevant emails, paper applications, and interview booklets led the court to allow the EEOC to argue for an adverse inference if the jury found bad faith and intent to deprive, due to inadequate nationwide preservation efforts.



Conclusion & Key Takeaways



Document accurately and contemporaneously



Comply with federal & state retention schedules



Issue litigation holds when litigation is anticipated



Store records securely and maintain confidentiality



Destroy records using approved methods when lawful



THANK YOU

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