# RECORDKEEPING 101: A PRIMER FOR EMPLOYER DOCUMENTATION

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How long do I have to keep this stuff?? Oregon law requires employers to keep personnel records for 60 days, and to keep payroll records for 2 years (3 years under federal law), but that does NOT mean it is a good idea to purge those documents as soon as you can lawfully do so. Good records are your primary defense to a wage and hour claim or a civil rights complaint - and those can be filed well after the requirement to keep those records has passed! Wage claims in Oregon may be filed at any time within 6 years from the date the wages were due. Discrimination claims may be filed at any time within one year of the alleged unlawful employment practice.

Keep in mind that Oregon law places the full responsibility for keeping and maintaining certain records on the employer (not the employee) and when an employer fails to keep those records, a court or administrative law judge will rely on the claimant's evidence, even if it is only approximate, to resolve the matter. Even after the law no longer requires you to maintain those records, discarding the records that would have substantiated the payment of disputed wages, or proved that there was a legitimate, non-discriminatory basis for an employment action, deprives you of your best, most concrete defense.

Let us step back and cover some basic recordkeeping principles and then address retention of those records. For recordkeeping purposes, documents may include records other than paper, such as email and other electronic information, voicemail and tape recordings, photographs and other physical evidence that may be useful for a judge or jury far down the road. Records, in all of their forms, take up lots of space, and we often try and reduce the amount of paper in our lives. But if those records have potential legal or tax consequences, we must resist the urge to purge! If an employer is constrained by records storage limitations, consider preserving the record in an alternative format such as scanning and storing the document digitally. A digital reproduction may be just as effective as an original if it can be authenticated. Another critical principle of recordkeeping is to make a good record in the first place. A contemporaneous record is better than one made weeks after the fact. Remember that the document may not get to a judge or jury for several years after the document is created, so be sure and include the time of day, if relevant, and the full date, including day, month *and year* on the record. Make the record clear, concise, consistent, specific and objective. Use exact quotations when appropriate rather than subjective characterizations of a conversation. Be sure not to create a "smoking gun" that would suggest a discriminatory motive for the action taken. The record should lead a finder-of-fact to an inescapable conclusion that, for example, a termination was justified by stating facts rather than making a conclusion for the reader. If you are documenting a warning to an employee of a performance problem or policy violation, give the employee a copy and

consider giving the employee the opportunity to include a response in the document. Have the employee sign the writing and document any refusal to sign.

Making a good record is virtually meaningless if you don't keep the record for an appropriate length of time, so that it may serve its intended purposes. Generally, we broadly classify documents other than tax records (about which you should consult with a tax professional or the Department of Revenue) into two categories: payroll records and other records. Since wage claims have a six year statute of limitations, and since an employer may not immediately learn if a wage claim had been filed on the deadline, payroll records should be retained for at least seven years. One piece of recent federal legislation suggests that employers should consider indefinite records retention for purposes of defending a pay discrimination claim. The Lilly Ledbetter Fair Pay Act provides that each discriminatory paycheck *or benefits payment* (i.e., a pension payment), rather than the original discriminatory compensation decision, begins the running of the statute of limitations under the Equal Pay Act. Other records generally should be retained for at least two years, except where indicated, since the statute of limitations on civil rights cases is usually one year from the date of alleged harm. These include such items as employment applications, résumés, notes of interviews, reference checks, performance appraisals, disciplinary and promotion documentation, workers' compensation and other leave records, disability accommodation documents, job descriptions, family medical leave documents (3 years from the end of leave), I-9 forms (3 years from date of hire or 1 year after termination, whichever is greater), OSHA forms 300, 300A, and 301 (5 years after the period covered in the document) and any record that is the subject of pending or threatened litigation (retain until final disposition of charges).

Making a good record in the first place and keeping it until the need for the record has passed are sound management practices that will protect employers from claims and help them to defend those claims if and when they arise. For more information about this subject, please consider attending one of our full-day seminars on recordkeeping, currently scheduled for March 15 in Portland and June 8 in Salem. For additional information and a full schedule of seminars and other services provided by the Technical Assistance to Employers program, visit the website at www.oregon.gov/BOLI/TA or call 971-673-0824.