

# Document Retention



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**1**

# What Is Document Retention?

## **Why we are talking about this (Is this really important?)**

- Legal obligations (numerous state and federal statutes)
- Lawsuits
- Sanctions (U.S. v. Arthur Andersen/ Philip Morris)
- Spoliation (“destruction of evidence”)
- Proposed changes in litigation rules (FRCP)
- Cost of retaining documents/data

## Topics:

- What to keep
- For how long
- How and where to keep it
- Factors and issues involved

## How Long to Keep?

- Depends on document type
- Depends on your industry
- Depends on who regulates

## MD Record Statute

- Uniform Preservation of Private Business Records Act
- MD Code, Business Regulations § 1-301 to 1-307
- Documents may be destroyed after 3 years unless other law extends the time

## Statutes of limitation

- How long someone has to file suit
- General statute of limitation in Maryland is (3 years)

## **Maryland Exceptions (some other statutes of limitations)**

- Documents under seal (12 years)
- Adverse possession (20 years)
- Defamation (1 year)
- Medical claims
- Claims against the government
- Employment claims



## The 'Discovery' Rule

- Statutes of limitation for certain types of actions can be extended until the act is discovered

## Exceptions By Contract

- Many contracts between businesses modify the limitations on the right to bring claims
- Many are 1 year
- Read the contract
- Notify the other party of its defaults when you find out about them (common fault)

# Outside of Maryland

Other states and other countries have different statutes of limitation

- Virginia
- Delaware
- D.C.
- Pennsylvania
- Just like MD, there are exceptions which lengthen or shorten the statutes of limitation

## Elsewhere

- For breach of contract:

|            |          |
|------------|----------|
| Kentucky   | 15 years |
| Illinois   | 10 years |
| New York   | 6 years  |
| California | 4 years  |

## Exceptions By Statute

- Title VII (300 or 180 days)
- ADEA
- ADA (same as Title VII)
- Civil Rights Act of 1866 (SOL based on state's law)
- Equal Pay Act (2 years)
- FMLA (2 years or 3 for willful act)

## How to Keep?

- Comply with statutes; and/or
- Be reasonable (Accessible, organized and indexed)

## Where to Keep?

- Most laws specify only that you keep them or have access to them with a few exceptions

# ADA, Rehab Act, FMLA, HIPAA and OSHA

Medical and employee assistance program (EAP) records should be kept separate from other employment records



## Employee personnel files

- Employees (and others) may have access right
- No right in Maryland
- But state laws vary:
  - Delaware allows employee access “on demand”
  - Connecticut allows employees to challenge content

# What to Keep?

## A sample of common items

## U.S. Citizenship and Immigration Services (USCIS)

- Formerly INS, now part of DHS
- I-9; Guide available at [http://uscis.gov/graphics/lawsregs/handbook/hand\\_emp.pdf](http://uscis.gov/graphics/lawsregs/handbook/hand_emp.pdf)
- 3 years after employment begins or 1 year after termination-whichever is later

## Fair Labor Standards Act

- 3 years-payroll records
- 2 years-employment and earnings records
- Exempt and non-exempt employees' records distinguished

# Maryland Wage and Hour Law

- 3 years

## ERISA

- No minimum – as long as may be relevant to a benefits determination

## Title VII

- Title VII of the Civil Rights Act of 1964
- Discrimination including race, religion, sex
- Form EEO-1 on-line filing at <http://www.eeoc.gov/eeo1survey/>

## Federal Government Contractors

- Executive Order 12466
- Rehabilitation Act
- Veterans Act



## Executive Order 11246

- Presidential Executive Order to:
  - Refrain from discrimination based on race, color, religion, sex or national origin; and
  - Provide affirmative action for women and minorities
- If have government contracts of \$10,000+; and
- Have a written AAP if 50 or more employees (service co.)
- Construction contractors different standards
- No reporting unless requested
- Sample AAP at [http://www.dol.gov/esa/regs/compliance/ofccp/pdf/sampl\\_eaap.pdf](http://www.dol.gov/esa/regs/compliance/ofccp/pdf/sampl_eaap.pdf)

## The Vietnam Veterans' Era Readjustment Act of 1974

- Affirmative action for covered veterans if:
  - Government contracts of \$10,000; or
  - 50 or more employees and \$50,000 must have a written plan
- File Veterans-100 Report annually

## Rehabilitation Act of 1973

- Nondiscriminatory provisions apply to:
  - all employers that receive federal funds; or
  - Who have government contracts of \$10,000+
- Affirmative action plan for certain employers with 50 or more employees and \$50,000 must have a written plan

## ADEA

- Age Discrimination in Employment Act of 1967
- 3 years

## OSHA

- 5 years after the end of the year regulated
- 10 employee exemption
- [www.osha.gov/recordkeeping/new-osha300form1-1-04.pdf](http://www.osha.gov/recordkeeping/new-osha300form1-1-04.pdf)

## FMLA

- Family and Medical Leave Act of 1993
- Retain records for 3 years
- Medical records must be retained separately from personnel file
- Must be available at request of DOL

## Environmental Regulations

- Add

## ‘Corporate’ Documents

- Documents related to the formation and maintenance of the corporate, partnership, LLC, or other entity through which you do business should be kept indefinitely
- Examples: articles of incorporation or organization, informal actions, meeting minutes, stock ledgers, transfer documents



## Intellectual property

- Indefinite (trade secrets)
- Patent rights are for 20 years
- Copyright for (life + 70 years minimum)
- Trademarks (10 years-renewable)

## ERISA

- Retirement plans
- IRS and DOL at inception and on a regular basis

## Accounting and Tax

- Talk to your accountant

## Other Categories

- Medical Records (HIPAA)
- Securities records
- Consumer protection

## What are **‘Electronic Documents’?**

- Data files
- Word processing files
- E-mails
- Image files

## Similar Principles

- The principles that apply to paper apply to E-documents; there are additional considerations

## E-Document Considerations

- Lighting a match won't make it go away
- “delete” button not final
- E-media can deteriorate
- Human factors: who, where and how is it being maintained

## E-Laws

- UETA (Uniform Electronic Transactions Act)
- E-SIGN
- UCITA (Uniform Computer Transactions Act)



## **Destruction**

- Physically destroy the media, i.e., burn the tape, drill holes in the hard drive, break the CD or DVD
- If you are trying to destroy it, get the job done

## So how long do I keep this stuff?

- 7 years will satisfy most laws
- No guarantees for litigation based upon the 'discovery rule'
- Don't sign documents under seal

## Document Retention Policies

- Not required by law
- No laws directly regulating them
- Are recommended as best practices policy:
  - Written policy can be distributed
  - Consistently applied
  - Business judgment applied
  - Good defense