LOOPER REED
LOOPER REED & MCGRAW P.C.

Recordkeeping Part II

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.

Federal Unemployment Tax Act (FUTA) and Federal Insurance Contributions Act (FICA): Any employer with employees must keep these records relating to payroll taxes for four years:

- Employer Identification Number (EIN);
- Amounts and dates of all wage, annuity, and pension payments;
- Amounts of tips reported to you by your employees;
- Records of allocated tips;
- The fair market value of in-kind wages paid;
- Names, addresses, social security numbers, and occupations of employees and recipients;
- Any employee copies of Forms W-2 and W-2c returned to you as undeliverable;
- Dates of employment for each employee;
- Periods for which employees and recipients were paid while absent due to sickness or injury and the amount and weekly rate of payments you or third-party payers made to them;
- Copies of employees' and recipients' income tax withholding allowance certificates (Forms W-4, W-4P, W-4(SP), W-4S, and W-4V);
- Copies of employees' Earned Income Credit Advance Payment Certificates (Forms W-5 and W-5(SP));
- Dates and amounts of tax deposits you made and acknowledgment numbers for deposits made by EFTPS;
- Copies of returns filed and confirmation numbers; and
- Records of fringe benefits and expense reimbursements provided to your employees, including substantiation.

Occupational Health and Safety Act (OSHA): OSHA records must be kept for five years depending on the number of employees and industry in which the business operates. Employers with either 10 or less employees at all times during the calendar year, or more than 10 employees in businesses of the type listed at the end of this edition must only keep records of fatalities or hospitalizations involving three or more employees.

Employers with 11 or more employees in a business *not* listed at the end of this edition must keep records using OSHA forms 300, 301, and 301-A regarding work related injuries that involve:

- Significant injury or illness diagnosed by a licensed healthcare professional;
- Death;
- Days away from work;
- Restricted work or transfer to another job;
- Medical treatment beyond first aid;
- Loss of consciousness;
- Cuts and other wounds contaminated with another person's blood or an infectious material;
- Situations where medical removal is required by an OSHA standard;
- Hearing loss; or
- Exposure to tuberculosis at work.

Employee Retirement Income Security Act (ERISA): Employers that have an employee benefit plan subject to ERISA must retain for six years all annual reports filed with the Secretary of Labor, summary plan descriptions (including any summaries of plan changes not contained in the summary plan description), and the bargaining agreements, trust agreements, contracts, or other instruments under which the plan is established or operated. Additionally, employers with ERISA covered plans shall maintain records on the matters of which disclosure is required under ERISA, providing in sufficient detail, the necessary basic information and data from which the plan documents may be verified, explained, or clarified, and checked for accuracy and completeness. This includes retaining all vouchers, worksheets, receipts, and applicable resolutions.

Immigration Reform and Control Act (IRCA): Applicable to all businesses, the IRCA requires employers to retain completed Form I-9s for as long as the individual works for the employer. If terminated, the employer must keep the Form I-9s the longer

of three years after the date of hire, or one year after the date employment is terminated.

Texas Worker Compensation Act: The Act does not specify the information to be retained, but does require employers to retain a "record of injuries to employees" for an unspecified period of time. It is recommended that employers retain all filings with the Texas Department of Insurance regarding worker's compensation claims, all documents received from the employer's worker compensation carrier (if a subscriber), and received from the injured employee for a period of four years after the claim is concluded regardless of whether the employee returns to work.

Lilly Ledbetter Fair Pay Act: The Ledbetter Act, passed in 2009, has played havoc with employers' document retention policies. In a nutshell, the Act (which will be covered in a future edition) extends the period of time an employee can make a claim that they were unfairly paid less because of a protected characteristic: race, color, religion, national origin, sex, pregnancy, age, military status, or genetic information. Employees in Texas used to be able to make a claim of this type for wages up to 300 days before they filed a claim. Of course, this cut out an employee's ability to make a claim for discrimination that may have gone on for years. The Ledbetter Act extends that period to two years.

The problem for employers is that prudence then dictates that employers should retain payroll records, employee evaluations, and other information that informs on pay decisions all the way back to the time the employee making the claim was hired to show patterns of fairness to employees having various protected characteristics. This is far beyond the period required presently by law.

What should I do:

With two editions covering document retention requirements, I am sure you are all ready for some simplified guidelines. Pundits are all over the place with suggestions on this point that vary extraordinarily. These are my thoughts:

Payroll\Payroll Taxes: 4 years after creation;
Medical and FMLA leave records: 4 years after creation;
Benefits\Plan records: 7 years after creation;
Form I-9: 3 years after termination;
Hiring and Applicant records: 4 years following hiring decision;
Injury records: 6 years after occurrence; and
Personnel files and personnel actions: 4 years (but possibly longer at your discretion considering the risk of a fair wage claim under the Ledbetter law).

OSHA List: Hardware stores, shoe repair and shoeshine parlors, meat and fish markets, funeral service and crematories, candy, nut, and confectionery stores, miscellaneous personal services, dairy products stores, advertising services, retail bakeries, credit reporting and collection services, miscellaneous food stores, mailing, reproduction, & stenographic services, new and used car and motorcycle dealers, computer and data processing services, gasoline service stations, re-upholstery and furniture repair, motion picture, apparel and accessory stores, dance studios, schools, and halls, radio, television, & computer stores, producers, orchestras, entertainers, eating and drinking places, bowling centers, drug stores and proprietary stores, offices & clinics of medical doctors, dentists and other health practitioners, liquor stores, miscellaneous shopping goods store, retail stores-not elsewhere classified, depository institutions (banks & savings institutions), medical and dental laboratories, non-depository, health and allied services-not elsewhere classified, security and commodity brokers, legal services, insurance carriers, educational services (schools, colleges, universities and libraries), insurance agents, brokers & services, individual and family services, real estate agents and managers, child day care services, title abstract offices, social services-not elsewhere classified, holding and other investment offices, museums and art galleries, portrait photographic studios, membership organizations, accounting, research, management, and related services, barber and beauty shops.

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.

This Looper Reed & McGraw guide is issued for informational purposes only and is not intended to be construed or used as general legal advice. Copyright © 2013 Looper Reed & McGraw, P.C. All rights reserved.

iStockphoto