Although electronic storage of personnel records is permissible under federal employment laws, employers must be mindful of the statutory rules relating to document retention periods and electronic storage systems to avoid legal pitfalls. If your company is considering implementing a paperless human resources department, read on for legal guidelines and tips to ensure a smooth transition.

**Personnel Records and Application Materials**

The Equal Employment Opportunity Commission (EEOC) requires that personnel and employment records be preserved for the following periods:

* Private employers must retain records for one year from the date of making the record or the personnel action involved, whichever occurs later, but in the case of involuntary termination of an employee, they must retain the terminated employee’s personnel or employment records for one year from the date of termination. Examples of documents to be retained include: performance evaluations, attendance records, disciplinary records, handbook receipts, requests for employment verification, education certifications, applications and resumes.
* Educational institutions and state and local governments must retain such records for two years from the date of the making of the record or the personnel action involved, whichever occurs later, but in the case of involuntary termination of an employee, they must retain the terminated employee’s personnel or employment records for two years from the date of termination.

Some states have laws that govern retention periods for personnel files that differ from the EEOC regulations. Further, record retention periods may be longer if the employer has affirmative action obligations or is required by regulatory agencies to maintain records for a longer period of time.

**Digitize Medical Records**

Medical information—including documents related to a disability accommodation request or Family and Medical Leave Act (FMLA) request—must be kept confidential and separate from an employee’s basic personnel file. One way to address this concern is to house electronic medical data in its own separate database with its own separate access protocol.

The Americans with Disabilities Act (ADA) requires that covered employers keep all ADA-related files for at least one year from the date the file was created. The FMLA requires covered employers to keep FMLA-related files for at least three years. As a best practice, medical records of terminated employees should be retained for at least four years from the date of termination. Remember, medical records related to workers’ compensation claims have a different retention period.

**EEO-1 Forms**

The EEOC recommends that race and ethnicity identification forms be kept separate from an employee’s basic personnel file. Again, it may be prudent to house electronic race/ethnicity data in its own separate database with its own separate access protocol.

**Payroll Documentation**

Because the Fair Labor Standards Act (FLSA) does not require a particular order or form of records, wage records may be maintained electronically. If records are stored electronically, records must be available for copying and transcription upon request by representatives of the Department of Labor, and reproductions must be clear and identifiable. The FLSA requires employers to keep payroll records for at least three years. Further, employers must keep all records (including wage rates, job evaluations, seniority and merit systems, and collective bargaining agreements) that explain the basis for paying different wages to employees of opposite sexes in the same establishment for at least two years. Please note that state wage laws (Arizona, for example) may require longer retention periods.

**OSHA Records**

Records required by the Occupational Safety and Health Administration (OSHA) may be kept electronically provided the computer they are stored on can produce forms equivalent to OSHA’s forms when they are needed and the system meets specific regulatory requirements. Access to injury and illness records must be limited. When an authorized government representative asks for certain records (for example, an OSHA 300 Log which lists all injuries and illnesses at worksites), copies of the records must be provided within four business hours. Finally, X-rays must be preserved in their original state (for example, if X-rays were received as hard copies, then they must be retained in hard copy form).

**I-9 Forms**

The U.S. Citizenship and Immigration Services requires that electronic systems used for storing I-9 documentation have:

* Reasonable controls to ensure the integrity, accuracy and reliability of the electronic storage system.
* Reasonable controls designed to prevent and detect the unauthorized or accidental creation of, addition to, alteration of, deletion of or deterioration of an electronic I-9 Form, including the electronic signature, if it is used.
* An inspection and quality assurance program that regularly evaluates the electronic generation or storage system and includes periodic checks of electronically stored I-9s, including the electronic signature, if it is used.
* A retrieval system that includes an indexing system that permits searches by any data element.
* The ability to reproduce legible paper copies.

Paper copies of I-9 Forms do not have to be retained if stored electronically, provided the storage system complies with the latter standards. Employers must retain I-9 Forms for three years after the date employment begins or one year after the date the person’s employment is terminated, whichever is later. If you are an agricultural association, agricultural employer or farm labor contractor, you must retain the I-9 Form for three years after the date employment begins for people you recruit or refer for a fee.

**Beware:**Copies of I-9 Forms must be available on three days’ notice of inspection by U.S. Immigration and Customs Enforcement.

**Employee Benefits Documents**

The Employee Retirement Income Security Act (ERISA) has two record retention provisions, which apply to all ERISA employee benefit plans (retirement, health and welfare plans):

* ERISA 107 requires anyone who files or certifies certain information (such as a Form 5500) to maintain sufficient records (for example, spreadsheets, e-mail correspondence, plan documents, amendments, work records) to explain, corroborate, substantiate and clarify what is in the filing or certification. Under ERISA 107, an employer must maintain these records for six years after the filing date (or from the date of any extended date for filing).
* ERISA 209 requires an employer to maintain all such information for “as long as a possibility exists that [the records] might be relevant to a determination of the benefit entitlements of a participant or beneficiary,” the regulations state. This is essentially an indefinite duration. ERISA 209 applies to documents such as plan notices and service records used to determine eligibility.

**General Requirements for Electronic Storage Systems**

The record maintenance requirements of federal employment laws are generally satisfied when using electronic media if:

* There are reasonable controls to ensure the integrity, accuracy, authenticity and reliability of the records kept in electronic form.
* The electronic records are maintained in reasonable order, in a safe and accessible place, and in a manner that they may be readily inspected or examined.
* The electronic records are readily convertible into legible and readable paper copies as may be needed to satisfy reporting and disclosure requirements.
* The electronic recordkeeping system is not subject, in whole or in part, to any agreement or restriction that would directly or indirectly compromise or limit a person’s ability to comply with any reporting and disclosure requirement.
* Adequate records management practices are established and implemented (for example, providing a secure storage environment; creating back-up electronic copies and selecting an offsite storage location; observing a quality assurance program evidenced by regular evaluations of the electronic recordkeeping system including periodic checks of electronically maintained or retained records; and retaining paper copies of records that cannot be clearly, accurately or completely transferred to an electronic recordkeeping system).

**Tips for Electronic Storage**

* If a lawsuit is filed against your company, you will have a legal duty to maintain relevant documents in their original form and suspend their destruction or alteration as soon as you learn that litigation is imminent and until the lawsuit is resolved. Although documents may be scanned into electronic form at this time, paper copies should not be destroyed during the pendency of the lawsuit.
* Account for ease of retrieval and searches when designing and implementing electronic document creation and storage protocols. Put time and effort in upfront to design detailed metadata to improve searchability.
* Establish security protocols so that only authorized individuals can access each electronically maintained file. That includes creating a secure and reliable electronic storage environment, including offsite backup, and complete and secure destruction protocols consistent with the retention policy for hard copies.
* If technology does not self-audit or contain compliance monitoring, consider a quality assurance program that includes regular evaluations and checks of the electronic record-keeping system.
* Retain paper copies of any records that cannot be clearly, accurately or completely transferred to an electronic record-keeping system (for example, performance documents which include notations in pencil or light ink).

*Adapted from “Going Paperless? Legal Guidelines for Electronic Retention of Documents & Evidentiary Considerations,” co-presented by Tiffani L. McDonough and Michael Fagan for the Liberty Bell Chapter of ARMA International (April 2014) and Archive Systems (May 2014). Used with permission.*