

5 commonly overlooked rules on keeping personnel records

“Into the cabinet it goes, I’ll deal with it later!” This is, too often, the dangerous generic policy adopted by harried HR pros when dealing with the daily onslaught of employee paperwork. How many of the best practices below might your organization be cutting corners on, leaving you open to litigation worries?

1. Separation of files

Got one big folder with an employee’s entire history in it? Big mistake. An employee’s personnel file should only hold information related to:

- Compensation
- Performance appraisals
- Job performance
- Any disciplinary actions taken
- Education and training records
- Documents relating to recognition and rewards

The following are required to be maintained separately:

- I-9 forms on employment eligibility
- Employees’ pension or 401(k) information
- Medical/disability records, including FMLA requests and paperwork
- Results of drug and alcohol tests
- Investigation files on serious incidents such as workplace violence or harassment

2. Retention of past employee files—and those who were never hired

Don’t merely shred job applications and resumes that seem hopeless. The Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act—all contain provisions that require that you store submitted job applications for at least one year. It’s safest to hold onto them for up to two years. For those who were actually hired, it’s recommended that you retain their original application throughout their employment and three years beyond that. Apply the same standard even to interview notes.

When an employee leaves, is it OK to finally lump all their files together? It is still recommended that you not do so. Employ a strict system for separation and make your life easier by maintaining that system whether employees are current or not, while obeying the rules on when certain files must be destroyed.

I-9 forms are of particular concern; keep them on file three years after the date of hire or one year after the employee’s termination date, whichever is later.

3. The structure of employee discipline notes

You can be held liable for your actions against personnel if you rely on information in their records that doesn't pertain to behavior that's been directly observed. Any log kept on an employee should *not* include:

- Information about the employee's family, ethnic background, beliefs or medical history
- Theories about why the employee is behaving a certain way
- Opinions about the employee's career prospects
- Unsubstantiated complaints against the employee
- Rumors or speculation about the employee's personal life
- Non-work-related information the employee posted or that was posted about the employee on social media.

Such a log *may* include:

- Notes on project assignments and deadlines met or not met
- Assessments of the quality of an employee's work
- Instances of tardiness, work absences or extended breaks
- Disciplinary discussions and actions taken
- Employee responses to problems and questions
- Positive contributions to the work effort
- Details of significant personal interactions with the employee.

Beware of pesky "desk files"—personal files that managers keep informally on their employees. Often these are simply notes scribbled about an employee's performance that a manager wants to make sure to include in a formal review, or a list of dates when employees were absent or late for work.

Desk files should be temporary. They should always be dated to make sure the information is added to official documents in a timely manner. After they're incorporated into formal performance reviews, formal disciplinary warnings, etc., dispose of them.

4. Consent from applicants

Want to obtain a credit report or other background information on a job applicant from a consumer reporting agency? The Fair Credit Reporting act requires you to notify and receive written consent first. The law applies only to third-party background checks, not to your own investigation of, say, the applicant's references, educational degree or driving records.

If you're requesting an "investigative consumer report"—a more in-depth investigation than just a credit report—you need to provide the applicant with a disclosure revealing the applicant's right to request information about the nature and scope of the report.

If you choose not to hire someone based on information from the report, you must provide a "pre-adverse action" notice to the applicant. It must include a copy of the consumer report and the Consumer Financial Protection Bureau's (CFPB) Summary of Rights.

Make sure all documentation of this process goes into a separate and secure file. Credit reports can be an identity theft disaster just waiting to happen.

5. New Covid considerations

The provisions of the Families First Coronavirus Response Act allow employees to continue to be paid even if

they cannot work or must stay home to watch their out-of-school children. To be reimbursed for those leave expenses in the form of tax credits, your records pertaining to them will have to be in good shape.

Do you have a coronavirus recordkeeping system to capture all the information you may need to report? Such a system should include, for every employee:

- Their regular rate of pay
- The date of any employer-issued facility closing or directive telling employees not to come to work
- The dates the employee began and ended Covid-related sick leave
- The dates of school closings resulting in employees having to stay home with their children, along with which children were affected and their ages
- The dates the employee began and ended Covid-related FMLA leave
- For quarantine-related leave, the name of the government or healthcare entity that recommended the quarantine
- The amounts paid to the employee during Covid-related leave.