

Member's Quarterly

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Feature

Delete or Shred?

Record keeping basics for employers

In the days of shrinking office space and crowded hard drives, HR departments may be asked to downsize and to get rid of some of their records. However, employers should be aware of legal record keeping requirements and risk management strategies before putting files in the box for shredding or deleting data from computer servers.

This article provides some guidance to assist with your record keeping practices regarding employee records. This article is not meant to address the different record keeping requirements that apply for financial records.

Record Keeping and the *Employment Standards Act*

The *Employment Standards Act* requires that employers keep certain records for each employee. The records may be kept by the employer or an agent (such as an accountant or payroll administrator). The records need to be accessible in the event of a Ministry of Labour inspection. Most of these records need to be retained for three years but differences arise in terms of how you calculate the three year period.

Each employer is required to keep, for each employee, records of:

1. employee names, addresses and start dates for three years after termination;
2. the information contained on employee wage statements for three years after the information is given to the employee;
3. the vacation time earned since the date of hire but not taken before the start of the vacation entitlement year, the vacation time earned during the vacation entitlement year (or stub period), vacation time taken (if any) during the vacation entitlement year (or stub period) and the amount of vacation time earned since the date of hire but not taken as of the end of the vacation entitlement year (or stub period). The records must be retained for three years;
4. the number of hours non-salaried employees worked each day and each week. For salaried employees, records of hours worked in excess of their regular work week, and those in excess of eight hours a day must be kept. These records are kept for three years after the day or week in question;
5. copies of agreements made with employees to work excess hours or to average overtime pay. These records are kept for three years from the last day on which the work was performed under the agreement;
6. an employer must keep all documents relating to an employee's leave (e.g., pregnancy, parental, family medical, etc.) for three years after the day the leave has ended;
7. clients of temporary help agencies are required to record the number of hours worked by each assignment employee for a period of three years after the day or week to which the information relates;
8. any agreements made to work excess hours or to average overtime hours for a period of three years from the last day on which work was performed under the agreement;



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Feature continued

9. if the employee is a student under the age of 18, the employee's date of birth. These records shall be kept until the employee turns 21 or for three years after their employment ends, whichever happens first; and
10. additional record keeping rules apply for employers who employ homeworkers.

Employers are also required by the *Occupational Health and Safety Act* to retain all documents associated with conducting a workplace investigation into alleged harassment or violence for a period of one year from the conclusion of the investigation. Investigations related to allegations of discrimination should also be kept for at least one year.

Record Keeping and Risk Management

Employers should consider retaining other records as a risk management tool.

There are no legal requirements to maintain records of employment reviews, employment contracts, disciplinary meetings, investigation reports/interviews, promotional and salary history of an employee. However, it would be best practice to retain all of these records for the duration of the employee's employment with the company and for a period after the termination of the employment relationship.

In Ontario, litigation can be commenced by a former employee up to two years after a dismissal – and sometimes longer. Accordingly, it is considered best practice to consider these types of employee records for three to five years and to ensure there is no ongoing litigation involving an employee before the records are destroyed.

Email, Email and More Email

There is no law in Ontario that will tell an employer how long they need to retain company emails. Employers should have written policies regarding email retention (and who may access an employee's work email account).

In employment-related lawsuits, the lawyer acting for an aggrieved former employee often asks for production of emails related to the events at issue in the litigation. If the emails have not been preserved, the employee may claim that the employer has intentionally destroyed evidence that is relevant to ongoing or contemplated litigation (a concept known as spoliation). Employee emails also can become relevant in other litigation that an employer may become involved in – such as patent and trademark lawsuits.

Determining the length of time that a company should retain emails is a complex issue. It is often the case that emails from different categories of employees should be retained for different periods of time. For most companies and average employees, some experts suggest that emails can be retained for as little as five years in an email archiving system. However, there are some types of employees in certain departments that should have their emails retained longer – such as executives, engineers/product developers, finance, human resources and legal departments.

For high-level executives and employees involved in product development, some experts suggest email retention for as long as 50 years. The reason behind this recommendation is if there were to be a dispute regarding the ownership or development of a product or if information related to a product is improperly provided to the competition. There are consultants available to assess your individual business needs and assist you in developing and implementing email retention strategies.

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Privacy and Employee Record Keeping

Access to employee personnel files and data should be limited to authorized staff who require the information to carry out their employment duties. It is also best practice to ensure that employee personnel files are organized such that authorized staff are only able to access specific categories of information in the employee file.

For example, the following organization system could be used:

- corporate information (e.g., resume, offer of employment, salary information, emergency contact person, special dietary needs);
- group benefits information;
- health information (personal information required only be any in-house health and medical staff or benefits administrators); and
- labour relations or performance improvement management information (annual performance reviews, minutes of disciplinary meetings).

Employers need to ensure that personal information obtained by employees is kept confidential and not disclosed to others without the employee's consent.

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