

Section V: Legal and Policy Issues

Legal Disclaimer

This manual and the associated materials have been prepared as educational and informational material and should be used for information purposes only. They should not be considered legal advice or legal opinions on any specific matters. You should consult a human resources consultant or employment attorney familiar with both federal and state legislation to assist you with any specific questions or issues. The appendices include some state and local regulations current as of the date this manual was created; however, you should research the most current edition of all regulations. You are also advised to refer to current state and local publications to ensure your continuing compliance with state and local regulations. Please be sure to consult with your external consultants, legal counsel, or other employment expert prior to finalizing any decisions on policies and procedures in relation to the following statutes, regulations and legislation.

Employment Records

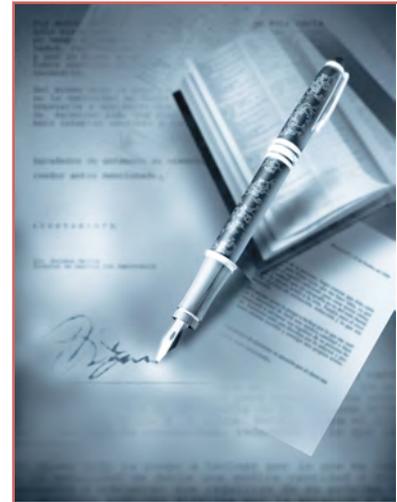
When you hire a new employee, one of the first things you probably have them do is fill out employment paperwork. Important forms like the W-4 (for federal tax elections), the I-9 Form (to establish eligibility to work in this country), personal information (including emergency contact information), benefits enrollment forms (if applicable) and signing for receipt of the Employee Handbook and/or other individual employment policies are all examples of documents that you may need to collect, store, retain and dispose of as part of the employment process.

There are best practices and sometimes rules (state-specific regulations) that govern how you keep the employee information you collect as well as how you dispose of the information when the employee no longer works for your clinic.

As the clinic director, one of your overall responsibilities is the management of important documents and records that are part of your business operations. Included in this list of important documents are the records you create and keep related to your employees.

Some things you'll want to think about when reviewing your employment records process are:

- ▶ What forms/documents/records do I need to create?
- ▶ What are the federal requirements regarding records retention?
- ▶ What are my individual state requirements regarding records retention?
- ▶ Who should have access to the records?
- ▶ Where should I keep the records?
- ▶ Do the records need to be secure (under lock and key)?
- ▶ How long should I keep the records?
- ▶ How do I dispose of the records when I no longer need to keep them?



Types of Employment Records

There are essentially three different types of employment records that should be stored in different files, separate and distinct from each other. The three different categories of files are: the employment file, the medical file, and other files.

The employment file should contain the employee's work-related documents including:

- ▶ A completed employment application
- ▶ A resume if one was provided
- ▶ Employment status forms such as: any forms required for payroll processing, and documents related to pay rate, job title, pay changes, demotions, annual merit increases or pay rate changes, title changes, suspensions and/or terminations.

- ▶ Performance appraisals
- ▶ Progressive discipline records including: the counseling record, consequences of behavior, signed counseling forms, etc.
- ▶ Training documentation including: certificates, training programs, etc.
- ▶ Attendance schedule including: tardiness, sick and vacation requests, etc.
- ▶ Employee Handbook acknowledgements and any other signed policy statements
- ▶ Employment forms including: W-4 form, background screening forms

The medical file should contain any records regarding the employee’s medical background, current condition or supporting documents. Under ADAAA, all medical information must be kept in a file separate from other personnel records. This includes doctors notes and medical info related to workers comp or FMLA. The employee’s supervisor and anyone else making employment decisions such as promotion, training, hours, etc., should not have access to this file. This is so the employee’s private medical information cannot be a factor in any employment decisions.

The following could be included in the employee’s medical file.

- ▶ Benefits enrollment forms (if they don’t contain any medical information other than enrollment data, they could be kept in the employee file. Insurance enrollment forms by themselves do not contain confidential health information and they can be kept in the employment file).
- ▶ Any medical exam information related to a pre- or post-employment offer
- ▶ Any medical claim expense forms
- ▶ FMLA documentation – including a “Release to Work” document (if your clinic employs 25 or more employees in a 75-mile radius, you may be required to provide FMLA notice and leave).
- ▶ Worker’s compensation accident information



Other files should contain records not previously described. Some examples of other types of employment records include:

- ▶ I-9 Form – the I-9 Form has to be retained for a specified period of time (it is suggested that you keep a separate binder for completed I-9 Forms separated by whether the employee is active or terminated). If you keep copies of the supporting documents for the I-9 (and you should), then the I-9 documents must be kept in a file separate from the medical records or personnel file, according to the USCIS. This is because that information can be used to illegally discriminate against employees based on race, color, age, citizenship or national ancestry.
- ▶ Investigative Files – investigation files pertaining to charges of discrimination, harassment or retaliation are examples of other types of files that require special record-keeping, but don’t belong in either the employment or medical files.

Developing a Records Retention Schedule

A records retention schedule will ensure that your clinic keeps your important employment records (along with other records such as: operational, legal, or financial) for as long as required, and that the records are destroyed properly when they are no longer needed.

It is important to first take stock of the kinds of records you currently have. Once you know what you have and how long you need to keep it (both for legal reasons and also for your own business needs), then you can create a records retention schedule. Sources of information on retention requirements include: what your business needs are, a legal mandate or state requirement, or what other clinics have developed. This information can serve as a starting point for your own retention schedule.



Once you have established your records retention system, it is important to follow your retention schedule when appropriate. There will be times that you may have to extend a retention period such as for a

government investigation or audit or if you are on notice of a pending lawsuit. In the event that an investigation, audit or legal action does occur, immediately stop your records destruction and seek advice from your legal representative in the case.

Before finalizing your records retention schedule, you should visit your state employment website. Your individual state may have records retention regulations and states vary widely on tax, unemployment and worker's compensation records and other requirements.

As tempting as it is, don't hang onto documents longer than your policy specifies just because you want to keep them for their sentimental or historical value. Any documents or information that is retained must be kept for a reason. As a business, your clinic must run efficiently and effectively and a clutter of outdated, unnecessary documents needs to either have a purpose or be eliminated. Like any other asset piece of equipment, if it is outdated, unnecessary and taking up space, you should most likely get rid of it.

Your available storage, both physical and electronic, is precious office "real estate" and should be treated as such. Destroy written and electronic documents and records that should not be retained according to your schedule. And, if there is something you want to keep beyond your guidelines, at least review carefully to minimize your legal liability.

In addition, the following suggestions are important to consider with regards to your records:

- ▶ Don't be a document hoarder – follow your retention policy for your legal, operational or archival purposes.
- ▶ Retain and destroy employment documents systematically.
- ▶ Separate and store employment records according to your policy timetable.

- ▶ Don't keep temporary materials, such as drafts, reminder notes, work sheets or extra copies after their original purpose is completed.

What can you do if a law does not state a specific retention period? Assuming your legal research was thorough, it is best to maintain records for three years. You must, however, document your search effort and the assumptions you used to set the three-year period. Then, if you missed a legal requirement during your search, you have documentation to show the judge or regulatory agency that your organization made a good-faith effort to comply with the law.

Keeping Employee Records Secure

Employment records are an attractive target for identity thieves. The information gathered from employees is the same personal information thieves are looking for – social security numbers, driver's license numbers and bank account numbers.

Limit the number of people able to access and handle these types of files to only a few people - those who have the need, the authority, and the ability to keep the contents confidential.

Don't forget about your electronic records: those that are scanned, saved electronically or through email.

Suggested Retention Periods for Various Types of Records

Certain types of documents require differing retention periods. Search your state records for any specific retention periods. A general list of retention periods by the type of record are listed in the following table:

OSHA records/reports	5 to 30 years
Form I-9	3 years after hire date and 1 year after termination date
401k/Benefit plans	years after final qualifying event
ADEA	1-3 years
FLSA	2-3 years (defined further below)
EEO-1 and VETS-100	3 years (minimum of 100 employees)
Title VII	1 year or final disposition of pending charge

Employers subject to the FLSA (Fair Labor Standards Act) are required to make and preserve specific records on employees' wages, hours, and other conditions of employment. The record-keeping rules under FLSA specify certain types of data that employers must keep for all covered employees, as well as information that must be kept for exempt employees to substantiate their exempt status. Records must be preserved and available for inspection for a period of two or three years, depending on the type of record.

The U.S. Department of Labor's Wage and Hour Division investigates possible FLSA violations and can inspect an employer's records to ensure compliance. Thus, properly maintained records can help an employer defend itself against claims for back wages and overtime.

Employers that intentionally fail to keep or deliberately falsify records required by FLSA face criminal penalties of up to \$10,000 and, on second conviction, imprisonment for up to six months.

In general, depending on the type of record, employers must preserve records for two or three years.

The following records must be preserved for at least three years:

- ▶ payroll records that contain all the information required by the record-keeping regulations
- ▶ plans, trusts, employment contracts, and union contracts involving exclusions from the regular rate
- ▶ agreements basing overtime pay on piece, hourly, or basic rates

The following “supplementary records”—those serving as the source documents for other payroll records maintained by an employer—must be kept for at least two years:

- ▶ Basic employment and earnings records. This requirement extends to all materials that substantiate payroll and other records, such as timecards or production cards.
- ▶ Wage rate tables. These can be hourly, daily, weekly, or pay period wage rate tables or piece-rate schedules. They must be kept for two years from their last effective date.
- ▶ Work-time schedules. These include all schedules or tables of the employer that establish the hours and days of employment of individual employees or of separate workforces. These schedules can be in any form, such as notices, company letters, or office memoranda, and must be preserved in the same form as they actually were used.

In general, employers must maintain and preserve certain records to document compliance with FLSA's minimum wage, overtime, equal pay, and child labor provisions.

For each covered employee, employers must maintain records containing the following information:

- ▶ Full name. Records must include each employee's full name as used for social security purposes. If the employer uses a number or symbol on timecards or other records in lieu of an employee's name, the number or symbol also must appear in the records.
- ▶ Home address. Employers must maintain the employee's current home address, including a zip code.
- ▶ Birth date. If the employee is under 19 years old, records must show the employee's birth date. In lieu of the birth date, an employer can keep an age certificate, a work certificate, or other proof of the person's age.
- ▶ Gender and occupation. Each employee's gender and occupation must be recorded because of FLSA's equal pay provisions.
- ▶ Workweek. Records must indicate the time of day and the day of the week on which an employee's workweek begins.
- ▶ Regular rate. An employee's regular hourly rate of pay must be shown for any workweek when overtime is worked and overtime pay is due.
- ▶ Regular rate exclusions. The amount and nature of each payment that is excluded from the regular rate must be shown in an employer's records.
- ▶ Wage basis. The wage, salary, or other earning rate used to determine the employee's straight-time earnings or wages must be included in an employer's records.

- ▶ Hours worked. Records must include each employee's total hours for each workday and workweek. Although employers are responsible for recording the time at which the employee actually begins and ends work, there is no requirement that a time clock or timecards be used in recording hours worked.
- ▶ Straight-time earnings. Records must include an employee's total daily or weekly straight-time earnings or wages—all earnings or wages received on the basis of hourly rates, piece rates, commissions, and salary, but exclusive of any premium for overtime.
- ▶ Weekly overtime pay. The employer must show the employee's total weekly overtime compensation—the compensation for overtime hours over and above all straight-time earnings or wages for those hours.
- ▶ Wage additions or deductions. The total amount of additions to or deductions from the wages paid to each employee during each pay period must be included in the employer's records.
- ▶ Wages paid. Records must show the total wages paid to the employee each pay period. If other federal or state regulations impose more restrictive record-keeping requirements than FLSA, the more restrictive rules apply.

White Collar Exemptions

For executive, administrative, professional, and outside sales employees who are exempt from FLSA's overtime and minimum wage requirements, employers must keep information regarding the:

- ▶ basis on which wages are paid - for example, weekly, monthly, or semimonthly
- ▶ total remuneration - pay plus fringe benefits.

Employers do not need to keep regular rates, regular rate exclusions, hours worked, straight-time earnings, or weekly overtime pay for white-collar exempt employees.

Record Destruction

When your retention period is completed and you are ready to throw out the files you no longer need to keep, pay special attention to how you eliminate the records. Once you have collected the records, you now have an obligation to dispose of them properly. Consider the following suggestions:

Destroy the records using a secure method of document destruction. Never throw the records in the trash! Always use a destruction method that ensures that no one can find and recreate the document. Utilize a good shredding method before throwing out the documents.

Don't let just anyone handle the documents waiting to be destroyed. Never let just anyone handle the documents to be destroyed. Follow the same process when you received the information in the first place and only allow someone who is authorized and able to handle the confidential nature of the records to handle the documents at the time of destruction.

Employee Handbooks

Whether or not you have a printed employee handbook, it is likely that your clinic already has policies in effect for the employees. If you don't have a written handbook, then the last decision that you made is essentially your policy.

- ▶ Can employees smoke in the building?
- ▶ Where and when employees are allowed to eat lunch?
- ▶ What time should employees report to work each day?
- ▶ How many vacation days to employees get?
- ▶ How do employees get paid?



These are just a few of the many questions employees have about work. There may also be other rules and regulations your clinic has that perhaps the employees are not as familiar with, and this means that each time an issue arises, you as the clinic director have to figure out the rules as you go along.

On top of all the above, there may be laws at the federal and state levels with which your clinic is required to be in compliance, and perhaps you or your employees aren't even aware of them. By creating an employee handbook, you now have an effective means of providing that communication, and protecting yourself, your clinic, and your employees from future problems.

There's no way around it, clinic directors spend a large percentage of their time dealing with employee relations and relaying applicable rules and policies to the staff. When there are no clear, written policies on employee and company rules and benefits, you need to answer questions and figure it out as you go. This can result in uneven and sometimes unfair application of your policies and rules, not to mention the loss of time involved when you have to stop and develop a policy as the issues arise.

The Employee Handbook is a great way to consistently communicate your expectations and policies to all of your employees!

The employee handbook is one of the most important communication tools between the clinic and your employees. It serves two purposes: first, it sets forth your expectations for your employees, and second, it also describes what they can expect from the clinic. It is far more efficient for your clinic to develop a clear, concise and well-written handbook that all employees receive on their first day of work. This allows the employee to review the policies in detail and to have a resource to use throughout their employment when questions arise.

So, what does an employee handbook do for your clinic?

- ▶ Provides written documentation of the clinic policies and rules
- ▶ Saves time for both you and the employees

- ▶ Is a good communication vehicle between you and your staff
- ▶ Potentially provides legal protection
- ▶ Spells out privileges and responsibilities for staff and clinic
- ▶ Consistently communicates expectations and policies to employees

However, great care must be taken when creating your employee handbook as misstatements or ambiguous wording can create legal liabilities for your clinic. In past legal disputes, courts have considered an employee handbook to be a contractual obligation, so word it carefully.



The employee handbook is one of the first formal communications that you will have with an employee after they are hired. You want to make sure the first impression is a good one. Similarly, in the event of a dispute or poor performance review, this will be the first place that the employee turns.

The handbook should contain enough detail to avoid confusion, but not so much as to overwhelm the reader. For instance, if there are other documents (i.e. group

insurance handbook, retirement plan documents) which more appropriately provide details, don't try to recreate the information in the handbook. Instead, offer a brief summary and refer to the other document in the employee handbook. Giving employees a handbook that is 250 pages will discourage them from reading it and referring to it on a regular basis. Remember: the employee handbook should be clear and concise!

The policies in your employee handbook should be specific to your clinic and will vary from clinic to clinic, depending on the size of your clinic, the number of employees, the policies that you set and the benefits you offer. You will need to carefully review the policies that are relevant to your clinic, your employees and your operations before deciding what should be included in your handbook.

Your rules do not change on a frequent basis but they can change over time. Therefore, an employee handbook should consist of those static policies, rules and benefits that don't change on a daily, weekly or monthly basis. However, it's important to review your employee handbook at least every 2-3 years to ensure that it is still accurate and reflective of your policies and rules.

Employee Handbook Sample Policy Topics

Welcome

- ▶ Employee Handbook Agreement and Acknowledgement Form
- ▶ The clinic mission, vision and values
- ▶ The clinic history and programs

Employment Setting

- ▶ At-will employment
- ▶ Anti-harassment and Anti-discrimination
- ▶ Equal Employment Opportunity
- ▶ Initial employment period (or introductory period)

- ▶ No Tolerance policy – “Drug/Alcohol Free”
- ▶ Whistleblower policy

Employment Policies

- ▶ Absenteeism
- ▶ Attendance and punctuality
- ▶ Breaks
- ▶ Building access
- ▶ Classifications of employment -
 - Full-Time staff exempt
 - Full-Time staff non-exempt
 - Part-time staff
 - Contract staff
- ▶ Confidentiality
- ▶ Discipline
 - Disciplinary actions
 - Discipline procedure
 - Violation of clinic policy
- ▶ Dress Code: Professional appearance guidelines
- ▶ Email/internet/cell phone policy
- ▶ Grievance policy
 - Complaint procedure
 - The investigation
 - Responsive action
- ▶ Job description
- ▶ Outside employment
- ▶ Payroll
- ▶ Performance reviews
- ▶ Personal information
- ▶ General employee safety
 - Safety Policy
 - How to report an unsafe area
 - What to do if you get injured on the job
 - How to report an accident or incident
- ▶ Smoking
- ▶ Termination
 - Voluntary – resignation
 - Involuntary
- ▶ Types of Employment Status/Work Hours
 - Full time salaried exempt
 - Full time hourly non-exempt

- Part time hourly non-exempt
- Clinic hours
- Overtime requirements

Employment Benefits

- ▶ Voluntary Benefits
 - Eligibility for benefits
 - COBRA (if required by size of clinic)
 - Insurance coverage
 - Health insurance
 - Disability
 - Retirement plan
 - Other specific benefits (i.e., employee vet care)
- ▶ Leaves of Absence
 - Military Leave
 - Disability Leave of Absence
 - FMLA (if required by size of clinic)
- ▶ Paid Time Off
 - Holidays
 - Vacation/Sick/Personal
 - Jury duty