PERSONNEL DOCUMENTS AND RECORD RETENTION

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I. FLSA Wage and Recordkeeping

FLSA generally requires employers to pay employees the designated minimum wage (currently $7.25/hour) and to pay overtime for employees who work over 40 hours per week. 29 U.S.C. §§ 206-207.

A. Recordkeeping Requirements

The FLSA requires employers to keep certain records relating to employees' compensation. 29 U.S.C. § 211(c). Section 11(c) of the FLSA requires employers to make, keep and preserve records of employees and of their "wages, hours, and other conditions and practices of employment." *Id*. The recordkeeping requirements of the FLSA, along with Department of Labor regulations, specify the types of information that employers must keep for all covered employees, as well as information that must be retained for exempt employees to substantiate their exempt status. In addition, certain wage-hour practices, such as commissions and tips, require employers to document their compliance with the special rules governing such practices. 29 U.S.C. § 201 et seq.; 29 C.F.R. § 516 et seq.

While the FLSA requires no particular form for these records, it does require that the records include certain identifying information about the employee and accurate data about hours worked and wages earned. 29 C.F.R. § 516.1.

1. Records Required for Nonexempt Employees

Every employer must maintain and preserve payroll or other records containing the following information for each employee:

a. Employee's full name and current home address;

b. Employee's date of birth, if under 19 years of age;

c. Employee's sex and occupation;

d. Employee's workweek (time of day and day of week on which the employee's workweek begins);

e. Employee's regular rate exclusions (the amount and nature of each payment that is excluded from the regular rate);

f. Employee's wage basis (the wage, salary, or other earning rate used in determining the employee's straight time (non-overtime) earnings for each pay period);

g. Employee's hours worked (includes total hours for each workday and workweek);

h. Employee's straight time earnings (daily or weekly straight time earnings, including all earnings received on the basis of hourly rates, piece rates, commissions or salary);

i. Employee's weekly overtime pay;

j. Deductions from and additions to the employee's wages;

k. Pay period covered (records must show the date each employee was paid and the pay period covered by the payment); and

l. Wages paid (total wages paid on each pay period). 29 C.F.R. § 516.2(a).

The FLSA's recordkeeping requirements are not satisfied by merely maintaining copies of employees' paychecks.

For employees working on fixed schedules, an employer may instead maintain records showing the schedule of daily and weekly hours the employees work. 29 C.F.R. § 516.2(c). However, if the employer elects this option, it must also indicate that the employee actually worked this schedule. 29 C.F.R. § 516.2(c)(1). For any week in which an employee works more or less than the scheduled hours, the employer must record the exact number of hours worked for each day and each week. 29 C.F.R. § 516.2(c)(2).

There are slightly different requirements for employees who earn commissions or tips. For employees on commission, an employer need only maintain the information required by items (a) through (e), (g), (j) and (1) above, as well as a copy of the commission agreement or understanding and the total compensation paid each pay period. 29 C.F.R. § 516.16. For tipped employees, the employer must maintain all the information in (a) through (1) above, as well as the following:

1. A notation identifying each tipped employee;
2. The weekly or monthly amount of tips received by the employee. The amount of each tipped employee's wages that derive from tips;
3. The hours worked each workday in any job in which the employee does not receive tips; and
4. The hours worked each workday in any job in which the employee receives tips and the total straight-time earnings for such hours.

2. Required Records For Exempt Employees

For exempt employees, employers must maintain and preserve records containing all the information required by items (a) through (f) and (k) and (1) above. 29 C.F.R. § 516.3. In addition, employers must maintain records showing the basis on which wages are paid in sufficient detail to permit calculation of an employee's total remuneration, including fringe benefits, for each pay period. 29 C.F.R. § 516.3. This may be shown as the dollar amount of earnings per month or per week, plus any appropriate addenda (e.g. "plus hospitalization and insurance plan A," "plus benefit package B," "plus two weeks paid vacation," etc.). 29 C.F.R. § 516.3.

B. Period and Place of Retention

1. Three Years

An employer must preserve the above records for at least three years from the date of last entry. The employer must also retain copies of collective bargaining

agreements, sales and purchase records, written employment agreements, and memoranda summarizing oral employment agreements for at least three years. 29 C.F.R. § 516.5.

2. Two Years

An employer must preserve for at least two years records on which wage computations are based (e.g., time cards, piece work tickets, wage rate tables, work and time schedules, and records of additions to or deductions from wages). 29 C.F.R. § 516.6. The employer must also retain for two years customer orders and invoices, shipping records, customer billings, and all records used to determine the original cost, operating and maintenance cost, and depreciation and interest charges, if such costs are involved in the calculation of wages paid. 29 C.F.R. § 516.6.

C. Location of Records

The records may be kept at the place of employment or in a central records office. 29 C.F.R. § 516.7. Wherever they are kept, the records must be available for inspection by the Department of Labor within 72 hours of the Department's notice to inspect them. 29 C.F.R. § 516.7.

D. Timekeeping Requirements

Employers may use any timekeeping method they choose. 29 C.F.R. § 785.48. For example, they may use a time clock, have a timekeeper keep track of employees' work hours, or tell their workers to write their own times on the records. 29 C.F.R. § 785.48. Any timekeeping plan is acceptable as long as it is complete and accurate. 29 C.F.R. § 785.48.

E.

Posting Requirements

Employers are required to post a notice explaining the minimum wage and overtime requirements of FLSA in a "conspicuous" place at every location where individuals are employed. 29 C.F.R. § 516.4. The Department of Labor provides employers with a poster containing the required information.

F. Reporting Requirements

Employers are required to file quarterly tax returns with the IRS reporting their employees' total wages and tips, other compensation (e.g., sick pay), taxable Social Security wages and tips, taxable Medicare wages and tips, etc., and the applicable taxes thereon. Employers should remind their employees to file an amended Form W-4 by December 1st to reflect changes in exemption allowances or exempt status, and should deliver Form W-2 on or before January 31st to their employees regarding the employee's annual income and withholdings.

G. Penalties

Failing to maintain records required by the FLSA can result in a variety of penalties. Although the Department of Labor has no authority to impose civil monetary penalties for recordkeeping violations, a person found to have willfully violated the recordkeeping requirements can face criminal sanctions. 29 U.S.C. § 216(a). Criminal sanctions include up to $10,000 in fines, six months imprisonment, or both. 29 U.S.C. § 216(a). In addition, courts can issue injunctions against future recordkeeping violations. 29 U.S.C. § 216(a).

II.

Federal Employment Laws

Various federal employment laws contain record retention and posting requirement provisions. With respect to federal record retention requirements, the following highlights some of these laws which each contain specific, if not distinct, record retention requirements:

A. FMLA

The Family and Medical Leave Act (FMLA) also has separate, rigid requirements for retention of certain documents relating to an individual's employment, such as payroll slips, timesheets or others documents on which wage computations are based, any records relating to any leave time the employee has taken, and documentation of employee benefits.

Every employer must maintain and preserve payroll or other records containing the following information for three years:

a. Basic payroll data showing additions/ deductions from wages & total compensation paid

b. Employee handbook provisions relating to FMLA Leave

c. Dates and hours of FMLA leave taken

d. Notices given to employees regarding FMLA

e. Employee requests for FMLA leave

f. All benefit documents and information about paid/unpaid leave status

g. Benefits premium information

h. Records of employee disputes re their FMLA leave

B. EEO Recordkeeping

Federal employment discrimination laws require employers to maintain personnel files and other documents for a specified period of time after an employee is terminated. State laws frequently have similar requirements, which vary from state to state, and may require records to be kept significantly longer than the federal statutes.

1. Title VII and ADA

Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, 2000e-17, and the Americans With Disabilities Act (ADA), 42 U.S.C. § 12111, the following documents should be kept for a one year from the date the record was made or from when an action was taken (*e.g.,* termination), whichever is later:

a. Employment records (hiring, promotion, demotion, transfer, layoff, termination, compensation changes, training selection)

b. Payroll records (name, address, birth date, occupation, rate of pay, days worked each week, compensation earned each week

c. Job descriptions

d. Union agreements & contracts

e. Retirement, pension & insurance plans

f. Seniority & merit system descriptions & records

For Affirmative Action employers, the foregoing documents must be retain for a two year period unless the employer has fewer than 150 employees or does not have a

Government contract of at least $150,000. For Affirmative Action employers not subject to the two year retention period, the retention requirement is one year from the date of making the record or the personnel action taken.

Records relating to an employment discrimination charge, including appraisals, job descriptions, payrolls, and other records, including electronically stored documents such as e-mails and instant messaging correspondence, etc., related to charging party as well as any "similarly situated" employees must be retained until the final disposition of the charge, including any subsequent litigation based on the charge.

2. <u>ADEA</u>

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq*., requires covered employer s to retain the following documents for a 1 year period:

a. employment applications

b. promotion, demotion or transfer

c. job orders given to employment agencies

d. employer-administered aptitude tests

e. advertisements, etc.

Pursuant to ADEA a three year retention period applies to personnel records containing an employee's name, address, date of birth, occupation, rate of pay and compensation earned each week; a one year after plan termination period applies to employee benefit plan information; and a ninety day retention period to application forms for temporary jobs.

C.

Prevailing Wage: Public Work Contracts

Under the federal law known as Davis-Bacon Act, 40 U.S.C. §§ 276a-276a-5 (applies to federal contracts for public work projects), the following documents should be kept for two years from the date the record was made:

a. Contract number and period each employee was engaged on the contract

b. Detailed pay records for each employee for each day worked

c. Record showing all employees paid prevailing benefits or their equivalent value

Under the federal laws known as the Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 34-45 (which protects employees of government contractors whose contracts exceed $10,000), and the McNamara O'Hara Services Contract Act, 41 U.S.C. § 351, *et seq*. (applies to general contractors and subcontractors performing services on U.S. government prime contracts in excess of $2,500) the following documents should be kept for 3 years from the date the record was made:

a. Wage and hour records for all "laborers and mechanics" employed in construction and repair of public works facilities

b. Records showing all employees paid at least the prevailing minimum wage

c. Age certificate for each employee under the age of 19

D. ERISA

Under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-138, employers are required to retain the following welfare plan documents for a six year period:

a. Benefit Plans

b. Summary Plan Descriptions

c. Employee records relating to an employer's welfare or health plan.

E. OSHA

The Occupational Safety & Health Act of 1970 (OSHA), 29 U.S.C. § 51 *et seq*., requires employers to main a log of occupational injuries or illnesses for a minimum of five years following the injury or illness resulting in (i) medical treatment (other than first aid); (ii) loss of consciousness or restriction of work or motion; or transfer or termination of employment. Other OSHA documentation retention requirements include the following documents for a minimum period of five years after reported:

a. OSHA 300 Report posted each year from February 1 through April 30.

b. Hazardous condition exposures

c. medical tests & screening

d. Allegations of employee exposure

e. Heavy equipment operation records

A thirty year retention period applies to employee medical records (measured from the termination of the employee's employment), and to analyses using exposure or medical records.

F. **EPPA**

Pursuant to the Employee Polygraph Protection Act (EPPA), 29 U.S.C. §§ 2001-2009, employers are required to retain the following documents for a three year period following the date of a polygraph exam:

a. Statement of reasons for conducting the examination

b. Copy of statement given to examinee about time and place of examination

c. Copies of opinions, reports, etc. to employer from examiner

G. **National Labor Relations Act**

The National Labor Relations Act, 29 U.S.C. § 151 *et seq*., requires that the following documents be kept for a minimum of seven years following the expiration of a labor agreement:

a. Collective bargaining agreements

b. Organizing records

c. Correspondence with union

III. **Sarbanes-Oxley Act**

In accordance with the Sarbanes-Oxley Act (SOX), which makes it a crime to alter, cover up, falsify, or destroy any document with the intent of impeding or obstructing any official proceeding, publicly-owned companies (with annual revenues in

excess of $75 million) and their accounting teams must adopt a policy which provides for the systematic review, retention and destruction of documents received or created in connection with the transaction of organization business. The Act states that all business records, including electronic records and electronic messages (i.e., e-mails), must be saved for "not less than five years." The consequences for non-compliance are fines, imprisonment, or both.

Section 802 of SOX specifically addresses the retention and destruction of records, with implied penalties. Section 802 also stresses the importance of record retention and destruction policies that affect all of a company's e-mail, e-mail attachments, and documents retained on computers, servers, auxiliary drives, e-data, web-sites, as well as hard copies of all company records. The rules state that any employee who knows their company is under investigation, or suspects that it might me, must stop all document destruction and alteration immediately, and create a company record showing that they have ordered a halt to all automatic e-data destruction practices.

Under Section 802, it is a "generally accepted retention period" for employers to retain employee payroll records on a permanent basis and employment applications for a three year period.

IV. U.S. Immigration Law

A. I-9 Employment Verification

In order to comply with IRCA, 8 U.S.C. § 1324, 8 C.F.R. §§ 274a.1 *et seq*., all U.S. employers must verify the employment eligibility and identity of all employees hired to work in the United States after November 6, 1986 by completing Employment

Eligibility Verification forms (Forms I-9) for all employees, including U.S. citizens. Employers who hire or continue to employ individuals knowing that they are not authorized to be employed in the United States may face civil and criminal penalties. A copy of the current version of Form I-9 is attached hereto as Exhibit A and is also available for download on the USCIS's website at www.uscis.gov.

All U.S. employers must complete and retain a Form I-9 for each individual they hire for employment in the United States. This includes citizens and noncitizens. On the form, the employer must examine the employment eligibility and identity document(s) an employee presents to determine whether the document(s) reasonably appear to be genuine and relate to the individual and record the document information on the Form I-9. The list of acceptable documents can be found on the last page of the form.

The USCIS's Handbook For Employers (Instructions for Completing Form I-9)(M-274) provides a valuable reference source for employers concerning the completion of Form I-9, a copy of which can be downloaded from the USCIS's website at www.uscis.gov.

B. Inspections and Penalties

Both ICE and the DOL inspect employers to ensure compliance with the I-9 requirements. Do not file Form I-9 with ICE or the DOL. Form I-9 must be kept by the employer either for three years after the date of hire or for one year after employment is terminated, whichever is later. The form must be available for inspection by authorized U.S. Government officials from ICE and the DOL.

Penalties for record keeping violations range from $110 to $1,100 per each paperwork occurrence per employee regardless of the number of prior offenses for which the employer has been cited. Each mistake on the I-9 Form is considered to be a separate violation.

C. Recent Form I-9 Revisions

The current version of the recently revised Form I-9 is marked with a revision date of "Rev. 08/07/09." The revision date can be found on the lower right hand corner of the form. (See Exhibit A).

The "02/02/09" edition of Form I-9 is also still being accepted. The revised Form I-9 reflects the USCIS's efforts to streamline the Employment Eligibility Verification (Form I-9) process by issuing the following new rules:

- Narrows the list of acceptable identity documents and further specifies that expired documents are ***not*** considered acceptable forms of identification.
- Adds foreign passports to List A which contain specially-marked machine-readable visas and documentation for certain citizens of the Federated States of Micronesia (FSM) and the Republic of the Marshall Islands (RMI).

D. Completing the I-9 Form

Section 1 of Form I-9, on which the employee states whether he or she is a U.S. citizen, permanent resident or alien authorized to work, must be completed and signed on

the first day the employee reports for work. Section 2 of the form, on which the employer records which documents were presented by the employee to evidence his or her status, must be completed within three days of the employee commencing work.

The following are some points to keep in mind when completing Form I-9:

- An applicant should not be asked to complete Form I-9 prior to the offer of employment. Form I-9 provides information on citizenship, national origin and visa status which could serve as a basis for a claim of discrimination if the applicant is not hired.
- Section 1 of Form I-9 must be completed and signed by the employee on the date the employee commences work. Any translator or person preparing Section 1 for the employee must also sign the form.
- Section 2 of the form must be completed within three business days of the commencement of employment. An employee who is unable to provide a document but can provide a filing receipt showing that the document has been applied for, must be given ninety days to produce the actual document, provided that the employee already has current employment authorization.

- A Form I-9 must be completed for every employee and for each independent contractor.
- Follow the same I-9 procedures for all employees.
- Remember that the employer must retain the I-9 for the longer of three years from the date of hire or one year after termination of the employment relationship. The employer must have an I-9 on file for all current employees other than employees hired prior to November 6, 1986.

E. Acceptable I-9 Verification Documents

When employees are given a Form I-9, they should be asked to provide **either** one document from List A (identity and employment eligibility) **or** one document from each of Lists B (identity) and C (employment eligibility). It is important to emphasize that an employer should not ask an employee to provide any particular document (e.g., green card) for completing Section 2 of Form I-9. An employer must accept any document specified on Form I-9, provided that it appears genuine and relates to the employee.

List A documents that establish both identity and employment eligibility include the following: United States Passport or Passport Card; Permanent Resident Card ("green card"); and the Employment Authorization Document (I-766).

List B documents that establish identity only include the following: Driver's license with photo or identifying information (name, DOB, height, weight, etc.);

Identification card with photo or identifying information (name, DOB, height, weight, etc.); school identification card with a photograph; United States military card or draft record; and a Voter's Registration Card.

List C documents that establish employment eligibility only include the following: Social Security account number card without employment restrictions; original or certified copy of birth certificate issued by a State, county, municipal authority or outlying possession of the United States bearing an official seal; United States Citizen Identification Card, INS Form I-197; and Identification card for use of a resident citizen in the United States, INS Form I-179.

F. Re-verification of I-9 Documents and Employees

Employers are required to re-verify the employment authorization of an employee whose List A or List C employment authorization document expires. The employer should either use Section 3 of the original Form I-9 or prepare a new Form I-9, including Section 1. The employer should establish a reminder system for the employee to file an application to renew his/her work authorization well in advance (120 to 180 days) of the expiration date of the current document because of the time taken by the USCIS to issue new documents.

It should be noted that the obligation to re-verify List A and List C documents does not extend to Form I-551 Alien Registration Receipt Cards or Permanent Resident Cards. USCIS and the Department of Justice Office of Special Counsel (which enforces the anti-discrimination provisions of the IRCA) take the position that while these cards may expire, the beneficiary's status as a Lawful Permanent Resident continues so long as

he or she remains a resident of the United States and, therefore, does not need to be re-verified. Form I-551 must have been valid at the time it was originally submitted as evidence of employment authorization.

V. New York State Laws

A. Wage and Hour Laws

Section 195 of the New York State Labor Law requires employers to maintain and preserve payroll records for a period of at least 3 years. These records must contain each employee's hours worked, gross wages, deductions and net wages. An employer's compliance with the recordkeeping requirements of New York law satisfies the recordkeeping requirements under FLSA. Employers must also keep a time book showing the names and addresses of each employee and the hours worked by them each day to comply with the requirements of Section 161(1) of the New York State Labor Law of providing employees with one day of rest in seven.

The New York Minimum Wage Orders each require employers to establish, maintain and preserve weekly employee payroll records for at least 6 years. The payroll records must include the names and addresses of employees, their social security numbers, the number of hours worked per day, the amount of their gross wages, their job classification and wage rate, deductions from their gross wages, and any allowances (if claimed as part of the minimum wage), money paid in cash, and student classification.

For each employee employed as an executive, administrative or professional capacity, the wage and hour records must contain the employee's name and address, social security number, occupation description and, for individuals working in an

executive or administrative capacity, the total wages and value of any allowances, if any, for each payroll period.

Special wage and hour document retention rules also exist for the hotel industry, restaurant industry, building service industry, farm workers, and non-profit institutions.

B. Commission Agreements

Section 191-b of the State Labor Law, N.Y. Lab. Law § 191-b, which governs commission agreements with sales representatives requires an employer to set forth the terms of the agreement in writing, including the method by which the commission is to be computed and paid. The agreement must be retained for a period of 6 years. A sales representative, during the course of the commissions agreement, is required to be paid the earned commission and all other monies earned or payable in accordance with the agreed terms of the agreement, but not later than 5 business days after the commission has become earned.

C. Employee Identity Protection Laws

New York's employee identity protection laws prohibit employers from, among other things: posting or displaying an employee's Social Security number; visibly printing a Social Security number on any identification badge or card (including a time card), and placing Social Security numbers in files with open access. These laws also prohibit employers from communicating an employee's "personal identifying information" to the general public. For purposes of this prohibition, "personal identifying information" means an employee's Social Security number, home address or telephone

number, personal e-mail address, Internet identification name or password, last name prior to marriage, and drivers' license number.

Under the employee identity protection laws, it is unlawful for any person to file documents that are available for public inspection that contain Social Security numbers of other persons. This includes filing documents with a state agency or state court. This prohibition will not apply where the Social Security number is otherwise required by federal or state law or regulation, or court rule, or if the other person is a dependent child or has consented to the filing.