

OUTLINE OF FEDERAL EMPLOYMENT LAW RECORDKEEPING REQUIREMENTS

Constangy, Brooks & Smith, LLC

TYPE OF RECORDS TO BE RETAINED	DESCRIPTION	RETENTION PERIOD	FORM IN WHICH RECORDS ARE TO BE KEPT	STATUTE AND REGULATORY AUTHORITY
<p>1. PERSONNEL RECORDS:</p>	<p>Applications, resumes, and other forms of employment inquiries, job advertisements, documents related to hiring, firing, transfer, assignment, demotions, promotions, layoffs, payroll records, rates of pay or other terms of compensation, job descriptions, employment handbooks, selection for training or apprenticeship programs, employee evaluations, requests for reasonable accommodation</p>	<p>•4 years generally recommended*</p>	<p>None specified</p>	<p>For compliance with the following statutes, these records should be retained for 1 year from date decision was made not to hire individual, the date of the personnel action or date record is made (whichever is later), or the date of involuntary termination[±]</p> <ul style="list-style-type: none"> •Title VII, Civil Rights Act of 1964^a; 29 CFR §§ 1602.14, 1602.20, 1602.21, 1602.7 •Civil Rights Act of 1866^b; 42 U.S.C. § 1981 •Americans with Disabilities Act (ADA)^a; 42 U.S.C. § 12117(a), •Age Discrimination In Employment Act (ADEA)^c; 29 CFR §§ 1627.2, 1627.3, 1627.4, 1627.5 •Executive Order 11246^d; 41 CFR §§ 60-1.3, 60-1.7, 60-1.12 •Rehabilitation Act of 1973^e; 41 CFR § 60-741.80 •Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRA)^f; 41 CFR §§ 60-250.2, 60-250.10, 60-250.80

* **NOTE: All employers are subject to the Civil Rights Act of 1866, 42 U.S.C. § 1981, as amended. Constangy recommends that all employment records be maintained for a minimum of four years, although some other applicable statutes have shorter limitations and record retention periods. See endnote b below.**

[±] Government contracts or subcontractors with 150 or more employees OR a government contract of \$150,000 or more must keep records for 2 years.

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<p>2. RECORDS RELATING TO EMPLOYMENT TESTS, EMPLOYMENT OPPORTUNITIES:</p>	<p>Personnel records relating to job orders submitted to employment agency or labor organization, test papers and documents related to employer-administered aptitude tests or other employment tests, physical examination results, interview notes, notices regarding openings, promotions, training programs, and opportunities for overtime work</p>	<p>•4 years generally recommended*</p>	<p>None specified – Physical exam results should be maintained in separate files and Treated as confidential medical records</p>	<p>For compliance with the following statutes, these records should be retained for 1 year from date of personnel action to which record relates[±]</p> <ul style="list-style-type: none"> •ADEA; Rehabilitation Act; VEVRA; Executive Order 11246
<p>3. ONLINE/ INTERNET APPLICATION RECORDS:</p>	<p>Any and all expressions of interest through the Internet or related technologies as to which the employer or government contractor considered the individual for a particular position, such as on-line resumes or internal resume databases, records identifying applicants contacted about their interest in a particular position</p> <ul style="list-style-type: none"> •If utilizing INTERNAL RESUME DATABASE, must maintain a record of each resume added to the database, the date added, the position for which each search of the database was made, and for each such search, the search criteria and date • If utilizing EXTERNAL RESUME DATABASE, must maintain a record of the position for which each search of the database was made, and for each search, the search criteria, the date of the search, and the resumes of the job seekers who met basic position qualifications 	<p>•1 year from date of personnel action to which record relates[±]</p>	<p>None specified</p>	<ul style="list-style-type: none"> •Executive Order 11246

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4. APPRENTICE PROGRAMS:	A chronological listing of the names, addresses, dates of application, gender, and minority group identification of all applicants for an apprenticeship program, including any test papers and interview notes; alternatively written applications which contain the required information will suffice	<ul style="list-style-type: none"> •4 years generally recommended* 	None specified but report EEO-2 must be filed.	For compliance with Title VII these records should be maintained for 2 years or program length, whichever is greater
5. PAYROLL RECORDS:	Records that contain name, address, Social Security number, date of birth, date of hire, and date of termination, gender and occupation, and rate of pay, basis on which wages are paid (hourly, commission, piecemeal), total weekly earnings broken out by straight time and overtime premium, wages paid during each pay period, dates of payment and pay period covered	<ul style="list-style-type: none"> •3 years from termination of employment 	No form is specified but if microfilm is used, employer must make any required transcripts; must be made available upon 72 hours' notice	<ul style="list-style-type: none"> •Fair Labor Standards Act (FLSA)^g; 29 CFR §§ 516.2, 516.3, 516.4, 516.5, 516.6, 516.7, 570.6 •ADEA; Family Medical Leave Act FMLA^h; 5 CFR § 630.1211; 20 CFR § 825.500
6. TIME CARDS AND SCHEDULES:	Records showing time each workday began and ended, total hours worked in each day and each week, wage rate tables, work schedules, amount of and reason for each deduction from or addition to wages, and daily output of an employee not paid on an elapsed time basis	<ul style="list-style-type: none"> •2 years from termination of employment 	None specified; must be made available upon 72 hours' notice	<ul style="list-style-type: none"> •FLSA •FMLA
7. WAGE DIFFERENTIAL:	Records explaining any wage differential between sexes and substantiating documents	<ul style="list-style-type: none"> •2 years 	None specified	<ul style="list-style-type: none"> •Equal Pay Act^g; 29 CFR § 1620.32; 20 CFR Part 516

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8. GENERAL BUSINESS RECORDS:	<ul style="list-style-type: none"> •Records showing total dollar volume of sales or business and total volume of goods purchased or received 	<ul style="list-style-type: none"> •3 years 	As maintained in the ordinary course of business; must be made available upon 72 hours' notice	<ul style="list-style-type: none"> •FLSA
	<ul style="list-style-type: none"> •Records of customer orders or invoices, incoming or outgoing shipping or delivery records, bills of lading and billings to customers (not individual sales slips or cash register tapes) 	<ul style="list-style-type: none"> •2 years 		
9. MINOR EMPLOYEES:	Certificates of age that include name, address, date of birth, place of birth, signature, and gender of minor, name and address of employer, industry of employer, occupation of minor, signature of issuing officer, date and place of issuance, and name and address of minor's parent or person standing in that position	<ul style="list-style-type: none"> •3 years from termination of employment 	Certificates of age must be kept on file at the minor's place of work; when minor terminates employment, employer must give certificate to minor	<ul style="list-style-type: none"> •FLSA
10. FEDERAL CONTRACTORS & SUBCONTRACTORS OF FEDERAL SERVICE CONTRACTS:	For each employee working on service contract, records showing name, address, work classification, Social Security number, rate of monetary wages and fringe benefits provided (or payments in lieu of benefits), total daily and weekly compensation, deductions from wages, daily and weekly hours worked, list of wages and benefits for those classes of service employees not included in wage determination for each contract, and list of predecessor contractor's employees furnished to the contractor	<ul style="list-style-type: none"> •3 years from completion of contract 	None specified	<ul style="list-style-type: none"> •McNamara-O'Hara Service Contract of 1965ⁱ; 29 CFR § 4.6(g)

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11. GOVERNMENT REPORTS:	<ul style="list-style-type: none"> •EEO-1 Reports •Government contractors with 50 or more employees and a single contract, subcontract, or purchase order amounting to \$50,000 or more •All other employers with 100 or more employees 	<ul style="list-style-type: none"> •1 year 	Records containing racial or ethnic identity should be kept separate from employee's basic personnel records that are available to those responsible for personnel decisions	<ul style="list-style-type: none"> •Executive Order 11246
	<ul style="list-style-type: none"> •VETS-100 Reports 	<ul style="list-style-type: none"> •1 year 		<ul style="list-style-type: none"> •VEVRA
12. MISC. DOCUMENTS, INCLUDING AGREEMENTS, CONTRACTS, CERTIFICATES, BENEFITS:	Written records relating to employee benefits plans, collective bargaining agreements, seniority and/or merit systems, plans, trusts, individual employment contracts, written FLSA agreements, certificates authorizing payment at less than minimum wage	<ul style="list-style-type: none"> •3 years from end of plan or system 	None specified	<ul style="list-style-type: none"> •FLSA •Equal Pay Act

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13. AFFIRMATIVE ACTION EMPLOYERS:[†]	<ul style="list-style-type: none"> • Applications for employment if employer has more than 150 employees, including where possible, the gender, race, and ethnicity of applicants and Internet applicants 	<ul style="list-style-type: none"> • 2 years from the date of filling the position 	Records containing racial or ethnic identity should be kept separate from employee's basic personnel records that are available to those responsible for personnel decisions	<ul style="list-style-type: none"> • Executive Order 11246 • Rehabilitation Act • VEVRA
	<ul style="list-style-type: none"> • Applications for employment if employer has less than 150 employees or federal contracts of less than \$150,000, including where possible, the gender, race, and ethnicity of applicants and Internet applicants 	<ul style="list-style-type: none"> • 1 year from the date of filling the position 		
	<ul style="list-style-type: none"> • Written affirmative action plans including supporting documentation, analyses, and related records or raw data, tests given to employees including documents on their use and validation studies; 	<ul style="list-style-type: none"> • 2 years 		
	<ul style="list-style-type: none"> • Personnel or employment records, including gender, race, and ethnicity 	<ul style="list-style-type: none"> • 2 years from the date of the making of the record or personnel action 		
	<ul style="list-style-type: none"> • Internal complaints and termination information for individuals with disabilities, disabled veterans, and veterans of the Vietnam era, includes all records concerning the actions taken and responses to such complaints and actions 	<ul style="list-style-type: none"> • 1 year from termination of employment 		

[†] These requirements apply to government contractors or subcontractors with more than 50 employees or a single contract in the amount of \$50,000 or more. Any federal depository is also subject to these requirements.

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14. FAMILY AND MEDICAL LEAVE ACT RECORDS:	Medical certifications and related medical information, type of leave taken, dates or hours of leave taken, name, position, and pay rate of person on leave, copies of all notices given to or received from employee, documents describing employee benefits or employer policies and practices regarding paid and unpaid leave, premium payments of employee benefits, and status, beginning and ending date of employee's 12-month period, and records of any dispute between employer and employee	<ul style="list-style-type: none"> • 3 years from the date the leave ended 	None specified; may be microfilm or computerized if made available upon request; medical records must be maintained in separate files and treated as confidential medical records	<ul style="list-style-type: none"> • FMLA
15. IMMIGRATION RECORDS:	Employment Eligibility Verification Form I-9	<ul style="list-style-type: none"> • 3 years from the date of completion • OR 1 year from termination of employment, whichever is later 	I-9 Form. Recommended that I-9 forms are kept separate from regular personnel documents to ensure no discrimination and easily distinguishable access to files if audited.	<ul style="list-style-type: none"> • Immigration Reform and Control Act (IRCA)^j
16. RECORDS OF SELF-IDENTIFYING VETERANS AND INDIVIDUALS WITH DISABILITIES:	Government contractors must keep a separate file on applicants and employees that self-identify as disabled veterans or Vietnam-Era veterans, or individuals with disabilities	<ul style="list-style-type: none"> • 2 years 	None specified	<ul style="list-style-type: none"> • Rehabilitation Act • VEVRA
17. EMPLOYEE BENEFITS RECORDS:	Benefit plan documents, disclosure of plan description, annual reports and summary of annual reports, summary plan descriptions,	<ul style="list-style-type: none"> • Generally 6 years from filing (or date would have been 	None specified; electronic record-keeping is	<ul style="list-style-type: none"> • Employment Retirement Income Security Act (ERISA)^k; 29 USC §

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	<p>all recorded information used in compiling required reports (such as vouchers, worksheets, receipts, applicable resolutions, and participants' elections and deferrals), copies of COBRA notices, acknowledgments that COBRA notices were received, documents relating to any instance in which COBRA is not offered due to gross misconduct, and COBRA-related correspondence[‡]</p>	<p>filed but for exemption or simplified reporting requirement)</p> <ul style="list-style-type: none"> •Every employer must maintain records concerning employees' benefits that are sufficient to determine the benefits due or which may become due to the employees 	<p>satisfactory if system has controls to ensure the integrity, accuracy, authenticity, and reliability of the records, the records are kept in reasonable order and may be readily inspected and searched and records management practices are established (such as labeling, back-up, and storage of retained records), and records are easily legible and readable on video terminal and when reproduced on paper</p> <p>Paper records may be destroyed once records are converted to an electronic recordkeeping</p>	<p>1027; 29 CFR § 2520.107-1</p> <ul style="list-style-type: none"> •Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)

[‡] COBRA regulations do not specify a recordkeeping period. However, as COBRA amended ERISA, it is recommended that records be maintained for six years from the date of the record. Employers who sponsor group health plans or are otherwise not subject to ERISA should review the record keeping requirements of the Health Insurance Portability and Accountability Act ("HIPAA"), 42 U.S.C. § 1320d-1 – d-8. Generally, employers subject to HIPAA must keep records relating to their privacy policies, procedures, and notifications, disclosures of protected health information, authorizations, documentation concerning complaints, records of sanctions, and business associate contracts for a period of six years. *See generally* 45 C.F.R. § 164.530(j).

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			system that satisfies all requirements	
18. OSHA RECORDS:	<ul style="list-style-type: none"> • OSHA Form 300 and 300-A: Record employee's injuries or illnesses if they result in death, one or more days away from work, restriction of work or motion, loss of consciousness, transfer to another job or medical treatment and work-related cases of cancer, chronic irreversible disease, fractured or cracked bone, or punctured eardrum when diagnosed by physician, include employee's name (or confidential number), job title, date of injury or onset of illness, description of injury or illness, parts of body affected, object or substance that caused injury or illness, number of calendar days away from work, on restricted duty, and fatalities 	<ul style="list-style-type: none"> • 5 years following end of year to which records relate. 	<ul style="list-style-type: none"> • Entries must be made within 7 calendar days • Records may be computerized 	Occupational Safety and Health Act (OSHA) ¹ ; 29 USC §§ 657-58; 29 CFR §§ 1904.7, 1904.29, 1904.32, 1904.44
	<ul style="list-style-type: none"> • OSHA Form 301: Record injured or ill employee's name, address, age, and gender, name and address of physician or other health care provider who provided treatment, indicate whether employee was treated in an emergency room or hospitalized, the date, time and description of injury or illness, how injury occurred, and what employee was doing just before incident 	<ul style="list-style-type: none"> • 5 years following end of year to which records relate 	<ul style="list-style-type: none"> • Entries must be made within 7 calendar days 	
	<ul style="list-style-type: none"> • Employee medical records, or analyses thereof, pertaining to employees exposed to toxic substances or harmful physical 	<ul style="list-style-type: none"> • Duration of employment, plus 	<ul style="list-style-type: none"> • None specified 	

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	<p>agents</p> <hr style="border-top: 1px dashed black;"/> <ul style="list-style-type: none"> •Employee exposure records, or analyses thereof, pertaining to employees exposed to toxic substances or harmful physical agents (includes records of any personal or area monitoring of occupational exposure to hazardous materials) 	<p>30 years</p> <hr style="border-top: 1px dashed black;"/> <ul style="list-style-type: none"> •30 years 	<ul style="list-style-type: none"> •None specified 	
<p>19. RECORDS RELATING TO CHARGE, COMPLAINT, ENFORCEMENT ACTION, OR COMPLIANCE REVIEW:</p>	<p>Personnel or employment records relating to aggrieved person and to all other employees holding positions similar to that held by aggrieved person, including application forms and test papers completed by aggrieved person and all other persons applying for same position as aggrieved person</p>	<p>Until final disposition of the charge, complaint, review, or action</p>	<p>None specified</p>	<ul style="list-style-type: none"> •Title VII •ADEA •ADA •Rehabilitation Act •Executive Order 11246 •VEVRA
<p>20. POLYGRAPH RESULTS:</p>	<p>A copy of the statement concerning the activity or incident under investigation and basis for testing particular employee, all opinions, reports, charts, written questions, lists, or other records relating to the test furnished by the examiner, records identifying the loss or injury and the access of the examinee to the loss or injury, identity of persons examined, copy of the written statement of time and place of examination and the examinee's right to consult counsel, notice to examiner of persons to be examined, and a record of the number of exams conducted each day as well as duration of examinations</p>	<p>3 years from date of exam (or from date examination requested if no exam is conducted)</p>	<p>Must be kept safe and accessible upon 72 hours' notice</p>	<ul style="list-style-type: none"> •Employee Polygraph Protection Act of 1988^m; 29 CFR § 801.30

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21. DRUG TESTING RECORDS:	DOT drug testing records for employees in safety-sensitive transportation positions in aviation, trucking, railroads, mass transit, pipelines and other transportation industries. [§]			<ul style="list-style-type: none"> •Omnibus Transportation Employee Testing Act of 1991⁹; 14 CFR Part 121, App. I; 14 CFR Part 121 App. J; 49 CFR § 382.401; 49 CFR § 219.901; 49 CFR § 219.903; 49 CFR § 655.71; 49 CFR § 199.227; 46 CFR § 16.260
	<ul style="list-style-type: none"> •Negative test results and alcohol tests results less than .02 	<ul style="list-style-type: none"> •1 year from test date (2 years for railroad) 		
	<ul style="list-style-type: none"> •Records related to the alcohol and drug collection process, random selection process, documents relating to decision to administer reasonable suspicion testing, and relating to post-accident testing 	<ul style="list-style-type: none"> •2 years 		
	<ul style="list-style-type: none"> •Education and training records 	<ul style="list-style-type: none"> •Maintain while individual is performing the function + 2 years after individual leaves function 		
	<ul style="list-style-type: none"> •Records from previous employers concerning drug and alcohol testing results of employees 	<ul style="list-style-type: none"> •3 years from receiving records from previous employers 		

[§] The retention requirements provided here are generally appropriate for all federally-mandated drug and alcohol testing for employees, however some variations exist between specific industries for some employees, specifically railroad employees, airline pilots, and pipeline employees. Additional review of industry-specific regulations should be conducted to determine an employer's obligations if engaged in those industries.

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	<ul style="list-style-type: none"> • Verified positive test results, documentation of refusal to submit to required tests, employee evaluations and referrals, controlled substance testing program administration, and annual MIS reports 	<ul style="list-style-type: none"> • 5 years from making of record 		

^a Title VII and the ADA apply to all employers engaged in interstate commerce with 15 or more employees.

^b NOTE: All employers are subject to the Civil Rights Act of 1866, 42 U.S.C. § 1981, as amended, which, in pertinent part, says that all citizens will have the same right to make and enforce contracts as white citizens. In 1991, Congress amended Section 1981 to provide that "make and enforce contracts" included certain conduct that occurred after the formation of the contract. In the context of the employment relationship, the 1991 amendment means that post-hire conduct such as harassment or termination is encompassed within Section 1981. Section 1981 has been applied to cases of race, color, and national origin discrimination in employment. The statute of limitations on Section 1981 claims was the most-analogous state statute of limitations, which was normally the particular state's statute of limitations for negligence actions (usually approximately three years). *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 107 S. Ct. 2617 (1987). In 1990, Congress enacted a four-year "catchall" statute of limitations that applied to federal statutes that were enacted after December 1990 and that did not contain their own specific statutes of limitations. *See 28 U.S.C. Section 1658(a)*. The U.S. Supreme Court in *Jones v. R.R. Donnelly & Sons Co.*, 541 U.S. 369, 124 S. Ct. 1836 (2004), held that the four-year statute of limitations in 28 U.S.C. Section 1658(a) applied to claims under Section 1981 if they could not have been brought but for the amendments to Section 1981 that were enacted in 1991. This would include claims for harassment and discriminatory termination. Otherwise, the most-analogous applicable state statute of limitations (often, but not always, three years) would apply to claims that would have been cognizable before the 1991 amendments, such as discriminatory failure to hire. Based on the above, Constangy recommends that all employment records be maintained for a minimum of four years, although some other applicable statutes have shorter limitations and record retention periods. Constangy also recommends that employers check the statutes of limitations in their relevant states that would apply to Section 1981 actions and ensure that they are retaining records for that period if it is longer than four years.

^c The ADEA applies to employers engaged in interstate commerce with 20 or more employees.

^d Executive Order 11246 applies to employers who are government contractors with an annual contract of \$10,000 or more. The recordkeeping requirements of Executive Order 11246 are applicable to government contractors with more than 50 employees and a single government contract in excess of \$50,000.

^e The Rehabilitation Act applies to employers with government contracts in excess of \$10,000.

^f VEVRA applies to employers with government contracts of \$25,000 or more.

^g The FLSA and Equal Pay Act apply generally to employers with 2 or more employees handling goods that have moved in commerce.

^h The FMLA applies to employers with 50 or more employees.

ⁱ The McNamara-O'Hara Service Contract Act applies to employers with federal government contracts greater than \$2,500 involving the use of service employees.

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^j The Immigration Reform and Control Act applies to all private employers with respect to prohibition on hiring unauthorized aliens; only employers with more than 3 employees covered with respect to prohibitions against national original and citizenship discrimination.

^k ERISA applies to all administrators of any pension or welfare benefit plan, including health, life, severance, disability, scholarship and apprenticeship plans.

^l OSHA requirements concerning Forms 300 and 301 apply to employers of 11 or more employees (except employers in certain low hazard retail, service, finance, insurance or real estate industries as specified at 29 CFR § 1904.2). OSHA requirements concerning retention of medical records and employee exposure records apply to all employers.

^m The Employee Polygraph Protection Act applies to all private sector employers engaged in or affecting commerce or in the production of goods for commerce.

ⁿ The Omnibus Transportation Employee Testing Act applies to employers covered under Department of Transportation drug and alcohol testing regulations, including employers engaged in the following industries: airlines, motor carrier, railroad, transit, pipelines, and maritime transportation.