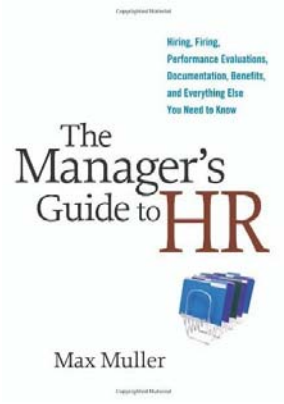
The Manager's Guide to HR

Hiring, Firing, Performance Evaluations, Documentation, Benefits, and Everything Else You Need to Know



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About the Author/s

Max Muller is an attorney, and began his involvement in human resources law in 1976 when he became house counsel for Isis Foods. He has presented thousands of seminars on the topic of human resources, including many for the American Management Association.

■ The Big Idea

There are ten areas in which a manager must be well-versed in HR policy.

1. **Hiring**—from defining the job to recruiting and interviewing
2. **Performance Evaluations**—the art and science of conducting an effective employee review
3. **Training**—heading off typical issues that can derail workplace success
4. **Benefits**—including FMLA, OSHA, HIPAA and COBRA
5. **Compensation**—the complexities of the Fair Labor Standards Act
6. **Employment Laws**—including how to avoid and mitigate claims of discrimination
7. **Hot-Button Issues**—defining and dealing with allegations of sexual harassment in the workplace
8. **Privacy Issues**—treading cautiously when collecting sensitive employee information
9. **Firing and Separation**—at-will employment and how to terminate with minimized issues
10. **Documentation and Records Retention**—what paperwork to keep and for how longa

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FEATURES OF THE BOOK

Reading Time: 5 hours, 304 pages

The Manager's Guide to HR contains detailed descriptions of various employment laws including FMLA, FLSA, HIPAA, and others, with each chapter delving deeply into both condensations of those laws and pertinent points for the smart employer. Further, this book includes an extensive library of tables, sample forms, checklists, sample correspondence, and other helpful fill-in-the-blank documents designed to make adhering to the important guidelines outlined in the text easy and efficient.

Taken as a whole, this book is a veritable library of information about employment law and prudent employer actions that would serve as an invaluable desk-reference for any manager.

INTRODUCTION

Management is a complex position. Beyond the actual supervising of employees, a task that employs all manner of leadership, communication and delegation skills itself, managers must also possess a firm grasp on the intricacies of the Human Resources process—hiring, firing, and everything in between. In The Manager's Guide to HR, author Max Muller provides managers in the U.S. a detailed primer in "hiring, firing, performance, evaluations, documentations, and everything else you need to know" about the business of human capital.

From tips to hiring the best talent, to in-depth disambiguation of a variety of governmental acts relating to labor such as the Family Medical Leave Act and the Fair Labor Standards Act, to straightforward advice on dealing with sexual harassment, conducting background checks, airtight recordkeeping and procedures for the retention and destruction of sensitive documents, Muller lays bare the dense network of laws and policies, best practices and smart procedures necessary to not only keep employees happy, but stay on the good side of both the C-suite and state and federal government.

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PART I: NEW ON THE JOB

Hiring is at the core of work life—everyone is affected by the process. Unfortunately, there are two ways to hire: hire smart, or hire dumb. Hiring dumb involves using an antiquated job description that does not accurately represent the way the job is today to find a person perfect for that out-of-date position that no longer exists. Those who wish to hire dumb may also choose to discriminate—based on sex, religion, age, nationality or any other legally protected characteristic. Hiring dumb is easy. Hiring smart, on the other hand, requires quite a bit more work. The author offers five detailed steps managers must master to hire smart: defining the job, writing the job description, recruiting, interviewing, and verifying employment eligibility.

Defining the job in terms of the skills and knowledge required, performance expected and typical work setting offered is the first step in making a well-informed hiring decision. To be thorough, there are four tasks to complete:

1. Review the existing job description—consider this a starting-point to glean basic technical requirements and reporting relationships, as well as a benchmark against which the job's current duties can be compared

2. Research other job descriptions—Use resources like the O*NET System and the Occupational Outlook Handbook to find examples of successful, existing job descriptions

3. Talk to people who already do the job—Employees know every detail of their daily work lives: what it takes to survive and thrive, who they really report to, how many hours a day they conduct specific task—exactly the information the writer of a good job description needs

4. Talk to supervisors—People in charge of the position being defined have a good idea of the job's core competencies. Asking about a job's requirements in terms of clerical knowledge, mathematics, time management and active learning skills and abilities like written comprehension, deductive reasoning and speech clarity may help lead the discussion

Managers should then use the information gathered to create both a Job Audit Form (a simple outline of the job) and an Essential/Nonessential Duties and Responsibilities Chart (a document that charts percentage of time devoted to specific, job-related tasks). Once these two documents are in place, the actual job description can be drafted. The author suggests that each description should include a summary statement, duties associated with the job, tasks required for the job (what should be done, how it should be done and why), and an indication of a degree of supervision, either given to or received by this position.

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The next step in hiring smart is bringing the right people to the job. Successful recruiting means attracting a large pool of qualified applicants through internal job postings, employee referrals, or external sources. Regardless, there are some touchy areas regarding recruitment. Discriminatory recruitment can involve refusal of applicants based on a "protected class"—religion, race, disability, age or nationality—or may be more subtly expressed in a job advertisement that portrays, for example, sexism by showing a picture of a female nurse (for a nursing position), or expresses a height requirement (which could be seen as discriminatory to women or people belonging to a short-statured nationality.) Narrow exceptions occur when an exclusion is necessary to the performance of a job, a bona fide occupational qualification, such as requesting a woman as an attendant in a female locker room, or requiring that men do not have facial hair as a safety precaution for mechanical work.

A number of cautions also apply to the receipt and retention of resumes during recruiting as well. Paper applications in response to job advertisements must be retained for at least one year, according to the code of Federal Regulations. The same goes for electronic or emailed resumes, if the applicant is responding to an actual advertisement for the position. Unsolicited resumes, on the other hand, are not automatically considered employment applications, and may be disposed of any time. If a large quantity of resumes or applications is received, a company may choose to narrow the field by using preemployment testing (legal testing of an applicant to make certain they are able to do the job), or by use of screening tools that rate applicants on a set number of skills and aptitudes.

The best applicants should then be asked to fill out an application form. Managers should review these forms and be ready to ask questions about:

- Overall appearance, with thought given to the nature of the position. Grammar, for example, is not important to a labor job, but would be for a teacher.
- Blanks and omissions of information
- Gaps in employment
- Overlaps in employment
- Frequent job changes (though understanding that today's workforce is more mobile than ever before is important)
- Logical inconsistencies between work-types
- Nondescriptive job titles or statements of job duties
- Reasons for leaving past employment
- Compensation, analyzing whether the applicant and the pay scale for the job they are applying for are compatible

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The next step in hiring smart, interviewing, must be treated with equal care. According to the author, structured interviews that focus on objective criteria, narrow conversation specifically to the job at hand and avoid delving into personal details about applicants that could be construed as discriminatory are more preferable to unstructured, casual interviewing techniques. In addition, trouble-areas can be subtle. For example, under the Americans with Disabilities act (ADA), an employer cannot ask whether an applicant "needs an accommodation to do the job" or query how the applicant may have become disabled. Employers can, however, ask whether the applicant can perform the essential functions of the job, and if he or she has the right education, training or skills for the position. The ADA also stipulates that an employer must keep any medical information divulged on applications confidential, with a few exceptions for alerting supervisors of work restrictions, and for paperwork needed by state workers compensation offices and insurance agencies.

All good interviews, regardless of an applicant's disability status, however, rely on the interviewer's ability to ask meaningful, competency-based questions that get at the specific information the company has defined in its job description. Some example queries might include, "Describe a time when you…", "Describe the most significant…." and "Identify (a number) of your best _____?"

The Immigration Reform and Control Act dictates that all U.S. employers are responsible for verifying the employment eligibility and identity of all employees hired after November 6, 1986. To comply with the law, all employees are required to complete I-9 Forms then submit those forms to the federal government and maintain records in their files for three years after the date of hire or one year after the date of employee termination. Non-standard circumstances that require attention may include employees hired remotely (an agent of the company may be sent to carry out I-9 responsibilities), presentation of non-original documents (in which case the employee must choose another, acceptable document to show eligibility), or issuance of a no-match letter, meaning an employee's submitted name or Social Security number does not match government records. Finally, former employees returning to work must re-do the I-9 process in its entirety to be deemed eligible.

While essential to the management process, performance evaluations are an uncomfortable subject for many people. Fortunately, proper preparation and structure can make the encounter easier and more productive—for everyone. In addition to advocating formal self-review for each worker, evaluators should begin at the employee's job description, focusing on that job's core competencies. By comparing an employee's performance against a set requirement, a "grade" can be given. Simple designations like this are only accurate or representative, however, if a broad range of competencies are represented and quantified clearly. The author recommends setting up a comprehensive rating system that offers number or letter ratings plus a detailed definition of what each number or letter means. For example: "E=Exceeded Expectations. The employee consistently did outstanding work, regularly going far beyond what was expected."

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Finally, in the basic checklist of managerial duties for new and recent hires, training sets the groundwork for a successful term of employment. Training a workforce in safety (hazard communication, fire and personal protective equipment like fire and hazmat suits), discrimination and harassment (sexual and otherwise) mitigates the possibility of on-the-job emotional harm, litigation, manager/employee tension and internal miscommunication, and increases job satisfaction, motivation and employee output.

All employee HR training should begin with identifying specific training goals, focusing on what employees are expected to achieve and how they will achieve those things. Goals should be written, clear, measurable, account for how employees will demonstrate that they understand the subjects taught, and define what makes for acceptable performance. All trainers should also take into account that everyone learns differently—and that there are three main types of learning styles: auditory, visual, and kinesthetic. Further, training records should be kept in good order and contain, at minimum, names of employees trained and the trainer, dates, content of training, and some sort of evidence of successful course completion.

PART II: THE DAILY GRIND

Another important but often complex issue for managers is benefits. The author covers three large benefit areas: The Family Medical Leave Act (FMLA), the Consolidated Omnibus Budget Reconciliation Act of 1985 (better known as COBRA) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

FMLA allows eligible employees to take up to 12 work-weeks of unpaid, job-protected leave during a calendar year for reasons like the birth or adoption of a child, to care for a sick family member, or in instances of medical emergency. During this time, an employer must pay a portion of the employee's healthcare coverage costs. FMLA is applicable to and covers employers with at minimum of 50 employees working during each day, during each of 20 or more calendar work-weeks in the current or preceding calendar year. Employees from temp agencies count in the "50 or more" headcount, and employees jointly working for two employers must be counted in both employers' FMLA tallies. Every company is strongly suggested to provide every employee written notice of FMLA guidelines, and must post a notice explaining the act's procedures for filing complaints or violations in a prominent location within the workplace.

There are four methods for determining the twelve-month period in which an employee may take their twelve weeks of leave:

- The calendar year, with unused time terminated on December 31 and a new twelve weeks granted on January 1

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- Any fixed, twelve-month "leave year", which is to say starting and ending on any one day in the calendar year
- A twelve-month period measured forward from the date that employee's first FMLA leave begins
- A "rolling" twelve-month period measured backward from the date the employee uses any FMLA leave

Employees must give their employers adequate notice that they will take their FMLA leave time—when possible, 30 days, and "as soon as practicable" in less foreseeable situations. Employers can then require employees to provide medical certification that supports the need for leave time, and can further request a second and even third medical opinion, but must reimburse the employee for reasonable out-of-pocket travel expenses related to getting those opinions. Employees can also choose to take their FMLA leave intermittently—by using their 12 weeks in blocks of time, or by reducing their work-week. If an employer is concerned about FMLA abuse, there are steps they can take to assure employees use the program within legal parameters, among them:

- Requiring employees to always submit certification from their healthcare providers
- Requiring employees to use paid sick days and vacation days concurrently with FMLA leave
- Requiring employees to resubmit certification every 30 days
- Not being afraid to place an employee suspected of fraud under private surveillance
- FMLA eligible employees:
- Have worked for the employer for a total of twelve months—which do not have to be consecutive
- Have worked at least 1,250 hours in the preceding twelve months—unless no record of actual hours is being kept, of they are a full-time teacher (teachers are automatically deemed to have put in the 1,250 hours)
- Work in the U.S. or a U.S. Territory where at least 50 employees are employed by the company within 75 miles—based on payroll records
- Or, are a relative of a service member

COBRA makes it possible for an employee to temporarily keep group healthcare benefits when they leave a company. Eligible employers must have at least 20 or more workers on 50 percent of the business days during the preceding calendar year. Eligible beneficiaries can be a covered employee, their spouse or dependent child. If an employee is terminated for "gross misconduct", the employer can deny an ex-employee COBRA. Otherwise, they are able to buy coverage at the full cost of the coverage to the employer company, plus up to two percent for administrative fees. A number of coordinated notices from Summary Plan Description to Notice of Early Termination of Continuation Coverage.

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Connectedly, HIPAA deals with preexisting conditions and limits the reasons an employee may be excluded from healthcare coverage for previous illnesses. To determine coverage, HIPAA counts an employee's prior coverage periods toward their plan's PCL (preexisting condition limitation) period. The more time a person had been previously covered, the less likely the employee is to be denied coverage.

Compensation is another vital issue in the HR and management world. The Fair Labor Standards Act of 1938 (FLSA) offers both minimum wage standards and overtime entitlements, but also sets down the rules by which employees must be compensated for their work. FLSA includes detailed provisions and rules for a number of compensation and work-time related items:

- Minimum wage and overtime
- What constitutes a "workweek" and how a "fluctuating workweek" must be handled
- Compensatory time off
- What makes up compensable hours
- How on-call time must be calculated
- Lecture, meeting and training time guidelines
- Travel time

Rest periods, mealtimes and issues relating to child labor are not covered as a part of FLSA, but are guided by both state and OSHA provisions. The author also presents great detail on the distinctions between exempt vs. nonexempt employees, and how FLSA deals with them with regard to minimum wage, overtime, child labor, record keeping, paying special attention to white-collar exemptions based on salary, duties, and other specific requirements of their jobs, including why creative professionals are exempt from FLSA, and how "learned professionals" such as professors and researchers must be counted.

While there are hundreds of laws dealing with the dynamics of the employee/employer relationship, employment laws pertaining to discrimination are particularly delicate issues. Laws like the Americans with Disabilities Act, the Pregnancy Discrimination Act and the Equal Pay Act set the standards for how an employer must tread with regard to hiring, managing and termination of employees of all ages, races, nationalities and both genders (among other delineations). Each includes their own prohibited acts, enforcement mechanisms, statutes of limitation, complaint measures, claims handling methodologies and investigation procedures. Those differences aside, however, there are two primary forms of discrimination:

- Disparate treatment, in which an employer treats a person differently because they are part of a protected class. Federally protected classes are race and color, religion, national origin, sex and age.

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- Disparate impact, where an employer uses a practice that is seemingly neutral, but has adverse impact on "most" members of a protected class. Examples might include height and weight requirements and no facial hair policies (which might discriminate against members of specific religions).

Regardless of the type of complaint, however, burden of proof lies with the plaintiff—an employee must make his or her case concretely that a discriminatory act has taken place. If the employer is proven in a court of law to have engaged in discrimination, the employee may be compensated in a number of ways, from simple reinstatement (if termination was the issue), to back pay, compensatory damages, punitive damages, front pay (where the situation is remedied as to be as close to as if the issue had never happened as possible), and the paying of attorney's fees.

In addition to the federally protected classes, some states, counties and even individual cities also recognize other designations as protected from discrimination, including marital status, sexual orientation, gender identity and lifestyle (smokers, for example). Additionally, the Genetic Information Nondiscrimination Act (GINA) prohibits discrimination based on genetic information in employment and healthcare, the implication being that a person could potentially be treated differently based on information about family or personal health that is available at the genetic, but potentially not, or not yet, at the observable physical level. Possession of the "breast cancer gene" would be one example.

Perhaps the hottest workplace topic of the past few decades has been sexual harassment. Sexual harassment is defined as "unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature that affects an individual's employment, unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive work environment." The most obvious form of sexual harassment is "quid pro quo" or "this for that" harassment, where a person, often in a supervisory role, requests some sort of sexual trade-off from as a condition for some kind of job benefit.

The courts draw a distinction between two types of cases: those that result in a tangible job action (firing or a position change) by the harassing superior, and those that do not. If the offending action does not result in a tangible job action, the courts further delineate whether the act created a hostile work environment. To determine whether an environment is hostile, certain criteria like the type and frequency of obscenity that was baseline in the environment before and after the plaintiff was exposed to it, the nature of the sexual acts or words, and the frequency of the encounters are considered. Regardless, to be a true sexual harassment claim, the encounters and advances must be unwelcome—defined as unacceptable "to a reasonable person under similar circumstances", something that is determined on a case-by-case basis.

Further, an employer may seek protection from a hostile environment claim under the Ellerth/Faragher Defense, which states that the company must have exercised "reasonable

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care"—that is, tried quickly and decisively to correct and prevent harassment, and that the employee failed to take advantage of those opportunities. The author warns, however, that reasonable care extends beyond simply having a written policy about sexual harassment. The careful employer will also provide it to every employee, redistribute it often, post the policy in prominent places, include it in employee handbooks and provide training on the policy to all employees. A company's procedure document should contain:

- Detailed explanation of prohibited acts, addressing all verbal, physical, visual (pornographic cartoons, for example), and sexual favors.
- Assurance of protection for complaining employees
- A clear complaint process that should be easy for victims to utilize
- Assurance of confidentiality for the complainer—to the extent that it does not hinder investigation of the claim
- Description of the investigation process and a clear plan for its implementation
- Assurance of immediate action upon determination that harassment has occurred

Internal investigation of a harassment claim is also of utmost importance to an employer. These issues must be handled with care, and an impartial investigator must be appointed. Appropriate investigators might be HR personnel, internal security, non-lawyer third-party investigators like former or retired employees, and attorney investigators—those these should be used with caution, and should always be outside counsel. The author also cautions managers to not rush into interviewing witnesses when a claim has been made. Planning (who to speak with, in what order), is key. There are also five different types of witnesses:

1. Percipient Witnesses: people directly involved in the incident
2. Fact Witnesses: people who have information relating to or explaining the incident
3. Predicate Witnesses: people with no personal knowledge of the incident, but who is necessary to establish the legal foundation of the case (like a payroll or records clerk)
4. Character Witnesses: direct connections with the complaining party with knowledge of their past actions
5. Expert Witnesses: people whose training give them more knowledge than the average person about a specific subject matter of use to the case

When interviewing any witness, taking detailed notes, talking about facts, starting with open-ended questions then moving to more focused questions, and never giving the impression that you do not believe any witness are important.

Finally, in any dispute, employees have Weingarten Rights—the right to union representation at investigation interviews if they choose. Employers, however, have no duty to advise employees of their Weingarten rights and may initiate questioning before a union representative is present. While union representatives may be allowed to participate, Weingarten does not mean that an employee has a right to a private attorney provided by the union, nor can any union representative interfere with the investigation, though they may assist the employee by clarifying facts.

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The bottom line for employers in all of these difficult situations is that a company is commanded by law (Section 5 of the OSHA act of 1970) to provide a safe workplace for its employees. This includes mitigating opportunity for workplace violence, which includes intimidation, threats, physical altercations, domestic violence or property damage committed by employees, clients, or anyone else in close connection with the business. There are four typical types of workplace violence: violence by strangers, by customers or clients, by coworkers, and by personal relations. In each case, violence is qualified as "verbal threats, threatening behavior or physical assaults."

Besides identifying workplace violence, the onus is also on the employer to prevent it. Environmental precautions like safe cash-handling policies and physically separating employees from clients can help. Administrative controls such as clearly posting a violence policy or the use of security guards and receptionists to screen visitors is advisable. Finally, behavioral strategies like training and simply enforcing and reinforcing workplace violence policies are important as well.

Privacy in the workplace is another vital issue for both employees and managers. There is unfortunately no specific law that defines privacy for the common worker. Instead, there are a lengthy set of complex laws, state doctrines and court cases that guide the way it is handled. As a result, the author suggests caution when dealing with touchy subjects such as background checks and medical histories, being diligent in receiving signed consent forms for all employee information before mining for it, and following the Supreme Court's rulings on drug and alcohol testing (which state that an applicant can be tested for drugs, but that the employer must not act on positive results without confirmation with a second test). Employers should also act with utmost care when monitoring employees in the workplace (via phone or internet), and checking into employees' personal lives when they are off-duty. In most cases, however, the law allows an employer to conduct investigations such as this, but cautions that an employee is entitled to a reasonable expectation of privacy. If problems do arise, an employer may be faced with claims of defamation, libel, slander, or in extreme cases, emotional distress.

PART III: EXIT INTERVIEW

When an employer/employee relationship is set to end, for whatever reason, emotions and the stakes for a company are high. As such, a manager must be well-versed in the intricacies of firing and separation. In all U.S. states except Montana, an employer can release an employee for any reason, or no reason at all, and an employee can reciprocate—leaving a job for any reason or no reason. This is called employment at-will, and it forms the basis of all termination of employment in the United States. It can, however, be complicated by a number of issues.

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Employer policy statements may be unclear, and give an employee just cause to believe that employment for a specific period is guaranteed. Probationary periods destroy the at-will clause as well, as they infer that the employee is being promised that if they make it past the initial time period that they can only be fired for just cause. Give-notice clauses destroy at-will for employees, requiring them to notify the employer before leaving a job. Finally, job security statements can direct that an employer "retains employees who perform their duties efficiently and effectively", thus negating the at-will clause as well. The author counsels that removing these procedures and statements is good practice for a business.

Employees can, however, be disciplined in a number of ways that comply with the law. They may be coached or counseled, retrained, receive verbal or written warnings (as long as they are clear and the employee is given opportunity to improve), be suspended, and, then, if all else fails, terminated.

Termination must be handled efficiently and effectively. The employer must be clear that the decision is final. They must disable any security access the employee has before commencing termination. The session should be short, and never a "surprise", as this often leads to litigation. Employees, however, can complain of things like wrongful discharge, a violation of public policy (that is, being fired for an act that would be encouraged or allowed in public, like taking military leave or refusing to engage in an illegal act), and violations of good faith.

Despite these uncomfortable issues, employers are protected from retribution in certain termination situations by the Worker Adjustment and Retraining Notification Act (WARN). This covers employers with a hundred or more full-time workers, and deals with separations springing from plant closings and mass layoffs, and presents a number of exceptions to the typical "sixty-day notice" requirement that even these terminations require, such as "unforeseeable business circumstances" allocations and "natural disasters".

Finally, after all has been said and done, after hiring, good management and well-handled termination, the smart employer must see documentation and records retention as an enduring action for business success. There are three reasons an employer should keep good records: (1) it makes good business sense, (2) some federal and state laws make it mandatory, and (3) as distasteful as it might be, there will likely be a day when the files are needed for litigation.

While there is no concrete list of what must be in an employee's personnel file, employers should set out who may and may not access that type of file. In some states, employees have a right to view their file, and in others, an employer must share the file, but should be allowed a "reasonable amount of time" to produce it, and can restrict access to during business hours on the employer's property. Medical information is different, however, and based on restrictions set in the Americans With Disabilities Act, must be kept confidential

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and in a separate file from general personnel information. I-9 forms, investigation records pertaining to discrimination and harassment complaints, and security clearance reports like background checks and personal credit history should also be kept separately.

While laws vary, and OSHA sets out a very detailed set of document creation and retention suggestions, employers are advised to keep records for at least one year from the date of employee hire. The reasoning for this is partially to help fulfill a business's requirement to create an Equal Employment Opportunity Employer Information Report (EEO-1), which shows the federal government the distribution of race, sexes and ethnicity across an entire organization. While its purpose is mostly for record-keeping, the government is looking for instances of discrimination in this report—evidence that, for example, the entire top tier of an organization is white and male, while the lowest tiers are exclusively female and Hispanic.

Beyond the one-year rule, employers should also create their own document retention policies. Some documents an employer might consider giving a time-frame for retaining are:

- Employment documents—which should be kept for five years after termination
- Workplace records—safety documents, maintenance records and travel schedules
- Accounting and corporate tax records—tax returns, receipts, purchases and expense reports
- Legal records—contracts, patents, legal pleadings, insurance records and computer disks and email
- General forms of media—photographs, audio recordings and facsimiles
- Hiring and termination-related articles—job postings, resume's, tax records, I-9 forms, and various job-related illness, injury reports and retirement and leave records

When their time is up, an employer must completely destroy this sensitive personal material—burning or shredding paper, destroying or erasing electronic files, and conducting due diligence to make sure the obliteration has taken place.

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