

Legal Update 2014:

**What You Need to Know and Do in
Response to Changes in the Law . . .
And Evolving Understandings**

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Key Laws That Affect Records Retention

- **Sarbanes-Oxley (2002)**
- **Lilly Ledbetter Fair Pay Act (2009)**
- **ERISA**
- **Uniform Electronic Transaction Act (UETA - 1999)**
- **Federal Preemption (if time permits)**

Sarbanes-Oxley Act of 2002

- **Late 1990's to 2000 major stock market increase**
 - **Many valueless stocks increased - .com's**
 - **Many companies “creatively” fabricated financial statements**
 - **Certified Public Accountants participated audit deception**
- **Examples: Enron, Tyco, Andersen**

Arthur Andersen

- Selected as CPA for Enron
 - \$3 million audit contract
 - \$75 million consulting contract
- Audit reflected overly positive financial picture
- Enron stock rose “artificially” – valued higher than reality

Arthur Andersen Obstruction of Justice Conviction

- Andersen had a reasonable retention program
 - Identified records to be retained in audit files with appropriate retention – 6 years
 - Retention only for “essential information to support our conclusions”
 - Permitted destruction of drafts, notes, and other non-final documents when no longer need or after engagement complete
 - No destruction if threatened litigation

Arthur Andersen Obstruction of Justice Conviction

- **Problem:**
 - Andersen under investigation regarding Enron audit
 - Andersen lawyer reminded company to destroy records under the policy – looked suspicious
 - Andersen destroyed records while litigation / government investigation in progress

Sarbanes-Oxley (2002)

- **New Bush SEC Director discovered abuse within 6 months.**
- **Goal of 2002 Law:**
 - **Improve accuracy of financial reporting**
 - **Restore confidence in the stock market**

Sarbanes-Oxley Key Provisions

- **Public Company Accounting Oversight Board (PCAOB)**
 - **Establishes federal oversight of public accounting firms auditing public companies.**
- **Requires CEO and CFO to personally certify the accuracy of financial statements**

Sarbanes-Oxley: Penalties

- Provides penalties, up to 20 years:
 - *Knowingly* altering, destroying, mutilating, concealing, covering up, making false entry in any record
 - *With the intent* to interfere with any government investigation or proper administration of any matter.

Sarbanes-Oxley: Recordkeeping

- **Public Auditors**
 - **Confirm accuracy of corporate financial statements**
 - **7-year retention for audit reports and audit workpapers**
- **Corporation**
 - **Maintain audit / accounting complaints**
 - **Manage outside auditors**
 - **Section 404: For annual audit**
 - **Establish internal accounting controls**
 - **Demonstrate controls works**

Sarbanes-Oxley Practical Operation

- **Public auditors confirm accuracy of financial system and reporting**
 - **Traditional audit**
 - **Review corporate controls**
- **Except for public auditors, corporation has no long-term retention for SEC**
- **SEC may not ever directly review corporate controls or Sarbanes-Oxley compliance**
- **Most don't understand the basics!!!**

Who is this?



- Hints
 - One of the only non-politicians who is named in a law
 - And, the law has created a recordkeeping controversy!

Lilly Ledbetter Fair Pay Act (2009)

- **Ledbetter employed by Goodyear Tire & Rubber Co.**
- **In 2007, Supreme Court found pay discrimination going back several years.**
- **Applying the 180 day statute of limitation in Civil Rights Act cannot resolve historical discrimination.**

Ledbetter Act: Provisions

- Each paycheck reviewable for discrimination
- Plaintiff's can go back an unlimited number of years
- Can show what should be pay 180 days ago – statute of limitations
- But, cannot collect accumulated pay loss – only 180 day loss

Ledbetter Act - Problem

- **Civil Rights Act 180 day statute of limitation still in effect.**
- **Plaintiff has right to search all historical pay records**
- **Company has no requirement to keep all historical pay records**
- **Numerous laws establish records retention requirements for payroll.**

Ledbetter Act – Impact on Retention of Payroll Records

- Many attorneys claim companies now must keep payroll record forever – IND
 - Not required by law
 - Huge retention and discovery burden
- Recommendation: Continue same payroll retention: 6 years.

Employee Retirement Income Security Act (ERISA)

- **In 1963, Studebaker Corporation closed plant**
- **Pension plan was inadequately funded or illegally misused**
- **Only some employee got benefits to which they were entitled.**
- **Congress proposed several bill to prevent future abuse.**

ERISA 1974 - Provisions

- **Employers not required to have employee benefit plans**
- **Primarily covers pension plans, but includes some health plans too**
- **Pension plan**
 - **Employees vest in 5 years**
 - **Must be adequately funded**
 - **Reports to employees/government**

ERISA

- **Pension Benefit Guaranty Corporation (PBGC)**
 - **Coverage if plan does not have sufficient assets**
 - **Requires company to keep records to show plan sufficiency**

ERISA

- Also covers some health insurance
- Health Insurance Portability and Accountability Act (HIPAA – 1996)
 - Plan must cover pre-existing medical conditions
 - Plan not discriminate
- COBRA – employees/beneficiaries continue coverage after termination

Types of Pension Plans

- **Defined Benefit Plan – benefits based on years of service, salary, and other factors**
- **Defined Contribution Plan – benefits based on contribution amount and investment performance**
- **Some advocate keep pension records forever to confirm contributions, benefits and investments**

ERISA – Statute of Limitations

- **29 USC 1113(a)(1): 6 years**
 - **When no notice provided to employees**
- **29 USC 1113(a)(2): 3 years**
 - **When “plaintiff had actual knowledge of the breach or violation”**
 - **Employee gets annual statements**
- **Fraud: 6 years after discovered**

ERISA – Recordkeeping Recommendation

- **Contributions: 6 years. PGBC requirement and conforms to longest statute of limitation**
- **Reports: 6 years**
- **Plans: ACT+6 years. ACT: while provisions in plan still in effect**
- **Employment Summary: IND. Years of service, grade, pay history, etc.**

Uniform Electronic Transactions Act (UETA: 1999)

- **Adopted as Uniform Law by 47 states**
- **Similar to “E-Sign” – Electronic Signatures in Global Networks**
 - **Electronic records law adopted by U.S. Federal Government.**
- **Electronic records are as valid as paper records**

UETA: Applicability

- **Electronic records and signatures have full legal effect**
- **Maintenance of electronic records constitutes legal compliance**
- **Exchange of emails may constitute a written contract, without signatures**
- **Conclusion: Electronic records same as traditional records**

UETA: Recordkeeping

- **Requirements to keep records satisfied by:**
 - **Retention of electronic records**
 - **Retention of electronic images scanned from paper records**
- **When records kept electronically, paper records can be destroyed or do not need to be maintained, with a few exceptions**

Exceptions: Retention of Original Records After Imaging

- Original records required by law – very few
- Records with intrinsic value: stock certificates, bonds, cash, negotiable instruments
- Documents for which the original signature or handwriting may be significant -- e.g., wills
- Notes, mortgages, and debt instruments that will be stamped “paid” and returned to owner

Federal Banking Preemption

- **Concept: Federal law preempts or “precludes” state law**
 - **Very strong concept in Canada**
- **Which law applies:**
 - **Federal: Federal-chartered bank – e.g., national bank.**
 - **State: State-charter bank.**

Federal Banking Preemption for National Banks – Problem

- States have some authority – contracts, escheat, insurance
- States do not have authority – banking and lending
 - US Supreme Court decisions confirm – traditional banking activity
- State may have authority – trusts, consumer protection, privacy, non-bank affiliates

Federal Banking Preemption for National Banks – Recordkeeping

- Federal banking law consistent and discernable – although complex
- State law
 - Must comply with multiple, competing requirements
 - Many requirements archaic, unreasonable, etc. – e.g., 7 years.
- Need internal final determination

And There are More . . .

- **Health Insurance Portability and Accountability Act (HIPAA – 1996)**
- **Patriot Act (2001)**
- **Affordable Care Act / “Obamacare” (2010)**
- **Dodd-Frank (2010)**

Questions

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Thank you for viewing.

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