Document, Document, Document

Creating Records to Memorialize and Defend Your Employment Decisions

Presented by:

Jase Tilley, Tiffany McClease, Mason Navarrete

Employment & Litigation Associates

Lerch, Early & Brewer

What to document in the normal course of employment?

Employee Handbook/Policies

Provides:

- Clarity and consistency
- Legal Protection
- Framework for Action

Tip: Require employees to sign a policy/handbook acknowledgment of receipt

Job Descriptions

- **Should include:**
  - Title of the position
  - Essential functions
  - Ancillary or other duties and responsibilities
  - Physical restrictions or requirements
  - Name or title to whom the position reports
- **Sets Expectations**
- **Supports Employment Decisions**

Tip: Evaluate and update job descriptions regularly and have employees sign an acknowledgment of receipt.

Personnel Files

- **Includes**:
  - Resumes/application forms submitted by applicants
  - Records dealing with hiring (i.e., interview notes, screening tools/tests), promotion, demotion, transfer, lay-off or termination
  - Leave records
  - Rates of pay, compensation, tenure
  - Selection for training or apprenticeship, or other terms of employment
  - Requests for reasonable accommodation

- **Tip- Medical documentation should be treated as confidential and kept separate from the personnel file.**

Performance Standards/Reviews

- Effective performance management requires putting employees on notice of what's expected of them and letting them know when they fall short.

- Employers should conduct performance reviews in the normal course of employment. Don't wait until issues arise to review performance.

Training Records

- **Legal Compliance**
- **Proof of Equal Access**
- **Proof of Good Faith Effort**

Timekeeping Records

- Under the **Fair Labor Standards Act (FLSA)**, every employer that employs Non-Exempt employees must maintain payroll and timekeeping records.

- **Includes**:
  - Payroll records
  - Collective bargaining agreements
  - Sale and purchase records
  - Wage computation records: Timecards, piece work tickets, wage rate tables, work and time schedules, records of additions to or deductions from wages

- If an employer fails to maintain a record of an employee's hours worked, it may not complain of inaccuracies in its employee's records as a basis for denying relief.

Other Documentation

- **EEO-1**
  - Covered employers must record and file workforce demographic data
  - There is a Notice of Proposed Rulemaking to eliminate the EEO-1 reporting requirement; however, the obligation continues until a final rule is issued.
- **FMLA Records**
  - Includes: leave dates and hours, employee leave requests, medical certification forms, and fitness for duty reports
- **Form I-9**
  - Used to verify an employee's identity and eligibility to work in the United States. It should be kept separate from an employee's personnel file.
- **Office of Federal Contract Compliance Programs (OFCCP) records**
  - Affirmative action plans for individuals with disabilities and protected veterans
  - As of September 21, 2026, federal contractors should no longer use OFCCP's self-identification of disability form CC-305

What should employers document when things are not going well?

Performance Review: Accuracy and Specificity

- Evaluate employee against communicated duties, standards, and expectations.
- Record both strengths and material deficiencies.
- Avoid inflated ratings that conflict with later discipline or termination.
- Use specific examples, dates, assignments, and expected outcomes.

Tip: The review should reflect actual performance, not the manager's desire to avoid a difficult conversation.

Preserving the Underlying Performance Record

- Client complaints, inaccurate communications, missed deadlines.
- Supervisor emails outlining deficiencies or concerns.
- Notes of informal coaching and counseling.
- Work samples.

Tip: Document the event, the expectation, the impact, the employee's explanation, and the follow up.

Performance Improvement Plans

- Define the deficiency and cross reference any written expectations, policies, or job performance requirements outlining required conduct.
- Identify required improvement and how it will be measured.
- Set realistic goals, deadlines, and identify available support.
- Document meetings, employee responses, and progress.
- State the consequences of failing to meet expectations.

- **Tip: Use a PIP only if the employer (and their manager) is prepared to retain the employee if the employee meaningfully satisfies it.**

Documenting Adverse Actions

- Memorialize the decision date, decision makers, and information considered.
- State the legitimate business reason in clear, consistent terms.
- Preserve documents supporting decision.
- Outline any prior corrective steps taken (such as a PIP).
- Identify any standards or policies violated.

- **Tip: If the decision is made Monday but communicated Friday, document the Monday decision on Monday. Timing matters when protected activity occurs between the internal decision and the employee-facing communication.**

Consistency Across Employees

- Use common forms and processes.
- Apply the same or similar standards to similarly situated employees.
- Train managers on rating scales and disciplinary language.
- If there are legitimate considerations making some situation unique, that should be documented.

- **Tip: Consistency means using a defensible process and explaining material differences, not forcing identical outcomes.**

Complaints and Investigations

- Promptly record the complaint
- Document supporting information:
  - Identify witnesses
  - Relevant documents
- Document investigation steps:
  - Witness interviews
  - Documents considered
- Record conclusions, basis for conclusions, and corrective action taken (if any).

- **Tip:** Be prompt, neutral, consistent, and specific. Separate facts, credibility assessments, and conclusions

What not to document

- **Editorial thoughts or personal opinions on employees:** Be neutral, objective, and fact specific.
- **Avoid extreme statements**: "always," "never." Employees can use one or two examples of contrary activity to undermine employer credibility.
- **Protected characteristics:** mentioning age, race, gender, religion, or medical issues as part of an evaluation process.

What should employers keep, and when does the retention clock stop?

Offboarding: Preserve Before You Purge

- Coordinate HR and IT before deleting a departing employee's email, files, or devices.
- Do not auto-wipe laptops or phones or reassign mailboxes on the last day.
- Give extra care to departing HR staff, managers, and decision-makers.
- Flag any employee with a complaint, accommodation request, leave, or dispute.

Example: An employee claims he worked unpaid overtime until 10 p.m. every night. Email showing no activity after 6 p.m. is strong evidence, but only if it still exists.

Tip: Build an HR/IT checkpoint into every separation before anything is deleted.

The Trigger: When the Duty to Preserve Begins

- The duty starts when litigation is **reasonably anticipated**, **not when a lawsuit is filed.**
- Common triggers:
  - Demand or preservation letter
  - EEOC, MCCR, or agency charge; subpoena; lawsuit
  - Internal complaint of discrimination, harassment, or retaliation
  - Contentious termination or threat to “call a lawyer”
- Once triggered, the hold overrides your normal deletion schedule.

Tip: When in doubt, escalate to HR or counsel the same day.

After a Trigger: Implementing a Litigation Hold

- Notify counsel and identify key people, time period, and issues.
- Have IT suspend auto-delete, email purges, and device wipes for those custodians.
- Send a written hold notice to custodians and get signed acknowledgments.
- Cover email, texts, Teams/Slack, shared drives, HR files, payroll, and time systems.
- Preserve good and bad documents. Do not edit, rename, or “clean up” files.
- Re-send reminders and keep the hold in place until counsel releases it.
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- **Tip: Know your auto-deletion settings now, before you ever need to turn them off.**

Retention Floors: Personnel and Pay Records

Record	Source	Minimum Period
Personnel records (hiring, promotion, discipline, accommodation requests, termination)	EEOC regulations (Title VII, ADA, GINA)	1 year from record or action; 1 year after involuntary termination
Payroll records	FLSA; Maryland Wage & Hour Law	3 years
Time cards, schedules, wage-rate tables	FLSA (Maryland: hours worked, 3 years)	2 years (3 years in Maryland)
Wage and separation records	Maryland unemployment regulations	5 years from end of calendar quarter

Tip: When more than one rule applies, keep the record for the longest period.

Retention Floors: Leave, I-9, and Safety

Record	Source	Minimum Period
FMLA leave records (medical certifications kept separately and confidentially)	FMLA	3 years
Form I-9	Immigration law (IRCA)	Later of 3 years after hire or 1 year after separation
OSHA 300 log, 300A summary, 301 reports	OSHA	5 years after end of calendar year
Records related to an EEOC charge	EEOC regulations	Until final disposition, including appeals

Recommended Practice

- Adopt a written schedule by record type, with an owner and start date for each.
- Start the clock at separation for most personnel records.
- Keep key records through the limitations period (often 3 years in Maryland), not just the regulatory minimum.
- Follow your own policies too. If your policy says 7 years, keep it 7 years. Inconsistency raises red flags.
- Destroy on schedule, consistently, and log it. Keeping everything forever is its own risk and is often more harmful than helpful.

- **Tip: Selective or inconsistent deletion looks worse in court than a consistent schedule.**

Practical Rules: Retention Takeaways

- **Know the floors.** Keep each record for the **longest** applicable period.
- **Follow your policy.** Your own retention policy is a promise, **not a suggestion.**
- **Offboard carefully.** No deletion without an HR/IT checkpoint. Ensuring HR and IT are working closely is very helpful.
- **Recognize the trigger.** The hold starts at reasonable anticipation, not the lawsuit.
- **Stop the auto-delete.** Suspend purges for anyone tied to the dispute.
- **Call counsel early.** A prompt, documented hold is your best defense.

Questions?

Thank You!

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About the Presenter



Jase B. Tilley III

Employment Attorney

Lerch, Early & Brewer

T 301-657-2719

F 301-347-1788

jbtilley@lerchearly.com

Jase Tilley works on a variety of cases ranging from probate matters, disputes over business relations, corporate transactions, and insurance disputes.

Results-oriented and determined, Jase's approach to his practice is to focus on exactly what the client's objectives are and then to devise a litigation strategy that is practical and effective in order to achieve those results. He is dedicated to finding the best outcome for each client based on their individualized needs and expectations.

About the Presenter



Tiffany N. McClease

Employment Attorney

Lerch, Early & Brewer

T 301-657-0744

F 301-986-0332

tnmcclease@lerchearly.com

Tiffany McClease is an employment attorney who represents clients in a wide range of labor relations, employment litigation, and workplace safety matters in Maryland. In her practice, Tiffany represents employers in cases arising under Title VII, FMLA, ADA, and FLSA, and provides strategic legal counsel and advice to employers on discipline, performance management, misconduct investigations, reasonable accommodations, and workforce restructuring.

About the Presenter



Mason Z. Navarrete

Litigation Attorney

Lerch, Early & Brewer

T 301-657-0186

F 301-347-1788

mznavarrete@lerchearly.com

Mason Navarrete is a litigation attorney who helps clients resolve disputes across the Washington, D.C. metropolitan area.

Mason represents individuals and businesses in complex business, estate, and employment litigation. He also regularly handles commercial landlord-tenant matters for landlords throughout the region.