Employee Documents:
Medical Document Retention

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Medical Document Retention

By: Craig A. Cowart

Employee issues involving medical care can be some of the most difficult challenges employers face. Complicated matters can arise in administering FMLA and worker compensation claims, and there are complex issues under laws like the ADA, COBRA, and now the Affordable Care Act. When navigating the sometimes tumultuous path of medical related issues, employers should also keep in mind the best practices in retaining related documents.

FMLA

The Family Medical Leave Act ("FMLA") provides that covered employers shall make, keep and preserve records pertaining to their obligations under the FMLA. The regulation found at 29 CFR 825.500 sets forth the recordkeeping requirements arising under the FMLA.[1]

Covered employers must keep FMLA–related documents for no less than three years and make them available to the Department of Labor upon request. Generally, employers are not required to submit any FMLA–related records to the Department of Labor unless specifically required by a Departmental official.

No particular order or form of records is required, and the regulations establish no requirement that any particular payroll or computerized personnel record systems be used. Records can be maintained or preserved in computer form so long as reproductions are clear and identifiable by date or pay period.

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[1] Special rules regarding recordkeeping apply to employers of airline flight crew employees. *See* 29 CFR 825.803.

The regulations provide that the following documents must be maintained for at least three years by covered employers who have eligible employees:

1. Basic payroll and identifying employee data, including name, address, and occupation; rate or basis of pay and terms of compensation; daily and weekly hours worked per pay period; additions to or deductions from wages; and total compensation paid.

2. Dates FMLA leave is taken by FMLA eligible employees (*e.g.,* available from time records, requests for leave, *etc.*, if so designated). Leave must be designated in records as FMLA leave; leave so designated may not include leave required under State law or an employer plan which is not also covered by FMLA.

3. If FMLA leave is taken by eligible employees in increments of less than one full day, the hours of the leave.

4. Copies of employee notices of leave furnished to the employer under FMLA, if in writing, and copies of all written notices given to employees as required under the FMLA and regulations. Copies of such notices may be maintained in employee personnel files.

5. Any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves.

6. Premium payments of employee benefits.

7. Records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement.

Even if they have no eligible employees, all covered employers must maintain the records described in item number one (1) above ("Basic payroll and identifying employee data, including name, address, and occupation; rate or basis of pay and terms of compensation; daily and weekly hours worked per pay period; additions to or deductions from wages; and total compensation paid.") for at least three years. This requirement applies to covered employers in a joint employer situation as well.

In cases where FMLA-eligible are not subject to FLSA's recordkeeping regulations for purposes of minimum wage or overtime compliance (because, for example, they are exempt from FLSA requirements), an employer may not have to keep a record of actual hours worked. In order to determine if the FLSA requires that such records be kept, employers should refer to 29 CFR 516.2 (discussing recordkeeping requirements under the FLSA). In order for records of actual hours worked for exempt employees not to be kept under the FLSA regulations, both of the following are required:

a. Eligibility for FMLA leave is presumed for any employee who has been employed for at least 12 months; and

b. With respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written and maintained record.

Records and documents relating to certifications, recertifications or medical histories of employees or employees' family members, created for purposed of the

FMLA, must be maintained as confidential medical records in separate files/records from the usual personnel files.

ADA

The Americans with Disabilities Act ("ADA")[2] permits covered entities to make pre-employment inquiries into the ability of an applicant to perform job-related functions. Covered entities may also require a medical examination (and/or inquiry) after making a conditional offer of employment to a job applicant and before the applicant begins his or her employment duties. Covered entities may also require a medical examination (and/or inquiry) that is job related and consistent with business necessity. Finally, voluntary medical examinations and activities, including voluntary medical histories, which are part of an employee health program available to employees at the work site are permissible.

Applicable regulations require that information obtained from permitted inquiries and examinations regarding the medical condition or history of the applicant "be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record." Exceptions to the confidentiality requirements include:

a. Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;

[2] The Americans with Disabilities Act Amendments Act was signed in 2008. For purposes of this paper, the shortened and familiar terms "Americans with Disabilities Act" or "ADA" are used.

b. First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and

c. Government officials investigating compliance with the FMLA (or other pertinent law) must be provided with relevant information upon request.

See 29 CFR 1630.14

Applicable regulations defining the length of time personnel or employment records made or kept by the employer must be maintained specifically apply to the ADA. *See* 29 CFR 1602.14. While the regulations define the minimum amount of time that personnel or employment records must be retained, it is often in the best interest of the employer to retain documents longer to ensure availability if needed for the defense of claims.

All personnel or employment records "including but not necessarily limited to requests for reasonable accommodation, application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship" must be preserved by the employer for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later. In the case of an involuntary termination of an employee, the personnel records of the individual terminated must be kept for a period of one year from the date of termination. The time periods are extended to two years for educational institutions and state and local governments. In order to ensure availability of the records in the event

of a claim or lawsuit, private employers should consider retaining the records for at least two years as well.

Where a charge of discrimination has been filed, or an action brought against the employer under Title VII, the ADA, or GINA,[3] the employer must preserve all personnel records relevant to the charge or action until final disposition of the charge or action. The date of final disposition of the charge or the action means the date of expiration of the statutory period within which the aggrieved person may bring an action in a U.S. District Court or, where an action is brought against the employer, the date on which the litigation is terminated.

Workers Compensation

The rules for workers' compensation related record retention varies by state. The U.S. Occupational and Safety Health Administration ("OSHA") requires regular reporting of any on-the-job injuries on a form called the OSHA Incident Report, summarized on the OSHA 300 log. Employers must save these records and the OSHA annual summary for five years following the end of the calendar year in which the records originated. However, employers must keep medical records for employees exposed to toxic substances or blood-borne pathogens for up to 30 years after the employee's termination date.

As for other workers' compensation related records, a 2012 decision from the United States Court of Appeals for the Fifth Circuit involving an attempted claim for bad

[3] Final regulations amending the recordkeeping rules to impose the same retention requirements under GINA as those that apply to Title VII and the ADA became effective April 3, 2012. GINA prohibits employers with 15 or more employees from discriminating against job applicants, current and former employees, labor union members, apprentices, and trainees on the basis of genetic information.

faith failure to pay workers' compensation benefits demonstrates that employers are served well to maintain records for quite some time. In *Patrick v. Wal-Mart, Inc.-Store #155*, 681 F.3d 614 (5th Cir. 2012), the employee suffered a lower-back injury on July 28, 1997 while stocking shelves. It was not until June 2012, almost fifteen years later, that the Fifth Circuit rendered its decision on appeal. Much of the delay resulted from litigation over the plaintiff's attempt to pursue a bad faith failure to pay claim long after the decision on the underlying workers' compensation claim.

While employers should obviously keep workers' compensation related records anytime there is a pending claim, the *Patrick* case demonstrates that because of the possibility of additional claims (such as bad faith failure to pay), employers are wise to preserve the records for some period of time even after a workers' compensation claim is complete. As a result, many recommend that employers keep records from workers' compensation claims, including records from insurers, for up to eleven years.

Affordable Care Act

As provisions of the Affordable Care Act ("ACA") begin to take effect, employers are left with a number of questions about how different requirements of the Act will impact their obligations. Recordkeeping and retention is one area of obligation with many questions left to be resolved.

While many proposed regulations related to the ACA generally, and recordkeeping and retention specifically, apply to state-operated reinsurance programs, comments and reasoning behind the regulation drafting provides some guidance to employers. In proposing that state-operated reinsurance programs be required to retain

records for ten years from the creation of the document, reference was made to the 10-year statute of limitations under the False Claims Act.

The False Claims Act imposes liability on persons and companies who defraud governmental programs. While claims typically involve federal contractors, it is not difficult to imagine that other employers subject to the provisions of the ACA could have some involvement in the event of False Claims Act litigation. For that reason, as a starting place while provisions of the ACA become effective, maintaining related records for ten years from creation is probably a good starting place.

Conclusion

Employers receive, generate, and accumulate substantial volumes of documents. Many of these documents are medical in nature and related to the FMLA, ADA, and the like. While it would be nice to purge those documents when the filing cabinet becomes crowded, employers must take care to protect themselves by complying with retention requirements and ensuring availability of records needed to defend against potential claims.