

LEGAL FRAMEWORK

Legislative Framework for Record Retention Requirements

As most HR professionals know, document retention for employee-related records—such as personnel files, payroll information, benefits records, and background checks—is a particularly complicated process, required by law, with variations from country to country. Complicating the process further, each document in each country has its own individual retention requirements, and the financial penalties for noncompliance can be significant. A carefully designed and implemented HR record retention policy is a necessary step to support an employer's robust compliance program.

While disposing of too many records can increase a company's legal exposure, disposing of too few records may also increase legal exposure as well as the cost of storage. Employers must identify which records should be retained, how long records should be retained and the different formats in which records may be stored. Employers must also determine how to ensure internal HR record retention policies comply with all applicable regulations and local laws.



General Recordkeeping Requirements

Keeping HR records through a robust document retention policy may be useful to employers for various reasons, including (a) maintaining the corporate memory of the company; (b) satisfying legal or regulatory requirements; (c) preserving documents with an enduring business value to the company; and (d) protecting the company against the risks of litigation and the need to preserve evidence and comply with disclosure obligations as necessary.

However, a balance must often be struck between keeping documents for a sufficiently long period of time, so as to meet an employer's legitimate business objectives, and not keeping those documents unnecessarily, which could give rise to a breach of data protection laws or otherwise create unnecessary risk.

Retention Periods

Most countries have minimum and maximum retention periods for certain HR records. Even if there is no statutory minimum retention period for a certain category of records in a particular country, it is often recommended to retain records until the expiration of the relevant time limits for bringing legal actions or regulatory investigations (statutes of limitations).

In addition to maintaining minimum retention periods, some countries also have maximum retention periods. A record's survival must often be limited so as to safeguard the privacy of persons whose personal data is contained in that record. In particular, records must be kept for no longer than is necessary for achieving the purposes for which the records were collected or subsequently used. After the maximum retention periods have expired, the documents should be either permanently deleted or anonymized (i.e., all references to data subjects should be redacted so that it is no longer possible to identify those persons).

In Hong Kong there are some differing timeframes for keeping employment-related information based on requirements in different legislation. The longest allowable time period should be followed which, pursuant to the Code of Practice on Human Resources Management issued by the Privacy Commissioner, is up to 2 years after the rejection of a job applicant or up to 7 years after the termination of employment unless there is a subsisting reason to retain longer or you have obtained the employee's (or job applicant's) consent. This is also consistent with the requirement

under the Inland Revenue Ordinance that business related records need to be kept for at least 7 years, after the date of the transaction, which includes payroll information. To be prudent, for employment related data, 2 years for job applicants and 7 years for employees should be treated as a maximum rather than minimum given the data protection principles require data users to get rid of data once it has fulfilled its purpose. In other words, data must not be kept longer than is necessary.

Please note, for certain HR information, the Employment Ordinance imposes a separate minimum retention period (i.e. 6 months after termination of employment) but as this period is shorter than the minimum period required for data privacy and tax purposes, there is no real practical purpose.

Format of Records

Multiple laws, decisions, and even everyday life practices apply when assessing the retention



period of a document. In Hong Kong, the requirement is generally focused on keeping records of certain information (for example,

wage related information) rather than specific documents. In practice, it is common for employers to keep certain documents (for example, employment contracts) because they readily contain the required information to be kept on record. The hard copy of certain statutory records (such as the register of directors and the register of company secretaries) should be kept physically at the company's registered office in Hong Kong or another designated place within Hong Kong.

Generally, there is no specific requirement on the format in which the records should be kept. Records can be kept in hard copy but electronic form (including cloud) is usually also acceptable as long as they are clear and can be readily made available for inspection upon request.

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