

### **Legal Alert: Document Retention and Destruction Policies**

Given the proliferation of applications and platforms used for communication and the prevalence of remote work and decentralized workspaces, proper document retention, management, and record-keeping is an increasingly important consideration for nonprofits. While it would be impractical for a nonprofit organization to permanently retain and store every document it creates, certain documents, ranging from employee payroll records to board meeting minutes to bank statements, should or must be preserved. An effective Document Retention and Destruction Policy (DRD Policy) can ensure that a nonprofit organization's staff and volunteers have uniform guidance about document management and that proper record retention and destruction becomes standard practice. Additionally, effectively managing electronic documents can lead to increased security, efficiency, reduced costs, and improved compliance with applicable laws and regulations.

#### **Why Should Your Nonprofit Preserve Records?**

Adopting a DRD Policy can help to prevent the wrongful destruction or disposal of documents necessary to comply with business, regulatory, or other legal requirements. Failing to preserve required records may result in your organization's inability to qualify for tax-exempt status, penalties for late filing of tax or other reporting documents, or sanctions if your organization is subject to litigation discovery or legal investigation. A DRD Policy can also conserve resources by preventing unnecessary storage of documents beyond their utility and minimizing the legal risk of keeping documents for longer than is necessary.

#### **Legal Framework**

Various laws impose the obligation on nonprofits to preserve their records for given periods of time. However, each nonprofit organization is unique. While the list below highlights a portion of the legal framework necessitating a DRD Policy, you should investigate what additional laws may apply to your organization and how they affect your document retention strategy.

1. **Internal Revenue Service.** Nonprofits must retain certain documents to comply with federal tax laws. While the Internal Revenue Service (IRS) does not list specific documents that must be retained, IRS Form 990 asks whether the filer has a written DRD Policy in place.<sup>i</sup> The IRS recommends every nonprofit organization develop and follow a DRD Policy in order to maintain its tax-exempt status, satisfy ongoing filing requirements, and avoid late filing penalties.<sup>ii</sup>
2. **Employment and Labor Law.** The New York State Labor Law<sup>iii</sup> and federal Fair Labor Standards Act<sup>iv</sup> both require covered employers to keep specified employee-related records. Under the New York Workers' Compensation Law, employers must also keep and preserve records of workplace injuries or illnesses.<sup>v</sup>
3. **Sarbanes-Oxley Act of 2002.** While the majority of the Sarbanes-Oxley Act of 2002 (SOX) applies only to public companies, certain provisions extend to nonprofits as well. SOX makes it a crime to change, destroy, conceal, or falsify any record with the intent to obstruct

or influence an official or governmental proceeding. Destruction of documents necessary to such proceedings may be punishable by fines or up to 20 years in prison.<sup>vi</sup>

4. **Litigation Holds.** A litigation hold refers to the duty to preserve all documents that may be necessary in a litigation or government investigation. An organization must retain all relevant documents in existence when the hold is put in place, as well as any relevant documents created thereafter.<sup>vii</sup> The duty to preserve such documents attaches when a party reasonably anticipates litigation.<sup>viii</sup> Significantly, a litigation hold may require suspension of an otherwise valid DRD Policy for certain documents when litigation is pending or reasonably foreseeable.<sup>ix</sup>

*Contractual Obligations.* In addition to statutory requirements, nonprofits should also be aware of potential document retention obligations in contracts, particularly those contracts with government funders. These types of contracts often require your organization to both maintain certain records and also allow them to be open to audit review by the funder, and may also include related reporting requirements. Before signing any contract, you should ensure you understand all document retention obligations to which your organization may be bound.

### **Recommendations for Creating and Following a DRD Policy**

The recommendations below comprise general proposals that are broadly applicable to nonprofits. Again, before adopting a DRD Policy, you should investigate any relevant statutory and contractual requirements and assess your organization's unique activities, including the documents that must be retained, how to retain them, and for how long.

- Not all documents should be destroyed. Certain types of documents must or should be preserved indefinitely, either as a result of their institutional importance to the nonprofit organization or to comply with federal or state requirements.
- All documents should be labelled in a consistent manner that allows for easy retrieval.
- A DRD Policy should include procedures for implementing litigation holds when a litigation, audit, or government investigation is reasonably anticipated.
- Designate an individual to be responsible for and administrate the DRD Policy. This person should regularly assess the nonprofit organization's compliance with policy as well as its relevance in light of new technological developments or nonprofit practices.
- If your organization relies on volunteer services or volunteers, they should be given as little responsibility as possible for complying with document retention requirements. To the extent possible, volunteers should work only with documents backed up to physical or digital storage and should not be permitted to remove documents from nonprofit facilities. If a volunteer creates new documents or is required to remove documents from nonprofit facilities, the administrator of your DRD Policy should request the volunteer produce any documents the nonprofit organization deems necessary to preserve.
- Ensure that sensitive documents are identified by the organization and that access to them is restricted to authorized personnel.
- Only include policies which you are confident your organization can follow. Adopting a policy and failing to follow it may be worse than not having one at all.

## Recommendations for Incorporating Electronic Management into a DRD Policies and Practices

- Document retention applies to both physical and digital records, regardless of whether they are saved on a cloud storage server or in a file cabinet. Emails are also “documents” and should be addressed in the DRD Policy.
- If your organization uses digital storage, it is important to ensure adequate backup mechanisms are in place. Implementing a regular and encrypted backup schedule will allow for the retention of key documents, protect against unauthorized access, disclosure, and alteration, and ensure confidentiality.
- Nonprofits should have migration strategies in place for electronically stored documents in order to protect against technological obsolescence.
- A DRD Policy should set out the types of documents that may be stored electronically versus physically and outline the security measures required to protect them.
- Nonprofits should use software that is capable of tracking changes in documents and that provides a chronological history of persons that have accessed them.

All policies should be periodically assessed and updated in order to ensure that they remain relevant and effective. **Sample Document Retention Schedule\***

<u>Item</u>	<u>Retention Period</u>
<b>Accounting and Finance</b>	
Accounts Payable and Accounts Receivable Ledgers	7 years
Annual Financial Statements	Permanent (or 7 years if Interim Financial Statements)
Annual Audit Reports	Permanent
Bank Statements and Reconciliations	7 years
Cancelled Checks	7 years (or permanent if for significant purchase)
Cash Receipts and Disbursements	3 years
Contracts	Permanent (or 7 years if expired)
Expense Reports and Related Documents	7 years
General Ledgers	Permanent
Tax Returns	Permanent
<b>Charitable and Grants</b>	
Contribution Records	Permanent
Documents Evidencing Terms of Gifts	Permanent
Grant Records	7 years after end of grant period

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\* Periods and document types are suggestions only. This schedule is not a replacement for your nonprofit organization’s or counsel’s determination as to the appropriate documents and retention strategy.

**Corporate and Exemption**

Articles of Incorporation and Bylaws (including all amendments)	Permanent
Annual Reports to Attorney General and Secretary of State	Permanent
Board and Committee Meeting Minutes	Permanent
Conflict of Interest Disclosure Forms	7 years
Employer Identification (EIN) Designation	Permanent
IRS Exemption Application and Determination Letter	Permanent
Licenses and Permits	Permanent
State Exemption Application and Determination Letter	Permanent

**Correspondence**

Correspondence (general)	3 years
Correspondence (legal and other significant matters)	Permanent
Email	5 years

**Employment, Personnel and Pension**

Benefit Plans, Timesheets and Payroll Records, etc.	7 years
Personnel Records	Permanent (or 7 years after termination)
Retirement and Pension Records	Permanent
Worker's Compensation Documents	18 years

**Insurance**

Insurance Reports and Claims Records	Permanent
Insurance Policies (Current and Expired)	Permanent

**Management and Miscellaneous**

Policies and Procedures Manual	Current version with revision history
Strategic, Marketing, Financing, Disaster Recovery Plans, etc.	7 years

**Property**

Property Deeds, Purchase or Sale Agreements, Tax Records	Permanent
Real Property Leases	Permanent (or 10 years after termination if personal property)
Trademarks, Copyrights and Patents	Permanent

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<sup>i</sup> IRS Form 990, at Part VI, Section B, Line 14.

<sup>ii</sup> IRS, Compliance guide for 501(c)(3) Public Charities, <https://www.irs.gov/charities-non-profits/publications-and-notice-for-exempt-organizations>

<sup>iii</sup> See, e.g., NY Labor Law § 195(4) (requiring employers to retain payroll records for a minimum of six years; requiring covered employers to retain certain records for four years).

<sup>iv</sup> See, e.g., 29 U.S.C. §§ 516.5, 515.6.

<sup>v</sup> See, e.g., NY Work Comp Law § 110(1) (requiring employers to keep records of workplace injuries or illnesses for 18 years).

<sup>vi</sup> Sarbanes-Oxley Act of 2002, §§ 802, 1102

<sup>vii</sup> Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).

<sup>viii</sup> *Id.*, at 218. Note, that while the duty to preserve documents does not attach merely due to the existence of a possible litigation, the litigation need not be imminent to trigger the obligation.

<sup>ix</sup> *Id.*