

SMALL BUSINESS GUIDE TO DOCUMENT RETENTION




Arent Fox
ATTORNEYS AT LAW

NFIB

LEGAL FOUNDATION

*Protecting the Rights of
America's Small Business Owners*

**This work was funded by the Ewing Marion Kauffman Foundation.
The contents of this publication are solely the responsibility of the NFIB Legal Foundation.**

INTRODUCTION

The NFIB Legal Foundation is pleased to provide you with this Small Business Guide to Document Retention. The NFIB Legal Foundation developed this document with the assistance of attorneys at Arent Fox PLLC in Washington, D.C. This handbook will help you develop a policy for saving and discarding documents, including e-mail and web pages, received and created in the ordinary course of business. A document retention policy is important for many reasons. In particular, a policy will facilitate your business's operations by promoting efficiency and freeing up valuable storage space. In addition, a document retention policy can protect you in litigation and help ensure compliance with federal and state laws and regulations. While it is important to clear out clutter, tossing the wrong paper or deleting an important e-mail can have disastrous consequences. This guide will help you identify the documents you need to keep and help you determine how long you need to retain them.

This document is NOT legal advice. If you would like to know more about any of the enclosed information you should contact an attorney licensed to practice law in your state. If you would like assistance finding an attorney, visit the *American Bar Association Lawyer Referral Service* at www.abanet.org/referral/home.html or contact (800) 285-2221 for your state or county bar association.

The information contained in this handbook has been compiled as a helpful guide for independent businesses. This handbook should not be considered a legal resource. While we have attempted to provide accurate and complete information, the authors and publishers of this handbook cannot be responsible for any errors or omissions in its contents. **Note: This handbook is provided with the understanding that the NFIB Legal Foundation and Arent Fox are not engaged in rendering legal or professional advice in this document.**

The **NFIB LEGAL FOUNDATION** is a 501(c)(3) public interest law firm created to protect the rights of America's small-business owners by providing advisory material on legal issues and by ensuring that the voice of small business is heard in the nation's courts. The National Federation of Independent Business (NFIB) is the nation's largest small-business advocacy group. A nonprofit, nonpartisan organization founded in 1943, NFIB represents the consensus views of its 600,000 members in Washington and all 50 state capitals. More information is available at www.nfiblegal.com.

THE SCOPE OF THIS GUIDE:

It is important to understand that a document retention policy (DRP) should be customized for an individual business. No guide, be it this guide, or any other, could comprehensively address all the document retention concerns and needs of your business.

TABLE OF CONTENTS

WHAT IS A DOCUMENT RETENTION POLICY AND WHY DO YOU NEED ONE? ...	3
<i>WHAT IS A DOCUMENT RETENTION POLICY?</i>	3
<i>WHY DO YOU NEED A DOCUMENT RETENTION POLICY?</i>	3
Business Efficiency	3
Protection in Litigation.....	3
Compliance With Federal and State Laws and Regulations.....	4
Tax Audit Procedures.....	4
Employment Laws.....	4
Retirement Plans	4
Health and Safety Documents	4
Environmental Records	4
The Health Insurance Portability and Accountability Act (HIPAA) of 1996	5
Uniform Preservation of (Private) Business Records Act.....	5
Uniform Photographic Copies of Business and Public Records as Evidence Act	5
Statutes of Limitations	5
A SMALL BUSINESS GUIDE TO DEVELOPING A DRP	5
<i>IDENTIFYING A DRP MANAGER</i>	6
<i>IDENTIFYING DOCUMENTS, BOTH PHYSICAL AND ELECTRONIC, THAT YOUR BUSINESS PRODUCES</i>	6
Employment Documents	6
Workplace Records	7
Accounting and Corporate Tax Records	8
Legal Records.....	9
Electronic Records	10
General Forms of Media	11
<i>DECIDING HOW LONG THE DOCUMENTS SHOULD BE KEPT</i>	12
Legal Requirements.....	12
Potential Uses of Documents	12
Reproduction	12
Litigation Suspension.....	13
<i>DECIDING HOW DOCUMENTS SHOULD BE KEPT.</i>	13
<i>DETERMINING HOW DOCUMENTS SHOULD BE DESTROYED</i>	14
<i>ENFORCING THE DOCUMENT RETENTION POLICY</i>	14
EVALUATING YOUR DOCUMENT RETENTION POLICY	14
Appendix A: Suggested Document Retention Guidelines.....	16

WHAT IS A DOCUMENT RETENTION POLICY AND WHY DO YOU NEED ONE?

WHAT IS A DOCUMENT RETENTION POLICY?

A document retention policy (DRP) provides for the systematic review, retention, and destruction of documents received or created in the course of business. A DRP will identify documents that need to be maintained, contain guidelines for how long certain documents should be kept and save your company valuable computer and physical storage space. In addition, a well-crafted DRP that is followed by your employees may assist your company in the event of litigation.

WHY DO YOU NEED A DOCUMENT RETENTION POLICY?

Business Efficiency

- ❑ A DRP promotes business efficiency in several ways. First, destruction of useless documents frees up valuable storage space at your business. Second, a consistently enforced DRP means that you should be able to quickly locate important documents when you need them. Finally, a DRP will reduce the time you and your employees spend handling and retrieving documents.

Protection in Litigation

- ❑ A DRP that is consistently followed may aid significantly in any litigation that might arise.
- ❑ Not having the right document can mean the difference between winning and losing in a lawsuit. For example, if you sue ABC Company because ABC owes your business money, it will be nearly impossible to win the case unless you have documentation of the debt. A DRP will assist you in identifying those materials that you need to keep, like evidence of the debt ABC owes you.
- ❑ On the other hand, the intentional destruction of documents relevant to pending or future litigation – known as the spoliation doctrine – can also severely undermine your business’s position in litigation. Simply stated, if a litigant requests a document that you cannot provide because it has been destroyed, then a judge or jury may in some circumstances be permitted to conclude that the document contained information detrimental to your position. The primary exception to this rule is if the destruction of the document was reasonable. Evidence of a clear and consistently enforced DRP, enacted for valid purposes, will go a long way to convince the court that the destruction of a document was reasonable.
- ❑ *Litigation Suspension* If you do find yourself in litigation, or if you believe that litigation is imminent, you must suspend the DRP **IMMEDIATELY**. If you continue to destroy documents pursuant to the DRP notwithstanding the fact litigation is imminent, the court will not view the destruction of documents as reasonable, and will assume that you

intentionally destroyed documents. **You must not destroy documents relevant to the pending and reasonably foreseeable litigation.** Your DRP **MUST** provide exceptions (that documents will not be destroyed) for pending and reasonably foreseeable litigation.

Compliance With Federal and State Laws and Regulations

- ❑ Many documents must be kept for a specific period of time pursuant to federal, state or local laws. These laws include tax, employee benefit, occupational safety and wage and hour provisions, among others.
- ❑ The following are brief descriptions of some of the federal and state laws that might apply to documents created or received in your business. These descriptions are provided only as examples. Federal and state laws have many different requirements with regard to document retention, and it is important that you evaluate the provisions that are applicable to your business and retain the documents for the required period of time.

Tax Audit Procedures

Generally speaking, the Internal Revenue Service (IRS) can audit your tax records for up to six years in cases of suspected fraud. You should keep tax-related documents for at least eight years.

Employment Laws

Employment laws, such as the Fair Labor Standards Act (FLSA) and state wage and hour laws may require businesses to retain certain documents. For example, the FLSA and Family Medical Leave Act regulations require businesses to retain certain payroll and wage records for either two or three years.

Retirement Plans

Any business that offers a retirement plan, such as a 401(k) plan, is subject to records retention regulations under the Employee Retirement and Income Security Act (ERISA).

Health and Safety Documents

The regulations of the Occupational Safety and Health Administration (OSHA) include many document retention requirements. For example, employers with more than 10 employees in certain industries are required to keep OSHA 300 logs describing work-related injuries and illnesses for five years.

Environmental Records

A business that produces or handles hazardous materials or waste or that produces, processes or stores certain chemicals is subject to the record-keeping requirements of the Environmental Protection Agency (EPA).

The Health Insurance Portability and Accountability Act (HIPAA) of 1996

This act relates to the privacy of medical and health-related records. If your business handles insurance records, the privacy and document retention provisions of HIPAA apply.

Uniform Preservation of (Private) Business Records Act

This Act, passed by many states, provides that you can destroy any regular business document after three years if no other statute requires you keep the document and the document is not the subject of pending or future litigation. Do not rely solely on the words of the Act for determining the length of document retention. As discussed in the second portion of this guide, other factors personal to your business may determine a length beyond three years for which you should keep these documents.

Uniform Photographic Copies of Business and Public Records as Evidence Act

This Act allows businesses to copy paper documents into electronic form, then destroy the originals to promote organization and decrease physical storage requirements. Most states have adopted some version of this Act.

Statutes of Limitations

State and federal laws have statutes of limitations that determine the deadline for filing a lawsuit. For example, the statute of limitations for filing a lawsuit in Maryland is three years, unless another statute establishes a different limitations period. As such, in Maryland, a lawsuit based on a contract dispute or personal injury must be filed within three years of the date the injury or contract breach occurs. Because there are so many different potential causes of action and statutes of limitation, it is impossible to base the retention periods in your DRP on these provisions. Instead, you should identify important documents that are not covered by another provision, such as tax and payroll records discussed above, and set a general retention period for them, such as five years. If, for example, you keep a contract with a vendor for five years, you will have it when and if you need to defend against a lawsuit filed by the vendor, or you file a lawsuit alleging breach of contract within the three-year period in Maryland.

Remember, this is only a short list of the many federal and state laws that may affect the retention of documents. It is important that you identify the specific federal, state or local document retention provisions that apply specifically to your business.

**A SMALL BUSINESS GUIDE TO DEVELOPING A DRP
CREATING YOUR DOCUMENT RETENTION POLICY**

Remember that every business is different, and you need to develop a DRP that is tailored to your business. The DRP should answer the question: What documents need to be kept and for how long? Your DRP need not be overly detailed. Remember, the simpler the policy the more

likely it is that you and your employees will follow it. Your DRP may just list the types of documents used in your business along with the length of time each category of documents will be kept. See Appendix A for a suggested document retention schedule.

The following steps should be taken to create a DRP:

1. Identify the DRP Manager
2. Identify documents, both physical and electronic, that your business produces
3. Decide how long documents should be kept
4. Decide how and where documents should be kept
5. Determine how documents should be destroyed
6. Follow the DRP

IDENTIFYING A DRP MANAGER

In establishing a DRP it is important that you designate one person who will be in charge of ensuring that all the employees understand and follow the policy. Ideally, this person, be it you or someone else, should be a senior employee because they will need to have authority to enforce the policy. The DRP manager will be responsible for implementing the DRP, including educating employees about the policy, and ensuring the proper retention, storage and maintenance of documents. He or she will also be responsible for suspending the DRP with regard to certain documents in case of litigation. If, for example, a former employee files a lawsuit, then the DRP would be suspended as to documents pertaining to the employee and the subject of the lawsuit.

IDENTIFYING DOCUMENTS, BOTH PHYSICAL AND ELECTRONIC, THAT YOUR BUSINESS PRODUCES

Below is a list of documents you should take into consideration, as well as reasons to keep or destroy these documents. Please note, this is not a complete list. Your business may have many documents that are not included.

Employment Documents

Lawsuits from current and former employees are common. It is important for you to maintain these records accurately and in their entirety. Employee records should be retained for the length of the employee's tenure with your business, and then for an additional period of time in the

event an employee files a lawsuit. Many DRPs retain employee documents for at least **five years** after an employee leaves the company.

- ❑ **Employee Records:** Records pertaining to employees, including benefits and training information, correspondence, timesheets, appraisals or evaluations and awards, employment contracts, and disciplinary records should be maintained in a secure location. If you fail to produce documents relating to the employment of a former employee when requested during a lawsuit, judges and juries may be permitted to draw an adverse inference. *For example, a terminated employee claims that he should not have been fired because he received outstanding evaluations. The employer claims that the employee was fired because he received unsatisfactory evaluations for the past two years. Unfortunately, the employer destroyed the employee's evaluations. The judge might instruct the jury that, because the employer destroyed important records that are relevant to a lawsuit, the jury can assume that the employer destroyed the records because they would support the employee's side of the story.*
- ❑ **Employment Taxes:** Employment tax records should include the following: Your employer identification number, names, addresses, social security numbers, and occupations of employees and recipients, dates of employment, amounts and dates of all wages, annuity, and pension payments, amounts of tips reported, the fair market value of in-kind wages paid, any employee copies of Form W-2 that were returned to you as undeliverable, copies of employees' and recipients' income tax withholding allowance certificates (Forms W-4, W-4P, W-4S, and W-4V), dates and amounts of tax deposits you made, copies of returns filed, records of allocated tips, records of fringe benefits provided, including substantiation.
- ❑ **Training Manuals:** Many businesses have training manuals that they periodically update. These manuals often set out the employee's job duties, describe any rules the employee is expected to follow, such as a drug and alcohol or sexual harassment policy, and discuss the employee's benefits, such as vacation or sick leave. Because lawsuits might not be filed until several years after an employee leaves the company or is terminated, DRPs generally call for the retention of old training manuals.

Workplace Records

Your business collects and generates a number of records that may not be reasonably termed employment documents. Many DRPs set the retention policy for these types of documents at five years. As discussed above, employees are required to keep many employment records, such as payroll documents, for a certain period of time by regulation.

- ❑ **Safety Documents:** Records of workplace injuries and safety training are important when it comes to providing information to safety inspectors. Additionally, these records could prove important if your business were sued for a personal injury.

- ❑ ***Maintenance Records:*** Machinery and vehicle maintenance records will help protect your business from accusations of negligence.
- ❑ ***Product Manuals:*** Any appliance, machine, vehicle, or similar item you purchase will come with a product manual. If an employee or contractor is injured while using these items and files a lawsuit, a product manual may help you show that you instructed the employee or contractor to use the equipment properly.
- ❑ ***Travel and Delivery Schedules:*** Small businesses that use their own trucks to deliver goods should keep accurate records of the trucks' delivery schedules. Plaintiffs injured in automobile accidents often sue businesses based on the distinctive markings on their trucks. When your business is threatened with a lawsuit, it will be beneficial to show exactly where your trucks were on the day in question.

Accounting and Corporate Tax Records

It is extremely important that you maintain a record of your business transactions. Except in a few cases, the law does not require you to retain any particular documents. The IRS does, however, require that your books show your gross income, as well as your deductions and credits. You should therefore maintain a record of your business transactions and supporting documentation. Additionally, sales records provide the legal basis for payment for goods and services. These records will be required if you ever have to collect from a customer in court or if a vendor seeks to collect from you.

The following are some of the types of records related to business transactions that you should keep:

- ❑ ***Tax Returns:*** Federal tax returns should be kept permanently.
- ❑ ***Gross receipts:*** These receipts show the income you receive from your business. You should keep supporting documents that show the amounts and source of your gross receipts. These include cash register tapes, bank deposit slips, receipt books, invoices, credit card charge slips and Forms 1099-MISC.
- ❑ ***Customer Records (paper):*** You may keep records that contain personal customer information for marketing purposes. These records should be safeguarded from outside individuals as proprietary business information. When you dispose of these records is generally up to you, depending on whether you use them for marketing or not.
- ❑ ***Purchases:*** These are items that you buy and resell to customers. For example, if you are a manufacturer, this includes the costs of all raw materials or parts that are used in the finished product. Documents include canceled checks, cash register receipts, credit card slips and invoices.

- ❑ ***Expense receipts:*** Expenses are the costs you incur to run your business. Documents for expenses include the following: canceled checks, cash register tapes, account statements, credit card sales slips, petty cash slips for small cash payments and invoices. Signed invoices serve as proof of receipt of goods, and assist with the collection of outstanding sums of money. More importantly, signed invoices may also serve as contracts.
- ❑ ***Travel, Transportation, Entertainment, and Gift Expenses:*** You should keep all receipts and credit card slips related to these expenses. For gifts, you must be able to show that the gift was necessary for your business and provide a description of the gift, the cost of the gift, the date of the gift.

Legal Records

Legal documents are some of the most important documents you may retain. Careful preservation of contracts, land records, and intellectual property documents often means the difference between winning and losing a particular claim.

- ❑ ***Real Estate Records:*** Generally speaking, in the United States, all contracts in land must be in writing. If you own land, you likely recorded the deed with the local land records office or Registrar of Deeds. If you have not, you should record a deed as soon as possible so that there is public record showing that you own the land. After recording the deed, keep the deed in a secure place. Because the statute of limitations for real estate is long, real estate documents should be kept for at least 20 years.
- ❑ ***Contracts:*** Contracts should be kept for the duration the contract is in force and for a considerable period thereafter. For contracts currently in force, you may want to keep these on site. Older contracts can be stored off-site. Numerous documents are considered contracts even though you do not think of them as such, including leases, warranties, insurance policies, and advertisements. The statute of limitations term for contract lawsuits varies by state, but can be over ten years. In developing your DRP, you may wish to check with your attorney to find out what the statute of limitations is in your state.
- ❑ ***Patents, Trademarks, and Copyrights:*** An intellectual property registration (patent, trademark, copyright) can always be challenged. You should permanently retain these records in a secure place.
- ❑ ***Citations, Tickets, and Other Administrative Penalties:*** After you pay a fine or other administrative penalty to a government agency, it is important to maintain these documents for some period of time, such as three to five years, in case the agency later claims you did not pay. In addition, if you sign a settlement agreement with a government agency, it should be retained for a substantial period of time in case the same compliance issue comes up again. For example, an employer and the Department of Labor may agree in a settlement agreement that certain employees must be paid overtime, while certain others are exempt from overtime pay. If the same issue arises five years

later, the employer will want to show the Department of Labor that it already agreed that certain employees are exempt from overtime pay.

- ❑ **Legal Pleadings:** You should consult with your attorney about retention of documents related to litigation. Documents should be maintained for at least the duration of the case and up to three years after the case has concluded.
- ❑ **Insurance Policies:** Insurance policies should be kept in a secure location. Consider protecting them from fire or theft with a safety deposit box. Take extreme caution in destroying old insurance policies because a seemingly expired or replaced policy may still be in effect. And even if policies have expired, claims can arise later for periods in which you were covered.
- ❑ **Licenses and Permits:** Your business license and permits are integral to your business while they are valid. Once renewed, you may want to consider disposing of old permits as they likely have no further use.
- ❑ **Government Paperwork:** All the forms you fill out to obtain licenses, permits and other permission from state and federal government should be kept at least for the lifetime of the permit. The government may decide to review your forms or applications.
- ❑ **Vehicle Registrations:** Your business may possess multiple vehicle registrations, likely kept with your vehicles. Keep these registrations along with your vehicle maintenance records.

Electronic Records

Maintenance and destruction of electronic records may be the most difficult part of the DRP. Software engineers, even your information technology providers, are in the business of protecting, not destroying, data. When you develop your DRP you should consult with any employees or consultants who perform maintenance on your business's computers. They will be able to adjust their own policies to ensure your electronic data is maintained as consistently as your hard data.

- ❑ **Computer Disks:** If your computer disks hold sensitive or important information, you may want to duplicate the information in an alternate format. Disks are easily lost or damaged.
- ❑ **E-mail:** The fastest way to send and receive written communication also provides the most document retention problems. Courts routinely treat e-mails like other paper documents. E-mail also tends to be much more difficult to destroy than paper documents. Educate all of your employees about the risks of electronic communications. Employees should have no false expectation of privacy about electronic messages sent on your business's computer system. Remember that "deleted" electronic documents exist in

numerous locations, including backup tapes and in recipients' in-boxes. While it is important that employees delete e-mail and other electronic documents on their PCs pursuant to the DRP, you may want to consult an information technology professional to ensure that all electronic documents are destroyed according to your DRP.

- ❑ **Hard Drives:** Computer hard drives are the repository for many documents. Never sell or give away an old hard drive without first eliminating all business documents. As with e-mail, destroying documents from computers is difficult without assistance from an information technology professional.
- ❑ **Web Pages:** If you sell products online, you may be making representations and warranties about the products on your website. You may also have privacy policies and other terms of dealing, and you should retain these just as you would any other contract. You may want to keep printouts of all website content. You may also ask your web-hosting company to maintain records of all past source codes. If your business offers advertisements online, please refer to the section on advertisements in this guide.

General Forms of Media

- ❑ **Photographs:** Unless you generate photographs in the regular course of business, or the photographs are produced in preparation for litigation, you may not need to retain photographs.
- ❑ **Audio Recordings:** Unless you generate audio recordings in the regular course of business, or the audio recordings are produced in preparation for litigation, you may not need to retain audio recordings.
- ❑ **Letters:** Correspondence sent and received will form the basis for contracts, tort claims, and inspections. You should consider the potential uses of a letter by litigants before destroying that letter.
- ❑ **Facsimiles:** Treat facsimiles like you would any other correspondence. Facsimile cover sheets provide information beyond that included in the substance of the facsimile and should be kept with the facsimile accordingly. If you have been sending facsimile advertisements in the past five years consult an attorney to determine your level of liability for unsolicited advertising and what you should do about old facsimiles and lists of facsimile recipients.
- ❑ **Advertisements & Promotional Items:** Advertisements and promotional items form the basis for contracts between your business and the customer. Copies of these items should be maintained at least for the length of the contract statute of limitations in your state, and potentially for the state of any customer who may have received the advertisement. You should treat online advertisements the same way you treat all other advertisements.

DECIDING HOW LONG THE DOCUMENTS SHOULD BE KEPT

You should consider the following factors:

Legal Requirements

Federal, state, and local laws and regulations: As previously discussed certain federal laws require you keep documents for a specific number of years. State and even local laws may also require retention of certain types of documents.

Statutes of limitations: The statutes of limitations for civil and criminal actions vary by state. See Appendix A for suggested retention periods.

Potential Uses of Documents

A basis for supporting or disproving legal claims: Plaintiffs have the burden of proving a civil claim against your business. The cost to your business of disproving a plaintiff's claim may increase if you no longer possess documents relevant to the lawsuit. A plaintiff that threatens your business with a completely baseless claim will be far less likely to file and pursue the claim if you possess and can show hard evidence in your favor early in the process. In the unfortunate event that you must sue a customer or other individual, accurate and complete records kept in a uniform fashion will help establish your case.

Support tax deductions, and expenditures: Your receipts and business expense reports should be kept in an organized fashion after every tax filing. If the IRS or your state tax agency decides to audit you or your business, these documents need to be readily attainable and well organized. At the very least, keep these documents for the length of the statute of limitations for audits.

Explain business decisions: A paper trail behind every business decision will protect you in many instances. For example, if you've had creditor problems, evidence of the past problems will show what went wrong, and why you made the changes to your business model.

Prepare for future expansion: Prospective purchasers and investors will want to know a great deal about your business. Accurate and complete financial records, employment records, and business models will protect you from cases of buyer's remorse. If you make an assertion to a prospective purchaser or investor it helps to have complete documentation for the assertion. In cases of a company going public, federal law prescribes your DRP via the Sarbanes-Oxley Act of 2002. Consult an attorney on how the Act applies to your business.

Reproduction

Destroy extra reproductions: Your DRP must not only apply to the original document, but to all reproductions. If you destroy some but not all documents according to your DRP, courts may find that your DRP is not reasonable. Also consider that many documents are stored in electronic format so paper records may no longer be necessary. If a document can be easily

reproduced from an electronic version, consider automatically destroying the paper copies. Note, however, that an electronic copy is rarely a reasonable substitute for a contract with original signatures.

Litigation Suspension

If faced with the prospect of litigation, or you are aware litigation is likely, **you must not destroy documents relevant to the pending litigation.** Immediately pull the plug on your shredder and notify employees that they must not destroy any relevant documents, including electronic documents. Adherence to your DRP while litigation is imminent or pending will **NOT** protect you in this instance. Your DRP must provide exceptions for pending and future litigation.

DECIDING HOW DOCUMENTS SHOULD BE KEPT.

Consider the following factors:

The expense of storage:

This may be your primary determinate as to what you keep and the methods of storage. Backing up electronic documents is fairly inexpensive. The expense of keeping paper records may be prohibitive for many businesses. If your business produces a lot of paper, you may want to hire a document storage company.

The space of storage:

Storing documents on site takes up valuable space. For businesses with small leased spaces, wasting space on paper storage is inefficient. Consider keeping most files at a home office. But note, just because business documents are stored off-site does not mean that they are not subject to your DRP or litigation. Depending on how the request is phrased, you are likely to be obliged to produce documents stored at home just as you would documents stored onsite. If you have extra space in your facility, you may want to keep your most recent records accessible. Store older records in a less accessible area of the facility. Storing offsite adds a small amount to the expense if you only need rare access to documents, but it dramatically reduces space used for storage.

The difficulty of retrieval:

Documents stored offsite, or at home, will be difficult to retrieve if you need them quickly. Current permits and licenses should be readily available onsite in case of inspection. Documents pertaining to recent transactions should also be readily available.

Security:

Some documents need to be kept safe. Contracts, employment documents, employee medical records, bank records and the like should be inaccessible to the general workforce. Very important documents should be protected from potential fire damage. Electronic security is another matter entirely. A list of basic precautions for electronic security can be found at <http://www.us-cert.gov/cas/tips/ST04-003.html>.

DETERMINING HOW DOCUMENTS SHOULD BE DESTROYED

Documents should be destroyed using a method that renders them unreadable, such as shredding. This is particularly true of sensitive materials, such as personnel records or company financial data. The same goes for electronic documents, but deleting and emptying the recycling bin is suitable for most circumstances. For more sensitive circumstances, consider using wiping utilities or talk to a consultant. Just remember that electronic documents are often stored in many locations (e.g., hard drives, servers, e-mail accounts), and even when erased can often be restored. This makes it especially important that you do not simply sell your old computers or hard drives to unknown individuals.

ENFORCING THE DOCUMENT RETENTION POLICY

The employees in your company will come into contact with documents on a regular basis. The DRP manager must ensure that employees read and understand the parts of the DRP that pertain to them. Follow the policy yourself, as the benefits of having a policy, space reduction, accessibility, and professionalism, only apply if the policy is followed in its entirety.

If you fail to follow your DRP, a litigation opponent can claim you selectively destroyed records. **Most courts will consider a partially enforced document retention policy unreasonable, exposing your business to an adverse inference in litigation, fines, and in extreme circumstances, criminal penalties.**

EVALUATING YOUR DOCUMENT RETENTION POLICY

Every year, your DRP manager should evaluate your document retention policy for a number of reasons. The DRP manager should ask questions such as:

- Are there any federal or state laws that apply to the business that may have changed?
- Have the costs of storage gone up or down?
- Is my business producing new types of documents?
- Has technology replaced certain types of paper documents?
- Is my business keeping far more documents than necessary?

Additionally, it is a good idea to remind your employees annually of their obligation to follow the policy – perhaps by requiring them to sign a statement acknowledging they are aware of the policy. You might also institute an annual “clean out the documents day” in conjunction with the annual reminder about the DRP.

Conclusion

By carefully considering the documents your business produces and the relevant laws, you should be able to develop a document retention policy that facilitates your business's operation and protects you in the event of a legal dispute. Keep in mind that there may be situations where it is better to retain a document regardless of whether you have a legal obligation to do so. The key is to develop a flexible policy that is tailored to your business.

**Appendix A: Suggested Document Retention Guidelines
Model DRP**

A model DRP is included below. The retention schedule is based in part on requirements contained in federal laws. Remember that there are many federal, state and local laws that may implicitly or explicitly require you to retain documents for a certain period of time. The model program below covers some of these laws, but it is important for you to identify any laws or regulations that apply to the documents your business generates.

Policy Statement

To facilitate efficient and effective operation of our company, we are implementing the following Document Retention Plan. As a condition to your employment, you are required to follow the terms of this plan.

All business records should be kept no longer than the period necessary for the proper conduct of ABC Company business. Except as designated below, or as specifically exempted by [insert name of the DRP manager], no documents shall be retained longer than five (5) years. This policy shall cover all business records of ABC Company, including written, printed and recorded matter and electronic forms of records, including e-mail messages in personal folders. Employees should review their electronic files regularly and delete them where appropriate to ensure compliance with this policy.

To ensure that this policy is followed, the DRP manager shall review the status of the DRP annually, preferably in December of each year. The DRP manager is responsible for overseeing the implementation of the DRP. Questions related to the policy should be directed to the DRP manager.

Accounting and Corporate Tax Records

Annual financial statements	Permanent
General ledger	20 years
Annual audit records	10 years
Journal Entries	8 years
Special reports	8 years
Canceled checks	8 years
A/P paid invoices	8 years
Business expense records	8 years
Credit card receipts	3 years
Cash receipts	3 years
A/R invoices	8 years
Federal tax returns (excluding payroll)	Permanent
Resale certificates	Permanent
Sales & use, property and other state tax returns	[Varies as required by state law]
1099s	8 years

Bank Records

Stop payment orders	3 years
Bank reconciliations	3 years
Bank deposits, remittance advices, and copies of checks	3 years
Superseded check signature authorizations	3 years

Payroll and Employment Tax Records

Payroll registers	Permanent
State unemployment tax records	Permanent
Canceled checks (Payroll)	8 years
Deductions register	8 years
Earnings records	8 years
Exemption certificates (W-4 & state withholding forms)	8 years
W-2 and W-3 withholding statements	8 years
Payroll tax returns	8 years
Notices of changes or adjustments to salary	8 years
Attendance rosters	3 years

Employee Records

Salary schedules	5 years
Job evaluations, reclassifications, merit pay increases and job descriptions	5 years
Records relating to promotion, demotion, lay-off, or discharge of employees	5 years after termination of employment
Immigration and Naturalization Form I-9	3 years after termination of employment
Employment and Termination Agreements	Permanent
Safety records, including logs of each occupational injury and illness, and annual summaries of all such injuries and illness	5 years
Savings plan documents, valuation reports	Permanent

Legal Records

General Contracts	3 years after termination (Except Employment & Termination Agreements)
Records & statements regarding personal injuries to outsiders	8 years
Real Estate contracts and documents	20 years - Permanent
Trademark Registration	Permanent
Copyright Registration	Permanent
Patents	Permanent
Incorporation & reorganization records including charter and bylaws	Permanent

Reports and minutes of the board of directors
Insurance policies

Permanent
Permanent

Other records

DRP manager's discretion, but generally not more than 5 years unless the document must be kept longer for business reasons

Suspension in the Event of Litigation

If a lawsuit is filed or appears imminent, the DRP manager may suspend this Policy to require that documents relating to the lawsuit or potential legal issue(s) be retained. If you receive notification from the DRP manager that the Policy has been suspended, you must retain all of the documents the DRP manager instructs you to keep rather than destroying them pursuant to the Policy.

NFIB

The Voice of Small Business®

NFIB Legal Foundation
1201 F Street, NW
Suite 200
Washington, D.C. 20004
(800) 552-6342