

# Report From Counsel

## An Essential Security Blanket: Document Retention Policies

*By Jenifer M. Pinkham, Esq.*

Document retention—especially the retention of electronic data—is a necessity for every company. In the twenty-first century business world, companies are creating and storing electronic information and printing out hard copies of documents daily. But for modern businesses, all of these documents can be expensive to store, electronically or in offsite storage facilities. So how does a company balance the need to retain documents for business and legal purposes with the desire to keep costs down by disposing of superfluous documents?

### What Is the Law? How Long Are You Required to Retain Documents?

First, aside from specific regulations and laws governing particular industries or instances, there is no uniform law of document retention. There are many statutes that govern record retention, including statutes relating to employee records, federal tax documents, wage and compensation records, documents relating to employee benefits, health and safety documents (OSHA), and the requirements for retention range from one year to thirty years. Also, companies have to keep in mind that there are statutes of limitations, which are different depending on what type of cause of action may be asserted by or against the company. The statute of limitations for contract claims is six (6) years and the statute of limitations for tort claims is three (3) years or four (4) years depending on the type of action. Obviously, you do

not want to dispose of any records that absolve you of liability in a lawsuit. So, to determine the appropriate document retention period for your company, you must consider the federal and state regulatory requirements, statutes of limitations, contractual obligations, and business considerations.

Thus, document retention policies should be tailored to the needs of your

specific company. There is, however, a common law duty to preserve documents and information once a company is put on notice of potential or pending litigation. And what is becoming increasingly clear, is that not having a document retention policy or a plan for implementing a so called,

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## Massachusetts Department of Revenue Grants Amnesty to Delinquent Taxpayers

*By Michael T. O'Neil, Esq.*

Massachusetts has established a two-month tax amnesty period ending on June 1, 2010, in order to encourage the payment of delinquent tax obligations to the Commonwealth. The Amnesty Program is primarily limited to the following existing business tax liabilities: sales/use tax, meals tax, material-man sales tax, withholding income, pass-through entity withholding, lottery annuity withholding, room occupancy excise, deeds excise, cigarette excise, club alcohol beverage excise, gasoline excise, special fuels excise, special fuels excise local option, and boat/recreational vehicles sales tax.

The Commissioner will notify taxpayers of their eligibility to participate in the Amnesty Program. Only those taxpayers to whom a "Tax Amnesty Notice" has been issued will be eligible. Under the Amnesty Program, if a taxpayer is notified by the Commissioner that the taxpayer is eligible and the taxpayer pays the full amount of tax and interest due for any period as shown on the "Tax Amnesty Notice," the Commissioner is authorized to waive all unpaid penalties including those imposed for failure to timely file a return; failure to file a proper return; failure to timely pay a tax liability; failure to file, report or pay electronically; and failure to pay the proper amount of any estimated tax payment for such period.

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# Americans with Disabilities Act Amendments

The Americans with Disabilities Act Amendments Act (ADAAA), which went into effect last year, was a legislative response to U.S. Supreme Court precedent. The ADAAA generally makes it easier for some employees to establish themselves as “disabled” and to require accommodations from their employers. Recently, the Equal Employment Opportunity Commission (EEOC) fleshed out the import of the ADAAA when it issued new regulations and an interpretive guidance.

The following are some of the important ADA issues addressed by the ADAAA and its implementing regulations.

## “Regarded As” Claims

There remain three ways to be “disabled” for ADA purposes: by having a physical or mental impairment that substantially limits one or more major life activities; by having a record of such an impairment; or by being regarded as having such an impairment. The bar has been lowered for making out a “regarded as” claim.

It used to be that a plaintiff had to establish that because of a mistaken belief about the individual’s impairment, the employer regarded him or her as either unable to perform or severely restricted in performing some major life activity. Now, under the more relaxed standard, the plaintiff need only show that the employer believed that the individual could not perform the particular job at issue.

## Major Life Activities

The thrust of the new rules is that the determination as to disability should be tilted in favor of broad ADA coverage and should not require extensive analysis. An individual’s ability to perform a major life activity will be compared to most people in the general population, often with more reliance on common sense than on scientific or medical evidence. It is enough for disability status if only one major life activity is substantially limited.

The original ADA and its regulations mention a number of major life activities, substantial limitations of which can lead to a finding that a person is disabled. These include such things as caring for oneself, performing manual tasks, seeing, hearing, eating, speaking, and walking, among other things.

Curiously enough, considering that the ADA is meant to prohibit a type of employment discrimination, before the latest legislation and regulations came into effect, the federal appellate courts were divided over whether

“working” was a major life activity. Now that question has been answered in the affirmative.

The new measures add reaching, sitting, and interacting with others to the ADA’s list of specific major life activities. Cardiovascular and lymphatic systems, and functions of the skin and special sense organs, have been added to the list of the major bodily functions that comprise a subcategory of major life activities.

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## E-Mailed Documents Allowed

Shortly before he left the employment of a residential treatment center for addicted persons, an employee e-mailed some of his employer’s documents to his and his wife’s personal e-mail accounts. The employee operated two consulting businesses of his own concerning addiction rehabilitation services. The employer’s documents, including its financial statement and the names of past and current patients at the center, could have been useful to those businesses.

When the employer discovered that the documents had been e-mailed, it sued the then-former employee under the federal Computer Fraud and Abuse Act (CFAA). The CFAA provides civil (and criminal) remedies for knowingly accessing a protected computer without authorization or for exceeding authorized access. A federal appellate court ruled in favor of the employee.

The language in the CFAA prohibiting the accessing of a computer without authorization means that the person has not received permission to use the computer for any purpose (such as when a hacker accesses a computer without permission), or when a computer owner, such as the employer, has rescinded permission and the defendant uses the computer anyway. Neither scenario describes what happened in the case before the court.

The employee, so long as he remained employed, had permission to access and use the company’s computers. There was no written employment agreement or set of guidelines for employees that might have prohibited or restricted employees of the company from e-mailing the company’s documents to personal computers. If keeping in-house documents in-house was a priority for the company, it would have been wise to incorporate appropriate restrictions on computer access and use by employees into an agreement or personnel policy.

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# Credit CARD Act

Recently, the Credit Card Accountability, Responsibility, and Disclosure Act of 2009 (the Credit CARD Act) went into effect. Congress saw a pressing need to protect consumers from abusive fees, penalties, interest rate increases, and other unjustified changes in the terms of credit card accounts. A new hike in the penalties for violators of the Act will provide extra incentive for compliance.

A few of the highlights of the Act are:

- The Act prohibits rate increases on existing balances due to “any time, any reason” or “universal default,” and severely restricts retroactive rate increases due to late payments.
- Contract terms must be clearly spelled out and must remain in place for all of the first year. Companies may continue to offer promotional rates with new accounts or during the life of an account, but these rates must be clearly disclosed and must last at least six months.
- Institutions are required to give credit card holders a reasonable time to pay the monthly bill—at least 21 calendar days (up from 14) from the time of mailing.
- Credit card companies are required to apply excess payments first to the highest interest balance (usually for new purchases), as most consumers would expect them to do but which some companies have not done because it is not as profitable.
- The Act ends the confusing practice by which issuers use the balance in a previous month, even if all or a part of it was paid off, to calculate interest charges on the current month. Many consumers likely were not even aware of this particular practice, called “double-cycle” billing.

Credit card holders will find it easier to avoid over-limit fees because institutions now have to obtain a consumer’s permission to process transactions that would place the account over the limit. So that consumers can better avoid unnecessary costs and manage their finances, creditors must give consumers clear disclosures of account terms before consumers open an account and clear statements of the activity on consumers’ accounts afterwards.

The Act contains new protections for college students and young adults, formerly a favorite target for blanket marketing of credit cards. Among other things, there is a new requirement that no card be issued to anyone under 21 unless he or she submits a written application, with either the signature of a co-signor over 21 or information showing independent means for repaying the credit card debt.

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## ADAAA

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### Mitigating Measures

Previously, a person was not impaired for ADA purposes if his or her impairment could be mitigated, such as by medication or medical devices. Under the new regulations, such positive effects of mitigating measures are ignored in determining whether an impairment is substantially limiting.

### Episodic Impairments

The ranks of potential plaintiffs under the ADA will also increase because of the rule applicable to those with an impairment that is episodic or even in remission, such as epilepsy, hypertension, multiple sclerosis, asthma, diabetes, and some mental illnesses. In such cases, an individual is disabled if, when the condition is active, the individual is substantially limited in a major life activity.

### Per Se Disabilities

To head off a prolonged argument over whether an individual is disabled

in the first place, and proceed to the consideration of possible accommodations by an employer, the new regulations effectively declare certain conditions to be per se disabilities. Examples include blindness, deafness, intellectual disabilities, missing limbs, and any mobility impairments requiring a wheelchair.

### Conclusion

Up until now, many ADA plaintiffs lost on the threshold issue of whether they were even “disabled” within the meaning of the ADA, rendering other issues moot. In the future, many more such plaintiffs will successfully cross the first hurdle. This will lead to more consideration and the fleshing out of such thorny ADA issues as whether the employer acted with a discriminatory motive, whether the employer met its duty to accommodate the disabled person, and whether different treatment of the disabled person could be justified by a significant risk of substantial harm to the person or to others in the workplace.

*Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.*

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## Document Retention

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“litigation hold” can have disastrous consequences as Courts have sanctioned companies for improperly handling documents and failing to preserve records.

Deciding to keep all documents forever may also lead to liability, as there have been cases where old damaging documents that could have been legally destroyed were discovered during litigation and inculpated the company.

### A Formal Policy is a Must.

All companies should have a Document Retention/Destruction Policy (“DRP”). A DRP establishes rules and guidelines for your employees relative to the storage, retention and destruction of documents and records, both electronic and hard copies. The DRP should provide organization, save your company time and resources, and most importantly, ensure you are keeping documents you are legally obligated to retain while properly destroying documents that may prove harmful. There is no one size fits all document retention policy.

When developing your DRP, consider the following:

- If your company is governed by federal or state law or regulations, follow them;
- If federal and state regulations conflict, follow the more stringent requirement;
- If there are industry standards, abide by them;
- Define how long, how and where to store both paper and electronic records, making sure you detail specific retention periods for certain categories of records;
- Make sure you understand how to properly destroy electronic data;
- Make sure you have considered all forms of data (blackberry, laptop, zip drive etc);
- Describe the manner in which to organize and store records so they can be recovered with relative ease;

- Specify how records are to be destroyed when their retention period has expired;
- Detail when the policy should be suspended (“litigation hold”);
- Specify the individual(s) responsible for enforcing and monitoring the policy;
- Define penalties for non-compliance;
- Review the policy on a regular basis.

### Implementation is Key

A document retention policy may look extraordinary on paper, but every person on your staff must be made aware of its existence, and it should be enforced. Adhering to a policy may limit liability because it will provide a clear date for expungement of records and a clear defense if there is litigation. Selective enforcement is a sure ticket to a spoliation of evidence or obstruction of justice charge.

Saving unnecessary documents, paper or electronic, can constitute a significant danger. There have been many companies that saved documents which came back to bite them. On the flip side, not retaining a document which you are legally obligated to retain, can have severe repercussions. So, drafting a policy which balances the risks and benefits and meets the needs of your company is essential.

Remember too that document retention policies have real benefits for companies. They preserve the storage space on the network, on user’s desktops and at off site storage facilities. They optimize network performance. They lessen the chance of having documents used against you in lawsuits. They force an imposed order which can be useful to productivity, and if all documents are properly stored, they prevent duplication of efforts.

In the end, when it comes down to litigation or a government information request, the most important reason to have a workable and active document retention policy is that it can persuade a court that the documents that no longer exist were purged in accordance with a policy and not willfully destroyed or spoliated. Courts do not

have a lot of patience for companies that mismanage or delete documents on an inconsistent basis.

If you need assistance in drafting a document retention policy or need further information regarding legal retention requirements, including specific requirements on how long certain documents must be maintained, please do not hesitate to contact Jenifer M. Pinkham at Schlossberg, LLC at 781-848-5028 or [jpinkham@sabusinesslaw.com](mailto:jpinkham@sabusinesslaw.com).

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## Car Dealers Clash with Website

In a variation on a familiar phrase, a federal trial court effectively has ruled that, in the context of a website posting customers’ reviews of their retail buying experiences, “you can’t blame the message board.”

In the case before the court, the defendant was an online consumer affairs company that allowed third parties to post commentary on the company’s website about their impressions of various businesses. The plaintiffs were a group of franchised car dealers who went on the offensive because of several less than complimentary reviews of their dealerships by customers who posted reviews on the website.

The dealerships’ claims of defamation and tortious interference with business expectancy failed because of a provision in the federal Communications Decency Act. The statute, by its plain language, creates a federal immunity to any cause of action that would make providers of any interactive computer service liable for information originating with a third-party user of the service. Specifically, the law precludes courts from entertaining claims that would place a computer service provider in a publisher’s role.