

Information Requirements Clearinghouse

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[PDF Version](#)[Legal Requirements and Legal Considerations — The Basis for the Legal Records Retention Period](#)

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The records retention schedule specifies the user, legal and other records retention periods for each retention category. User retention periods are the periods users need records to perform their function. Legal retention periods are the periods the organization needs records to meet its legal obligations. Some organizations specify other retention periods such as research and historical to meet the unique needs of the organization.

The legal retention period actually consists of two periods — the legal requirements period and the legal considerations period. The legal requirements period represents the time an organization must keep records to avoid fines, penalties, or other adverse consequences.

The legal considerations period represents one or more legal issues that might affect the retention of records. These are not requirements! Typically, statutes of limitation, some limitations of assessment, and concerns related to litigation fall into this category. You may keep records during this period or you may destroy them. Your organization will decide based upon their needs and their risk analysis.

This article provides guidance on how to determine the legal retention period for your records retention schedule, based upon legal requirements and legal considerations.

Legal Research

Adequate legal research must be performed to create a legally acceptable records retention program. Each organization should initially determine the scope of their legal responsibility including jurisdiction (e.g., state, federal, and international), activities (e.g., industry, employment, and tax) and other legal requirements. Summarize this information in a Legal Research Index and make copies of the appropriate laws assembled for review by legal counsel.

Several laws may affect the same records. For example, the United States federal government and each state issue many laws affecting tax records. To simplify the analysis, summarize the various laws in legal groups.

Legal Groups

Legal groups may be defined simply as "a summary of legal requirements and legal considerations, in a simplified form, for use in a records retention schedule." Initially, sort the Legal Research Index by function or subject. This brings together the laws applicable to the same types of issues, regardless of jurisdiction or source. You then assign legal group codes.

Assign the same legal group code to all those laws that will be treated the same for records retention purposes. Sometimes a government agency issues a unique or detailed requirement for a particular industry. In that case, assign special legal group codes to represent those unique laws that cannot be grouped with others for records retention purposes. Expect some modifications in the legal groups as you develop the records retention program.

The Legal Group File contains a listing and description of each legal group. It should distinguish between legal requirements and legal considerations, and provide the total legal retention period to be applied in the records retention schedule. This analysis will help substantiate the validity of the total legal retention period applied in your records retention program.

Legal Requirements

The legal requirements section of the Legal Group File represents the retention period that an organization usually must follow. Laws specifying a legal requirement must clearly specify the period for retaining records. Typically, the law will state "records covered by this section must be kept for x years."

You are under no obligation, however, to follow a law unless it is stated clearly. Similarly, a government agency may not enforce a vague retention requirement. You must have clear notice before fines or penalties can be imposed upon you.

The minimum limitation of assessment for tax purposes also should be treated as a legal requirement. Most tax laws require you to keep records for the period the taxing agency requires them for the administration of any tax law. Under normal circumstances, the tax agency may assess your taxes during the stated minimum period. For example, the Internal Revenue Service must assess your taxes within three years after you file a tax return. [See US 226-1870-00] This minimum limitation of assessment period of three years should be considered as a legal requirement. You will be expected to maintain your tax records for at least that long.

Other limitation of assessment periods generally refer to special circumstances such as fraud or the understatement. These will be addressed in the section on legal considerations.

You do not follow the legal requirements for those states in which you do not do business nor for those agencies that do not regulate your activities. Some records managers mistakenly apply legal requirements issued by a regulatory agency that has no authority over their organization. These laws do not apply to you and should not appear in your Legal Research Index.

Use the Legal Research Index to determine the longest legal requirement that applies to your organization. Scan the index for entries that have the same Legal Group Code. Only consider the retention requirements characterized by a numerical retention value. The longest and shortest of these should be listed in your Legal Group File with the associated citations. This will enable legal counsel and other reviewers to see the scope of your legal requirement and determine that the total legal retention period is adequate.

The legal requirement selected should be converted into a records retention period that uses an abbreviation and format that you will use in the records retention schedule. For example, your longest legal requirement for tax purposes might specify that records must be kept for five years after filing a tax return (TAX+5). You may then propose a retention period of six years after the end of the calendar year (6). This six-year period would provide one year for the year the return is filed plus the five-year retention required by the law. By convention, all records should be maintained during the year in which they were created. Translating the legal requirement into a legal retention period will facilitate the implementation

and practical operation of the retention program.

An organization may elect a retention period for legal requirements that is less than the longest period stated by law in the following circumstances:

- *The law specifies a retention period that is only a few months longer than the selected one.* For example, the law requires you to keep records for five years after you file the tax return. This approach normally results in a safe legal requirement period of six years — one year for the year of filing and five years required by the law. You elect instead to specify a retention period of five years, recognizing that this period is a few months shorter than the legal requirements. Since most people file tax returns around April 15 — three and one half months after the end of the tax year — you determine that your risk of fines or penalties is small. Regardless, the taxing agencies have always audited your organization within five years and have never requested information after six years.
- *Although you conduct business in the state with the longest legal retention requirement, you only had minimal contact with that state.* You elect to ignore the requirements of the state with the longest retention period and select the next longest retention period. History has shown that the second longest retention period has been adequate to protect your organization.

The detailed Legal Group File should also indicate the legal citation or other reason for selecting the legal retention period. This will enable you to explain any deviations from the longest legal retention period.

Legal Considerations

Legal considerations include laws and other legal concerns that may impact the legal retention period. Use your discretion to determine whether records should be maintained during a legal consideration period or destroyed. As long as you destroy records in the regular course of business, under an approved records retention program, prior to litigation, government investigation or audit, you will not be subject to fines and penalties. On the other hand, if you destroy records too early, these records may not be available to help your organization defend itself in litigation and certain types of tax audits. Organizations have also found that records kept too long also may be harmful in similar situations.

A legal consideration will generally be one of the following:

- A statute of limitations or limitation of actions indicating the period during which a legal action may be initiated.
- A limitation of assessment for taxes that specifies an unlikely occurrence. For example, the Internal Revenue Service may assess your taxes up to six years after you file your tax return if you understate your income by 25% or more [See US 226-1890-00] It is unlikely that you will ever understate your income by that amount. Your risks are extremely small if you maintain tax records less than six years. Note: You should normally treat the minimum limitation of assessment as a legal requirement.
- Laws containing requirements to keep records without stating specific records retention periods. The retention period for these records are generally presumed to be three years or less.
- Concerns related to ongoing legal liability such as exposure of employees to hazardous substances or product liability. Your organization may be held liable for damages for an indefinite period into the future. You should adopt a legal strategy to determine how long to keep records when it is unclear if or when you will be held liable. Sometimes concerns related to litigation will result in very long legal consideration periods.

The laws that contain legal considerations generally are "statutes of limitation (SL)", "limitations of action (LA)", or "limitations of assessment (LA)", or merely requirements to keep records without retention periods (MAINT). The Legal Research Index should contain abbreviations of the type of requirement found in each law. Normally by scanning the laws under each legal group, you can determine the minimum and maximum legal consideration period.

The legal consideration period will generally be one of the following:

- the longest legal consideration period,
- the shortest legal consideration period,
- the average or mean legal consideration period,
- the legal consideration period that is longer than 80% of the other legal consideration periods, or
- the period your legal counsel feels is appropriate.

Again, these periods are not legal requirements and you are not obligated to keep records during these periods. You are therefore free to select any legal consideration period that meets the needs of your organization. Include citations for the minimum, maximum and selected periods. You may need to convert the abbreviated form of the considerations stated in the law to a records retention period that you can use in the records retention schedule.

The selection of the legal considerations period should be independent of the selection for the legal requirements period. This will enable you and your legal counsel to differentiate between the retention periods for legal considerations and legal requirements purposes.

Total Legal Retention

You can now compare the selected retention periods for legal requirements and legal considerations. The longest of those two retention periods will become the total legal retention period for the legal group. Next, enter the legal retention period in your records retention schedule.

Advantages Over Traditional Methods

While the procedures described above may seem cumbersome, they will result in an accurate determination of your legal retention period. Many organizations do not understand the difference between legal requirements and legal considerations. As a result, some organizations keep records for long periods of time because someone mistakenly believes that a legal consideration, such as a statute of limitation, states a retention requirement.

The methodology described above clearly differentiates between legal requirements and legal considerations. You may use your discretion when applying legal considerations. You must normally apply the longest legal requirement without discretion. Emphasize this difference during the review period.

This process also enables you to modify retention periods quickly and easily if circumstances change. For example, if an organization ceases to do business in a state with the longest legal requirement, you can quickly determine the second longest legal requirement from the Legal Research Index and change the total retention for the associated legal group.

You then apply the new legal retention period for the group to your retention schedule. Similarly, if attitudes change toward legal considerations, you can change the legal retention period to correspond to the new position.

Summary

The legal retention period for your records can be determined through legal research, and the development of a legal research index and a legal group file. These legal groups should reflect the minimum, maximum, and selected retention periods for both legal requirements and legal considerations. The total legal retention period will then be the longest between the selected legal requirements and selected legal considerations for each legal group.

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