

# Welfare Plan Record Retention Requirements

*Lockton Benefits*

*Compliance Services*

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## Welfare benefit plans: Select federal record retention requirements

Documents that must be retained	Retention period	Retention responsibility	Penalties	Notes
<p><b>ERISA requirement:</b></p> <p>All records which document the accuracy of information on the Form 5500, including:</p> <ul style="list-style-type: none"> <li>• Contracts</li> <li>• Agreements</li> <li>• Claim and appeal records</li> <li>• Plan documents</li> <li>• Summary plan descriptions</li> <li>• Notices of material modification or reduction in benefits</li> <li>• Summaries of benefits and coverage (SBCs), and copies of mid-year changes to information reflected in the SBCs</li> <li>• Forms 5500 and schedules</li> <li>• Enrollment materials</li> <li>• Requests for reimbursement</li> <li>• Lists of covered employees</li> <li>• Records of payroll deductions</li> <li>• Wellness program documents and records, including records of incentives/penalties and reasonable alternative standards</li> </ul>	<p><b>Six years</b> (from date of filing the Form 5500); best practice is to retain for at least <b>eight years</b>.</p> <p>If plan participants or beneficiaries were to sue the plan for benefits, such suits are generally subject to the statute of limitations under federal law (ERISA) or, where ERISA does not supply a statute of limitations, applicable state law. The state limitations period typically applied is the limitation for suits alleging a breach of a written contract.</p> <p>These state statutes of limitations typically range from five to 10 years. Thus, where the state statute of limitations is longer than six years, it may be prudent to keep these plan records for such longer period.</p> <p><b>Special rule for grandfathered plans:</b> Group health plans claiming grandfathered status under the ACA must keep plan documents describing the plan terms in effect as of March 23, 2010 though the current date, to demonstrate that the plan has not relinquished grandfathered status.</p>	<p>The plan administrator (typically, the employer) and every person who certifies any information on a 5500 (e.g., an insurer who is obligated to provide and certify information about coverage and premiums).</p>	<p>No civil penalties, but criminal penalties may apply.</p> <p>Any person who willfully violates the ERISA record retention rules is subject to a fine of not more than \$100,000 (\$500,000 if the employer is the plan administrator), imprisonment for not more than 10 years, or both.</p>	<p>The responsibility for record retention cannot be delegated away to a third-party administrator (TPA), even if the plan has an agreement with the TPA for record-keeping services.</p> <p>Be sure that service agreements and Business Associate agreements address whether the TPA will return documents to the plan or retain documents for a sufficient length of time to allow the plan administrator to comply with this record retention requirement.</p>

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<p><b>HIPAA Privacy and Security requirements:</b></p> <ul style="list-style-type: none"> <li>• HIPAA privacy/security policies and procedures</li> <li>• Business Associate contracts</li> <li>• Designations of privacy/security officials</li> <li>• Notices of privacy practices</li> <li>• Authorizations for use and disclosure of PHI</li> <li>• Records of privacy training</li> <li>• Records of complaints and how they were resolved</li> <li>• Records showing that all required notifications were made in the event of a privacy breach</li> <li>• Records pertaining to individuals' rights of access, amendment and accounting of disclosure</li> </ul>	<p><b>Six years.</b></p> <p>Period begins to run from the date the document was created or was last in effect, whichever is later.</p> <p>State privacy laws may compel a longer retention period. State statutes of limitation, if longer than six years, may suggest retaining records for such longer period.</p>	<p>Plan administrators and business associates.</p>	<p>Potentially up to \$100 per violation, up to a total per year of \$1.5 million. This maximum applies to each separate violation.</p>	<p>Documents that are subject to the HIPAA Privacy / Security rule's requirements should not be destroyed by a Business Associate before the end of the HIPAA record retention period unless the health plan has the same information in its own records or has arranged for a TPA to retain the records.</p>

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<p><b>Tax Code requirement:</b></p> <ul style="list-style-type: none"> <li>• Cafeteria plans</li> <li>• Healthcare plans</li> <li>• Health flexible spending account (FSAs) documents</li> <li>• Dependent care assistance program (DCAPs) documents</li> <li>• Pretax payroll deduction records</li> <li>• Employment records</li> <li>• Group health plan enrollment records</li> <li>• Group health plan waiver forms (recommended, if waiver forms are obtained)</li> <li>• Copies of ACA Forms 1094-C and 1095-C filed with the IRS and/or furnished to employees</li> <li>• Records reflecting the “minimum value” status of group health plan offerings intended to meet that status</li> <li>• Records substantiating ACA employer mandate affordability safe harbor applicability to coverage offers</li> <li>• Records reflecting the “dependent” or “non-dependent” status of certain beneficiaries, such as domestic partners</li> <li>• Other documents and records under which the plan sponsor provided tax-favored benefits, including (as applicable) results of nondiscrimination testing</li> </ul> <p>Documents retained should include all documents demonstrating the sponsor’s compliance with applicable Tax Code requirements.</p>	<p>Generally, <b>four years</b>, per the Tax Code. But we recommend employers retain these records for at least <b>six years</b>.</p> <p>Documentation used for ACA reporting purposes (i.e., employment records, plan enrollment records, waiver forms) should be held indefinitely as the IRS has indicated violations associated with inaccurate or delinquent filings are not subject to a statute of limitations.</p>	<p>The employer/plan sponsor.</p>	<p>Currently, the IRS does not have separate penalties for failing to retain records for tax-favored benefit plans.</p> <p>However, failure to retain the records may impede the employer’s or enrollees’ ability to demonstrate, on a tax audit, the nontaxability of certain benefits.</p>	<p>Common problems we find include:</p> <ul style="list-style-type: none"> <li>• The employer’s failure to maintain a written cafeteria plan, authorizing/justifying the pretax payroll deduction of premiums, and</li> <li>• The employer’s failure to inquire, of an employee with domestic partner coverage, regarding the dependency status of the domestic partner.</li> <li>• The employer’s need to respond to an IRS 226J or similar letter proposing the assessment of ACA employer mandate penalties.</li> </ul>

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<p><b>Public Health Service Act -</b>  <i>(Applicable ONLY for nonfederal governmental plans which are not otherwise subject to these rules through ERISA)</i></p> <p>A plan sponsor should retain documentation which demonstrates the plan complied or attempted to comply in good faith with applicable PHS Act provisions. In order to mitigate or avoid CMS imposing civil monetary penalties for noncompliance. Documents include:</p> <ul style="list-style-type: none"> <li>• Group policy</li> <li>• Certificate of insurance</li> <li>• Insurance application</li> <li>• Policy riders</li> <li>• Plan amendments</li> <li>• Endorsements</li> <li>• Employee communications pertaining to the benefits</li> <li>• Internal policies and procedures applicable to the plan</li> <li>• Any other documents which may form the basis to refute the complaint or allegation</li> </ul>	<p>The PHSA does not specify a statute of limitations for enforcement actions by HHS or lawsuits seeking benefits under a benefit plan. A common approach is to look to the most analogous state law limitations period such as breach of contract or applicable state insurance law if the plan is fully-insured. Also, the federal “fall back” statute of limitations for civil violations under 28 U.S.C. §2462 is five years.</p>	<p>Nonfederal governmental plans are subject to some ACA rules and may opt into compliance with other ACA rules as stated in the chart. See the <a href="#">laws applicable to nonfederal governmental plans</a>.</p> <p>Liability of plan violations falls to the plan sponsor. HHS has authority to review plan documents and request additional information from the plan as needed to determine whether there are any compliance issues.</p>	<p>The Secretary of HHS may impose civil monetary penalties of up to \$155/day for noncompliance with applicable rules.</p>	<p>Applicable to nonfederal governmental plans which are not otherwise subject to the parallel provisions through ERISA.</p>

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