ARMA METRO NYC ANNUAL SPRING CONFERENCE

RIM & IG for Today & Tomorrow

TUESDAY, MARCH 7, 2017
8:00 am - 5:00 pm with Reception immediately following

New York Executive Conference Center
1601 Broadway, New York, NY 10019
http://armanyc.org/2017_Spring_Conference

LEGAL RESEARCH FOR THE RECORDS RETENTION SCHEDULE: HOW, WHERE & WHAT-NOT?

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LEGAL RESEARCH
Why should you care?

- Confidently defend retention schedule requirements with legal references
- Understand the overall research process as the basis for creating and updating the schedule
- Know how changes in laws and regulations impact your retention schedule
- Assess and monitor retention schedules developed by external consultants
- Know when and why schedules should be updated
- Prepare for discussion of legal requirements with attorneys and other retention stakeholders
LEGAL RESEARCH
Why should you care?

• Teach you where and how to find legal requirements
• Help you read and recognize legal records retention citations
• Learn to document legal research on the retention schedule
• Clarify and distinguish between laws and regulations
• Learn to analyze resulting research for application to the schedule
• Execute defensible destruction based on legal research
RESEARCH LEGAL REQUIREMENTS

What is common law?

• Common law places great emphasis on case law or precedent. The basic premise behind common law is that similar cases should be decided based on a consistent set of principles.
  • U.S. and canada are both common law countries; therefore, legal resources and research methods are similar for both.
RESEARCH LEGAL REQUIREMENTS

Legal Research: Background

• Over 4,700 U.S. federal statutes and 3,500 U.S. federal regulations

• Most organizations subject to very few statutory or regulatory requirements

• Some statutes apply to businesses or government agencies in general
  • Most requirements apply to:
    • specific classes of records
    • certain types of businesses
    • specific types of products or services
RESEARCH LEGAL REQUIREMENTS

What are some preliminary research considerations?

• Scope of legal research required
  • Determine with legal counsel

• Statutes applicable to most organizations include:
  • Business incorporation
  • Labor and employment
  • Tax administration
RESEARCH LEGAL REQUIREMENTS

What are some additional research considerations?

• Products or services that may be subject to recordkeeping requirements
• Geographic locations of business activities
• Federal, state, or regulatory agencies that regulate the activities of the organization
• Litigation history of the organization and related concerns
RESEARCH LEGAL REQUIREMENTS

What are the 5 outcomes of legal requirements research?

1. No recordkeeping requirement is found
2. Requirement is found specifying a retention period
3. Requirement is found containing a requirement to “maintain” the record with no specific time period
4. Statute of limitation is found
5. Case law is identified
What if there are two or more legal requirements?

- When two or more requirements exist for the same record, retain the record for the period specified in the longest requirement.
How should legal requirements be interpreted?

- Exercise your best judgment, so that a reasonable person would conclude you made a reasonable interpretation.
RESEARCH LEGAL REQUIREMENTS

What are the 3 kinds of law in common law countries?

• **Statutory or legislative law**, which includes statutes, public laws, and acts

• **Administrative law**, which includes regulations and rulings

• **Case law or judicial law**, which includes court cases, decisions, and opinions
RESEARCH LEGAL REQUIREMENTS

Where are records retention legal requirements found?

• Federal laws
• Federal regulations
  ▪ Most requirements are found in regulations
  ▪ Generally, federal requirements are much easier to find than state requirements
• State laws
• State regulations
• Municipal and county ordinances and codes
• Case law
RESEARCH LEGAL REQUIREMENTS

Before you start researching, know what you are looking for!

• Are you looking for a statute or a regulation?

• Is it federal or state? If a state, which one?

• If a statute, does it have a popular name?
  • Sarbanes-Oxley Act of 2002 (SOX)
  • Health Insurance and Portability Act of 1996 (HIPAA)
  • Lilly Ledbetter Fair Pay Act
RESEARCH LEGAL REQUIREMENTS

Statutes: In what publications are U.S. federal laws found?

• Research sources
  • United States Code (USC)
  • United States Code Annotated (USCA)
  • United States Code Service, Lawyers Edition
    • The USC is the codification by subject matter (topical) of the general and permanent laws of the U.S. divided by broad subjects into 50 titles.
RESEARCH LEGAL REQUIREMENTS

Statutes: What are some common USC titles?

• Title 5 Government Organization and Employees
• Title 17 Copyrights
• Title 21 Food and Drugs
• Title 26 Internal Revenue Code
• Title 29 Labor
• Title 41 Public Contracts
• Title 49 Transportation

See Section 2.1.1 for a complete list
RESEARCH LEGAL REQUIREMENTS

Statutes: What are U.S. popular name tables and where are they found?

• Found in the USC, it lists federal acts, organized alphabetically by their short titles or common names, with citations
  • Occupational Safety & Health Act of 1970 (OSHA)
  • Sarbanes-Oxley Act of 2002 (SOX)
  • U.S. Patriot Act

• Search the Popular Name table located at: http://uscode.house.gov/search/criteria.shtml

See Section 2.1.3 for more examples of acts
RESEARCH LEGAL REQUIREMENTS

Regulations: In what publications are U.S. federal regulations found?

• Federal Register

• Code of Federal Regulations (CFR)
  • Codification of the general and permanent rules published in the Federal Register by U.S. departments and agencies of the federal government
  • Divided into 50 titles that represent broad areas subject to federal regulation
RESEARCH LEGAL REQUIREMENTS

Regulations: Where is a list of U.S. agencies that regulate activities?

• USA.gov lists U.S. government departments and agencies at:
  • www.usa.gov/directory/federal/index.shtml
  • Agency websites provide:
    • Another access point
    • Clarifications of intent of regulations
    • Sometimes they list relevant acts and statutes

See Section 2.1.3 for examples of agencies
RESEARCH LEGAL REQUIREMENTS

Regulations: What are some common CFR titles (U.S.)?

• Title 16 - Commercial Practices
• Title 17 - Commodity and Securities Exchanges
• Title 20 - Employees' Benefits
• Title 21 - Food and Drugs
• Title 26 - Internal Revenue
• Title 29 – Labor
• Title 37 - Patents, Trademarks, and Copyrights

See Section 2.1.2 for a complete list
Where can I find U.S. federal laws and regulations?

- Your organization’s law library
- Local law library
- Online
  - http://www.law.cornell.edu/cfr/text
  - http://www.washlaw.edu
  - http://gpoaccess.gov/uscode/index
RESEARCH LEGAL REQUIREMENTS

What are some research access points?

• Subject area
  • Subject index for specific title (e.g., labor, internal revenue, food and drug, etc.)

• Keywords
  • Records; retention; recordkeeping; maintain; keep; limitation; limitations of action

• Popular name
  • Name of the act or statute (Sarbanes-Oxley)

• Citation
  • Search by title number, then correct section
RESEARCH LEGAL REQUIREMENTS

How are state legal requirements found?

• Apply the same principles for researching federal statutes to researching state or provincial statutes, but use state or provincial resources to find them.
RESEARCH LEGAL REQUIREMENTS

Where can I find U.S. state laws?

• Your Organization’s law library
• Local law library
• Online
  • http://law.findlaw.com/state-laws/state-codes.html
  • http://law.justia.com
  • http://nolo.com/legal-research/state-law.html
RESEARCH LEGAL REQUIREMENTS
Where are U.S. state regulations found?

• If state’s regulations are published in an “Administrative Code,” use the subject index
• If there is no state administrative code, determine which agency issued the regulations
• Check the agency’s Website for the regulations
• If the regulations still cannot be located, call the agency directly
RESEARCH LEGAL REQUIREMENTS

How do I find municipal/county ordinances?

• Ordinances are usually divided into codes such as “building code,” “planning code,” etc.
  • Local law library
  • Check city and county agency websites
  • Online resources
    • www.statelocalgov.net
    • www.municode.com
Research rules in Codes of Professional Responsibility issued by professional associations or regulatory bodies in each state/province.

- For example, law firm client file retention is determined by ethical and disciplinary rules governing attorney behavior set forth by Bar Associations in model rules for each state/province including:
  - Confidentiality of information
  - Safekeeping of property (retention period)
  - Declining or terminating representation
RESEARCH LEGAL REQUIREMENTS

How are international requirements identified?

• Countries have different legal systems and cultural expectations
  • Consult a local subject matter expert (SME)
    • Your organization’s employees in that country
    • Local attorney knowledgeable in records retention
  • Consult a qualified specialist
    • RIM consultant specializing in that country
  • Consult with your home country’s embassy located in the country you are researching for more guidance
RESEARCH LEGAL REQUIREMENTS

Why must accountability requirements be researched?

• Records may be needed for fiscal or performance audits
  • “An audit is an independent review and examination of records and activities to test for compliance with established policies and standards.”

RESEARCH LEGAL REQUIREMENTS

What are some questions to ask about accountability requirements?

• Is there an “audit cycle”?  
• Is there a limitation of assessment period?  
• How long is reasonable?
RESEARCH LEGAL REQUIREMENTS

How do I identify accountability requirements?

• Legal research
  • Use keywords such as:
    • limitation
    • limitation of action
    • limitation of assessment (fiscal)

• Ask your auditor
• Consult the “auditee”
RESEARCH LEGAL REQUIREMENTS

Words of Warning

• *Always, always* review the relevant requirements yourself. Never take anyone’s word about records retention requirements on faith!!
RESEARCH LEGAL REQUIREMENTS

What legal citation style should be used in the U.S.?

• *The Bluebook: A Uniform System of Citation*
  • Online references to Bluebook citation style
    • http://www.law.cornell.edu/citation/topics.htm
    • http://law.suffolk.edu/library/research/bluebook
RESEARCH LEGAL REQUIREMENTS

Citing Legal Research: U.S.

5 CFR 2604.201

Title

Part or Section

Code of Federal Regulations

64 FR 28089

Volume

Page

Federal Register
RESEARCH LEGAL REQUIREMENTS

Citing Legal Research: U.S. State Statute Examples

• Citation styles vary from state to state
  • Typical citations include title (or volume number), and sections such as:
    • Mich. Comp. Laws Ann. 421.27 (c)(2)(ii)
Where can I find relevant case law?

• Annotated compilation of statutes to verify your information because courts modify and interpret statutes
  • Editors find cases relevant to the law and clarify and interpret them for researchers
    • Value added service available from West Law and Lexis at a cost
    • RIM treatises – subject specific
RESEARCH LEGAL REQUIREMENTS
What is a trigger event?

• “A trigger event is something that must occur before a retention period begins to run.”
  • Mandated by law or arise from business needs
  • More than one trigger may apply
  • Examples include expiration of contract; termination of employee; sale of asset; termination of a matter; termination of contract; or life of facility.
RESEARCH LEGAL REQUIREMENTS

Why is a trigger necessary?

• Records related to a given asset might have a retention period of 6 years, for example
  ▪ However, the given asset might be in effect for longer than 6 years
  ▪ Disposing of records after 6 years might mean the records are discarded while the asset is still in effect
  ▪ Therefore, a retention period that takes into account the life of the asset plus a reasonable period afterward should be chosen
RESEARCH LEGAL REQUIREMENTS

What if a trigger event is not stated?

“...common is finding requirements that state a period of years without a trigger event, even though the requirement as literally stated makes no sense.”

• Apply common sense and ask:
  – Does the record involve a one-time event, a series of events, or an ongoing relationship?
  – If ongoing, will users know what the active period or termination date will be?
  – Can the periods or dates be reduced to a finite period or are they variable and cannot be anticipated?
RESEARCH LEGAL REQUIREMENTS

After legal research is complete, how is it organized?

• Retain copies of the **full text** for all legal requirements
• Note the applicable statutory or regulatory citation(s) for each records series
• Compile an index documenting each records series with the corresponding citations and details
RESEARCH LEGAL REQUIREMENTS

What information is needed for RRS development?

- Records series name
- Citation
- Jurisdiction
- Agency
- Retention requirement(s)
- Trigger events
What does the analysis look like?

<table>
<thead>
<tr>
<th>Records Series</th>
<th>Citation</th>
<th>Jurisdiction</th>
<th>Agency</th>
<th>Legal Retention</th>
<th>Trigger</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>HUMAN RESOURCES</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employee Medical Records</td>
<td>29 CFR 1910.1020(d)(1)(i)</td>
<td>US Federal</td>
<td>Department of Labor</td>
<td>30 years</td>
<td>Termination of employment</td>
</tr>
<tr>
<td></td>
<td>45 CFR 164.530(j)(2)</td>
<td>US Federal</td>
<td>Department of Health and Human Services</td>
<td>6 years</td>
<td>From date of creation; or date last in effect, whichever is later</td>
</tr>
<tr>
<td>Employee Recruitment &amp; Selection</td>
<td>29 CFR 1627.3</td>
<td>US Federal</td>
<td>Department Of Labor</td>
<td>3 Years</td>
<td>While active</td>
</tr>
</tbody>
</table>
RESEARCH LEGAL REQUIREMENTS

Legal Research in a Nutshell

1. Select records series
2. Identify subject area/context of records series
3. Determine research resource(s) (federal statute; federal regulations, etc.), then title within resource (labor, internal revenue service, patents, etc.)
4. Use subject index; RIM keywords; popular name; or citations to locate legal requirements
5. Note the citation & retain a copy of the research
6. Repeat for next research resource for the records series until all research resources are exhausted
RESEARCH LEGAL REQUIREMENTS

Things to Remember

• Search for legal, regulatory and accountability requirements

• Most requirements are found in regulations

• Some requirements are vague, but you must document them (e.g., “maintain records”)

• Some records series have no requirements, but you must document that none were found

• Search for federal, state/provincial, and local requirements in the appropriate resources