

community BANKER

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Welcome to the July/August issue of the COMMUNITY BANKERS' ADVISOR.

The ADVISOR is prepared by attorneys at Olson & Burns P.C. to provide information pertaining to legal developments affecting the field of banking. In order to accomplish this objective, we welcome any comments our readers have regarding the content and format of this publication. Please address your comments to:

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The attorneys at Olson & Burns represent a wide range of clients in the financial and commercial areas. Our attorneys represent more than 30 banks throughout North Dakota.

YOU ARE ASKING

Q: What is the law for the bank to pay checks after a customer's death?

A: The applicable law is N.D.C.C. § 41-04-36 (U.C.C. § 4-405), death or incompetence of customer. Generally, a bank can continue to pay checks until it knows of the customer's death and has a reasonable opportunity to act on the knowledge. Moreover, even with knowledge of a customer's death, a bank can pay checks drawn on or before the date of death for ten days after the date of death, unless someone claiming an interest in the account orders the bank to stop payment.

Q: A customer wants to open an account as "Jack Doe, ATF Jack Doe Revocable Trust. Is this legal?"

A: We assume that "ATF" is the abbreviation for "As Trustee For." It's not "illegal", but a bank should not open accounts using initials or terms that 1) have no specified meaning to it under its policies or usual and customary practices or 2) are not explicitly recognized by state law. Your bank, your policy.

Q: We have CD account titled in the name of John Doe Revocable Trust with John and/or Jane Doe as trustees. John recently died and Jane wants to re-title the account in her name only, not the trust, and name a beneficiary. Can we do this without cashing in the CD and issuing a check payable to her as trustee?



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A: You must review the terms of the John Doe Revocable Trust to determine the intent of the settlor/grantor for the future of the trust and all of its assets upon John's death. If you have questions about *whether* you can do what Jane asks or *how* you can do what Jane asks, don't do anything until your lawyer reviews the trust documents and advises you on what's appropriate.

Q: We are considering combining bank statements when we send them out. In a couple of cases, Husband and Wife hold a deposit account together, but only one spouse has a small savings account. If we combine these statements for mailing, are we violating the customer disclosure rules?

A: Yes. If Wife is not an owner of the account, it would seem that disclosing Husband's banking information this way is a violation of N.D.C.C. Ch.6-08.1, Disclosure of Customer Information (even though you know both statements will be opened by Wife anyway). Generally, unless there is identical ownership to the different accounts, do not combine statements without written permission from an account holder. See the discussion on disclosure below, and determine if the hassle is worth the savings in postage.

Q: A certificate of deposit is set up as Mom and Dad, POD Daughter. If Daughter calls and asks questions about the CD, such as the term, the value, any other POD, etc., what can we tell her if she is the POD beneficiary only?

A: Nothing - she isn't an owner on the account. Don't even admit the existence of the CD to Daughter. Giving her information is a violation of N.D.C.C. Ch.6-08.1, Disclosure of Customer Information. If Mom and Dad want her to know the details, they can tell her themselves or they need to let the bank know that they consent to the disclosure. Under N.D.C.C. § 6-08.1-03(1), Duty of confidentiality, a bank may disclose customer information "Pursuant to consent granted by the customer in accordance with this chapter." Keep in mind that "consent" isn't just a phone call saying "It's ok to answer her questions." It's a

lot more involved than that - when it comes to a customer giving consent for disclosure of customer information, the law provides in relevant part that

2. A valid consent must be in writing and signed by the customer. In consenting to disclosure of customer information, a customer may specify any of the following:

- a. The time during which such consent will operate.
- b. The customer information to be disclosed.
- c. The persons, governmental agencies, or law enforcement agencies to which disclosure may be made.

N.D.C.C. § 6-08.1-0(2). As you can see, if Mom and Dad want her to know anything, it's easier for them to tell Daughter rather than going through the formalities for the bank's disclosure. Until the bank receives written consent, mum's the word.

CLARIFICATION

In our Legislative update of HB 1136, the effective date when SS# or TIN#s will be required on a UCC is **August 1, 2015**, not July 1, 2013. We mistakenly marked this section of our working copy of the Bill as effective 2013 when the effective date is actually 2015. We regret the error. The Secretary of State will *not* accept the SS# on a UCC until all of the software has been updated and the electronic filing starts.

The summary should read as follows:

HB 1136: Social Security numbers: (1) **Effective August 1, 2015**, social security numbers or tax ID numbers are one again required on financing statements. (N.D.C.C. § 41-09-87(2)(h)) (HB 1136, section 25); (2) Mortgages may not contain social security numbers. (N.D.C.C. § 41-09-73(3)(c)(3)) (HB 1136, section 23) Note that mortgages that are also fixture filings will still have to be filed in the office of the county recorder, and signature and notarization are still required; (3) The social security number or taxpayer ID number will not be disclosed to the searcher, so the searcher must have and input both the debtor's name and the debtor's SSN or TIN to filter the results. (N.D.C.C. § 41-09-73(6) (HB 1136, section 23); (4) Effective August 1, 2015, lien

statements for statutory liens such as agricultural supplier's lien, repairman's lien, etc. may now contain the debtor's social security number, or TIN number, as the case may be. (See generally Title 35, Liens) After that date, Miscellaneous Statutory Lien filings and Amendments (MSL-1, MSL-2) will be searchable by SSN/TIN.

Recorded Documents Font Size

We are aware that several (and possibly many?) county recorders are requiring a certain font size for documents presented for recording and that non-complying documents will not be recorded. The Burleigh County Recorder recently announced that that office will no longer accept for recording documents (including attachments) with a font size of 8 or smaller. The McKenzie County Recorder has also recently announced that that office will no longer accept anything smaller than a "10 pitch Times New Roman font." We know from its website that Bottineau county requires at *least* a 12-point font. Beyond that, we have not checked in with every county and cannot report all requirements.

Under North Dakota law, county recorders have the authority to make decisions about required font size. N.D.C.C. § 11-18-05, which provides the guidelines for instruments submitted for recording, sets out *very* specific requirements for page size and margins, but does not make any mention of the font size. The following subsection makes *clear* that font-size requirements are discretionary to the recorder:

The printed, written, or typed words must be considered legible *by the recorder* before the page will be accepted for recording.

N.D.C.C. § 11-18-05(1)(a)(2) (*emphasis added*). There are fifty-three counties in this state, meaning that there is the potential for fifty-three separate font-size requirements for instruments to be recorded. We suggest that going forward, banks may want to (1) be proactive and make 12-

point font the font for all documents to be recorded, or, (2) prior to drafting the loan documents that will be recorded (mortgages, assignments, etc. and their attachments), call the recorder to find out if there is a font requirement for recording in that particular county.

Your Bulging File Cabinets How Long to Keep Employee Records

"Document management" is knowing not only what to keep, but what to get rid of and when to get rid of it. Different kinds of records are governed by different laws; federal laws that govern employee-related record-keeping requirements (in some cases applicable based on the number of employees) may include the 1) Fair Labor Standards Act, 2) Civil Rights Act; 3) Pregnancy Discrimination Act; 4) Family and Medical Leave Act; 5) Federal Insurance Contribution Act; 6) Age Discrimination in Employment Act; 7) Employee Retirement Income Security Act; 8) Americans with Disabilities Act; 9) Occupational Safety and Health Act; 10) Immigration and Nationality Act; and the 11) Equal Pay Act. Then, of course, there are also state and federal income tax laws, state and federal unemployment compensation laws, and worker's compensation laws. Without attempting to address every record - an impossibility - what follows is some guidance to federal document retention for different papers you may have filed away:

1 Year Retention:

*Employment applications - one year from date of submission (29 U.S.C. § 626; 29 C.F.R. § 1627.3 (Age Discrimination in Employment Act)); (42 U.S.C. § 2000e-8(c); 29 C.F.R. §1602.14 (Title VII of the Civil Rights Act))

*Resumes - one year after submission (29 U.S.C. § 626; 29 C.F.R. § 1627.3 (Age Discrimination in Employment Act)); (42 U.S.C. § 2000e-8(c); 29 C.F.R. §1602.14 (Title VII of the Civil Rights Act))

*References - one year after record is made

*Job advertisements - one year after record is made (29 U.S.C. § 626; 29 C.F.R. § 1627.3 (Age Discrimination in Employment Act))

*I-9 immigration forms -1 year from termination

or 3 years from date of hire, whichever is later (8 U.S.C. § 1324a(b)(3) (Immigration and Nationality Act))

*Layoffs, reductions in force, recall records - one year from time of request (29 U.S.C. § 626; 29 C.F.R. § 1627.3 (Age Discrimination in Employment Act)); (42 U.S.C. § 2000e-8(c); 29 C.F.R. § 1602.14 (Title VII of the Civil Rights Act))

*Accommodation requests - one year after record is made (29 C.F.R. § 1602.14 (Americans With Disabilities Act))

*Promotion records - one year from date of action (29 U.S.C. § 626; 29 C.F.R. § 1627.3 (Age Discrimination in Employment Act)); (42 U.S.C. § 2000e-8(c); 29 C.F.R. § 1602.14 (Title VII of the Civil Rights Act))

*Demotion records - one year from date of action (29 U.S.C. § 626; 29 C.F.R. § 1627.3 (Age Discrimination in Employment Act)); (42 U.S.C. § 2000e-8(c); 29 C.F.R. § 1602.14 (Title VII of the Civil Rights Act))

*Transfer records - one year from date of action (29 U.S.C. § 626; 29 C.F.R. § 1627.3 (Age Discrimination in Employment Act)); (42 U.S.C. § 2000e-8(c); 29 C.F.R. § 1602.14 (Title VII of the Civil Rights Act))

*Pre-employment Tests (aptitude, personality, physical testing, etc.) - one year from date of test (29 U.S.C. § 626; 29 C.F.R. § 1627.3 (Age Discrimination in Employment Act))

*Termination Records - one year after termination (29 U.S.C. § 626; 29 C.F.R. § 1627.3 (Age Discrimination in Employment Act)); (42 U.S.C. § 2000e-8(c); 29 C.F.R. § 1602.14 (Title VII of the Civil Rights Act)); (29 C.F.R. § 1602.14 (Americans With Disabilities Act))

2 Year Retention:

*Job evaluations - two years after record is made

*Time cards or time sheets - two years after record is made (29 U.S.C. § 211(c); 29 C.F.R. § 516.6 & § 1620.32 (Fair Labor Standards Act))

*Records explaining merit or seniority systems - two years after record is made

3 Year Retention:

*Dates that Family and Medical Leave Act leave is taken - three years from end of leave (29 U.S.C. § 2616; 29 C.F.R. § 825.500 (Family and Medical Leave Act))

*Basic Payroll Information (name, address, occupation, hours worked on a daily and weekly basis, rate or rates of pay, total wages earned, deductions, net pay for the pay period, etc.) - three years (29 U.S.C. § 626; 29 C.F.R. § 1627.3 (Age Discrimination in Employment Act)); (29 U.S.C. § 2616; 29 C.F.R. § 825.500 (Family and Medical Leave Act))

*I-9 immigration forms - 1 year from termination or 3 years from date of hire, whichever is later (8 U.S.C. § 1324a(b)(3) (Immigration and Nationality Act))

4 Year Retention:

*Basic Employee information (name, address, phone number, position, date of hire, date of termination, SSN, etc.) - four years after record is made

5 Year Retention:

*OSHA Forms 300, 300A, 301 - five years following the end of the calendar year the records cover (29 U.S.C. § 657; 29 C.F.R. § 1904.33 (Occupational Safety and Health Act))

Indefinite Retention:

*Records pertaining to discrimination charges - until final disposition of charges or the action (29 C.F.R. § 1602.14 (Americans With Disabilities Act)) (42 U.S.C. § 2000e-8(c); 29 C.F.R. § 1602.14 (Title VII of the Civil Rights Act)); (29 U.S.C. § 626; 29 C.F.R. § 1627.3 (Age Discrimination in Employment Act))

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