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Performance Management

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1

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Overview of Training



- Review the risks of poor employee management practices
- Recognize common mistakes (from the employer's perspective)
- Identify goals of effective performance management practices
- Provide common-sense, practical guidelines which will help Human Resources, Supervisors and Managers with their personnel management responsibilities



2

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Implications of Poor Performance Management

Risks of Poor or Inconsistent Employee Management



- **Lawsuits**
 - **Against the Company**
 - **Against particular HR person, manager, supervisor or director**
- **Problems with employee complaints**
 - **Lost Productivity**
 - **Lower morale**
 - **Increased costs – money spent on attorneys fees, for example.**
- **Even claims that have no merit must be defended once in court.**

Examples Of Federal And State Employment Laws:

- Title VII of the Civil Rights Act
- Americans with Disabilities Act
- Age Discrimination in Employment Act
- Wage and hour laws (FLSA)
- Defamation (Libel & Slander)
- Negligent or intentional infliction of emotional distress
- Breach of oral or written, express or implied, contract or Promissory estoppel
- Violation of company policies, personnel manuals or employee handbooks
- Wrongful discharge
- **State Antidiscrimination laws**
- Older Workers Benefit Protection Act
- Family and Medical Leave Act
- “Whistleblower” claims
- Retaliation
- Negligent hiring or retention
- Misrepresentation or Fraud
- Violation of public policy
- Tortious interference with contract
- Occupational Safety and Health Act (OSHA)
- Workers’ Compensation Act



5

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Top 10 Employer Mistakes (from the employer’s perspective)

1. **Failing to coach/warn and document performance and behavior issues prior to termination.**
2. **Ignoring a problem or waiting too long to discipline or terminate.**
3. **Ignoring or reacting emotionally to an employee complaint or, worse yet, retaliating against the complainant.**
4. **Failing to consider the situation from the employee’s perspective and the perspective of the outside world (i.e., ignoring the optics of the termination).**



6

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Top 10 Employer Mistakes (from the employer's perspective)

5. **Failing to train supervisors regarding basic employment laws, employer policies, and personnel practices.**
6. **Not investigating thoroughly before disciplining or terminating, including failing to ask the employee for his/her side of the story.**
7. **Treating employees, or applying workplace policies or practices, in an inconsistent manner.**

Top 10 Employer Mistakes (from the employer's perspective)

8. **Ignoring or overlooking bad timing (e.g., disciplining or terminating before/after/during a leave of absence, an employee complaint, or employee protected conduct).**
9. **Terminating on the spot; not having the potential termination reviewed by a central authority or legal counsel.**
10. **Failing to consider the strategic use of separation/release agreements.**

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Tips for Effective Performance Management

Goals of Implementing Effective Performance Management



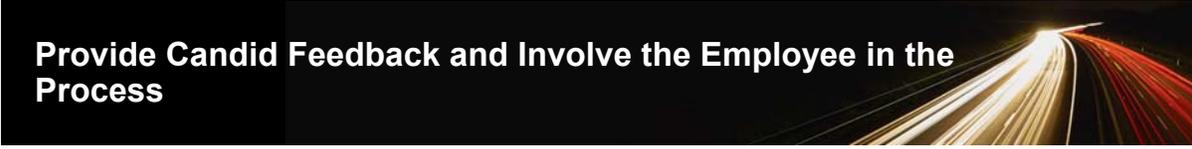
- **Set employees up for success.**
- **Avoid creating problems.**
 - **Keep morale up; avoid loss of productivity.**
 - **Minimize/eliminate administrative time/expenses.**
 - **Minimize/eliminate legal fees/expenses.**
- **Control damage and maintain trust.**
 - **Limit claims, despite good faith and/or technical errors.**
 - **Enhance odds of quick, amicable resolutions.**
- **Successfully defend claims if it becomes necessary.**

Address Performance Issues Early

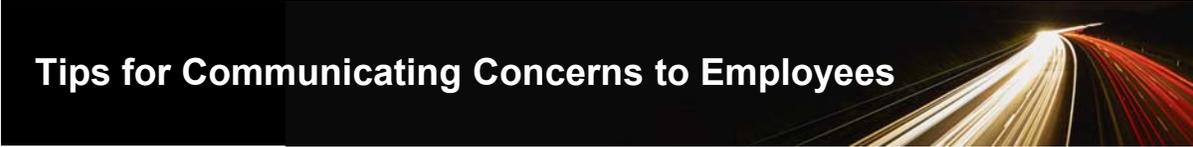


- **Address performance issues as they arise**
 - Do not wait for formal or scheduled review processes
 - Issues that arise between review cycles should be addressed promptly
 - Do not wait until discharge is the preferred or only option left
 - Address the problem at issue; do not use disciplinary actions to cover an employee's entire employment
- **Substandard performance should be reflected in performance evaluations**
- **Do not transfer or demote a “problem” employee at the first sign of a performance issue**

Provide Candid Feedback and Involve the Employee in the Process

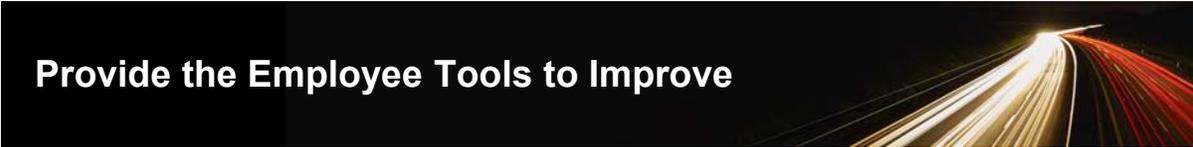


- **Importance of Involving the Employee**
 - Employee Morale
 - Jury Studies
- **Communicate Performance Concerns with the Employee as they Arise**
- **Follow up with the Employee as Needed During the Process**
 - If performance improves, recognize the accomplishment, **BUT** be clear that you expect the level of performance to continue



Tips for Communicating Concerns to Employees

- **Generally supervisors or managers should handle the communications**
- **In-person conversations are usually preferable, but should be accompanied by appropriate documentation**
- **Be direct and honest, but not unkind**
- **Consider: Is this a long-term employee who has never received accurate feedback before?**
 - **If so, be prepared to explain why you are addressing the issue now and allow sufficient time and tools for improvement**



Provide the Employee Tools to Improve

- **Types of Tools**
 - **Additional Internal or External Training or Development Opportunities**
 - **1-on-1 or Group Coaching / Mentoring**
 - **Performance Improvement Plans (“PIPs”)**
- **Provide Clear Deadlines or Targets, if Applicable**
 - **BUT avoid language that limits the Company’s ability to act if it becomes necessary to do so**
 - **AND include a disclaimer that deadlines/targets do NOT create an employment contract or change at-will relationship**

Follow Applicable Policies and Procedures

- Review Company policies and procedures regarding discipline and performance issues
- Consider whether the performance issue triggers the need for an investigation and/or falls within certain policies prohibiting harassment, discrimination, and the like
- Supervisors and managers should involve HR and ask questions about policies, procedures, and past practices
- Review employee's history to determine whether same conduct has gone unaddressed by prior managers

Be Consistent

- Be consistent in your assessment of what constitutes a performance issue and the gravity of the issue
- Be consistent in the tools you offer employees to improve
- Be consistent in your documentation
- Be consistent in your discipline (the same punishment should fit the same crime)
- Supervisors and managers should involve HR to ensure consistency across prior practice
- Always check and adhere to Company policies, procedures, and any other applicable documentation

Special Considerations

- Employees Who Have an Offer Letter or an Employment Agreement
- Employees Who Have Taken Leave or are Taking Leave
- Employees Who Have Complained
- International Employees
- Reductions in Force



Hypothetical #1

Arlo never comes to work on time. When he does get to work, he is your best worker in terms of the speed and accuracy of his work.

Carol is always on time, but she takes much longer to complete her daily tasks, sometimes leaving them until tomorrow.

You decide to put Carol on a PIP.

You do not mention Arlo's late arrival in his annual review.

Did you do the right thing for Carol?

What about for Arlo?

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Document the Problem and the Process

Goals of Documentation



- To provide the employee an accurate and comprehensive description of the performance issue so he/she is aware of Company expectations and the need for improvement
- To ensure the Company is delivering a message that is clear and carefully crafted
- To serve as evidence of the performance issue, the impact of the issue on the Company, the items discussed with the employee, and the opportunities the Company provided the employee to improve
- May decrease the risk of litigation



Timing of Documentation

- **Situations will vary, but some items should generally be documented**
- **Develop consistent practices regarding when and how you document performance issues and follow those practices**
- **Document oral communications as soon as possible**
- **Follow all applicable Company policies**



Types of Documentation

- **Types of Documentation May Include:**
 - **Performance Evaluations**
 - **Written Warnings**
 - **Memoranda**
 - **Supervisory Notes (Handwritten, Electronic, etc.)**
 - **Email Correspondence**
 - **Calendar Entries**
 - **Others**
- **Some documents will be shared with the employee, others may not**
 - **Consider where documents will be kept**

Manner of Documentation

- **Keep your audience in mind**
 - The audience is **NOT** just the employee and/or HR
 - Include sufficient detail so a neutral third-party (e.g., human-rights agency, judge, or jury) understands not only the performance issue, but also the context
- **Use respectful and objective language**
- **Avoid excessive use of legal jargon**
- **Document observations, facts, and/or metrics behind the performance critique instead of only the conclusion**
- **Consider whether you wish to have the employee acknowledge receiving the document**

Content of Documentation

- **Do Not Include:**
 - Opinions about the employee or opinion-based descriptors (lazy, thoughtless)
 - Stale or outdated feedback
- **Generally Include:**
 - Current issues (**BUT** may relate back to ongoing conduct)
 - Descriptions
 - Stick to the facts
 - Sue punched in at 7:05 for her 7:00 shift vs. Sue does not care about work
 - Manuel used a loud voice and profanity when talking with co-worker vs. Manuel is a bully
 - Relevant policies
 - Explanations
 - Consequences



Documenting Consequences

- **Keep language regarding the consequences of further infractions clear, but flexible**
 - Further performance issues . . . May (or will) result in disciplinary action, up to and including termination.
 - NOT: If you fail to . . . again, you “will be terminated” or you “will be suspended.”
- **Do not limit the future consequences language to just the type of infraction at issue**
 - Further performance issues, including, but not limited to, failure on your part to properly document “X,” . . .
 - NOT: If you fail to document “X” again, you may be subject to disciplinary action, up to and including termination.



Documenting Confidential Information

- **Do Not Include:**
 - Medical information
 - Health information
- **IF you must collect confidential information**
 - Keep it separate from all other information
 - Keep it protected:
 - use a password on a computer for digital files;
 - keep hard copies locked and secure

Think Before You Send

- Adhere to these guidelines regardless of whether the specific document is going to the employee and regardless of the document type
 - Beware of emails, texts, ims, and other electronic messages that seem “informal”
 - Beware of notes
- “When I sent the instant message, I didn’t think it was going to be Exhibit #1 at my deposition”



Hypothetical #2

Maria has been struggling to meet performance targets. After several coaching sessions resulting in little improvement, Maria’s manager decides to place her on a performance improvement plan. The plan states Maria’s progress will be measured 30, 60, and 90 days from the start of the plan. Maria’s performance stays about the same, but Maria’s manager does not meet with her again regarding the PIP.

Six months later at her annual evaluation, Maria receives a negative evaluation and is told she will not receive a bonus or a merit increase this year.

How should Maria’s manager have handled this situation?

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Tips for Addressing Misconduct and Performance Issues

Investigate and Make Thoughtful Decisions



Investigation



- **Act, Don't React: Take a Step Back and Evaluate the Issues**
- **Assess the Investigation into Employee Misconduct**
 - Design an investigation in which the employer can explain all the steps it did take (and all the steps it did not take)
 - Where possible, the investigation should involve a neutral party to review the investigation, the findings, and follow-up action

Put the Misconduct into Perspective

- Use a “Totality of the Circumstances” Approach to Evaluate the Situation

- Evaluate the overall picture conveyed by the employee’s record
- Difficult employees may have a track record of positive reviews despite their interpersonal issues because no supervisor wants to address them
- Consider steps short of discharge in the first instance
- In the workplace, surprises are not good
- Consider a transfer or a demotion

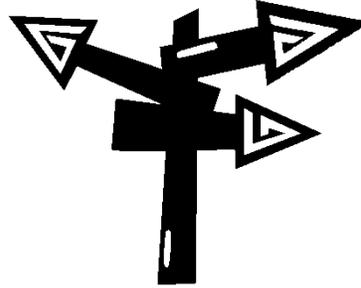


Determine the Scope of the Issue

- Can it be corrected?
- What is the employee’s history with the Company?
- What is the employee’s track record in the position?
- Has the issue been addressed with the employee?

Consider Alternatives to Discharge

- **Would a performance improvement plan (PIP) be appropriate?**
- **Would remedial training be appropriate?**
- **Would a lateral move or demotion be appropriate?**
 - **But don't transfer your problems!**



Ensure Compliance with Policies

- **Review employee handbook or applicable policies**
- **Review supervisor's manual**
- **Review Company policies regarding personnel practices**
- **Review all correspondence between employee and company**
- **Review employee's personnel file**

Check for Statistical Imbalance

- What is the historical turnover rate within the employee's unit?
- Do turnover rates vary based on protected class or whistleblower status?



Identify and Prepare the Decision-Maker(s)

- Will the decision-maker(s) accept responsibility and support the decision if challenged?
- What is the status of the decision-maker(s) relationship with the employee?

Implementing the Discharge Decision

- Be aware of the risk of conflict at and after termination
- Mitigate risks of conflict prior to termination
- Be prepared for resistance



Identify a Crisp and Convincing Explanation for the Discipline or Discharge

- Does a shared understanding exist among all decision-makers?
- How will the company demonstrate the consistency of its explanation to a skeptical third party?



Hypothetical #3

Jamal has only been with the Company for three months and has already had several performance issues. Jamal's managers and human resources personnel have coached Jamal and provided him with all of the necessary training, but Jamal just isn't improving. The decision is made to terminate Jamal's employment.

On the day of his planned termination, Jamal contacts HR to complain about his manager. He feels his manager is not treating him fairly compared to his peers. Jamal is a member of several protected classes, including race and national origin.

Should the Company proceed with the termination?

Conclusion

“Asking questions is a great way to learn.”

➤ Big Bird, Sesame Street

Questions?

