



CONSTANGY
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Employment Documentation Best Practices

FACT Risk Management Conference

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Types of Documents that Relate to Evaluating Employees

- Personnel policies
- Performance evaluations
- Disciplinary documentation
- Investigative reports
- Separation agreements
- Exit interviews
- EEOC/FCHR Charge responses
- Unemployment Compensation forms



Commonly Used Employment Laws

- **42 U.S.C. §1981**
- **Title VII of the Civil Rights Act of 1964**
- **Americans with Disabilities Act, as amended (ADAAA)**
- **Age Discrimination in Employment Act (ADEA)**
- **Equal Pay Act (EPA)**
- **Florida Civil Rights Act**
- **Florida Whistleblower Acts**
- **And many more....**



Legal Framework

- **Prima Facie Case**
 - Comparators
- **Retaliation**
 - Causal Connection
 - Timing
- **Pretext**
 - Who is making the decision?
 - Who is approving/recommending/objecting?
 - HR is not a decision-maker
 - Reasons for decision
 - Consistency and a unified front
 - Problems
 - Inconsistency
 - Inaccurate information
 - Shifting reasons



Keys to Effective Documentation

- **Keep a litigation perspective**
 - What juries expect
 - Be consistent
 - Don't admit liability
 - Don't use legal wording or conclusions
 - Don't comment on age, gender, race, religion, or disability
- **Be objective, not subjective**
- **Be fact driven, not conclusory**
- **Be accurate**



Value of Effective Documentation

- **Effective documentation can refresh memories faded by time**
- **Effective documentation is used as evidence during litigation to:**
 - Show that the employee's performance did not meet the standard or that the employee violated policy
 - Show that an applicant was less qualified
 - Show that progressive discipline was used
 - Add credibility to employer's witness testimony
 - Prove that you treated the employee/applicant fairly



The Risks of Failing to Document or Poor Documentation

- Lack of support for future discipline
- Lack of support for performance evaluation
- Appearance of a contrived or “pretextual” reason for later discipline
- Lack of memory of past events – consider the passage of time from a charge being filed to a lawsuit being resolved.
- Dispute over what happened or what was said



Best Practices of Good Documentation

- Prepare documentation while incident is still fresh in your mind
- Put difficult documentation aside after first draft and revisit – remove emotions
- Save documentation
- Emails, IMs and text messages ARE documentation
- DATE ALL DOCUMENTATION



Personnel Policies

- Equal Employment Opportunity
- Accommodations
- Standards of Conduct – reason for discipline; not all-inclusive
- Avoid “for cause” language for at-will employees
- Avoid complicated review and appeal processes
- Progressive discipline and discretion to not apply



Performance Evaluations – Why do we do them?

- Motivate performance; improve productivity
- Determine compensation
- Promote minimal level of communication between employee and manager
- Identify development and training needs
- Make decisions about promotion, demotion, and layoff
- Defend the employer in the event of a charge or lawsuit



Performance Evaluations

- Be timely
- Be accurate
- Avoid the “halo” effect
- Be careful in rating on attendance when protected leave has been taken
- Consider an employee self evaluation



Making Performance Reviews Less of a Burden

- Keep good notes on both accomplishments and shortcomings
- Leave no surprises for the assessment
- Talk as well as write
- Start and end with the positive
- Be specific when calling for change
- Be respectful when offering criticism
- Allow staff members to respond in writing



Performance Reviews

- Conduct a “horizontal” review (other employees in the same job category) and a “vertical” review (prior evaluations of the same employee)
- Watch what you say when delivering a review. Avoid comments that contradict the process:
 - “Don’t worry about my comment on that, it’s really not a big deal!”
 - “I’m just a hard grader.”



Performance Improvement Plans

- Be accurate.
- Be clear with expectations.
- Be clear with consequences if expectations aren’t met – including the ability to end the PIP early if employee is not meeting expectations.
- Comply with meetings to be set under the PIP.



Disciplinary Documentation

- **An effective disciplinary document does the following:**
 - Defines a standard
 - Makes clear that employee is aware of standard
 - Specifies violation of the standard
 - Provides opportunity to correct behavior, if possible.



Disciplinary Documentation

- **Don't wait until time of performance review**
- **Review action taken against this employee in the past**
- **Review action taken against other employees of similar offenses**
- **Remember to document non-disciplinary discussions that touch on performance**



Supporting Materials

Policies:

- Performance evaluations
- Written statements or complaints
- Video
- Notes/communications relating to the reason(s) for disciplinary action
- Relevant memoranda, letters, email, etc.
- Work records (e.g., attendance, time sheets, productivity, work assignments that did not meet expectations)



Counseling and Progressive Discipline

Allows an employer to:

- **Notify employee that performance or conduct does not meet expectations or is unacceptable**
- **Determine the reason(s) for the problem and whether the employer can help the employee improve**
- **Set and communicate expectations for future performance or conduct, including a deadline for improvement and consequences of failure**
- **Document discussions of specific issues with the employee**



Pre-Decision Analysis

- Does the disciplinary action make good business sense?
- What is the chronology of conduct and communication?
- Has progressive discipline been applied? If not, is there a valid and supportable reason for not applying it?
- Which policies apply?
- Is the disciplinary action consistent with policy and practice?
- Is there sufficient documentary evidence to support the disciplinary action?



Pre-Decision Analysis

- Was a proper investigation done?
- Has the employee engaged in statutorily protected activity?
- Has the employee requested leave or an accommodation?
- What is the employee's legal status? (at will, contract, for cause)
- Are there any due process considerations?



Workplace Investigations

- Who should investigate?
- How should you document? Investigative documentation speaks volumes.
- Notes and other investigative documentation
- What can you substantiate?



Termination

- **Analyze risk factors:**
 - Can the employee assert a retaliation claim?
 - Can the employee assert a discrimination claim?
 - Does the termination implicate the FMLA/ADA?
 - Does the personnel file support termination?



Documentation of Termination: The Bottom Line

- Do your documents reflect a legitimate, nondiscriminatory reason for the discharge?
- Do your documents show that the reason is a fair one?



Documentation of Termination Reason

- Disciplinary form?
- Letter to employee?
- Memo to file?
- Is less more?
 - Loss of confidence
 - End of probationary period
 - At-will employees



Termination Meeting

- **Consider allowing a resignation in lieu of termination**
- **Consider offering a separation agreement in exchange for a release**
 - What policies apply? Avoid severance without getting anything in return
 - Statutory limitation on severance – Section 215.425, Fla. Stat.
 - Limited to 6 weeks if paid in settlement of an employment dispute
 - 20 weeks if part of a contract or employment agreement
 - Limitation does not include earned and accrued annual, sick, compensatory or administrative leave
 - What leave policies/payout obligations apply? Is your policy written to avoid paying out leave to someone who resigns without 2 weeks notice or who resigns in lieu of termination?
 - Is there a right to a name-clearing hearing?



A Successful Termination

- **The basis for the termination is clearly justifiable and legal**
- **The employee had fair notice of or should have reasonably foreseen the termination (i.e., it should not come as a surprise)**
- **The termination appears to the average person to have been fair in the way it was carried out**



Logistics

- **Best day and time to discharge employee?**
 - ASAP after the decision is made
 - Aim for the start or end of the workday when fewer people are around
- **In-person, as long as it won't cause significant delay or a safety concern**
- **Follow relevant policies and procedures specific to termination**



Logistics

- **Keep it confidential (avoid a defamation or retaliation claim)**
- **Ensure full payment of all compensation owed**
- **Will accrued vacation be paid out?**
- **Consider a separation/severance agreement releasing all legal claims**
- **Disable electronic resources and collect company property**
- **Internal notification**
- **Have talking points for the meeting and stick to them.**



After the Meeting

- Document what was said during the meeting, if it differs at all from the bullet point list/agenda you prepared for the meeting. Be consistent.
- Have the witness do the same.
- Follow up with any questions that you could not answer during the meeting.



Pitfalls to Avoid in Employee Discipline

- Do not rush a decision.
- Do not rush your documentation – it is critical that your documentation is accurate. –PRETEXT
- It is crucial that the reason you provide is accurate and DOES NOT change. –PRETEXT
- Do not be pressured into approving discipline without sufficient time to consider and review.
- Be prepared to “own” the recommendation and the decision. You will be asked – Who made the decision? Who recommended the decision? Who was involved in the decision?



Consistency

- Never maintain bad management practices simply to be “consistent.”
- Managers can manage differently – but should be consistent with their own employees.
- If you change the “rules,” notify employees that things will be different in the future, then consistently hold them to the new standard.



Exit Interviews

- Do you use them?
- Purpose?
- In writing? In person?
- Follow-up?



Post-Employment Documents

- Position statement submitted to the EEOC or FCHR – consistency continues to be critical
- Beware of internal discussions, emails, text messages, and other communications that are not privileged
- Unemployment compensation responses – consistency continues to be critical



Consistency

Make sure the reason(s) that lead to disciplinary action are accurate and consistently repeated in counseling, disciplinary, and discharge records, unemployment claim responses, EEOC responses, etc. If not, these “mixed signals” can open the door for plaintiffs to reach a jury if a lawsuit is ever filed.

Remember pretext?



Case Studies

1. **Documentation should support facts known at the time and minimize effect of memory loss due to institutional turnover or passage of time**

-August 2019

Employee conduct

Documentation re behavior, but no witness statements or identification of who witnessed behavior, no notes from confirming calls

-September 2019

Employee terminated

-HR turnover, retirements

-June 2020

EEOC/FCHR Charge filed

-August 2020

EEOC position statement submitted

Incorrectly states who observed conduct, who made decision, and adds additional reasons for decision

-December 2021

Lawsuit filed

-January 2023

Depositions taken



Case Studies

2. **Documentation should support reasons for disciplinary decision**

- Employee terminated during probationary period for lack of production, profanity, and not getting along with employees
- Employee documentation only references generic failure to successfully complete probationary period
- Charge and lawsuit filed
- Decision-maker is asked 4 years later, what did employee fail to do, that led to decision to end the probationary period?





Thank You!

For further questions or comments, please reach out to me at:

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