ACEC

2019 Indiana Principal & Owners Summit

EMPLOYMENT LAW ROUNDTABLE
Documenting and Executing Employee Investigations, Discipline, and Discharge
Good Documentation = Good Management
Common, Understandable, But Ultimately BAD Reasons For Not Doing It Right

1) “Indiana’s an at-will state”
2) Too busy, no time
3) The conversations can be really awkward – surely employees know when they’re doing something wrong/poorly
4) Why risk getting accused of “picking on” someone (or worse yet: discrimination/harassment/retaliation/etc.)?
Performance Management

The challenge:
Create and maintain a happy, productive workforce...

...without inadvertently saying, doing, or omitting anything that could support an employment law claim!
IT CAN BE DONE!

The keys are CONSISTENCY, CANDOR, TIMELINESS, and GOOD DOCUMENTATION
WHY?

- Judges and juries like “paper trails”
- Consistent messages – verbal and written – bolster employee morale and perceptions of fair treatment
- Honest and timely written feedback puts everyone on the same page (pun intended)
Performance Management & Documentation

Let’s Break It Down Into:

1) Documentation generally
2) Performance v. Conduct Discipline
3) Investigations
4) Choosing & Delivering Discipline (“up to and including discharge”)
Documentation Generally

All Documentation Should Include

1) A three-part date
   • Date(s) authored v. date(s) of occurrence(s)
   • Beware “auto-date” features, copy/paste recycling
2) Full names
   (author and everyone else mentioned)
3) Details
   (Who? What? When? Where? How often?)
4) Legible handwriting
Documentation Generally

Good Documentation Focuses On SOBs:

Specific
Observable
Behaviors
Documentation Generally

Compare this...

Megan -

_Last week I spoke with you about the need to pay more attention to detail and follow-up. If I don’t see improvement, you may be looking at a formal written warning._
Over the last month we have had multiple vendors contact us regarding errors in their payments attributable to you transposing numbers or decimal points when you enter the data in the AP system. Specifically, XYZ Corp was shorted $400 on Invoice #2397. On 10-30-17, ABC, Inc. received a surplus payment of $9.99. And Bob’s Maintenance received only half the amount of their invoices for weeks ending 10-6 and 10-13. Bob’s Office Manager called twice during the week of 10-20 and it took you four business days to return her call.

You need to strive for zero errors in accounts payable entries and to return vendor inquiries within 48 hours, tops. I need to see immediate and sustained efforts in both areas.
Disciplinary Documentation

*Should Address:*

1) The Past – capture prior incidents and discussions
2) The Present – explain the current problem
3) The Future – confirm expectations and consequences
Disciplinary Documentation

Distinguish Between Performance & Conduct Issues

1) Performance Issues

- *E.g.*, productivity, error rates, meeting deadlines, problem-solving, budgeting, error-free writing, etc.
- Message: Must demonstrate consistent and sustained improvement over time
- Generally follow “progressive” discipline (but reserving the right to skip steps if appropriate).
Disciplinary Documentation

*Distinguish Between Performance & Conduct Issues*

2) Conduct Issues

- *E.g.*, insubordination, offensive conduct, threatening/fighting, safety violations, etc.
- Message: Stop it right now!
- Skip “steps” as needed, including “jumping” to discharge on “strike two” (if they even get a second chance at all)
Disciplinary Documentation

What about attendance?
Performance-oriented Communications Should:

Consider, diagnose, and address the root cause(s) of the problem:

- Lack of motivation?
- Lack of skill/ability?
- Lack of training?
- Personal problem?
- Problems with a process, system, or team upon which the employee depends?
Investigations

Before Issuing Conduct-based Discipline, Be Sure You Can Explain:

1) The rule/policy/expectation(s) violated
2) Who was involved and how (violators, contributors, witnesses, those impacted)
3) When and where the violation(s) occurred
4) The employee’s side of the story

E.g., Investigate! (Call it what you will)
Investigations

Some Thoughts On Interview Strategies and Approach
Investigations

*Tips For Documenting Investigations:*

1) Safely store your documentation
2) Explain options considered but rejected and why
3) “Use” “quotes” “properly”
4) Distinguish clearly between information reported, factual findings and analysis/conclusions
5) Consider the value of the attorney-client privilege
6) Think through the pros and cons of email v. phone v. live conversation
Investigations

Write For An Audience “From Mars”

1) Your investigation may be picked apart later. Make sure your documentation is sensible and persuasive to someone outside “your world.”

2) Make sure your file shows you:
   • Conducted a thorough and fair investigation
   • Reached a reasonable conclusion based on your evidence
   • Treated the employee professionally/fairly
Choosing Discipline

*Consider...*

1) What prior discipline has the employee received? (And is it documented?)
2) Was the prior discipline for the same or different conduct?
3) How much time has passed since prior violations?
4) Any extenuating circumstances? And how solid are they?
5) If others were involved, how, and were they disciplined consistently?
Choosing Discipline

*Treat Similar Situations Similarly (not “the same”)*

1) Temp v. regular employee
2) Different type/degree of misconduct
3) Supervisor v. non-supervisor
4) Change in policy/process (preferably documented)
5) Prior disciplinary history
6) Lack of prior disciplinary history
7) Strength (or lack) of evidence
8) Other “mitigating” or “aggravating” factors
Delivering Discipline

Progressive Discipline

1) “Verbal” Warning
   • Document it (briefly)

2) Written Warning(s)
   • More formal because more serious/frequent

3) Final Written Warning
   • “Or else”

4) Suspension
   • Disciplinary (punitive and rare)
   • Investigatory (highly useful).
Delivering Discipline

**Good Guidelines**

1) Don’t delay once the decision has been made
2) Never in public – plan the location and time of day
3) HR and supervisor present
   (one does the talking, one does the note-taking)
4) Do a dry run and consider written talking points
5) Focus on performance/conduct, do not delve (or be dragged) into character or personality
6) Try to end on a positive note
Delivering Discipline

Termination

1) Know – and in most instances share with the employee – all reasons for discharge
2) Consider the resignation option
3) Anticipate questions and objections (and prepare answers)
4) Do not give or offer to give a reference
Delivering Discipline

Termination

5) Practice aloud **at least once**
   (even if you’ll take a script or talking points into the meeting)

6) Think through the physical space
   needed to secure belongings,
   exit the room, exit the premises, etc.
Performance Evaluations

*Failure to do them timely and regularly leads to:*

1) Malaise and inertia
2) Low productivity and poor quality
3) Low morale and lack of cooperation
4) Allegations of bad faith/bad motive later
5) Difficulty protesting unemployment claims
Performance Evaluations

Prepare Properly & Cover Comprehensively

1) Know your objectives
   • What period of time?
   • Do you have good data?

2) Identify any obstacles to your ability to be objective and impartial

3) Review the employee’s performance, conduct, and attendance (mindful of excused v. unexcused)
Performance Evaluations

Prepare Properly & Cover Comprehensively (Cont.)

4) Review other accomplishments worthy of mention
5) Identify areas for improvement
   • AND strategies for the employee to implement
   • AND ways that others can help the employee improve
Performance Evaluations

**Additional Guidelines**

1) Conduct evaluations on time
2) Don’t play favorites
3) Avoid statements that create inaccurate expectations
4) Don’t avoid constructive feedback
5) Don’t forget some motivation (and/or, as appropriate, a plan for rehabilitation)
6) Don’t defame – be able to backup anything and everything you say
Goal Setting

*Should be:*

- **S**pecific
- **M**easurable
- **A**chievable
- **R**elvant
- **T**ime-based
Always Remember EEO

Don’t Say or Write Anything Suggesting Negativity Towards:

1) Race, color, national origin
2) Sex, orientation, pregnancy
3) Religion
4) Age (40+)
5) Disability, genetic history
6) Citizenship status
7) Veteran status
8) Complaints of (alleged) discrimination
9) Complaints about pay
10) Complaints of (alleged) regulatory or reporting violations
11) Workplace safety complaints
12) Union sympathies
13) FMLA, military, other protected absences
14) Workers’ comp claims
THE END – THANK YOU!
QUESTIONS?

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