

Behind the Looking Glass – The Transparency of Employment Records

By Stephen Marmaduke, Esq.

An article appearing in the last edition of *California Veterinarian* discussed how the documentation of expectations and job performance could facilitate a better work environment. That article emphasized the importance to the employer of maintaining documents relating to employees, particularly when issues of discipline and termination are involved. It is also important that employees and employers understand that employees have rights relating to documents that concern their job performance. This article focuses on the employees' rights, including their rights of access to their personnel files and other documents, as well the impact of good documentation on creating a positive place to work.

"Transparency" has been popularized to denote the openness and candor perceived as necessary to create trust and positive communications. As clear expectations and communications facilitate a positive and productive workplace environment, transparency is important. There are perceptions that the records and documents maintained by an employer regarding an employee may be secreted in a "desk file" and used only by the employer if it needs to take action or protect itself from the employee. That is not the case. The employee has clear rights to review many employment-related documents. Accordingly, documents should be created and maintained to accurately memorialize the employee's status and communications between the employer and the employee, and not merely to "set up" the employee.

The Law Regarding Access to Documents

California law provides that current and former employees (or a representative) have the right to inspect and receive a copy of their "personnel file." There is no clear definition of what is contained in that file. The Labor Code generally describes the records to be produced to a requesting employee as "the personnel records that the employer maintains relating to the employee's performance or to any grievance concerning the employee." The California Department of Industrial

Relations has opined that records that are used or have been used to determine an employee's qualifications for promotion, additional compensation, or disciplinary action (including termination) are generally considered to be "personnel records." This is a very broad definition that goes beyond documents that the employer may choose to maintain in a personnel file. The following are some examples of personnel records (this list is not all inclusive):

1. Applications for employment
2. Payroll authorization forms
3. Notices of commendation, warning, discipline, and/or termination
4. Notices of layoff, leaves of absence, and vacations
5. Notices of wage attachments or garnishments
6. Education and training notices and records
7. Performance appraisals/reviews
8. Attendance records

Procedurally, a current or former employee may (directly or through their authorized representative) request to inspect and/or receive a copy of their personnel records. Inspections must be allowed at reasonable times and intervals, but not later than 30 calendar days from the date the employer receives a written request. Within that time frame, the employer shall provide a copy of the personnel records at a charge not to exceed the actual cost of reproduction (including postal charges). The employer may redact the name of any nonsupervisory employee that appears in the documents. The employer is required to keep these documents for at least three years after the termination of the employment relationship. If the employer fails to provide these records, the Department of Labor Standards Enforcement will enforce the inspection and copying rights and impose a \$750 penalty.

Employers are also required to keep accurate payroll records on each employee, which must be made available for inspection by the employee upon reasonable request. The scope of "payroll records" is



broad enough to include incentive and production plans as well as the formulas and records supporting payment under these plans. These records must be made available to a current or former employee (or their agent) upon 21-days' written notice.

Employees are also entitled to copies of documents that they have signed as an employee.

The employee may protect his or her status by documentation as well. Employers may not retaliate against employees who assert a legal right or privilege. Employees may also be protected from retaliation for making claims of discrimination, harassment, or illegal practices. Employers are required to retain documents submitted by employees containing allegations that are protected. The existence of the documents in the employer's file may facilitate an employee creating the nexus between the protected activity and subsequent adverse employment actions necessary to establish a claim of retaliation.

The Practical Benefits of Transparency

So how does proper documentation and the transparency of those documents contribute to a positive working environment? Simply, it forces communication. And, the understanding that an employee's records are an "open book" should facilitate candor and accountability.

As mentioned in our prior article, a comprehensive, updated job description is an important document as it establishes the baseline for expectations and performance. The job description should be vetted at hiring and reviewed on a regular basis. A structured, periodic review process compels the employer and the employee to discuss the job description and any changes thereto, and to clearly confirm (or establish) expectations and promote the accountability of both parties.

Proper documentation includes scheduled and systematic performance reviews. Too often, reviews are delayed due to

the press of business, or not conducted at all. They should be scheduled and timely performed. Efforts should be made to provide objective feedback, and the responsibility for preparing and delivering the review should be undertaken by someone with real management responsibility. Reviews give employees valuable input and the opportunities to make adjustments in performance necessary to succeed or, alternatively, adjust their expectations. Importantly, reviews stimulate communication. Review summaries should be accurate and employees should have the opportunity to comment on them. Again, the personnel records should accurately reflect the employer's expectations and the employee's performance. If there are disparate perceptions, they should be addressed at that time.

If problems develop or expectations are not being met, the employer should institute a performance review. The review should be documented as well as the employee's comments. Although this may be a disciplinary process with a "write-up," it need not be. If the employee believes that there are concerns about job expectations, it would be reasonable for them to request a meeting.

In some instances, the employee may determine that the work environment is not what they want. Or, it may become clear that they will not succeed. There may be benefits to these realizations. Not all employment relationships work well. Too often, however, the relationship deteriorates because issues are not identified and addressed.

There is no substitute for good communications in an employment relationship. In an ideal world, the documentation should follow the communications. The workplace is a busy place. Often communications, particularly difficult ones, fall to the bottom of the priority level. If both the employer and the employee appreciate that the personnel file is a transparent reflection of expectations, performance, and aspirations, the attention to documentation may facilitate communication and contribute to a better work environment. ■



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