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Document, Document, Document: The Importance of Documenting Employee Performance

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Most employers generally understand the importance of documenting employee performance. However, the challenge is to appropriately and effectively document employee performance to minimize risk for the employer and to effectively communicate perceived issues with the employee. This requires clear expectations and consistent communication from both the employer and the employee. In cases where an employee has a perceived shortcoming, the employer should provide notice, guidance, and time to correct the issue prior to it becoming a significant problem. There are far too many

instances when an employer takes an informal approach with an employee and, as a result, fails to document performance or other issues.

Now, the question employers may be asking is, “so what?” In response, the purpose of documenting employee performance is not just to protect the employer in the event of a lawsuit or to add additional duties to management. It also provides employers the opportunity to demonstrate the steps the employer has taken to help an employee’s success and to provide feedback when appropriate.

As all employers know, there are times when employment relationships must end. Although California is an “at-will”

employment state, an employer is often at risk when it elects to take action to terminate or discipline an employee, even if the reasons seem justified. To reduce the risk of liability and to provide a justification for potential discipline or termination, employers should clearly communicate its employment-related expectations and policies. Additionally, if issues arise during the employment relationship, they should be documented and maintained for the duration of the employment relationship.

Not only is documenting employee performance critical, but good documentation requires planning and may even begin before the employment relationship begins. For instance, written job descriptions and performance standards that reflect the employer's expectations are vital. These may be contained in an employee handbook or separate documents. These documents can be used hand-in-hand with training opportunities or to justify disciplinary action. Employers should maintain and follow a discipline policy, and that policy should in turn provide a balance of structure and flexibility.

The importance of regular performance reviews and documentation of the reviews cannot be overemphasized. The documentation should make it clear that failures to meet job requirements and needed areas of improvement have been clearly and fairly explained. This is because there are many instances where there are obvious performance issues but the employer fails to bring it to the attention of the employee—this can result in frustration for both the employer and the employee. An employment relationship requires clear communication and trust. If an employee

is being provided consistent documented feedback and if the employee fails to meet performance standards, typically it will not be a shock if the employment relationship must end. By contrast, if performance issues are never discussed with the employee and the employment relationship ends, it may leave the employee to wonder or infer that there was a pretext for the termination.

As performance issues arise, the employer should meet with the employee at issue, explain to the employee why their performance or misconduct fails to meet expectations and standards, give the employee an opportunity to explain their perspectives and raise grievances, and advise the employee that there could be discipline or termination if corrective action is not taken. The content of the meeting should be summarized in writing, with the summary placed in the employee's personnel file and given to the employee. The employee should sign and return the copy acknowledging receipt. If the employee refuses to sign the copy, a note should be included in the written summary indicating that the employee refused to sign it.

Practically, there are factors that employers should consider prior to taking an adverse employment action (i.e., discipline, termination, demotion, etc.). This includes, but is not limited to: whether there is credible evidence to support the disciplinary action; whether there is a need for further factual investigation; whether there is a clear notice of the policies and standards; whether the steps taken and the contemplated discipline are consistent with policies and treatment of other employees; whether there are

alternatives to discipline; whether the employee is a member of a protected class; or whether the employee has any claim of disability that was not reasonably accommodated.

Employee discipline is not a step-by-step process and each situation must be evaluated carefully and independently prior to taking any adverse action. Clearly written policies, job descriptions, and documented reviews and write-ups can minimize an employer's potential liability. The bottom line is that if the personnel file demonstrates: (1) the employer had clear employment policies and job expectations; (2) the employee was warned that they were failing to meet these expectations; (3) the employee was given an opportunity to improve; and (4) the employee failed to improve, then discipline—up to and including termination—will likely be appropriate and defensible. ■

Jizell Lopez is a civil litigation attorney who primarily represents clients in federal and state court litigation and before administrative agencies regarding all manner of employment claims, including single plaintiff lawsuits, class action lawsuits, and wage and hour representative lawsuits. Jizell's practice includes allegations of harassment, discrimination, wrongful termination, retaliation, wage and hour non-compliance, and more.