HOW TO DOCUMENT EMPLOYEE PERFORMANCE AND DISCIPLINARY PROBLEMS

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Given the employer's need to either rehabilitate or eliminate problem employees, below are some practical suggestions for Texas employers on effectuating both goals. As has been seen, despite seemingly broad flexibility which the employer has under the at-will employment doctrine in Texas, the employer can find itself defending allegations of unlawful employment practices, including discrimination. Thus, the employer needs to be able to demonstrate that whatever action was taken in dealing with a borderline employee was based on lawful, non-discriminatory reasons. The strategies below are designed to assist in that effort. Smaller employers have a lot more flexibility than larger employers and should avoid getting tied up in complex discipline or appraisal systems that do not work for them.

A. THE EMPLOYER MAY BENEFIT FROM CLEAR APPRAISAL, DISCIPLINE, AND TERMINATION PROCEDURES

1. While clear procedures may be helpful, do not establish procedures to which you would not want to be bound
2. Handbooks should clearly state they do not constitute a contract of employment or alter the at-will employment relationship
3. Keep written rules simple
   a. The larger the employer, the more the need for established procedures
   b. Smaller employers should avoid complex procedures, policies, forms
   c. Design procedures and forms so the lowest level supervisor will understand and follow
4. Prerequisites to an effective performance procedure
   a. Supervisors and employees must mutually respect and cooperate with each other to accomplish the employer's goals
   b. Supervisors must recognize, encourage and support employees' efforts to meet clearly defined goals
   c. Supervisors must be seen by employees to be competent, knowledgeable and excited about their employment and professional positions
   d. Employees must understand that the supervisor is sincerely interested in assisting the employees in improving their job performance
   e. Employees must be receptive to suggestions and constructive critiques to improve the employee's job performance and job-related skills

B. TWO KINDS OF ACTIONS HARDEST FOR EMPLOYER TO DEFEND

1. Discipline and discharge based on failure to properly do the job or to follow instructions (sometimes called "performance cases")
2. Discharge for a single or first incident of misconduct without a prior warning, unless egregious

C. WHAT KIND OF DISCIPLINARY PROCEDURES?

1. For a large company with a staff of human resource professionals there can be formal, written but simple procedures for periodic appraisals and for discipline. The smaller the company, the more informal the process that can be used
2. If you use a matrix for disciplinary actions, keyed to type of offense and number of prior offenses, be prepared to apply it universally. Don't let the exceptions undermine the rule.

3. Written progressive disciplinary procedures are a framework but should generally not be too restrictive (best approach is to utilize progressive discipline concepts without "chiseling them in stone")
4. If offenses are listed, insure they are "illustrative" and not exclusive
5. One-on-one contact with employees on performance and conduct problems is the best, followed by some form of written affirmation

D. TRAINING

1. Be sure to give new employees or employees going into a new job adequate on-the-job training.
2. Provide in-house training to update employees on new developments and procedures affecting their jobs.
3. Training should include sharpening of "people" skills.
   a. How to deal with clients, customers
   b. How to supervise and treat subordinates
   c. Sensitivity training so as to avoid offensive comments, actions
4. Consider in-house and formal training programs to assist employees having performance and other problems.
5. Require attendance at key training programs.
6. Keep records on training.
   a. When was it conducted?
   b. Length of training session(s)
   c. What was covered?
   d. Who was present?
   e. Attendance sheets signed by employees (add printed names to be certain they are legible)
   f. Consider certificates of attendance on key trainings to be retained in personnel files for easy evidence later.

E. PURPOSE OF PERFORMANCE APPRAISALS

In developing a performance appraisal system, first evaluate the purpose(s):

1. To determine the extent to which an employee has met or exceeded performance standards or expectations
2. To identify and reward performance which consistently exceeds standards by means of:
   a. Merit pay increases
   b. Discretionary bonuses
   c. Increased responsibility
   d. Promotions
3. To identify and deal appropriately with consistently substandard performance and to motivate employees to improve their performance by
   a. Withholding or denial of pay raises
   b. Denial of discretionary bonuses
   c. Counseling/rehabilitation
   d. Disciplinary action including termination
4. To support other personnel actions based on performance
5. To inventory the employer's most valuable asset -- its human resources
6. Improve communications between supervisors and employees by

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