

HANDLING EMPLOYEE PERFORMANCE & DISCIPLINARY PROBLEMS

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, and non-retaliatory reasons. The strategies below are designed to assist in that effort but represent mere guidelines and suggestions. 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. As demonstrated throughout our discussion, employment issues are highly fact-specific, and each instance should be evaluated carefully along with legal counsel if necessary.

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 should mutually respect and cooperate with each other to accomplish the employer's goals.
 - b. Supervisors should recognize, encourage and support employees' efforts to meet clearly defined goals.
 - c. Supervisors should be seen by employees to be competent, knowledgeable and excited about their employment and professional positions.
 - d. Employees should understand that the supervisor is sincerely interested in assisting the employees in improving their job performance.
 - e. Employees should 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 the misconduct was 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, it should be applied 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”). Employers should preserve their flexibility to tailor disciplinary approaches to each particular situation.
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 confirmation.

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 (handouts or presentations from the training may be helpful)?
 - d. Who was present?
 - e. Attendance sheets signed by employees (add printed names to be certain they are legible) and retain for the Company’s records.
 - 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:
 - a. Initiating periodic superior-subordinate communications.
 - b. Allowing employees a comfortable and open forum to explain their views of the workplace, their concerns, and their understanding of their performance.
7. Serve as a “mirror image” of the supervisor’s managerial skills and performance.
 - a. Periodic review of supervisor’s efforts, or lack thereof, to assist the employee in efforts to improve performance.
 - b. Periodic review of job-related performance feedback, or lack thereof, given to the employee by the supervisor.
8. Develop documentation for proper determination of termination decisions, defense of EEO charges and lawsuits filed against the employer.
 - a. Past evaluations reviewed by a neutral, knowledgeable third party (labor and employment attorney) prior to the adverse employment decision to assess the advisability of the proposed termination/discipline.
 - b. If a complaint or lawsuit is filed, past performance appraisals could support the employer’s defense if nondiscriminatory reasons for the employer’s actions were documented and communicated to the employee.
 - c. Often inflated evaluations end up being the best evidence a former employee has. An employee terminated for poor performance whose last review was rated “meets expectations” is more credible when challenging a performance related termination.

F. ESTABLISH PERFORMANCE STANDARDS OR EXPECTATIONS

1. Can be written.
 - a. Useful when:
 - (1) Employer is large company.
 - (2) Human Resources staff available to assist/review.
 - (3) Standards are quantifiable, i.e., meeting, sales, budgets or production quotas.
 - b. Can be attached to or made part of appraisal.
 - c. Should be signed and dated by both supervisor and employee.
2. Can be general, verbal.
 - a. But more difficult to measure against.
 - b. Verbal communications subject to dispute unless reduced to writing in memo signed by supervisor and employee; or follow up confirming email from employee to supervisor.
3. Job description important.
 - a. Must accurately define duties.
 - b. Can include performance standards if fixed and objective.
 - c. Should be in writing, signed by supervisor and employee.
 - d. Revise as duties change.
 - e. Make clear other duties may be assigned from time to time.
4. Performance standards must be:
 - a. Job related.
 - b. Reasonable.
 - c. Attainable.
5. Different standards and forms may be appropriate for various types of positions.
 - a. Clerical and administrative support staff.
 - b. First-line supervisors.

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First appeared as part of the conference materials for the
2022 Essential Employment Law: A Practical Course in the Basics session
"Defensive Documentation from Hiring to Firing"