

PRESENTED AT

2024 Essential Employment Law: A Practical Course in the Basics

August 23, 2024

Fully Virtual Conference

**DOCUMENTATION: HANDLING EMPLOYEE
PERFORMANCE
& DISCIPLINARY PROBLEMS**

Steven Mierl

Author Contact Information:

Steven Mierl

Cornell, Smith, Mierl, Brutocao &

Burton, LLP

1607 West Ave.

Austin, TX

smierl@cornellsmith.com

512-328-1540

DOCUMENTATION: 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 generally have 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. Similarly, avoid overpromising employer action – such as “We will make every possible effort to . . .” While such aspirational statements sound great, the realities of the workplace usually render “some” or “minimal” efforts.
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.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Documentation: Handling Employee Performance & Disciplinary Problems

First appeared as part of the conference materials for the
2024 Essential Employment Law: A Practical Course in the Basics session
"Effective and Defensive Documentation from Hiring to Firing"