Do’s and Don’ts of Documentation - Employment Litigation

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As many of you know, proper documentation is critical in almost every aspect of managing your employees. Documentation is often the difference between a defense verdict and a multi-million dollar jury award. But don’t just document to document - poor documentation is worse than no documentation at all. Instead, document with purpose. Here are my top five do’s and don’ts of documentation.

The Do’s

1. Do Establish Clear Performance Expectations. I like to start out formal documentation with a clear statement of what the employer’s performance expectations are for the employee. This statement of the performance expectations will guide every aspect of the documentation and set the standards upon which current deficiencies are noted and future performance will be measured. It should be obvious, but make sure an employee is not hearing these performance expectancies for the first time in formal documentation of a performance problem. If that is the case, you have bigger problems than poor documentation. Instead, the performance expectancies need to be consistent with the employee's job description and the tasks actually assigned to the employee. Consistent, clear and well-written performance expectations are critical if you want an employee to succeed in changing his performance.

2. Do Focus on the Facts. Provide the employee with a clear statement of the facts. A clear statement of the facts focuses solely on what you know happened, and does not include any speculation or unverified information. For the purpose of a disciplinary action, the fact that an employee reported to work two hours late is sufficient. You do not need to include the speculation that the employee had been out drinking the night before because he has a weekly poker game at the local watering hole. Stick to the facts because this might have been the one night the employee missed the poker game to care for his sick child.

3. Do Review Patterns of Problem Behavior. When an employer takes the time to actually perform written documentation of a performance or behavior problem, it typically is not the first time the employee has had the problem. Instead of ignoring all of the previous instances, list in detail every occasion when the employee has exhibited the problem behavior. Be sure to include what steps were taken each time these problems came to light - did the supervisor talk to the employee, was the employee reprimanded (formally or informally), was the employee warned or suspended. Include the pattern to show that you considered these previous instances when taking the current action.

4. Do Write a Specific Plan. Include in your documentation a specific plan for the employee to improve. List out the criteria the employee must meet, and a time frame for meeting each expectancy. The more specific and objective the criteria, the easier it is to measure improvement. Be sure to include in your documentation that failure to meet the criteria will result in further disciplinary action, up to and including termination.

5. Do Follow-up. Documentation is only valuable if you follow-up. For example, if you place an employee on a formal 6-month corrective action plan, but never follow-up, the corrective action plan is void. The best practice is to have specific criteria with specific time frames, and have a formal review during those exact timeframes. Don’t delay!

The Don’ts

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1. **Don't Generalize.** The most difficult cases to defend are those in which the employee is terminated for “not being a team player” or any other trendy cliché. Such generalizations have no place in formal documentation. You must provide specific examples of problematic behavior. Fail to do so, and you may “be left holding the bag.”

2. **Don't Diagnose Why the Employee Is Performing Poorly.** New lawyers are taught to focus on the what, when, where, and why when asking a witness questions. When documenting poor performance, don't diagnose the “why.” Even if you suspect the employee’s divorce, financial situation or social life is affecting his performance, avoid the urge to put such a diagnosis in the formal documentation. Understand that it is entirely proper to offer employee assistance or other benefits to employees that have personal problems, but it is not appropriate to include such personal problems in formal documentation.

3. **Don't Include Your Mental Impressions and Editorial Comments.** A common mistake made by inexperienced supervisors is to include their mental impressions in the performance documentation. What do I mean? Say an employee is written up for failure to follow supervisor’s instructions. Instead of simply stating exactly what the supervisor told the employee, the supervisor will state something like “I thought my directions were clear.” If you have to editorialize what was said, it probably was not as clear as you thought. State the facts, and avoid commenting on those facts.

4. **Don't Embellish, Stretch the Truth or Call It Something It is Not.** There is nothing worse than documentation where an employer overstates what took place. Minor embellishments tend to take on a life of their own, often becoming the driving force behind the disciplinary action when the truth was sufficient. Now you are left defending a lie. Worse yet, don't call “dishonesty” a “fraud” and don't accuse an employee of “stealing” when they made a mistake. Call it as you see it and nothing more.

5. **Don't Apologize.** I cringe reading a disciplinary document where a supervisor says, “I am sorry I have to do this.” No, you’re not! You are doing your job, and you are doing the documentation because the employee is not doing their job. If you have to apologize for something, then formal documentation is obviously not warranted.

**Practical Take Away**

Documentation is an important aspect of managing relationships with your employees. You will be much better served by shifting your approach to documentation from quantity to quality. Trust me, you would much rather defend one or two well-written documents than twenty-five poorly written ones. So, go forward and document with purpose.
