

JacksonLewis

# Performance Management and Documentation

CP of NYS

6.5.2024

Richard D. Landau

Jackson Lewis P.C. • White Plains, NY

# The Purpose of Evaluating and Disciplining

- Observe and correct employee's unsatisfactory work performance and/or violation of employer's policies
- Place employee on notice of the employer's expectations
- Provide opportunity to communicate about performance issues
- Provide positive reinforcement while identifying deficiencies and providing plan for improvement
- Litigation defense

# Prevention Is Key

## FROM DAY ONE

- What does the job description say?
- Establish clear objective performance expectations, job requirements.
- Do **not** assume an understanding of job duties.
- Coach employee from Day 1 to reinforce performance expectations, keep reinforcing as necessary.
- Define job mastery and career development goals as part of the performance improvement process.
- Train properly and when needed.

# The Key to Performance Evaluations

Continuous Performance Monitoring

# Performance Monitoring / Feedback Guidelines

- SPECIFIC:** Include objective facts, not just conclusions
- TIMELY:** Address performance issues, both good and bad, in a timely fashion
- EXPLAIN:** Explain your expectations to the employee
- EMPATHY:** Don't paint the employee into a corner
- LISTEN:** Listen and consider legitimate explanations for performance issues

# Common Mistakes to Avoid When Evaluating

- Rating employees higher than warranted
  - Do not over-inflate – be honest
- Not supporting performance evaluations with objective data and facts (as opposed to conclusions)
- Being “soft” in the evaluation process by failing to address performance issues under the guise that you do not want to demoralize the employee

## Common Mistakes to Avoid (continued)

- “Squirreling” complaints away for another day, rather than addressing them immediately
- Partially completing an evaluation
- Failing to clearly state future expectations
- Contradicting written review in meeting with employee
- Including performance problems in the evaluation never previously addressed with employee



# Writing the Review

## Evaluate Performance, NOT the Person

### Use objective facts, NOT subjective conclusions

- Cite specific examples to support conclusions
- Do not speculate
- Do not psychoanalyze
- Use language that makes sense to the employee
- Provide suggestions and target milestones
- Follow up with the employee

# The Performance Evaluation Conference

- Conduct in private location
- Be prepared to discuss examples of job accomplishments and performance deficiencies
- Establish goals and/or plan of action
- Discuss positives and ensure criticisms are constructive
- How can management help the employee do his/her job better?
- Listen to employee response, if any
- Have employee sign the form



# Performance Problem Solving

Here is a model to explore performance problems with your employees and a set of guidelines for conducting performance discussions:

- Is it an ability problem? Does the employee have the skills and knowledge?
- Is it a clarity problem? Is employee clear on goals, objectives or targets?
- Is it an organizational help problem? What resources are needed?
- Is it an incentive problem? Do you know any underlying causes which could impact employee's motivation?
- Is it an evaluation problem? Is there a lack of day-to-day feedback?
- Is it a validity problem? Are the policies, procedures, rules or regulations appropriate?
- Is it an environmental problem? Is there a problem with the employee's work environment, i.e., getting along with co-workers?

# Performance Monitoring/Feedback Guidelines

**DOCUMENT, DOCUMENT, DOCUMENT!**

**Be sure to include:**

**Your name**

**The date**

**Issue addressed**

**Expected performance**

**Follow up**

# Pitfalls Of Documenting

E  
X  
A  
M  
P  
L  
E



“Because you have taken so much leave, the department is suffering because you are never here....”

# Pitfalls Of Documenting

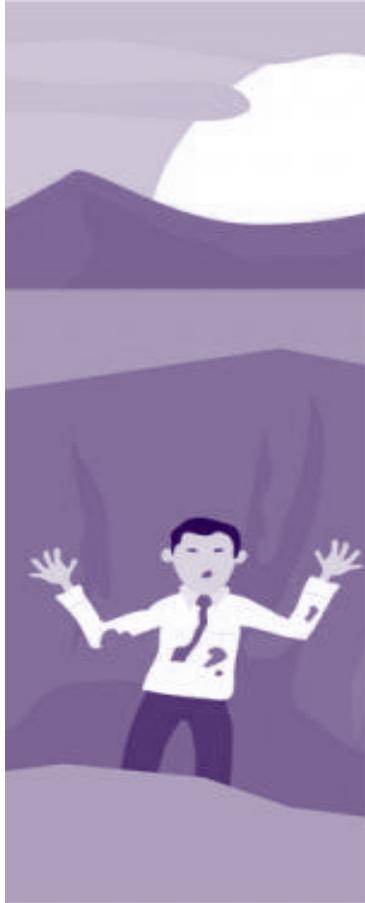
E  
X  
A  
M  
P  
L  
E



“Since giving birth to your second child, your productivity has declined  
.....”

# Pitfalls of Documenting

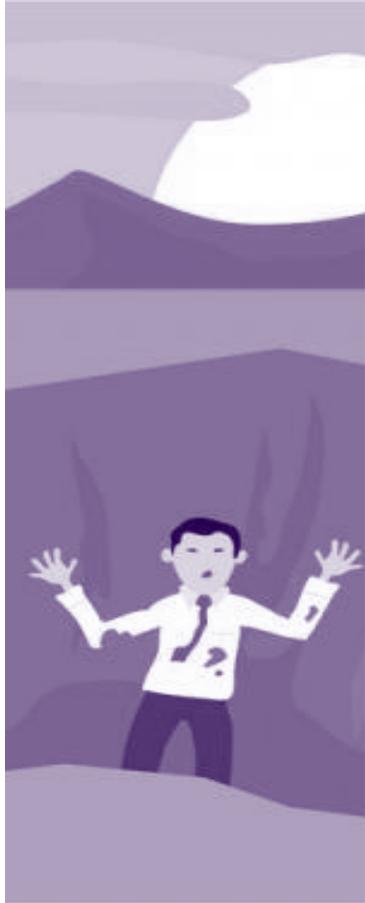
E  
X  
A  
M  
P  
L  
E



**“Your continual refusal to abide by our dress code, apparently because of some cultural heritage thing, is unacceptable....”**

# Pitfalls of Documenting

E  
X  
A  
M  
P  
L  
E



“Your attitude is poor and you appear to be depressed.”

# Effective Documentation?

<u>Job Knowledge</u>	Strongly Agree 4.0	Generally Agree 3.5	Agree 3.0	Disagree 2.5	Completely Disagree 2.0
----------------------	-----------------------	------------------------	--------------	-----------------	----------------------------

Bobby is a real team player; he is an absolute joy to be around and to supervise. I just think he is the most fantastic employee; possibly the best employee I've ever supervised. Signed: Manager

Manager Rating of Employee: 2.75

What does this even mean?

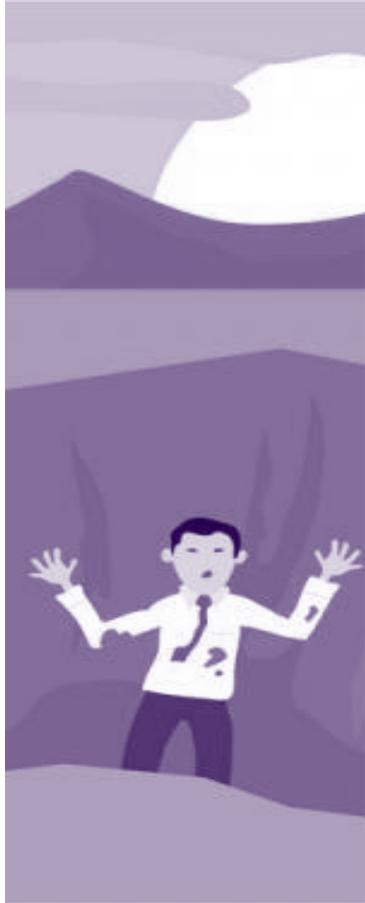
Grossly exaggerated evaluation of performance ("overly nice")

# Effective Documentation?

1/4/23 <u>Annual Review</u>	7/1/23	1/6/24	2/1/24 - 4/15/24	5/1/24
<p>Bobby is a real team player; he is an absolute joy to be around and to supervise. I just think he is the most fantastic employee; possibly the best employee I've ever supervised.</p>	<p>No mid-year review as required by company policy.</p>	<p>Meets or Exceeds expectations in all categories. Minimal comments (problem developing, but not entirely his fault)</p>	<p>Approved FMLA leave.</p>	<p>Bobby is fired because of his "consistent poor performance."</p>

# Effective Documentation?

E  
X  
A  
M  
P  
L  
E

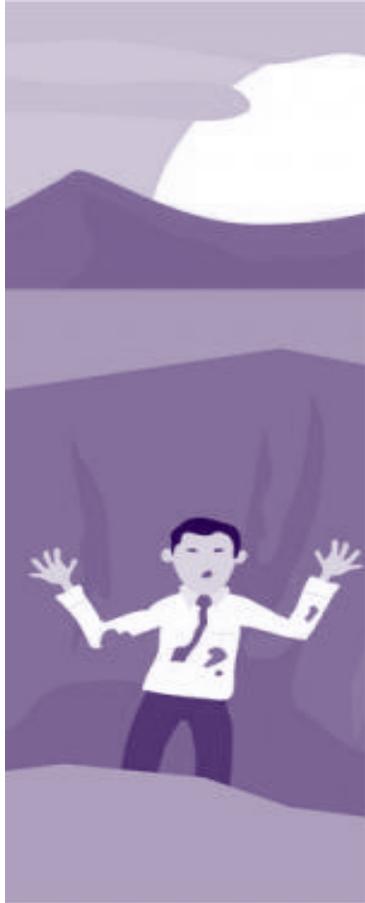


**“You have been spoken to about your unacceptable conduct.”**

**What is missing?**

# Effective Documentation?

E  
X  
A  
M  
P  
L  
E



“Your attendance has been poor in the last few months.”

What is missing?

# The Progressive Discipline Process

- Advantages to progressive discipline
- Steps in the disciplinary process
- The importance of consistency
- Preventive discipline
- Being fair when imposing discipline
- The verbal warning
- The written warning
  - What to document
- How to draft a written warning
- How NOT to draft a written warning
- The counseling meeting
- Suspensions and
- Termination

# Advantages to Progressive Discipline

- Gives employees notice of expectations
- Removes subjectivity
- Creates a written record for the employer
- Allows employees opportunity to correct behavior
- Progressive discipline systems recognize that discharge is generally the last resort
- Can reduce the risk of wrongful discharge litigation

# Steps in the Progressive Discipline Process

- Provide employee with outline of process
- Possible progression (Handbook Ch. 9, Art. III)
  - Verbal warning
  - Written Reprimand
  - Special Probation (PIP)
  - Suspension
  - Disciplinary Demotion
  - Termination
- Reserve discretion to bypass any of these steps



# Importance of Consistency

- Consistency is critical in avoiding allegation of discrimination
- Avoid actions such as informal discipline for “buddies/friends”
- Enforce rules with all employees
- Make decisions based on job requirements and performance
- Make sure you are unbiased

# The Verbal Warning

- Identification of behavior or performance issue
- Specific timeline for performance/behavior correction
- Statement of managerial support
- Statement of consequences
- REMEMBER TO DOCUMENT



# The Written Reprimand

## What to Document

- Date of writing/date of document
- Author of writing
- Recitation of what happened
- Rule violated
- Prior incidents/discussions
- Fact that the employee had adequate warning
- Corrective action to be taken
- Future monitoring

# The Written Reprimand

## Good Practices

- Remove emotion from your responses
- Double-check for validity and accuracy
- If facts are in doubt, do not document
- Be consistent and fair with regard to the individual employee  
(*i.e.*: warnings and evaluations given to the employee should be consistent with documentation in the personnel file)
- Document early

# How to Draft a Warning or Reprimand

A short e-mail can suffice or a memo which is signed by the employee to acknowledgment receipt. For instance:

**To:** *Employee*

**From:** *Supervisor*

**Date:** *July 12, 2024*

*Your tone when speaking on the phone with service recipients needs improvement. When I passed your desk today, I heard you raise your voice at a service recipient over the phone. This is the second time in the past month I witnessed such an incident. After the first time, I met with you and reminded you of the importance of treating service recipients with respect and we discussed that it is inappropriate to raise your voice at a service recipient. Service recipients must be given our full attention and respect. Immediate and sustained improvement is required. Further instances of this nature may lead to disciplinary action, up to and including termination.*

# The Counseling Meeting

## Procedure:

- Review the document
- Let the employee comment
- Listen
- Do not rescind/change position in the meeting
- Must the employee sign?
- Must there be a witness?
- Provide Due Process
  - Give employee the specifics of the charges against him or her, and provide employee with an opportunity to respond
  - Although not required by law, courts and reviewing agencies tend to look favorably on procedures involving due process

# Most Common Managerial Mistakes That Lead To Litigation

Not treating  
employees fairly  
and consistently

Disregarding  
policies (for  
some or all  
employees)

Failing to confer  
internally on an  
issue

Ignoring  
misconduct of  
employees

# Most Common Managerial Mistakes That Lead To Litigation

Getting too  
comfortable at  
work

Failing to  
document  
performance  
concerns

Not considering  
potential for  
“unconscious  
bias”

**Questions?**

JacksonLewis

Thank **you.**