



How to Document **Disciplinary and Performance Problems**



Employment Law *Advisor*

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Introduction: The vital importance of diligent documentation

Managers and supervisors are usually the first members of the company to notice that an employee has done (or not done) something that warrants discipline or is experiencing performance shortcomings that need to improve. Both situations require complete, accurate and timely documentation.

Frontline managers are HR's partners in making sure the organization has a clear record justifying any official act that affects employees.

That's why it is critical to train managers in how to create documentation. Of course, as an HR professional, you need to know how to do that, too. Taking the time and care to document thoroughly can save you and your organization major headaches later.

There are crucial reasons documentation must be taken seriously:

- Written documentation serves as an essential record and reminder of exactly where an employee stands in the disciplinary process or performance-management process. It prevents misunderstandings between team members, managers, HR and executives. Clear documentation eliminates miscommunication, saving everyone headaches later.
- Employees tend to take disciplinary and performance expectations and issues more seriously when they know infractions are being formally documented in their permanent file. This makes them aware that their behavior could negatively impact future promotions, raises and career progression.
- Closely following your company's standardized documentation procedures is important for eliminating any potential future claims of unfair treatment, favoritism, bias or

discrimination in how issues were handled. Maintaining consistency using the same process and documentation templates for all employees is key to showing no one was treated differently.

- Thorough documentation also legally protects the company by providing a clear trail and evidence of how performance issues were properly addressed. This becomes critical in the event of lawsuits by former employees claiming unfair termination or grievances raised by unions representing disciplined workers who will want to see the evidence firsthand.

Follow these rules to craft ‘bullet-proof’ documentation

Accurate, complete and timely documentation is crucial to enforcing work rules, ensuring fairness, promoting good performance and, most important, winning in court if an employee sues you.

Being able to prove your side of an employment law case usually comes down to whose story is most believable. Having good notes and files on what happened, who was involved and how you handled the situation will often carry the day. Judges and juries expect employers to document HR matters. Regulatory agencies like the EEOC do, too.

What to document? If it affects how an employee does the job, or whether he or she is hired, or promoted or punished for some infraction, write it down. Of course, when there’s the slightest whiff of harassment or retaliation, you need to document that, too. The same goes for matters relating to the FMLA and ADA.

General principles of good documentation

To be useful, documentation of disciplinary problems or performance shortcomings must follow several general principles.

The best documentation is contemporaneous. That is, the documentation is created as soon as an issue emerges. Document the problem right away—that day, if at all possible. Waiting too long to make notes about what happened provides an opportunity for errors to creep in and details to get fuzzy.

At the top of the page on every piece of documentation, write the date and time you created the record. This will carry great weight in court. Nothing looks more suspicious to a judge or jury than documentation that was created only after an employee filed a lawsuit. The natural conclusion is that the organization fabricated documentation to aid in its legal defense.

Document consistently. You can't decide to document some instances of rule-breaking and not other similar situations. You can't routinely document infractions committed by some kinds of employees but let it slide when others misbehave or perform

What should you document?

- Hiring processes, candidate interviews
- Terminations
- Discipline: Failure to comply with work rules and safety procedures, insubordination, physical violence, verbal threats, on-the-job impairment from alcohol or drugs
- Employee complaints of harassment and discrimination
- Internal investigations
- Performance management/reviews: Incompetent job performance, good performance
- Excessive tardiness, unexcused absences
- FLMA leave requests
- Requests for accommodations under the ADA and Pregnant Workers Fairness Act
- Requests for religious accommodations.

poorly. Consistently applying the same documentation standards insulates your organization from claims that you play favorites, or worse, discriminate.

Maintain confidentiality. Ensure that only those people who really need to see documentation actually have a chance to see it. Documentation of misbehavior or performance deficiencies is among the most serious of records that can go in an employee's personnel file. Make sure it is stored securely and away from prying eyes.

Make plans to back up documentation. These are important organizational records. If you need to produce documentation to defend your organization in court, that will probably happen long after the records were created. Whether your documentation is written on paper or in a computer file, ensure you have copies you can retrieve easily.

Rules for creating documentation

Follow these rules for creating documentation that promotes your organization's goals and will stand up in court. When documenting:

Describe your expectations. These come from your company documents—things like job descriptions, policies, procedures, employee goals and company standards. Cite the specific expectation the employee failed to meet.

Describe the behavior or performance that must change. When the employee doesn't meet expectations, it's time to begin the disciplinary process. Start by explaining exactly what you perceive the problem to be. Follow these tips:

- **Describe the conduct, not the individual.** “Your last three reports were late,” not “You're lazy.” Keep observations job-related and use objective criteria—the ones you cited under expectations. Describe the impact on others—how the problem affects co-workers and the organization as a whole.

- **Be specific.** *Example of poor documentation:* “Mary turns in sloppy work.” *Better:* “Mary’s most recent report contained four spreadsheet errors that led to budget miscalculations. It took another employee two hours to identify the problem and figure out how to correct it. This is the third time this year that spreadsheet errors have compromised Mary’s reports.”

Give specific examples that need improvement. Did the worker miss a clearly defined deadline? Provide new deadlines and require the employee to inform their supervisor if there’s a valid reason these won’t be met.

- **Write in a clear, factual manner.** Note the policy or procedure that the employee has violated. Date the document.
- **Stick to the facts.** Avoid emotional content such as personal impressions (“I think ...”), labels (“he’s a whiner ...”) and subjective adjectives (“very unproductive ...”). Resist the temptation to speculate about why a disciplinary infraction occurred. If your documentation says something like, “John is always late on Monday mornings because he parties all weekend,” the plaintiff’s lawyer is definitely going to ask if you have been spying on John’s after-hours activities or listening to the workplace rumor mill to dig up dirt on John. Those lines of inquiry will make you look bad to a judge or jury.

Include the employee’s explanation of why expectations aren’t being met. There could be a good reason why an employee’s reports were late—maybe co-workers aren’t providing the information necessary to complete them. Including the employee’s explanation helps the employee own the problem and the solution. It also shows you’re interested in resolving the issue. Demonstrating your good-faith effort to correct inappropriate behavior or help the employee perform more effectively will help you win lawsuits.

Detail the action plan and the goals. Explain what steps the employee must take to improve her performance or conduct.

Spell out the steps the manager or supervisor will take to help the employee achieve the desired results. Ask the employee to agree to the terms by signing off on them.

Set specific measures for improvement. Merely listing expectations generally isn't good enough. Assign deadlines to all action items. For example, don't say the employee needs to complete sales reports as soon as possible. List specific reports and assign each a due date. This is more work up front but pays off if you have to fire the worker later. You will have a solid record showing those missed deadlines.

Describe the consequences. Clearly state what will happen if performance or behavior does not improve—discipline, demotion, no promotion, additional training, etc. If necessary, add the dreaded phrase “up to and including termination.”

Include time expectations. When must the employee show improvement or meet the goals you agreed to? Be realistic; don't ask for the impossible. Set out an exact time frame, such as 30, 60 or 90 days.

Note: If you prescribe an exact time frame, you **MUST** follow up at that time.

Follow up. State what will happen when you follow up. What part of the **performance** will you be reviewing? What specific improvements do you expect? What will happen if the employee is successful in meeting the goals you set? If you use a progressive discipline system, here's where to spell out the next steps.

Final note: Coordinate closely with supervisors every time you or they initiate discipline. Check in with them regularly to get their feedback on the employee's progress or lack thereof. Tell supervisors that HR must approve every subsequent disciplinary act or decision to terminate. Document all those conversations.

How to document employee infractions: 4 ‘musts’ to include

HR consultant and author Paul Falcone has advice for HR professionals and managers who must write up employees for violating work rules: Tell the story in detail!

Using a narrative structure helps make clear to employees what they did wrong and why they need to correct their behavior. If a dispute related to discipline ever turns into a lawsuit, presenting all the facts in a clear, compelling way will help the court conclude that you, the employer, acted in good faith to uphold your standards. Assume your documentation will be held up to some form of legal scrutiny.

When writing up an employee, use a tried-and-true structure: who, what, when, where and why.

- Who committed the infraction? Who else witnessed it?
- What did the employee do (or not do)?
- When did it happen?
- Where did it happen?
- Why did the offense deserve a write-up?

Falcone offers these tips for crafting documentation that will help correct employee behavior and stand up in court:

1. Paint pictures with words

Use your senses when describing events. For example, “You left your work area untidy again” means nothing to a jury nine months from now. But they can picture it if you write, “An eight-inch stack of incoming work orders was piled on your desk and spare parts were scattered across your work bench.”

Turn subjective evaluations into concrete facts. Don’t state, “You appeared at the customer’s home under the influence of alcohol.”

How would you know unless you had a breathalyzer? What you can state is, “The customer reported that he heard you slurring your words, saw that your eyes were glassy, smelled alcohol on your breath and noticed that your gait was unsteady.”

Ask: How would it read in court?

When documenting employee shortcomings, always have this key question in mind: “How would this sound if it were read aloud in court?”

If the language used even suggests a discriminatory or retaliatory motive, the organization could find itself in legal trouble.

Before managers put a single word on paper, they should ask themselves these questions:

- Do I restrict my written comments to an employee’s on-the-job performance?
- Do I remain objective when it comes to analyzing an employee’s work?
- Do I consider how my words may be construed as unprofessional, demeaning or sarcastic?
- Do I make certain that I get all the facts from all involved parties?

Even the most informal note tossed into an employee’s file should meet those criteria.

2. Document the negative impact

What was the bad outcome that resulted from the employee’s actions? That’s the legitimate business reason that justifies the discipline.

Too many times, managers lament, “My gosh. I was in the office until 10:00 last night doing all this stuff that the employee was supposed to have done.”

That all needs to go into the documentation: “I found inconsistencies throughout your calculations and had to correct them myself

before they could be processed. As a result, I had to work until 10:00 p.m. last night. We'll have to hire a temp beginning tomorrow and push back the goal date a week."

3. Retain physical evidence

It happens all the time: An employee turns in a work product with so many errors that the manager just throws it in the garbage out of frustration. That's a big mistake. The shoddy work might be the most important evidence you have that an employee is not meeting your standards.

When you write up employees, attach the faulty product as an example. That's what justifies the discipline.

4. Include the employee's response

Give the employee an opportunity to respond to the written warning or discipline. That allows you to document that you listened to the individual's side of the story *before* taking disciplinary action. You incorporated their feedback in the document, yet you're still holding them to the organization's standard.

Advice for managers: How to document the need to discipline

Documenting employee misbehavior is an essential function of every manager's job. Whether the issue is poor attendance, interpersonal squabbles, failure to follow rules and procedures or any of the other ways employees mess up at work, good documentation is critical. It paves the way for correcting problems. It lays the groundwork for whatever happens next—for example, suspension, demotion or termination.

And it forms the backbone of your organization's defense in court if an employee decides to sue. Strong documentation will be

Questions to ask before writing up an employee

Before you discipline an employee, ask a few key questions to ensure you're acting appropriately:

- Does the punishment fit the crime?
- Have you already discussed the problem with the employee?
- Are the facts clear, or is there room for disagreement about what happened?
- Is the punishment you are considering consistent with what you have done in the past?

It's all about fairness. After all, most workplace lawsuits stem from employees' perceptions that they got a raw deal.

especially important if an employee claims discipline or another adverse employment action was based on illegal discrimination (on the basis of race, age, gender, disability, religion, etc.). Sound, ongoing documentation by management will prove that performance—not bias—was the reason for the firing.

Best documentation practices

You can help limit your organization's legal liability by counseling managers to keep three basic principles in mind when documenting discipline.

Documentation should be:

1. Immediate. Managers should take notes right after an incident occurs. It's much harder for an employee to cast doubt on the boss's motives if the written explanation comes right after the action.

2. Accurate and believable. When an outside observer (judge, jury or EEO investigator) is called to judge your side of the story, detailed observations add authenticity. The more specific the documentation, the greater the credibility.

Example: Instead of noting that "Bill's work has been sloppy lately," it's better to note, "In each of his last three reports, Bill had at least two important accounting mistakes that needed revisions."

3. Agreed upon. If both sides agree on what happened, it's much tougher for either side to later change claims. Try to get employees involved in the documentation process.

Managers should ask the employee to summarize her input in writing, and then compare it to their own recollections. If they can't reach an agreement, try to get detailed statements from witnesses.

Advice for managers: How to document employee performance

It happens to every manager: You sit down to prepare a staff member's review and realize you can remember only what the person has done the past few weeks. Or you allow only a single incident (good or bad) to color your assessment.

Supervisors should never rely solely on memory to evaluate employee performance. That makes appraisals far more difficult than necessary. Instead, it's best to institute a simple recording system to document employee performance.

The most useful, easy-to-implement way is to create and maintain a log for each person. Performance logs don't need to be complicated or sophisticated. They can simply be sheets of paper in a folder or a file on your computer. Choose whatever means you're comfortable with.

The key is to establish a system that you will use regularly. No matter how you take notes, make sure to keep them confidential.

Many employee lawsuits can be quickly dismissed if performance logs can clearly demonstrate a history of performance problems leading to the firing.

Recording employees' performance: 8 tips

To begin the process, create a file for each employee you supervise. Include in each file a copy of the employee's job description, job application and resume. Then follow these steps for recording performance:

1. Include positive and negative behaviors. Recording only negative incidents will unfairly bias your evaluation. Make a point to note instances of satisfactory or outstanding performance, too.

One way to ensure a balanced reporting: Update employee performance logs on a regular basis, instead of waiting for a specific incident to occur. Ironically, failing to document a positive performance can strengthen an employee's claims of discrimination. A file of all-bad comments may look like a setup.

2. Date each entry. Details such as time, date and day of the week help identify patterns that may indicate an underlying problem before it becomes more serious.

3. Write observations, not assumptions. In all log entries, be careful about the language you use. Performance logs can end

The ABCs of documentation for managers

Part of management is documenting employee performance. It's an aspect that many managers don't enjoy, but it's crucial if you have to defend a decision to terminate an employee or recommend him or her for promotion.

Don't take any chances with your record-keeping responsibilities. Here's what to keep in mind:

Don't drag your feet. Document discussions about performance as soon as they take place, when the facts and details are fresh in your mind.

Record the specifics. Always note the date and time of your discussion (or any incident you're reporting). Include the employee's name and job title along with your own so there's no question about whom the document refers to.

Stick to the facts. Use objective, factual language in your report. Leave out personal opinions or any theories you can't back up with evidence.

Describe the intended result. Don't describe the incident or conversation by itself. Specify what actions you asked the employee to take as a result. Include his or her response in your notes. This reduces the possibility that the employee will later claim he or she didn't know what you wanted.

Submit a copy to HR. All documentation on employee performance and behavior needs to be filed in a central location.

up as evidence in a lawsuit. Your log comments should only focus on behavior that you directly observe. Don't make assumptions about the reasons for the behavior or make judgments about an employee's character. Keep out any comments that border on personal comment or that show personal prejudice.

4. Be specific. *Example of poor documentation:* "Employee was late three times in the past month." *Better:* "Employee was 30 minutes late on Feb. 5; reason given: traffic. Employee was 45 minutes late on Feb. 9; reason given: overslept. Employee was an hour late on Feb. 23; reason given: car problems."

5. Keep out biased language. A good rule of thumb: Any statement that would be inappropriate in conversation is also inappropriate in an employee log. That includes references to an employee's age, sex, race, disability, marital status, religion or sexual orientation. Don't suggest reasons for employee actions or make connections between events without direct evidence.

For example, you may know that Dan's wife recently filed for divorce, but don't suggest in the log that his personal problems are the reason his work performance has slipped.

6. Be brief, but complete. Log entries should use specific examples, rather than general comments. Instead of saying, "Megan's work was excellent," say, "Megan has reduced the number of data-entry errors to fewer than one per 450 records."

7. Track trends. If you begin to see patterns, make notes in the log or flag prior incidents of the same behavior. You don't need to discuss every entry with your staff members. Bring your observations to the employees' attention only after you've defined a specific problem.

8. Be consistent. Don't include comments about a behavior in one person's performance log if you ignore the same behavior in other employees. When in doubt, check to see how similar problems have been documented in the past.

Quiz: Are you documenting the legal way?

It's important to know the kind of language managers should—and should not—use when documenting performance or behavior issues. Test your knowledge by answering “True” or “False” to the following statements:

1. An employee is caught stealing company equipment. It's best to list the termination reason as “gross misconduct” since “stealing” could be defamatory.
2. An employee with a disability is having trouble meeting job standards. It's best to list her performance as “satisfactory” so she won't be discouraged.
3. A disciplinary warning should always contain language that spells out the potential penalties the employee faces if he repeats the offense.
4. If an employee is terminated for poor performance, the best way to disqualify him from unemployment benefits is to use terms such as “unsatisfactory work” or “totally inefficient.”

See next page for quiz answers


Quiz Answers

1. FALSE. It's not defamatory to list the truthful reason for an employee's termination and to share that on a need-to-know basis. Sharing the reason with other employees or the public could be defamatory.

2. FALSE. This type of thinking can land a manager in the middle of a disability discrimination lawsuit if the employee has to be fired and then fights your performance reasoning in court. So be honest. Spell out the problems and attempt to find solutions.

3. TRUE. Courts typically uphold claims if they believe an employee was not properly warned about the possible consequences of future violations. Spell out in writing exactly what the employee can expect from further violations.

4. FALSE. Terms such as "unsatisfactory work" are the very ones that could result in unemployment benefits. Such payments are typically withheld only when employees are terminated for gross insubordination or willful misconduct.



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