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DEALING WITH THE PROBLEM EMPLOYEE:

*Practical Strategies to
Avoid Legal Issues for
Employers of All Sizes*

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I. INTRODUCTION

Employee and employer relationships are among the basic building blocks of our economic and societal structure, affecting most people over the greater part of their lives. Employment is the means by which society's goods and services are provided and employees are the largest line item expense for virtually every employer. With that in mind, employers invest heavily in selecting and training their employees and are eager to retain good employees in an effort to capitalize on employees' skills and knowledge to operate a profitable business. Given the significant investment in time and expense associated with employees, when employers find themselves with a disgruntled and unhappy workforce, they soon realize that productivity is down, and labor costs are up.

Problem employees create trouble for employers of all sizes. Regardless of the number of employees, every employer will eventually face an employee who exhibits unacceptable behavior. There are three basic types of problem employees: underperformers, employees with disciplinary problems, and unqualified employees. Early warning signs of problem employees include:

- decline in performance
- increased complaining
- withdrawal from socializing
- low self-esteem
- stronger need for approval
- lack of self-discipline
- lack of confidence
- failure to realize impact of behavior
- increased tardiness or absenteeism
- disinterest in work
- decline in productivity
- missed deadlines
- defensive and hostile behavior
- sloppy appearance
- becoming a target of complaints by customers and co-workers



The earlier an employer realizes an employee is becoming problematic, the quicker that employee can be disciplined and rehabilitated into a productive worker, or fired and replaced with a better suited employee.

These materials provide a brief overview of the laws that govern the employer/employee relationship and advise an employer on how to address problem employees while avoiding potential legal issues along the way.

II. LAWS GOVERNING THE EMPLOYMENT RELATIONSHIP

The legal principles which provide the framework for the employment relationship consist of a maze of federal and state statutes, common-law doctrines, and administrative findings. The following descriptions contain a brief summary of some of the major federal, state, and local laws which govern the employer/employee relationship. As is evident from the list below, while problem employees are universal to virtually every employer, the laws that apply depend on the size of the workforce.

- a. National Labor Relations Act (“NLRA”): The NLRA covers union/employer relations and applies to private sector employees and employers involved in interstate commerce.
- b. Fair Labor Standards Act (“FLSA”): The FLSA covers minimum wage, overtime, and child labor requirements on a federal basis. To be entitled to FLSA benefits, an employee must either be engaged in interstate commerce, engaged in the production of goods for interstate commerce, which includes work closely related and directly essential to the production of goods for interstate commerce, or employed by an enterprise engaged in commerce or in the production of goods for commerce. Covered business enterprises must have at least 2 employees.
- c. Title VII of the Civil Rights Act (“Title VII”): Title VII prohibits discrimination in employment on the basis of race, color, sex, national origin, and religion. Also, it requires employers to accommodate the religious beliefs of employees. Title VII applies to employers of 15 or more employees in 20 or more calendar weeks in the current or preceding year.
- d. Age Discrimination in Employment Act (“ADEA”): The ADEA prohibits discrimination in employment on the basis of age (specifically it protects employees 40 years old or older). The ADEA applies to employers of 20 or more persons in 20 or more weeks of the relevant year.



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- e. Americans with Disabilities Act (“ADA”): The ADA applies to employers of 15 or more persons during 20 calendar weeks of the current or previous year.

Title I: Prohibits discrimination in employment on the basis of disability and requires employers to reasonably accommodate the disabilities of employees.

Title III: Requires businesses that are open to the public to remove barriers and ensure access by the disabled.

- f. Employee Retirement Income Security Act (“ERISA”): ERISA governs pension plans and other benefits provided to employees. ERISA is applicable to all employee benefit plans established or maintained by any employer engaged in commerce or in any industry or activity affecting commerce and/or any employee organization or organization representing employees engaged in commerce or in any industry or activity affecting commerce.
- g. Veteran’s Reemployment Act and USSERA: These laws guarantee reemployment rights to participants in the armed services or national guard.
- h. Section 1981 (42 U.S.C. § 1981): Section 1981 prohibits discrimination on the basis of race. This law largely parallels Title VII protections.
- i. Section 1983 (42 U.S.C. § 1983): Section 1983 extends constitutional protections to public employees.
- j. Worker Adjustment and Notification Act (“WARN”): The WARN Act regulates mass layoffs and plant shutdowns. WARN requires business enterprises that employ 100 or more employees to provide affected employees, or their bargaining representatives, and certain state and local government entities, 60 days advance written notice before plant closings or mass layoffs.
- k. Family and Medical Leave Act (“FMLA”): The FMLA guarantees time off for certain employees in specific circumstances such as an employee’s own serious health condition, to care for a spouse, child, or parent with a serious health condition, and the birth or adoption of a child. The FMLA applies only to employers of 50 or more employees during 20 weeks of the current or preceding calendar year and to an employee who has worked for the employer 12 months or more, including working at least 1,250 hours during the preceding 12 months.



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- l.** Executive Order 11246 and Office of Federal Contract Compliance Program (“OFCCP”) Regulations: These regulations require non-discrimination by federal contractors and affirmative action plans.
- m.** Fair Credit Reporting Act (“FCRA”): The FCRA provides for disclosures and authorization requirements for background checks on employees and applicants.
- n.** State Laws:
 - i.** Wrongful Discharge: Some states have laws restricting an employer’s right to terminate employees.
 - ii.** Wage and Hour: Some states grant greater wage and hour protections to employees than the Fair Labor Standards Act.
 - iii.** Restrictive Covenants: Laws regarding protections to employers against unfair competition by former employees.
 - iv.** Contract Law: Laws regarding employment contracts and their enforcement.
 - v.** Leave Law: Some state laws provide greater leave protection than the FMLA.
 - vi.** Tort Law: Some states have tort laws which directly impact the employment relationship.

III. MANAGING THE PROBLEM EMPLOYEE

By allowing poor performers to continue their negative behavior patterns, managers put the productivity and effectiveness of the entire organization at risk. Problem employees hurt morale, lower productivity, waste valuable time and energy, and even set the stage for possible lawsuits. The following two principles, (1) *consistency* and (2) *written documentation*, provide practical strategies to aid employers in disciplining problem employees and avoid running afoul of the laws described above in Section II.

a. CONSISTENCY

To reduce potential legal issues, managers should discipline problem employees in a fair and consistent manner. This consistency in treatment prevents a problem



employee from later claiming the manager singled him or her out for punishment for reasons other than the problems the employee created. Use the following acronym to guide you in treating all employees the **SAME**.

S – Set Clear Standards.

- Managers need to outline to all employees exactly what constitutes problem behavior and what an employee can do to fix the problem. The manager should emphasize the standards of behavior are company policies which apply to and must be met by all employees. Explaining these universal standards to employees helps prevent subsequent claims of discrimination in the discipline or firing decisions.

A – Act Respectfully and Reasonably.

- Treat all employees with respect and dignity throughout the discipline procedure. This prevents future claims of emotional distress and humiliation. In addition, the manager should outline a reasonable deadline for all employees to mend the problem. Giving employees a 30, 60, or 90 day improvement window may encourage them to try harder, as opposed to warning an employee in the morning and then firing that employee in the afternoon. It is unreasonable to expect every employee to be perfect.

M – Mete Out Punishment.

- The manager must be sure the employees understand the consequences of inaction. Disciplinary notices should not promise continued employment, but rather advise employees that failure to provide immediate and sustained improvement will result in a specified punishment.

E – Evaluate Employees Honestly.

- Managers should be blunt with each employee. Managers must describe the employee's performance problems in terms the employee can understand. The manager should judge all employees fairly and objectively. Every employee should be measured against the same standard without regard to the employee's race, color, sex, religion, national origin, age, disability, sexual orientation, political beliefs, veteran status, or any other personal, social, or behavioral traits or habits.



- In addition, the manager should be honest with himself when evaluating an employee. The manager should not allow prejudice, partiality, or spite to influence the decision to discipline. This honesty, along with clear standards of behavior and outlined forms of discipline, prevents an employee from later claiming the manager singled him or her out to fire.

The essence of effective people management is managing emotions. By demonstrating consistency in disciplining problem employees, employers will promote a fair and impartial work environment. This emphasis on fairness helps manage the emotions of problem employees. If all employees are treated the **SAME**, then no one employee can feel singled out or discriminated against by his or her employer.

b. PAPER TRAIL

Managers should also create a detailed paper trail describing the problem employee and the employee's attempt to correct the unacceptable behavior. Most employment cases are won or lost based on written documents. Documentation speaks to the jury more convincingly than witness testimony because it is prepared contemporaneously with the event and is, therefore, considered more reliable by the jury. In the words of Paul Falcone, director of employment and development at Paramount Pictures and author of 101 Sample Write-Ups for Documenting Employee Performance Problems, "If you didn't put it in writing, you might as well settle it on the courthouse steps, because you don't have a defense."

Use the following acronym to guide you in conducting and keeping discipline records on **FILE**.

F – Frequently Conduct Written Performance Evaluations.

- Written performance evaluations should be done on an annual basis on the anniversary of the employee's hire date or on a set date for all employees. Giving all employees their performance evaluations during the same time period promotes fairness and consistency. Evaluations should be given to each and every employee every year without fail.
- A supervisor may want to give a written performance evaluation to newly hired employees after at least 90 days to let each employee know how he or she is performing. A 90 day performance evaluation allows the employee to improve his or her performance if necessary. In addition, written performance evaluations could



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also be given when an employee demonstrates significant improvement or deterioration of performance.

- After a performance evaluation, the manager should keep a written copy and a copy should be put in the employee's personnel file on a permanent basis. The employee may also be given a written copy of the evaluation.

I – Invite Other Managers and Supervisors to Privately Respond or Discuss the Problem Employee.

- Managers should promote open communication between other managers and supervisors within the same employer. If another manager or supervisor struggles with unacceptable behavior of the problem employee, he or she should report the behavior to the head manager so it can be documented in the employee's file. Open communication and written documentation aids managers with a large number of employees who cannot be in every place at the time a problem arises.

L – Look at Prior Evaluations and Address Progress or Lack of Progress.

- The discipline report should describe any previous counseling sessions or discipline of the employee. A history of performance problems will be a great justification for an employee's termination and any lawsuits which arise therefrom.

E – Evaluate Each Employee Problem Thoroughly and Record Substantive Written Comments.

- To ease the process of recording all discipline infractions, managers should create a standard form for evaluating each employee problem. This form should leave a space for the standard or policy which has been violated and several lines to describe the incident.
- Each disciplinary report should briefly state the basic facts which resulted in the discipline accurately and without exaggeration. In addition to recording a description of the problem on file, these comments should identify the specific corrective action plan created to eliminate the problem. The manager should state the



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desired conduct of the employee and the consequences of future violations.

In addition to recording disciplinary incidents, an employer should provide a hard copy of the expected behavior of a desirable employee and the overall goals and visions of the employer. The employer could place this information in an employee handbook or provide it in a separate document for the employee to sign. By keeping this information on **FILE**, the employer creates evidence that the employee knew what behavior could result in discipline or termination should future legal troubles arise.

c. EXAMPLES

The following two typical problem employees exemplify how inconsistency and lack of discipline records can lead to legal trouble.

- **Always Late Lisa**
 - This example illustrates the problem employee who constantly arrives late to work, meetings, and other important employee gatherings. Overtime, this lateness appears disrespectful to both the manager and other employees and causes them to lose confidence in the tardy employee. This behavior decreases morale and leads to a decline in productivity in the workplace.
 - Consistency is a key factor in dealing with Late Lisa to avoid future legal troubles. For example, Manager Marcy and Lisa are good friends. Marcy overlooks Lisa's constant tardiness to work because of their friendship. However, Marcy does not overlook when Lisa's co-worker Bob arrives late. Marcy fires Bob for being late to work.
 - Although Manager Marcy may not have broken the law by being friends with Lisa, this inconsistent application of the rules may result in Bob filing a charge of discrimination or other complaint against the employer. If Bob is of a different race, national origin, or religion than Lisa, he may charge Marcy with discrimination for allowing Lisa to show up to work late but not allowing him the same privilege. This potentially expansive problem could have been avoided if Manager Marcy had enforced the late policy consistently among all of the employees, despite her friendships.



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- When dealing with late employees, do not ignore chronic lateness. It takes more effort to confront this problem than it does to simply ignore it, but ignoring it inevitably leads to more problems. Managers should take a consistent approach to lateness and place responsibility on the employee to be on time. Be consistent in implementing disciplinary procedures on every employee who is frequently tardy and document each episode of tardiness and discipline to avoid potential legal pitfalls.
- **Insubordinate Sam**
 - This example illustrates the problem employee who challenges a manager in front of other workers and supervisors. This type of behavior is very disruptive of the hierarchal setup of the place of employment and if allowed to continue, could lead to other employees losing respect for the manager's authority.
 - Once again (like when managing Late Lisa), Manager Marcy should be consistent in and document the handling of Insubordinate Sam. Any employee who shows signs of insubordinate behavior should be disciplined in the same manner. Any episode of insubordination, such as refusing to perform a particular task or arguing with a manager or supervisor about the employee's responsibilities, should be documented in written form and placed in the employee's personnel file. This consistency and paper trail will be useful as evidence if the employer later fires the employee.

These examples illustrate practical strategies *for managing* problem employees and avoiding legal issues. The next section provides practical strategies to avoid legal trouble *for terminating* an employee.

IV. **TERMINATING A PROBLEM EMPLOYEE**

When a problem employee continues to exhibit unacceptable behavior, despite several disciplinary procedures, the manager may decide to terminate the employee. In deciding whether to save the employee, a manager should assess the potential value of the employee, estimate the expenditure of time required to work with the employee, and evaluate the probability of success. Once the decision to terminate is final, the manager should make every effort to be *consistent* and *document* the termination procedure in order to defend against potential legal trouble.



a. MAKING THE DECISION TO TERMINATE

The manager should first investigate the issue to ensure his or her understanding of the facts is accurate. The employer should check the employee's file for documented disciplinary problems. This step reemphasizes the importance of documenting the employee's episodes of inappropriateness and subsequent punishment. These documents support the decision to terminate and provide a defense to later claims of unfairness and discrimination.

b. CONDUCTING THE TERMINATION

Like all other stages of dealing with a problem employee, the termination procedure itself should be consistent and well documented. Managers should try to implement a procedure by which all employees can be terminated in the same fashion. The following suggestions provide a method to follow for terminating all employees and emphasize the importance of documenting each step.

When the actual termination meeting occurs, two management representatives should be present at the conference. One representative should be primarily responsible for observing and taking notes. The meeting should take place close to the time of the infraction and in a fairly discrete location. This location should ensure confidentiality so that others are not able to overhear the conference. Some minimal security measures could be taken such as contacting the security personnel in advance and have them standing by, but not in immediate sight of others.

In the meeting, the manager should be calm and professional without shouting or using profanity. The manager should be courteous but get to the point quickly. A good technique is to tell the employee he or she must listen first and then respond. The decision should be briefly explained with resolve and confidence that the decision is appropriate. It is very important for the manager to document the termination conference. This paper trail should include specific comments, behavior, and significant events throughout the termination.

c. EXAMPLE

The following example provides an illustration of how inconsistent treatment and lack of documentation during the termination procedure can lead to legal trouble.

- **Early Retiree Richard**
 - This example illustrates the problem employee who has been working for awhile and is beginning to practice on-the-job retirement. The manager decides it is time to let Richard go after months of little to no productivity.



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- If the manager failed to document Richard's lack of productivity or discipline measures taken against him, Richard may be able to successfully allege age discrimination. Without evidence of Richard's unacceptable behavior in his personnel file, Richard could claim that the Manager Marcy singled him out because he was old and decided to fire him and hire a younger replacement. However, if Marcy documented her disciplinary efforts to correct Richard's lack of work, Marcy would have a strong defense for why she fired Richard.

V. CONCLUSION

The harmony in an employee/employer relationship defines the success of any place of employment. When an employee becomes discontent and problematic at work, the manager should try to correct the unacceptable behavior. A manager might first discipline the employee. If disciplinary measures are not enough, the manager may decide to terminate the employee.

When making discipline and termination decisions, a manager should be aware of the laws governing the employment relationship. If the problem employee is not dealt with properly, the manager might be setting the stage for future legal troubles. In fact, employees who cause trouble while employed are much more to cause legal trouble if disciplined or terminated. However, two practical strategies can help an employer effectively manage and terminate employees while preventing potential courtroom battles.

Two practical strategies for dealing with a problem employee while avoiding legal issues are *consistency* and *documentation*. By treating all employees the **SAME** in discipline and termination procedures, managers prevent any employee from later claiming discrimination. Documenting on **FILE** every incident of problematic behavior, disciplinary methods, and termination procedure creates evidence of the reasoning behind why the manager decided to discipline or terminate the employee. If the employee later files a lawsuit, the manager's hard work applying these principles will likely result in success for the employer.