



EFFECTIVE AND DEFENSIBLE DOCUMENTATION:

... Corrective Action and Discipline




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TODAY'S PRESENTER



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CORRECTIVE ACTION AND DISCIPLINE: THE PRINCIPLE OF POSITIVE PROGRESSIVE DISCIPLINE



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WHY PROPER DOCUMENTATION IS IMPORTANT

“Of all the employment cases that come across my desk, 90% would simply go away if the manager had proper documentation of what happened.”

“If it’s not written down, it didn’t happen.”

“Every employment case comes down to the simple issue of fairness. Did the employer treat the employee fairly?”


*Robert Mathiason, Esq.
The Littler Law Firm
San Francisco, CA*



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WHY PROPER DOCUMENTATION IS IMPORTANT

- Today’s employment documentation may very well become critical evidence in tomorrow’s employment case.
- Decisions to terminate or impose employee discipline are closely scrutinized by the courts and other adjudicators.
- Would your documentation hold up to a court’s inspection and help support your employer’s side of the case?
- Or could your documentation cause your defense to crumble?
- If you don’t have evidence to back up your decision, you could face penalties and even lawsuits charging discrimination.
- Be sure to have your documentation in order to stand up to this scrutiny.





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CORRECTIVE ACTIONS ARE . . .

Corrective action is a process of communicating with the employee, when an *employee does not meet expected and communicated performance, conduct, or behavior standards*, and taking appropriate action:


1. To improve employee **PERFORMANCE**
2. To promote compliance with established rules and expectations, and to improve employee **CONDUCT**
3. To change and improve unacceptable employee **BEHAVIOR/ATTITUDE**.

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DISCIPLINARY ACTIONS ARE ...


- Disciplinary action is taken to correct and improve performance, conduct, and behavior/attitude problems when the employee still does not meet expected and communicated performance standards, and corrective action has not been effective,
- **OR** when the seriousness of offense warrants more formal measures than corrective action.
- **Take disciplinary action in positive and constructive way, to send a message that you are out help the employee become a fully productive member of your work unit.**
- **While your overall goal is still improvement, consequences for the employee’s failure to improve are much more serious.**
- **The disciplinary process features efforts to provide feedback to the employee so he or she can correct the problem.**
- The goal of discipline **STILL**, is to improve employee performance.



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POSITIVE PROGRESSIVE CORRECTIVE/DISCIPLINE ACTION IS:

- Both corrective and disciplinary actions should be “progressive” and “positive” -- starting at the lowest level, and then progressing up the appropriate steps.
 - However, this depends on the specifics of each case
 - Avoid prescriptive policies, retain ability to skip steps
- Each corrective action, whether it is verbal or written, ***MUST be progressively documented ... or “it never happened.”***
- Each action should build upon the previous action and must be documented properly in order to provide the employees the opportunity to correct the performance, conduct, or behavior/attitude deficiencies or problems.
- Corrective Action and Disciplinary Action must be taken with the intent of correcting the problem – ***a positive outcome is always the goal – even in a termination.***

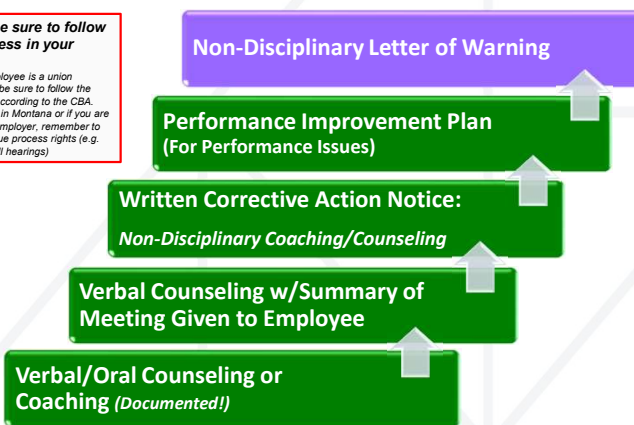



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SAMPLE PROGRESSION OF CORRECTIVE ACTION

NOTE: Be sure to follow the process in your policies!

- If the employee is a union member, be sure to follow the process according to the CBA.
- If you are in Montana or if you are a public employer, remember to provide due process rights (e.g. Loudermill hearings)



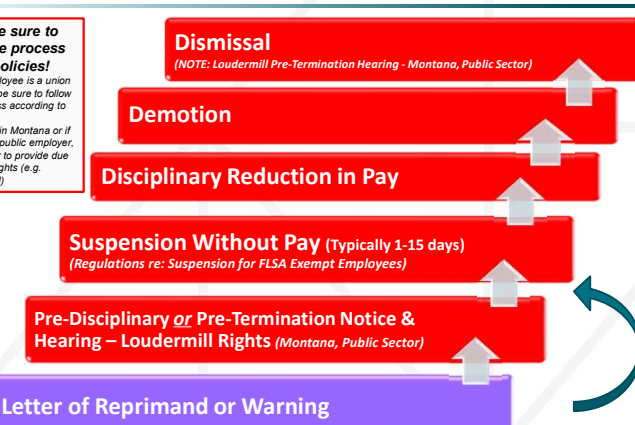



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SAMPLE PROGRESSION OF DISCIPLINARY ACTION

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**PUBLIC SECTOR EMPLOYERS:
LOUDEMILL RIGHTS: PRE-DISCIPLINARY HEARING**

Loudermill Rights. A 1985 U.S. Supreme Court decision, *Cleveland Board of Education v. Loudermill*, established what are called "Loudermill Rights" for public employees.

- Loudermill says that public employees have a property interest in their employment. You may not take something of value away from them without providing “due process.”
- Will also apply to employers in Montana, and
- Employers who by policy or contract (e.g. a CBA) have granted due process right to employees.






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LOUDERMILL RIGHTS LAW AND LEGAL DEFINITION

- The term 'Loudermill rights' refer to those employee rights which state that most public employees have a property right in their jobs.
 - Pursuant to such rights, an employee cannot have their property (job) taken away or impacted (e.g. imposing severe discipline) by the government without being provided due process.
 - It also gives the employees a right to pre-termination hearing that gives them the opportunity to present their side of the story before the employer makes a decision on discipline.
- The term 'loudermill rights' comes from the case Cleveland Board of Education v. Loudermill, 470 U.S. 532 (U.S. 1985), decided by the Supreme Court of the United States in 1985.
 - The decision laid out that most public employees have property interest in their jobs and are therefore allowed due process rights if they are severely disciplined or fired.
 - Loudermill rights include providing a Loudermill letter to the employee – i.e. specific written notice of the charges and an explanation of the employer's evidence so the employee can provide a meaningful response and an opportunity to correct factual mistakes in the investigation and to address the type of discipline being considered.



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THE BENEFITS OF POSITIVE PROGRESSIVE DISCIPLINE

- The process is designed to **help the employee to be successful in their job, by helping them to correct the problem.**
 - Establishes expectations and predictability
 - Applies consequences fairly and consistently
 - Corrects inappropriate behavior and poor performance
 - Helps rehabilitate employees with potential
 - Protects against complaints and lawsuits
 - It is a FAIR way to treat employees





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THE BENEFITS OF POSITIVE PROGRESSIVE DISCIPLINE

Positive Progressive Discipline:

- Allows supervisor to intervene at the first signs of trouble and promptly address a problem with the employee
- Enhances communication between managers and employees
- Helps managers to achieve higher performance and productivity
- Improved morale and retention
- Avoids expensive replacement cost
- Ensures consistency and fairness in dealing with employees
- Lays groundwork for fair, legally defensible termination for employees who demonstrate that they cannot/will not improve





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YOUR ROLE AS A LEADER & SUPERVISOR

The role of a supervisor/leader is to:

- Improve performance of the individual, work groups/teams, and the organization.
- Provide and communicate clear expectations
- Improve conduct and behaviors so that employees perform at their best for the employer.
- Provide support & expertise to employees - coach
- Find solutions & solve problems
- Make needed corrections
- The most important job you have as a leader is to ...
 - **HELP THE PEOPLE YOU ARE RESPONSIBLE FOR, TO BE SUCCESSFUL IN THEIR JOBS**

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PROBLEM-SOLVING AND ROOT CAUSE ANALYSIS IN CORRECTIVE ACTION & DISCIPLINE

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IDENTIFY AND DEFINE THE PROBLEM

“Understanding* and formulating the problem is often more essential than its solution”**
Albert Einstein

*** “Understanding ... the problem” means:**

1. **Defining the impact of the problem** on performance of the individual, group, organization, and community/constituents served
2. **Diagnosing the root cause(s) of the problem** so you can distinguish the symptom from the cause

Only then, can you formulate your plans to solve the problem by addressing the root cause of the problem.
 Be careful not to “lead with the solution.”

**** I would eliminate the word, “often,” change it to “always.”**

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THE SUPERVISOR'S RESPONSIBILITY

EMPLOYEE PROBLEM → **FIX IT!**

STOP!
 Diagnose the Type of Problem (*Performance, Conduct, and/or Behavior*) and its Root Cause(s), and Determine Proper Course of Action to Fix and Resolve the Problem – **Help the employee to BE SUCCESSFUL**

CORRECTIVE ACTION:
 Counsel, Train, Coach?

DISCIPLINARY ACTION:
 Suspend, Demote, Terminate?

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IDENTIFY AND DEFINE THE PROBLEM

1. PERFORMANCE (Can't Do) - problems related to the quality of work (failure to meet quality standards)



- **Usually based lack of knowledge, skill, or ability**
 • *Performance Improvement Plan, Training/Coaching*
- **Poor quality of work – What is the root cause?**
 • *Untimely completion, limited production*
- **Failure to meet quality standards**
- **Indicators of poor performance**
 • *Inaccuracies, errors*
 • *Failure to meet expectations for work quality, cost, or service*
 • *Spoilage or waste of materials*
 • *Inappropriate or poor work methods, processes*
 • *Customer/client dissatisfaction*
- **Conduct and/or behavior problems will also impact performance**

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IDENTIFY AND DEFINE THE PROBLEM

2. CONDUCT (Won't do) – problems related to violating policy or work rules resulting in disruption to the workplace

- **Employees need to clearly understand conduct expectations, communicated to spell out:**
 - Standards of performance and workplace conduct, promoting a culture of respect and good performance.
 - Corrective action and disciplinary procedures, which provide clear structures for dealing with problems.
 - Standardized procedures make sure everyone is treated fairly and equally in similar circumstances.
- **Policies, Work Rules, Protocols, Procedures, Standards**
 - Employment policies, including a code of conduct policy
 - Job Descriptions
 - Employment agreements, contracts
- **Some sort of tribunal process to resolve problems, disputes or conflicts**






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IDENTIFY AND DEFINE THE PROBLEM

3. BEHAVIOR / ATTITUDE - inappropriate and disruptive actions that interfere with workplace operations, or preventing employees from carrying out assigned tasks

- **May cross over to “conduct,” but should be linked to performance impacts, including impact on other employees**
- **Inappropriate behaviors (poor attitude)**
 - Disruptive/disorderly behavior
 - Negativism, lack of cooperation, hostility
 - Unwillingness to take responsibility
 - Failure or refusal to follow reasonable instructions or direction
- **Resistance to change**
 - Unwillingness, refusal, or inability to update skills and work methods
 - Resistance to policy, procedure, work method/process changes
 - Lack of flexibility in response to problems
 - Non-cooperation with work group, team, other colleagues






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IDENTIFY AND DEFINE THE PROBLEM

3. BEHAVIOR / ATTITUDE - continued



- **Inappropriate interpersonal relations**
 - Gossiping, spreading rumors or misinformation
 - Bullying or mobbing behaviors
 - General incivility/insolence, disrespectful toward others
 - Use of insulting, intimidating, or abusive language
 - Inappropriate communication style (over-aggressive, passive)
 - Impatient, inconsiderate, argumentative
 - Destructive humor, sarcasm, horseplay
 - Inappropriate conflict with others such as customers, coworkers, supervisors
- **Inappropriate physical behavior**
 - Smoking, eating, drinking in inappropriate places
 - Threatening, hostile, or intimidating behaviors
 - Sleeping on the job
 - Problems with professional appearance, personal hygiene

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PROBLEM-SOLVING CORRECTIVE ACTION


- 1. FRAME AND DEFINE THE PROBLEM**
 - In performance terms – what needs to be “fixed?”
- 2. DIAGNOSE THE PROBLEM** – Focus on Root Causes
 - Distinguish between symptoms and causes
 - Perform Root Cause Analysis
- 3. GENERATE SOLUTIONS TO ADDRESS THE ROOT CAUSES OF THE PROBLEM**
 - Prioritize Corrective Actions
 - Develop Plan to Change Performance/Conduct/Behavior
- 4. IMPLEMENT CHOSEN SOLUTIONS**
- 5. MONITOR & EVALUATE EFFECTIVENESS OF SOLUTIONS BASED ON IMPROVEMENTS IN PERFORMANCE**

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START CORRECTIVE ACTION OR POSITIVE DISCIPLINE WHEN...


- You see a pattern emerging
 - e.g. absenteeism, missed deadlines
- The conduct causes disruption in the office
- A policy or rule is violated
- Performance has not improved in spite of Corrective Action
- Don't wait to address the problem.
- Don't diminish or alter responsibilities.
- Follow through on "promised" discipline.



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IDENTIFY AND DEFINE THE PROBLEM

- Identification of the real problem is extremely important. Which bucket or buckets?
- If the wrong cause and solution for that cause is selected, the problem will still be there.
- Common Mistakes When Identifying Problems
 - Defining problem too broadly or too narrowly
 - Focusing on wrong problem to begin with
 - Dealing with symptoms, not real causes
- Determine the root cause of the problem.
 - Removing the cause should cause the symptoms to disappear or cease.
 - Symptom: Customer dissatisfaction
 - Cause: Poorly trained employees
 - Solution: Implement customer relations training program for employees





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IDENTIFYING AN EMPLOYEE PROBLEM OR DEFICIENCY

Review the following:



- **Position description, goals and expectations**
 - Current and accurate?
 - Performance standards and metrics
- **Last Performance Reviews or Annual Review**
 - Goals and Projects Assigned at Annual Review
 - Goals and Projects Assigned subsequent to Annual Review
- **Your Incident Files**
- **Possibly other internal and external customers**
- **Applicable policies/procedures both company and departmental:**
 - How was it communicated to staff?

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COMMON ROOT CAUSES OF EMPLOYEE PROBLEMS


- Lack of Skill or Knowledge About How to do the Job
- Poor Leadership/Management/Supervision
- Poor Communication
- Poor Change Management
- High-Stress Work Environments
- Personal or Family Issues
- A Medical Condition
- Discrimination in the Workplace
- Workplace Harassment and/or Bullying
- Stale Job Responsibilities – Boredom
- Scarce Rewards and Recognition
- Not Enough Resources to do a Job

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COMMON ROOT CAUSES OF EMPLOYEE PROBLEMS

- Low Employee Motivation and Engagement
- Poorly Written or Communicated Policies and Procedures
- Burnout and Stress
- Poor Hiring Practices
- Poor Employee Placement
- Unresolved Conflict in the Workplace
- Unclear or Unreasonable Performance Expectations
- Inefficient Work Methods, Processes, Systems
- Inadequate Maintenance of Equipment & Machinery
- Inconsistent or Unfair Application of Policies
- Lack of Discipline and Accountability



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DISCUSS THE PROBLEM WITH EMPLOYEE

- Describe the gap between actual and desired performance, conduct, or behavior.
- Discuss previous counseling, corrective action on same or similar performance/conduct/behavior problems.
- If no agreement is reached, describe impact
- If no agreement is reached, describe possible consequences of not correcting the problem.
- After gaining agreement, ask:
 - What specifically will you do to correct this problem?
 - What might prevent you from doing what you've agreed to?
 - Is there something the employee needs from you (training, resources, etc.)
 - Will you do it?
- Thank the employee and end on a positive note

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LEGAL AND DEFENSIBLE PRACTICES IN CORRECTIVE ACTION AND DISCIPLINE

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DOCUMENT, DOCUMENT, DOCUMENT!

But do it correctly...


- HOW to document is even more important than the “document, document, document” mantra.
- Research has revealed cases that are weak and hard to prove include five common characteristics:
 1. Subjective decision making,
 2. Failure to explain expected job performance,
 3. Lack of assistance from management,
 4. Failure to warn employee; and
 5. Testimony that lacks credibility.
- “Poor or missing documentation is the plaintiff attorney’s best friend.”

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YOUR DOCUMENTATION IS DISCOVERABLE

- Keep in mind that **all documents – including emails - are subject to discovery in litigation or EEOC investigation**, and in the public sector, as well as some jurisdictions, they are a public record.
- **Assume that the document will be seen by a third party** - an attorney, hearing officer, or other adjudicator.
- **They will become evidence in a trial.**
- **PROOFREAD** – watch for *how* it is written
- The **“SNIFF TEST”** - use the “How will this look to a jury,” or the “How will this look on the front page of the paper” test.



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WHY SHOULD I DOCUMENT?

BURDEN OF PROOF IN EMPLOYMENT CASES:

- The initial burden of proof in most employment claims is on the employee (or plaintiff) in the form of the initial claim/charge against the employer.
 - Plaintiffs typically must prove, by a preponderance of the evidence, that they have been wronged and are entitled to damages. “Preponderance of the evidence” simply means “more likely than not,” a 51 percent to 49 percent calculus that the evidence and argument advanced by the plaintiff is more credible than that advanced by the defendant.
 - This initial burden on the plaintiff is a light one and is usually easily satisfied.
- Once a claim/charge is “justified” by the plaintiff to the court (or other body), the burden of proof will shift to the employer and other named defendants to disprove the claim/charge.
- **NOTE:** In cases involving a company’s termination of an employee “for cause” pursuant to an employment contract, however, that standard burden of proof allocation is reversed. The company, not the employee, has the burden to establish that its termination of the executive was justified. The company has the burden of proof.



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WHY SHOULD I DOCUMENT?

THE EMPLOYER’S BURDEN OF PROOF IN EMPLOYMENT CASES:

- “If its not written down ... it didn’t happen.” Then you have no evidence to meet your burden, and you will lose the case.
- But, if it **IS** written down by a manager or supervisor, then the documentation is considered to be “**prima facie evidence**” that an event occurred.

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COMMON LAW STANDARDS IN CORRECTIVE ACTION AND DISCIPLINE

If it’s not written down,
IT NEVER HAPPENED!

Or ...

IT WON’T HAPPEN

PRIMA FACIE EVIDENCE

“At first face” or “On its face”

- Upon initial examination, sufficient corroborating evidence appears to exist to support a case.
- Prima facie denotes evidence that, unless rebutted, is sufficient to prove a particular proposition or fact.
- Once justified to the court, the burden of proof shifts to the employer, which requires it to present evidence for all of the essential facts in its case. If it cannot, its claim may be dismissed without any need for a response by other parties.


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COMMON LAW STANDARDS IN CORRECTIVE ACTION AND DISCIPLINE

“JUST CAUSE” DETERMINANTS:

1. Was the employee warned of the consequences of the performance, conduct, or behavior problem?
2. Was the employer’s rule reasonable?
3. Did management investigate/diagnose before disciplining?
4. Was the investigation fair and impartial?
5. Was there evidence of guilt, or of the nature of the problem?
6. Were the policies, rules, and corrective action/discipline applied in a fair and even-handed fashion?
7. Was the corrective action/discipline reasonable, given the offense?
8. Was the corrective action/discipline reasonable, based on similar infractions by others in the past?




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COMMON LAW STANDARDS IN CORRECTIVE ACTION AND DISCIPLINE

“DUE PROCESS” PROCEDURES:
(Public Sector, Montana, or Granted by Policy or Contract)

1. An unbiased tribunal (*group of people chosen to examine a case*).
2. Notice of the proposed action and the grounds asserted for it.
3. Opportunity to present reasons why the proposed action should not be taken.
4. The right to present evidence, including the right to call witnesses.
5. The right to know opposing evidence.
6. The right to cross-examine adverse witnesses.
7. A decision based exclusively on the evidence presented.
8. Opportunity to be represented by counsel.
9. Requirement that the tribunal prepare a record of the evidence presented.
10. Requirement that the tribunal prepare written findings of fact and reasons for its decision.




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COMMON LAW STANDARDS IN CORRECTIVE ACTION AND DISCIPLINE

“DUE PROCESS” CONSIDERATIONS:
(Public Sector, Montana, or Granted by Policy or Contract)


1. Did the process meet the “due process” requirements that:
 - The person must be given notice;
 - The person must be given the opportunity to be heard; and
 - The final decision is made by a neutral decision-maker.
2. How have precedents been handled in the organization for similar problems warranting corrective action/discipline?
3. Is a complaint process available and known to employees?
4. Was the complaint process used?
5. Was retaliation used against the employee in any way?
6. Was the decision to discipline made based on objective facts?
7. Would the actions and processes be viewed as “fair” and “equitable” by a third party or entity?



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COMMON LAW STANDARDS IN CORRECTIVE ACTION AND DISCIPLINE

Employee Should:	Employer Should:
<ol style="list-style-type: none"> 1. Know clearly what policies, procedures, and work rules must be followed 2. Be informed of expected standards of performance –<i>e.g. job description, work procedures</i> 3. Have the right to be given appropriate feedback 4. Be given the chance for improvement 5. Receive professional assistance, training, and other support, if necessary 	<ol style="list-style-type: none"> 1. Clearly state what the problem is – performance, behavior, conduct 2. Specify impacts of the problem(s) 3. Listen to the employee’s explanation of “what happened” 4. Provide clear, specific expectations of what change is to be made. 5. Provide specific timelines for improvement or change 6. Clearly indicate consequences of not making required changes 7. Provide specific direction, guidance, and training for improvement. 8. Document all “good faith efforts” to help the employee to succeed.



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MEETING COMMON LAW STANDARDS IN DOCUMENTATION

- 1. Clearly state what the problem is – performance, behavior, conduct**

 - Where possible, refer to a specific situation or incident. Rather than citing an employee's lack of attention to detail generally, point out that the employee's budget report has been incomplete for each of the preceding weeks, and give examples.
 - As much as possible, tie an employee's performance to a stated company rule or policy that has been violated.
 - LEGAL EFFECT:** Specificity clearly puts an employee on notice of specific performance, conduct, or behavior which needs to be changed.
 - Such notice is more persuasive to a court because it only requires an employee to change performance, conduct, or behavior - not personality traits, and because it demonstrates that the employee has been given a fair opportunity to succeed.

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MEETING COMMON LAW STANDARDS IN DOCUMENTATION

- 2. Explain the impact/importance of the problem to the company, work team, individuals, and employee**

 - Explaining the importance of the problem focuses attention on the company's needs, rather than on the personal interaction between the manager and the employee.
 - It also stresses the seriousness of the issue to the employee.
 - e.g. "When you are late to work, we have to get another employee to cover for you, which disrupts their work."*
 - LEGAL EFFECT:** In many different legal contexts, the fact that the deficiency or problem is important to the company will assist the employer.
 - It may demonstrate that failure to correct the problem is "good cause" for termination or that an employer's proffered reason for termination is not a pretext for discrimination.

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MEETING COMMON LAW STANDARDS IN DOCUMENTATION

- 3. Listen to the employee's explanation of "what happened," and partner with employee to find a solution when appropriate**

 - Listening to the employee's "side" of the story is only fair – you don't want to find out afterward that there was a very good explanation for the problem (e.g. a legal reason for being late).
 - The partnering approach helps the employee to perceive the situation as an opportunity to succeed rather than an attack with no way out.
 - It also encourages creative problem-solving by the employee and allows management to take advantage of the employee's expertise in solving the problem.
 - It also establishes the basis for the employee to commit to correct the problem(s).
 - LEGAL EFFECT:** If partnering for a solution is unsuccessful, documenting this approach may demonstrate the reasonableness of the employer's request and the employee's refusal to cooperate.


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MEETING COMMON LAW STANDARDS IN DOCUMENTATION

4. Provide clear, specific expectations of what change is to be made.

- Indicate exactly what you expect the employee to do to correct or resolve the problem.
 - Example: If an employee is being written up for tardiness, your expectation could be, "You must be present at your workstation, and ready to begin work each scheduled day at 8:30 a.m."
 - Or if a write-up addresses poor sales performance, you could state the number of sales to be met in a specific timeframe (or however you measure sales productivity).
- LEGAL EFFECT:** The "fairness" doctrine is clear here – it isn't enough to tell the employee what s/he has done wrong.
 - You need to clearly state what the employee needs to do to correct the problem, in measurable terms.
 - This also shows your good faith effort to help him/her to improve.




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MEETING COMMON LAW STANDARDS IN DOCUMENTATION

5. Provide specific timelines for improvement or change

- Indicate exactly **WHEN** you expect the employee to correct or resolve the problem.
 - Example:** Don't say, "We expect you to turn things around immediately." That can mean different things to different people, she said. Rather, say, "We expect your report will be turned in by 5 p.m. tomorrow."
- Follow up at the specified deadline. If you don't follow up, it shows you don't care enough about the problem to ensure that it is corrected.
- LEGAL EFFECT:** The "fairness" doctrine is also clear here – again, you need to clearly state specifically **WHEN** the employee needs to make required changes to correct the problem.
 - This also shows your good faith effort to help him/her to improve.




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MEETING COMMON LAW STANDARDS IN DOCUMENTATION

6. Clearly indicate consequences of not making required changes

- Describe the consequences if the behavior or poor performance continues.
 - You don't want to discuss consequences in early coaching sessions.
 - However, after repeated attempts to help the employee meet expectations have been unsuccessful, or in the case of serious policy violations, disciplinary action may be needed.
- LEGAL EFFECT:** Courts in every legal jurisdiction have clearly indicated that employees must be told what the consequences may be if they do **NOT** make required changes to correct the problem(s) within the specified timeframe.




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MEETING COMMON LAW STANDARDS IN DOCUMENTATION

7. Offer help and assistance, and document all "good faith efforts" to help the employee to succeed.

- Document your commitments to help the employee to succeed.
 - Correcting performance/conduct/behavior problems is **STILL** the employee's responsibility **but** do what is appropriate for you to help the employee to succeed such as coaching, training, etc.
- LEGAL EFFECT:** Employees should clearly place the responsibility on the employees, rather than on themselves, for improvement.
 - Clear responsibility helps to combat an employee argument that performance problems stem from a failure by the employer.
 - Giving time for an employee to correct the problem is necessary for effective notice and is important to the perception of a fair process, both to an employee and to outside observers.




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MEETING COMMON LAW STANDARDS IN DOCUMENTATION

8. Write documentation carefully, and precisely. Avoid vague phrases that could provide grounds for discrimination lawsuits.

- Don't terminate someone for a "bad attitude" or because he isn't a good "culture fit."
- Those are red flags that could cause the employee to believe the firing is attributable to his or her gender, race or national origin—or to his or her membership in another group protected under federal civil rights laws.
- **LEGAL EFFECT:** Vague language means your evidence is weak and will not stand up to a legal or other challenge.
 - Remember to prepare documentation with the expectation that a third party (internal or external) will review it.
 - Include enough information so others know what happened and what steps were taken to put the employee on notice and offer the individual an opportunity to correct performance.



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MEETING COMMON LAW STANDARDS IN DOCUMENTATION

9. Summarize past discussions and note employee agreement, where possible.

- In particular, note reasonable expectations on time frames that have been agreed to in the past.
- Summary of past discussions make both employer and employee aware of the background leading up to the current action, which may prevent the employee from viewing the current action in isolation.
- **LEGAL EFFECT:** Document your good faith efforts to help!
 - Summary of past discussion in performance documentation not only demonstrates an employee's past efforts at correcting performance, but also provides documentation of employer efforts that may not have been previously documented for whatever reason, such as oral or informal warnings or comments.
 - Documenting employee agreement is important to combat possible arguments that the plan of action requested by the employer was not reasonable or known to the employee.



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THE PROCESS OF POSITIVE PROGRESSIVE DISCIPLINE


Facts	• Focus on facts to define the problem
Objectives	• Explain to employee how to resolve the issue or problem
Solutions	• Help employee reach objectives
Actions	• Actions to take if the problem is not corrected



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THE PROCESS OF POSITIVE PROGRESSIVE DISCIPLINE


- 1. Problem Analysis - Gather information!**
 - Before you act, make sure you know what happened
 - Root cause analysis of performance/conduct/behavior problem
- 2. Assess the severity** – consider how the problem is affecting the employee, team and company
- 3. Decide how to respond** – choose the appropriate disciplinary measure based on frequency and severity and how company handled similar issues in the past
- 4. Prepare to talk to the employee** – plan your meeting to include what you will say and how you will say it
 - Follow steps included in your official form.
 - Prepare draft of corrective action/discipline form to guide discussion with employee



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THE PROCESS OF POSITIVE PROGRESSIVE DISCIPLINE


- 5. Meet with employee** – review issues on draft form, talk about what has happened, and **collaborate** to
 - Create an improvement plan when appropriate
 - Gain commitment from employee to correct/improve problem performance, conduct, and/or behaviors
 - Have employee specify steps s/he will take, or changes s/he will make to improve performance, conduct, and/or behavior
 - Specify steps you will take to assist the employee (e.g. training)
- 6. Document** – make written record of the corrective action or discipline, improvement plan, and employee commitments to change/improve
 - Prepare final draft of form, based on employee meeting



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MEETING WITH THE EMPLOYEE



- Describe the gap between actual and desired performance, conduct, or behavior.
- Discuss previous counseling, corrective action on same or similar performance/conduct/behavior problems.
- If no agreement is reached, describe impact
- If no agreement is reached, describe possible consequences of not correcting the problem.
- After gaining agreement, ask:
 - What specifically will you do to correct this problem?
 - What might prevent you from doing what you've agreed to?
 - Is there something the employee needs from you (training, resources, etc.)
 - Will you do it?
- Tell employee when you will meet again to review final document
- Thank the employee for their cooperation, and for their commitment to address and correct these problems.
- End on a positive note



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THE PROCESS OF POSITIVE PROGRESSIVE DISCIPLINE

- 7. Follow-up** -to make sure the employee is meeting their commitment
 - If the problem **HAS** been resolved:
 - Thank the employee for living up to their commitment.
 - Use positive reinforcement and recognition as the best ways to build and maintain superior performance.
 - Make note to file and attach to original documentation.
 - If the problem **HAS NOT** been resolved:
 - Find out why and act quickly and appropriately.
 - Look for alternative solutions.
 - Use factual justification for further corrective action or disciplinary action.

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TOP TEN (OR MORE) BEST PRACTICES IN CORRECTIVE ACTION AND POSITIVE DISCIPLINE



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Tip 1 - FOCUS ON SOLVING THE PROBLEM

- Concentrate on **SOLVING THE PROBLEM**: the incident, performance, conduct, or behavior.
- **Stick to the facts**, and don't include opinions about the employee or comment on personality traits.
- For example, instead of saying "John is irresponsible," describe the specific actions that led to this conclusion
 - (John lost the keys to the company van, John forgot to lock up when leaving, John missed a deadline, etc.)
- Be respectful and professional in dealing with the employee.




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Tip 2 – CONDUCT A FULL AND FAIR INVESTIGATION BEFORE YOU ACT


- **DON'T jump to conclusions** or make hasty decisions without exploring all the facts. You can't make a fair decision without having all the available evidence at your disposal.
- **You need to investigate** and gather as much information as possible before making any decisions and conduct your investigations with sensitivity and objectivity.
 - **Gather all relevant facts** before making a decision involving an adverse employment action (e.g. discipline, termination of employment).
- **Take the time to get the employees side of the story** - find out why conduct and/or performance expectations are not being met.
 - Not only does this show that you attempted to be fair and reasonable, but you may also be surprised by what you learn.
 - For example, you may discover that an employee needs a reasonable accommodation or a job-protected leave.



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Tip 2 – CONDUCT A FULL AND FAIR INVESTIGATION (Continued)

- **CONDUCT A FULL AND FAIR INVESTIGATION.**
 - Before an employer decides to discipline an employee, there should be a full and fair investigation of the events.
 - In certain circumstances, it may be appropriate to have someone other than the employee's direct manager or supervisor conduct the investigation or review the discipline decision.
 - If there were witnesses to the misconduct, those witnesses should be interviewed, and note in a separate document what they had to say.
 - Sometimes information from other sources may lead a manager to reconsider whether discipline is appropriate.




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Tip 2 – CONDUCT A FULL AND FAIR INVESTIGATION (Continued)

- **DIAGNOSE THE ROOT CAUSE OF THE PROBLEM**
 - For documentation to be effective, it must be factual.
 - The goal in completing such documentation is that anyone who might read the employee discipline form will get a clear picture of what happened and why the discipline was imposed.
 - Be sure to do a root cause analysis of the problem, whether performance, conduct, or behavior.
 - Detail the impact of performance, conduct, or behavior problems on organizational, team, and colleague performance.




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Tip 3 – JUST WRITE THE FACTS: DON'T EMBELLISH

- In completing the form, it is important that the **information is objective** in describing the problem, or incident.
- The documentation should describe the problem (performance, conduct, and/or behavior) that led to the discipline, rather than the attitude of the employee, the manager's personal views of the employee, or a "diagnosis" of the employee/problem.
- Provide the employee with a clear statement of the facts when summarizing the employee's performance problem, misconduct or policy violation.




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Tip 3 – CONTINUED: "JUST WRITE THE FACTS ..."

- A clear statement of facts focuses solely on what you know happened and doesn't include any speculation or unverified information.
- When describing the problem, don't exaggerate. Avoid words such as "always" and "never," unless you can substantiate them.
 - For example, don't say an employee "never turns her report in on time" if she has, in fact, turned in even one report on schedule.*
- Exaggerating, even innocently, can cloud your credibility if you're called to testify.
- Factual statements focus on employee conduct, behavior, and/or performance - not on the supervisor's conclusions.



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Tip 4 – BE CLEAR AND SPECIFIC


- In completing the form, it is important to set forth the facts in specific detail, and clearly written.
- Proofread with HR before issuing document to employee.
- The manager should clearly state what the employee did that violated a company policy or work rule.
 - For example**, managers shouldn't say that the employee is lazy, but should describe the facts that have led to the conclusion. Say instead:
 - "Marion Jones failed to arrive at the work site on time for seven consecutive days. Jones left the site early on each of those days. The work that was assigned to Jones by the supervisor was not completed on any of the days that Jones worked."*
- The more specific factual detail that you can record on the form, the better. If there is not enough space provided on the form, additional pages can be attached.

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Tip 4 – CONTINUED: "BE CLEAR AND SPECIFIC"

SUBJECTIVE	FACTUAL
"You are habitually late."	"You were 10 minutes late to work on March 10 and 15 minutes late on March 20. You were 30 minutes late on April 3 and April 30. You did not call in to report that you would be late."
"Your work is sloppy."	"You have made an average of five errors each week for the last ten weeks on your cycle counts. Your errors have required us to conduct a complete inventory audit."




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Tip 5 – REVIEW PATTERNS OF PROBLEMS


- When an employer takes the time to actually document a performance, conduct, or behavior problem in writing, it’s typically not the first time the problem has happened.
 - **DON’T** ignore all the previous incidents,
 - **DO** list in detail every time the employee has exhibited the problem behavior.
- Include steps you took each time the 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 previous incidents when you took the current action.
 - Does **NOT** have to be the same problem to show “a pattern of disregard for company policy ...”
 - Documenting prior incidents that were not documented at the time
 - “Do you remember when we met to discuss ...”




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Tip 6 – COMPLETE THE FORM WHEN FACTS ARE FRESH

- The memory of an event is clearer right after the event, as opposed to days later.
- Legal principle of “temporal proximity” of event to document
- Managers should complete the employee corrective/disciplinary action form as soon as possible after the performance, conduct, and/or behavior incident occurred so that their recollections will be clear and accurate.
- **NEVER, NEVER** back-date a document!







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Tip 7 - DON'T CONTRADICT PREVIOUS DOCUMENTATION

- When describing the misconduct, it’s important that your documents match previous records.
- If an employee’s annual review indicates the employee is “above average” or “meeting expectations” in every category, it will be difficult to justify a disciplinary report a month later saying the employee didn’t meet performance standards.







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Tip 8 - IDENTIFY THE RULE OR POLICY VIOLATED

- Document whether the employee has broken a rule, policy or performance standard and specify what it is.
- It’s easier to justify your actions if the workplace requirement is in writing and communicated to employees.
- If there is a written standard, include a copy of it with your paperwork.
- Remember: Rules don’t have to be in a formal handbook to apply. Any written employee communications, including emails, are acceptable.






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Tip 9 - STATE CONSEQUENCES OF NOT CORRECTING THE PROBLEM

- The write-up must indicate what action you will take if the employee doesn't meet the stated expectations to correct the problem.
 - If your employee correct the problem, what will happen?
 - What is the deadline for the problem to be solved?
 - When will you meet again to discuss, coach, review progress, etc.?
- Address these questions when documenting employee behavior.
- For conduct and other serious violations, state:
 - "Failure to correct the problems identified herein will result in further appropriate disciplinary action, up to and including possible termination of your employment."***




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Tip 10 – USE AN 8-STEP PROCESS TO ISSUE THE DOCUMENT

1. Prepare a draft of the corrective action/disciplinary document
2. Meet with HR to review the document
3. Meet with the employee to review the contents
4. Listen to their side of the story, and gain their commitment to resolve the problem
5. Based on the conversation, go back and finalize the document, review again with HR if necessary
6. Meet a second time with the employee to review the contents and finalize with signature.
7. File the original signature copy in the employee's official file in HR
8. Make a copy of the document and give it to the employee.



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Tip 10 – Continued – Meeting With the Employee

- Describe the gap between actual and desired performance, conduct, or behavior.
- Discuss previous counseling, corrective action on same or similar performance/conduct/behavior problems.
- If no agreement is reached, describe impact
- If no agreement is reached, describe possible consequences of not correcting the problem.
- After gaining agreement, ask:
 - What specifically will you do to correct this problem?
 - What might prevent you from doing what you've agreed to?
 - Is there something the employee needs from you (training, resources, etc.)
 - Will you do it?
- Tell employee when you will meet again to review final document
- Thank the employee for their cooperation, and for their commitment to address and correct these problems.
- End on a positive note

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Tip 10 – Continued – Listen to the Employee's Side

ALLOW THE EMPLOYEE TO EXPLAIN THEIR SIDE OF THE STORY

- This may change your perception of what happened.
- It may reveal an underlying legitimate reason for the problem (ADA, FMLA, etc.)
- Record the employee's version of events on the form.
- While the explanation may not alter the discipline that is being imposed, it allows the employee to tell his side of the story – evidence of fair dealing.
- It also helps to preserve the employee's version of events in the event he changes his account in the future.



THERE ARE TWO SIDES TO EVERY STORY. IF YOU AREN'T WILLING OR ABLE TO LISTEN TO BOTH SIDES, DON'T BE SO QUICK TO MAKE JUDGEMENT ON WHAT YOU HAVEN'T HEARD.

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Tip 10 – Continued – Getting Employee’s Signature



- When you obtain the employee’s signature on the corrective action/disciplinary document, (*indicating they have read and understand the content, not necessarily that they agree with the contents*):
- If the employee refuses to sign, either:
 - Ask another manager to witness the fact the employee received the document but refused to sign it, or
 - Write: “I reviewed this document with <NAME> on <DATE & TIME> at <LOCATION>, and <NAME> refused to sign it.”
- You now have proper **prima facie evidence** documentation to support your action, based on your signature.

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Tip 11 – WRITE A SPECIFIC PLAN FOR IMPROVEMENT

- Discuss **with the employee**, a specific plan to follow for improvement, and fixing the problem(s).
 - Performance Improvement Plan for performance problems, do develop skill and knowledge
 - PIP may not be appropriate for conduct or behavior problems
- List the criteria the employee must meet and include a time frame for meeting each expectation.
- Include your role in the plan.
- The more specific and objective the criteria, the easier it is to measure improvement.
- Gain commitment from employee to correct the problems and follow the improvement plan.
- State that the employee’s failure to meet the criteria will result in further disciplinary action, up to and including possible termination of employment.






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Tip 12 – BE FAIR AND EQUITABLE

“Every employment case boils down to a simple issue of fairness. Did the employer treat the employee fairly?”



- Managers or supervisors need to be fair and equitable in imposing discipline regardless of who is being disciplined.
- The employer must be consistent in the application of discipline, across the organization.
 - Best Practice:** Have HR review disciplinary documents before they are issues
 - Best Practice:** Have HR review the organization’s employee handbook with managers and supervisors on a periodic basis to ensure that they are familiar with policies and are consistently and uniformly enforcing them.

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Tip 13 – FOLLOW UP REGULARLY AND AS NEEDED


- Documentation is valuable only if you follow up with the employee.
 - For example, if you place an employee on a formal six-month corrective action plan but never follow up, the corrective action plan will be void.
- The **best practice** is to set specific performance, conduct, and/or behavior criteria with specific time frames for meeting them.
 - PIP when appropriate
 - “Effective immediately” may also be appropriate
- Calendar your follow up and undertake a formal review during those exact time frames.
- Adjust the action plan as needed
- Once the performance/conduct/behavior is corrected, acknowledge the employee’s effort, and document in the employee’s file.

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Tip 14 – DON'T APOLOGIZE

- I cringe when I hear, or read in a disciplinary document when a supervisor says, "I am sorry I have to do this, but ..."
- No, you're not! You're doing your job, and you're documenting the incident because the employee isn't doing his job.
- If you have to apologize for something, then formal documentation may not be warranted ...
- **NOTE:** This does **NOT MEAN** that you shouldn't apologize if you make a mistake or do something wrong.



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Tip 15 – DO ESTABLISH AND COMMUNICATE CLEAR RULES


- **Establish and Communicate Clear Rules** - Upon hiring and all during employment, ensure that employees understand what policies, rules, SOPs, etc. they have to comply with.
 - This could range from punctuality to dress codes and encompass state and federal laws addressing codes of conduct and harassment policies.
- **Don't Assume Employees Know the Rules** - One of the biggest mistakes supervisors and employers make is assuming that employees fully understand their roles, responsibilities, and organizational processes.
 - Every employee should have a signed document on file that they have been given, are responsible for understanding, and accept the policies, etc.
 - Any addendums require additional sign-offs to mitigate risk.

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Tip 16 – DO HOLD MANAGERS/SUPERVISORS ACCOUNTABLE

- **Managers and Supervisors are responsible for managing employee performance** - You hire them for a reason - to oversee the productivity and performance of divisional teams.
 - Therefore, managers and supervisors should be held accountable for performance management and delivering on a consistent set of corrective action and discipline measures when necessary.
 - Best Practice: Include supervisory responsibilities in each supervisor's job description!



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Tip 17 – FOLLOW PROGRESSIVE C-A DISCIPLINE PROCESS

- **Remember to document verbal discussions** and then proceed to written documentation, should the unwanted performance, conduct, or behaviors continue.
 - Putting things in writing signifies permanency and when things are written, there is more of an impact on the employee. It's usually not until it is in written form does it get the attention of the employee.
 - Don't keep having multiple conversations with the employee without documenting them or proceeding to the next step in progressive discipline.
 - **Best Practice:** Inform employee, or get employee's signature regarding documentation of verbal corrective action.
- **Document that the employee understands and acknowledges** what you've told them, whether it is having them respond through email or signing a disciplinary or coaching form.
 - Unless it is documented, it essentially doesn't exist for the purposes of ongoing discipline, unemployment or a lawsuit (worst case scenario).

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Tip 18 – KEEP YOUR WORD

- **Keep your word and stick to upholding the consequences** should the employee’s behavior not improve.
 - If there were no consequences, why would someone change their behavior? People will do what you allow them to do.
- **Don’t give them empty threats** and think it will just go away over time. If anything, things will get worse.
- **Don’t avoid problems, or “tiptoe”** around telling the employee about performance, conduct, or behavior problems.
- **Suck it up and take necessary corrective action.** Disciplining and coaching employees is not something most people like to do, but I can guarantee that issues not resolved as they happen with an employee will cause bigger issues in the end.

Keeping your word

SAY → DO




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Tip 19 – USE OFFICIAL C-A/DISCIPLINE FORMS

Such a form will make documenting employee misconduct easier for managers and supervisors and it ensures a uniform process. The pre-printed, fill-in-the-blank form should include:

- Spaces for basic information regarding the employee,
- The time and date of the incident or incidents,
- The type of problem being addressed: **PERFORMANCE, CONDUCT, and/or BEHAVIOR**
- A description of the incident warranting employee discipline,
- The specific policy or work rule that was violated,
- Previous documented corrective action related to the problem
- The action that will be taken against the employee,
- Training or other assistance to be provided to the employee, and
- The consequences of not correcting the performance, behavior, or conduct.
- Space for employee comments





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Tip 20 – BE A COACH AND ADVISOR

REMEMBER – The supervisor’s most important job is to help the employees that they supervise, **TO BE SUCCESSFUL!**

- Offer encouragement and direction to correct an issue early on
- Coaching is a less formal way to raise issues and concerns
- The appropriate response to first time problems that are relatively minor
- Keys to Effective Coaching:
 - Don’t be too formal
 - Engage the employee
 - Collaborate on solution
 - Don’t forget to document coaching/oral counseling
 - Follow-up to make sure the problem is resolved
 - Again, your goal is to improve performance!





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Tip 20 – *Continued*: BE A COACH AND ADVISOR

USE THE PROGRESSIVE CORRECTIVE ACTION/DISCIPLINE PROCESS AS A POSITIVE, CONSTRUCTIVE EXPERIENCE:

- **Work with the employee to correct the problem**
- **Help the employee to be successful**
- While the responsibility is on the employee to improve his or her performance, behavior, or conduct, the supervisor should also offer solutions to help the employee to correct the problem.
- With some employees, it may be beneficial to map out some definitive next steps the employee will take to improve conduct in the future.
- However, remember that such plans must be available for all employees who are having performance problems. Again, it’s a matter of uniformity in the discipline process
- Documentation of employee misconduct must be handled as a business issue. It helps the employee change his behavior. And it protects the business.

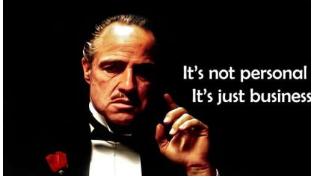


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Tip 20 – Continued: BE A COACH AND ADVISOR


**FOCUS ON FIXING THE PROBLEM –
NOT ON BLAMING THE PERSON**

- Concentrate on solving the problem - performance, conduct, and/or behavior.
- Solve the problem with the employee.



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**IN SUMMARY:
DOCUMENTATION DO'S AND DON'TS**

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IN SUMMARY: DOCUMENTATION DO'S

- Stick to **PERFORMANCE** and **Performance Impacts of CONDUCT and BEHAVIOR!**
- Produce and file documentation as needed throughout the year.
- Create contemporaneous documents – temporal proximity
 - **NEVER** back date documents
 - Include the date
 - Include full name(s) at least once, then initials or first name is OK
- Consistent treatment for similar issues
- Clear and precise language is critical
- Use a professional tone, and avoid bias
- When possible, obtain the employee's signature to verify the discussion and goals ... (what if s/he won't sign?)

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IN SUMMARY: DOCUMENTATION DO'S

- **Do state what happened.** Be specific, be objective.
- **Do state what policy the employee violated.** Attaching a copy of the policy from your employee handbook is helpful.
- **Do indicate why the violation harms the company.** This provides context, which may not be obvious to everyone involved.
- **Do provide specific instructions on how the employee can improve.** Give concrete guidance and suggestions; ask for input from employee.
- **Do indicate consequences.** Be clear on what will happen if the situation is not remedied. This also protects you later if further infractions occur.
- **Do issue corrective action/discipline consistently.** Everyone needs to be held to the same standard.
- **Do follow up.** Following up with either the employee or the supervisor, or even just checking records, is important. (The appropriate follow-up depends on the circumstances).


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IN SUMMARY: DOCUMENTATION DON'Ts

AVOID


- Expressing personal opinions, accusations, or judging
- Generalities, overstatements and exaggerations
- Words and phrases without detailed, objective descriptions such as:
 - Weakness, shortcomings, inadequacy, failure, it appears, insubordinate
 - Bad attitude, not a team player, you don't fit in, not a "culture" fit
- Reaching conclusions without all the facts
- Legal conclusions
- Absolute Expressions unless completely accurate – such as:
 - Always, Never, Every time, Invariably
- Documenting anything for the record that you have not already communicated directly to the employee



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IN SUMMARY: DOCUMENTATION DON'Ts



- **Don't be too vague.**
 - It is important for the employee to understand specifically what it was that he or she did wrong, what she needs to do improve, how she is going to improve it.
- **Don't be overly specific.**
 - Over-documenting can appear to be nit-picking; be sure to not be so detailed as to appear unfair (e.g. "employee was two-and-a-half minutes late"). It raises the question of whether all employees were equally penalized for such an infraction.
- **Don't issue a discipline or terminate without a witness.**
 - Any time you are going to convey negative news to an employee, it is important to have at least two company representatives in the room. This helps to minimize any questions over what occurred.
- **Don't forget to file it in the personnel file.**
 - If the documentation is lost, it may as well never have occurred. Employees should get a copy of the documentation.
- **Don't forget the employee signature line.**
 - It is very important to show that you at least made an effort to have the employee sign off on the corrective or disciplinary action.



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USE AN 8-STEP PROCESS TO ISSUE THE DOCUMENT

1. Prepare a draft of the corrective action/disciplinary document
2. Meet with HR to review the document
3. Meet with the employee to review the contents
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