Slide 1

POMS RISK CONTROL & INSURANCE — SMARTER INSURANCE FOR SMARTER BUSINESS.

THE EFFECTIVE AND DEFENSIBLE WAY TO ADDRESS EMPLOYEE PROBLEMS

*Proper Documentation, and
the Process of Corrective and Disciplinary Action*

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PROBLEM → SOLUTION

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TODAY'S PRESENTER

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WHY 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?"

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

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WHY 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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POSITIVE, PROGRESSIVE CORRECTIVE AND DISCIPLINARY ACTION
(PPDCA)

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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 standards, and taking appropriate action:

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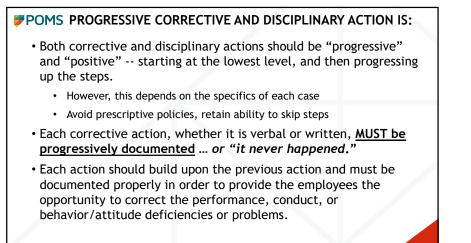- To change and improve unacceptable employee **BEHAVIOR/ATTITUDE**.

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DISCIPLINARY ACTIONS ARE . . .

Disciplinary action is taken to turn performance, conduct, and behavior/attitude problems around 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 is to improve employee performance.

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⬛ POMS PROGRESSIVE CORRECTIVE AND DISCIPLINARY ACTION IS:

- Both corrective and disciplinary actions should be "progressive" and "positive" -- starting at the lowest level, and then progressing up the 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.

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⬛ POMS PROGRESSION OF CORRECTIVE ACTION

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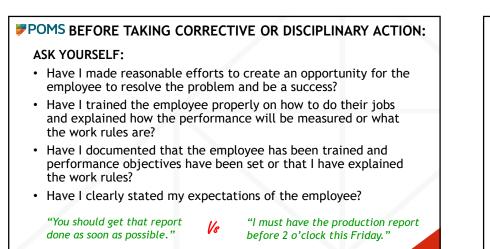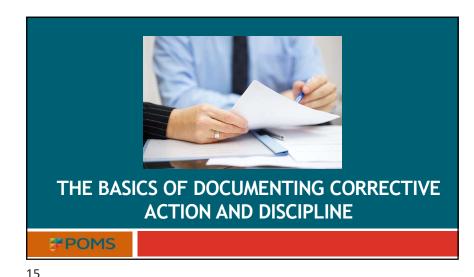- *If the employee is a union member, be sure to follow the process according to the CBA.*
- *If you are in Montana or if you are a public employer, remember to provide due process rights (e.g. Loudermill)*

Non-Disciplinary Letter of Counseling

Performance Improvement Plan (For Performance Issues)

Written Corrective Action Notice: *Non-Disciplinary Coaching/Counseling*

Verbal Counseling w/summary of meeting

Verbal Counseling or Coaching

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⬛ POMS PROGRESSION OF DISCIPLINARY 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)*

Dismissal
(NOTE: Loudermill Pre-Termination Hearing for Montana, Public Sector)

Demotion

Reduction in Pay

Suspension (Typically 1-15 days)
(Regulations re: Suspension for FLSA Exempt Employees)

Pre-Disciplinary and/or Pre-Termination Notice & Hearing – Loudermill Rights *(Montana, Public Sector)*

Letter of Reprimand or Warning

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⬛ POMS THE BENEFITS OF PPCDA

It 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
- It is a **FAIR** way to treat employees
- Allows supervisor to intervene **when the problem starts**
- Enhances **communication** between supervisors and employees
- Improved **trust, morale, and retention**
- Ensures consistency and **FAIRNESS** in dealing with employees
- Lays groundwork for **fair, legally defensible** termination for employees that cannot improve

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POMS BEFORE TAKING CORRECTIVE OR DISCIPLINARY ACTION:

ASK YOURSELF:
- Have I made reasonable efforts to create an opportunity for the employee to resolve the problem and be a success?
- Have I trained the employee properly on how to do their jobs and explained how the performance will be measured or what the work rules are?
- Have I documented that the employee has been trained and performance objectives have been set or that I have explained the work rules?
- Have I clearly stated my expectations of the employee?

"You should get that report done as soon as possible." Vs *"I must have the production report before 2 o'clock this Friday."*

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POMS YOUR ROLE AS A LEADER
- 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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THE BASICS OF DOCUMENTING CORRECTIVE ACTION AND DISCIPLINE
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POMS YOUR LEGAL DUTY AS A LEADER AND SUPERVISOR

EMPLOYEE PROBLEM → *Your PRIMARY Responsibility is to* → **FIX IT!**

STOP! THINK BEFORE YOU ACT
REMEMBER: YOUR GOAL IS TO HELP THE EMPLOYEE TO BE SUCCESSFUL Using Positive, Progressive Corrective and/or Disciplinary Action
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 –

CORRECTIVE ACTION: Counsel, Train, Coach?

DISCIPLINARY ACTION: Suspend, Demote, Terminate?

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POMS — CLEARLY IDENTIFY AND DEFINE THE PROBLEM

"Understanding* and formulating the problem is … more essential than its solution"
Albert Einstein

"*Understanding … the problem*" means:

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

Only then, can you formulate your plans to solve the problem.

Be careful not to "lead with <u>your</u> solution."

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POMS — IDENTIFYING AND DEFINING THE PROBLEM

- As a leader, supervisors need to be able to identify performance, conduct, and behavior issues, provide coaching and support addressing issues of concern to help employees improve be successful in their jobs.
- Sometimes supervisors allow performance issues to continue without addressing them. This may be because they are busy, want to avoid a challenging conversation, or hope that issues will be corrected on their own over time. However, it's important to quickly identify and address issues of concern with employees regarding performance, conduct, and/or behavior.
- For most performance issues, initial steps should include setting/clarifying expectations, coaching and training to help an employee learn and adapt in their role. Remember to apply an equity lens and consider what biases you may have in each situation.

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POMS — IDENTIFYING AND DEFINING THE PROBLEM

To effectively identify performance concerns:

- Ensure you understand the work, the standards of performance for the job, and performance outcomes for each employee.
- Monitor work trends, repeated behaviors or substandard work over a period time.
- Consider feedback from coworkers, customers or other stakeholders, but make sure that you are also making your own observations.
- Connect with each employee regularly to understand what is working well in their role and where they are having issues.
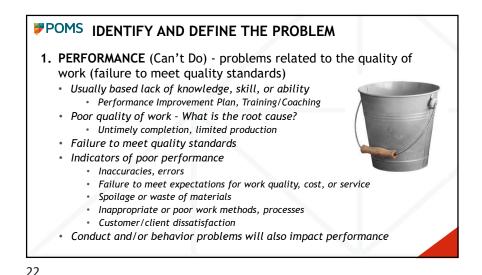
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POMS — IDENTIFYING AND DEFINING THE PROBLEM

Common types of performance concerns by areas of performance:

JOB KNOWLEDGE	QUALITY OF WORK	QUANTITY OF WORK
• Lack of understanding of policies and procedures.	• Customer/Client dissatisfaction	• Poor Prioritization
• Limited expertise in required knowledge areas	• Spoilage and/or waste of materials	• Untimely completion of work tasks and assignments
• Lack of skills needed for the job	• Poor quality of final work product – not meeting standards, etc.	• Inconsistent metrics of completion
• Inaccuracies or errors		
• Unwillingness to update knowledge and skills.		

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POMS IDENTIFYING AND DEFINING THE PROBLEM

Common types of performance concerns by areas of performance:

RELIABILITY
- Missing, or tardy to meetings.
- Inconsistent follow through on tasks and assignments.
- Attendance concerns (tardiness, absenteeism, leaving without permission).

TEAMWORK
- Lack of cooperation with colleagues and team members.
- Unwillingness to take responsibility.
- Aggressive or passive communication style

BEHAVIOR/CONDUCT
- Violating policy or work rules
- Insubordination
- Disruptive behaviors that interfere with' work.
- Substance abuse
- Fighting, yelling, or abusive behaviors

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POMS 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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POMS 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 dispute resolution process to resolve problems, disputes or conflicts*

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POMS 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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POMS — 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, passiv*
     - *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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POMS — 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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POMS — 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.

- **DO NOT LEAD WITH DISCIPLINE! Lead with a question** –
  - *"This is the third time you've been late in the last two weeks. Is there something going on that I need to know about?"*
- 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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POMS — INVESTIGATING AN EMPLOYEE PROBLEM

Review the following:

- Position description, goals and expectations
  - Current and accurate?
  - Are performance standards and metrics clearly written?
- Last Performance Reviews or Annual Review
  - Goals and Projects Assigned at Annual Review
  - Goals and Projects Assigned subsequent to AR
- 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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POMS COMMON ROOT CAUSES OR EMPLOYEE PROBLEMS

- Poor Leadership/Management/Supervision
  - Especially, not addressing problems constructively when they first arise.
- Poor Communication
- Lack of Skill or Knowledge About How to do the Job
- 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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POMS COMMON ROOT CAUSES OR EMPLOYEE PROBLEMS

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

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POMS DISCUSS THE PROBLEM _WITH_ THE EMPLOYEE

REMEMBER – The goal is to work with the employee to solve the problem(s)
- 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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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

THE PRINCIPLE OF FAIRNESS IN PPCDA

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POMS — REMEMBER YOUR LEGAL DUTY AS A SUPERVISOR

- 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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POMS — WHAT IS FAIRNESS IN EMPLOYMENT?

Fairness in the workplace refers to an aspect of organizational justice with regards to both process and outcome.

- Factors that support fair treatment in the workplace include mutual respect, strong interpersonal relationships and honest communication.
  - Individuals who feel they're being treated unfairly in the workplace can have low morale, reduced productivity, and poor job satisfaction. It can also result in high turnover.
  - Individuals who feel they are treated well by their managers and organizations are often motivated to perform at higher levels.
  - They have a greater sense of team spirit and overall job satisfaction.
  - Individuals who feel valued and are treated fairly at work are better engaged and more productive.

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POMS — WHAT IS FAIRNESS IN EMPLOYMENT?

An area of law has developed a set of principles that provide some objective standards in determining fairness, and the need to adjust fairness to the situation at hand:

- **The right to be heard.** Includes the right to know about any problems they are having, and to tell their side of the story
- **The right to an unbiased decision-maker.**
- **The right to receive constructive feedback and assistance when needed.** An environment where people are comfortable sharing feedback.
- Employees expect to be treated fairly – fair treatment, a fair process, and a fair outcome … and the law expects employers to treat employees fairly.

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POMS — THREE ASPECTS OF FAIRNESS: The Fairness Triangle

- The Fairness Triangle illustrates how **fairness** includes more than the result, but also how we are treated.

- Of importance is understanding that fairness doesn't mean sameness. In fact, treating everyone the same can create and perpetuate unfairness and inequity.

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POMS — THE BENEFITS OF PPCDA

It is a _FAIR PROCESS_ designed to **HELP THE EMPLOYEE TO SUCCEED IN THEIR JOB, BY _WORKING WITH THEM_ TO CORRECT THE PROBLEM**

- Establishes expectations and predictability
- **Applies consequences fairly and consistently**
- Corrects inappropriate behavior and poor performance
- **It is a FAIR way to treat employees**
- Allows supervisor to intervene at the first signs of trouble
- Enhances communication between managers and employees
- Improved morale and retention
- **Ensures consistency and FAIRNESS in dealing with employees**
- Lays groundwork **for fair, legally defensible** termination for employees that cannot improve.

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POMS — THE IMPORTANCE OF FAIRNESS IN THE CORRECTIVE & DISCIPLINARY ACTION PROCESS

"Every employment case comes down to a simple issue of fairness. Did the employer treat the employee fairly?" – _Garry G. Mathiason, Littler Mendelson P.C._

- _Employers should follow a fair and proper process in addressing employment problems_ before disciplining or dismissing an employee for a performance, conduct, and/or behavior problem.
- This includes giving the employee the opportunity, for example, to:
  - Defend themselves, or give their side of the story
  - Raise mitigating circumstances that may have contributed to the problem
  - Know, understand, and respond to the allegations, and state their case
  - Clearly understand what the specific problem is, and why the status quo is unacceptable
  - Clearly understand what your expectations are to correct the problem

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POMS — TIPS TO ENSURE FAIRNESS IN THE CORRECTIVE & DISCIPLINARY ACTION PROCESS

- **Advise the employee**: Inform the employee of the allegations in a way they can understand.
- **Give a reasonable time to respond**: Allow the employee enough time to prepare a response.
- **Consider the employee's response**: Make sure the employee's response, and their side of the story is taken into account.
- **Conduct thorough inquiries**: If new evidence is presented, adjourn the disciplinary process to investigate.
- **Make a reasonable and balanced decision**: The decision should be consistent with how other employees have been treated.
- **Consider alternatives to dismissal**: For example, demotion could be an alternative to summary dismissal for gross misconduct.

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POMS — THE PROCESS OF PPDCA

1. <u>Problem Analysis</u> – Investigate and gather information!
   - Before you act, make sure you know what happened
   - <u>Root cause analysis</u> of performance/conduct/behavior problem
2. <u>Assess the Severity and Impact</u>– consider how the problem is affecting the employee, team and company
3. <u>Decide How to Respond</u> – choose the appropriate disciplinary measure based on frequency, severity, and how company handled similar issues in the past.
   - Make preliminary determination about what level of positive corrective or disciplinary action is appropriate to fix the problem.
4. <u>Prepare to Talk to the Employee</u> – 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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POMS THE PROCESS OF PPDCA

5. <u>Meet With Employee</u> – review and discuss issues on the form you have drafted, talk about what has happened, and *<u>collaborate to solve the problem!</u>*
   - Discuss the problem(s) to ensure employee understands what needs to change
   - Describe the gap between actual and desired performance, conduct, or behavior, and impact of problem on the organization, department, peers, etc.
   - Reference previous counseling, corrective action on same or similar performance, conduct, and/or behavior problems.
   - Describe possible consequences of not correcting the problem.
   - Gain commitment from employee to correct/improve problem performance, conduct, and/or behaviors, and after gaining agreement to correct the problem(s):
   - Have employee specify steps they will take, or changes they will make to improve performance, conduct, and/or behavior, and to correct the problem.
   - Ask if there something the employee needs from you (training, resources, etc.)
   - Tell employee when you will meet again to review final document

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POMS THE PROCESS OF PPDCA

6. <u>Revise Documentation Based on Employee Input</u> – 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
7. **Meet Again With Employee to Review Revised/Final Documentation**
   - Obtain signature, or revise again if needed
8. **Follow-up -to make sure the employee is meeting their commitment**
   - If the problem <u>HAS</u> 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 <u>HAS NOT</u> been resolved:
     - Find out why and act quickly and appropriately.
     - Look for alternative solutions.
     - Use factual justification for further action.

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THE PROCESS OF POSITIVE, PROGRESSIVE CORRECTIVE AND/OR DISCIPLINARY ACTION (PPCDA):
Preparing for Your Meeting With the Employee, Meeting With the Employee, and Working Together to Solve the Problem(s)

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POMS YOUR LEGAL DUTY AS A SUPERVISOR

EMPLOYEE PROBLEM → *Your PRIMARY Responsibility is to* → **FIX IT!**

STOP! THINK BEFORE YOU ACT
REMEMBER: YOUR GOAL IS TO HELP THE EMPLOYEE TO BE SUCCESSFUL
Using Positive, Progressive Corrective and/or Disciplinary Action
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 –

CORRECTIVE ACTION:
Counsel, Train, Coach?

DISCIPLINARY ACTION:
Suspend, Demote, Terminate?

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POMS BEFORE TAKING CORRECTIVE OR DISCIPLINARY ACTION:

YOUR FIRST THOUGHT MUST BE TO ASK YOURSELF:

- Is there anything I have done, or have failed to do, that may have contributed to this being a problem?
- Have I been fair to the employee in dealing with this problem?
- Have I made reasonable efforts to create an opportunity, and to provide support to the employee to resolve the problem and be a success?
- Have I trained the employee properly on how to do their job, and communicated the expected performance standards, and how they will be measured and evaluated?
- Do I have documented evidence that the employee has been trained, that performance objectives, behavioral standards, work rules, and policies have been clearly communicated to the employee?
- Have I clearly stated my expectations of the employee?

"You need to get that report done as soon as possible!" **Vs** *"I need the production report before 2 o'clock this Friday."*

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POMS MEETING WITH THE EMPLOYEE – Your Goals are to Ensure That:

1. You get about additional information you may need from the employee to clarify the problem(s) and the root cause(s) of the problem(s) – get their side of the story.
2. The employee understands the problem(s), and the impact on their performance, on the team, on other colleagues in the workplace, and on the organization.
3. The employee acknowledges that they understand the problem(s), that they are unacceptable, and that they need to be corrected.
4. The employee commits to correcting the performance, conduct, and/or behavior that is at issue, and agrees to a clear set of standards that must be met, and a timeline to fix them.
5. The employee agrees and commits to the steps they will take & changes they will make to improve performance, conduct, and/or behavior, to correct the problem.
6. You and the employee to agree on a plan of action to correct the problem(s).
7. You make appropriate commitment(s) to assist the employee to make needed improvements in their performance, conduct, and/or behavior.
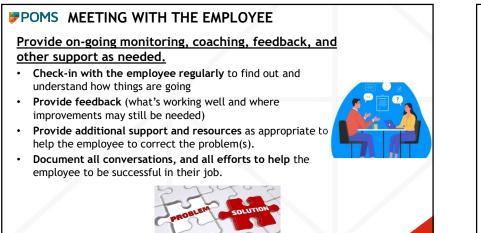8. You promptly, and properly document all discussions, agreements, and commitments.

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POMS MEETING WITH THE EMPLOYEE

The initial meeting with the employee should focus on communication, information gathering, and resolving the problem(s) together.

Don't start with discipline, other than when warranted for particularly egregious problems.

- **Connect with your employee** one-on-one in a private/confidential setting.
  - Expect and accept discomfort as these conversations may not always go smoothly.
- **Be specific** about what you observed.
- **Be timely,** ensuring the employee remembers what occurred.
- Talk about **the impact the issue had** on the business, team, work, etc.
- **"Seek first to understand"** - What is the employee's side of the story concerning the issues/problems of concern?
- **Come to agreement about the problem(s**), and that status quo is unacceptable and must improve.
- Work together to **brainstorm ways to resolve the problem(s).**

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POMS MEETING WITH THE EMPLOYEE

Clarify and Set Clear Expectations for Improvement

- Once there is agreement about the problem, be sure you have **clearly identified the root cause(s).**
- **Discuss the changes that need to be made** and demonstrate or outline what a successful outcome and timeframe to make needed changes would be.
- **Refer to policies, guidelines, instruction manuals, etc.** that are specific to the performance, conduct, and/or behavior concern.
- **Offer training opportunities or other support** as needed and appropriate.
- **Ensure expectations are consistent** across the work and/or team.
- **Work <u>with</u> the employee to identify solutions to the problems.**

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POMS MEETING WITH THE EMPLOYEE

Provide on-going monitoring, coaching, feedback, and other support as needed.

- **Check-in with the employee regularly** to find out and understand how things are going
- **Provide feedback** (what's working well and where improvements may still be needed)
- **Provide additional support and resources** as appropriate to help the employee to correct the problem(s).
- **Document all conversations, and all efforts to help** the employee to be successful in their job.

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POMS MEETING WITH THE EMPLOYEE – The General Flow

1. Clearly describe each discrete problem that needs to be corrected, citing examples and being careful not to aggregate different types of problems.
2. Describe the impact of the problem(s) on the employee, the team, other co-workers, the organization, and the clients/customers served.
3. Describe the gap between actual and desired performance, conduct, or behavior.
4. Ask for the employee's side of the story for each problem – is there a valid reason at the root of each problem? If so, adjust your meeting appropriately.
5. Clearly state your expectations for how these problems need to be corrected, defining the standards for performance, conduct, and/or behavior that must be achieved.
6. Review previous counseling, corrective, or disciplinary action taken on these problems, and previous commitments the employee may have made to correct those problems.
7. Briefly describe possible consequences of not correcting the problem.

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POMS MEETING WITH THE EMPLOYEE – The General Flow

8. Gain the employees acknowledgement of the problems, and their agreement that they understand each problem, that status quo is unacceptable, that the problems must be corrected, and that there will be a consequence if they are not corrected.
9. After gaining agreement that the problems need to be corrected, review each problem that you have identified, and for each one 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 commit to doing what needs to be done to correct the problem(s)?
10. Review your notes with the employee, the commitments that have been made, what each of you have agreed to do, and set a time to meet again to review your documentation of the meeting and the agreements made.
11. 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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POMS MEETING WITH THE EMPLOYEE – The General Flow

12. Immediately go back to your office to:
    - Document this meeting itself - detail what was said and what commitments were made.
    - Revise your corrective/disciplinary action or PIP based on the discussion in the meeting.
    - If needed, write a separate memo of agreement to codify specifically what the employee and you will do to correct each problem – including target dates and metrics/criteria to assess if the problem has been corrected.
    - Finalize your draft documents and review your documentation with HR if appropriate.
13. Meet again with the employee to review the documents and to ensure that they are complete from yours, and the employee's perspective.
    - If more revisions need to be made based on this meeting, GO BACK TO STEP 12.
11. Once the documents are agreed to and finalized, get the document signed by both of you.
    - Keep the original signature copy in the employee's official file.
    - Make copies for you and the employee, review (suggest highlighting) the agreements with the employee.
    - Give a copy of the document to the employee, and thank them for their commitment to improving their performance/conduct/behavior.
12. Regularly monitor progress on the agreements to ensure corrections/improvements are being made. If the issues aren't being corrected, then re-start the process with the employee.

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POMS MEETING WITH THE EMPLOYEE - Tips

- **Be consistent:** Hold all employees to the same expectations for performance and behavior
- **Keep it confidential:** Don't share the issue with anyone who isn't involved
- **Create an action plan:** Work with the employee to develop a plan with measurable steps to improve
- **Acknowledge accomplishments:** Recognize the employee's good work and positive contributions
- **Discuss progress:** Talk about the employee's achievements, contributions, and areas where they need to improve
- **Provide constructive feedback:** Explain what's wrong with the employee's work and suggest ways to improve
- **Establish consequences:** If the employee doesn't meet goals, determine the consequences
- **Identify challenges:** Note any problems the employee has encountered and discuss potential solutions
- **Acknowledge strengths:** Recognize positive things you've noticed about the employee or what others have said about their work

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POMS MEETING WITH THE EMPLOYEE - Tips

The purpose of any one-on-one meeting with an employee is to **build a good working relationship between the manager and their direct report.** The meetings can cover topics such as work, career development, growth, performance, development, and motivation.

Here are some tips for preparing for a one-on-one meeting with an employee:

- **Prepare:** Be mentally prepared, research the employee's work and goals, and arrive early
- **Set an agenda:** Share a clear agenda in advance with talking points
- **Prepare questions:** Create specific, open-ended questions
- **Invite the employee:** Send an email invite that explains the purpose of the meeting

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POMS MEETING WITH THE EMPLOYEE - Tips

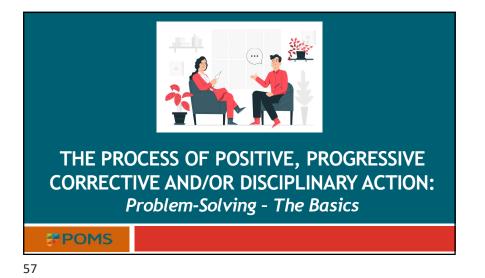*CONTINUED: tips for conducting a one-on-one meeting with an employee:*

- **Listen:** Listen more than you speak and focus on the employee
- **Be present:** Be fully present and accept feedback
- **Take notes:** Take notes and follow-through
- **Stay on track:** Keep to time and stay focused on the agenda
- **Be positive:** Open with something positive and celebrate achievements
- **Encourage participation:** Encourage audience participation and seek feedback

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POMS SUMMARY OF PROCESS TO ISSUE PPCDA Document

1. **Set Meeting Goals, and plan** for the meeting – gather information as needed.
2. **Prepare first draft of the PPCDA document**, use it to guide your initial meeting with the employee
3. **Meet with HR to review** the document as needed
4. **Meet with the employee** to discuss the contents, problem, and expectations
5. **Work together to develop agreements** on what the employee and you will do to correct the problem(s), and gain their commitment to resolve the problem
6. **Finalize the document** based on the conversation, review again with HR if necessary
7. **Meet a second time with the employee to review** the contents and finalize with signature.
8. **File the original signature copy** in the employee's official file in HR
9. **Make a copy of the document – review again, and give it to the employee.**

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THE PROCESS OF POSITIVE, PROGRESSIVE CORRECTIVE AND/OR DISCIPLINARY ACTION:
Problem-Solving – The Basics

POMS

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POMS MEETING WITH THE EMPLOYEE - Remember your goals

1. You get about additional information you may need from the employee to clarify the problem(s) and the root cause(s) of the problem(s) – get their side of the story.
2. The employee understands the problem(s), and the impact on their performance, on the team, on other colleagues in the workplace, and on the organization.
3. The employee acknowledges that they understand the problem(s), that they are unacceptable, and that they need to be corrected.
4. The employee commits to correcting the performance, conduct, and/or behavior that is at issue, and agrees to a clear set of standards that must be met, and a timeline to fix them.
5. The employee agrees and commits to the steps they will take & changes they will make to improve performance, conduct, and/or behavior, to correct the problem.
6. You and the employee to agree on a plan of action to correct the problem(s).
7. You make appropriate commitment(s) to assist the employee to make needed improvements in their performance, conduct, and/or behavior.
8. You promptly, and properly document all discussions, agreements, and commitments.

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POMS PROBLEM-SOLVING WITH THE EMPLOYEE

STEP 1: IDENTIFY AND UNDERSTAND THE PROBLEM

- What is the problem(s)? What is the impact of the problem(s)?
  - Often can be defined in performance-based terms: What is happening, v. what should be happening? Use metrics to clarify.
  - Use Root-Cause analysis to be sure you have correctly identified the problem that needs to be corrected, rather than addressing symptoms.
- What is the impact of the problem on the employee, colleagues, team members, the organization, and on your clients/customers.
- When did the problem start and how long has this problem been going on?
- What has been done previously to address the problem?

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POMS PROBLEM-SOLVING WITH THE EMPLOYEE

STEP 1: IDENTIFY AND UNDERSTAND THE PROBLEM

A good way to correctly identify the problem and its root causes is to ask questions, and discuss with the people who are involved and affected by it:

- **Who**: Who is involved with this problem? Who caused the problem? Who is most affected by this issue?
- **What**: What is happening? What is the extent of the issue? What does this problem prevent from moving forward?
- **Where**: Where did this problem take place? Does this problem affect anything else in the immediate area?
- **When**: When did this problem happen? When does this problem take effect? Is this an urgent issue that needs to be solved within a certain timeframe?
- **Why**: Why is it happening? Why does it impact workflows?
- **How**: How did this problem occur? How is it affecting workflows and team members from being productive?

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POMS PROBLEM-SOLVING WITH THE EMPLOYEE

STEP 2: CLARIFY AND ANALYZE THE PROBLEM –

- What information or data is available or needed to help clarify, or fully understand the problem?
- Is it a top priority to resolve the problem at this point in time?
- Are additional resources required to clarify the problem? If yes, elevate the problem to your leader and/or coordinate with HR to help locate the right resources and form a team.
- Consider discussing the issue with employee or employees involved, to get their input and perspectives about the problem
- Ensure the problem is contained and does not get passed to the next process step.

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POMS CLARIFY EXPECTATIONS AND AGREE ON GOALS

STEP 3: DEFINE GOALS AND EXPECTATIONS TO CORRECT THE PROBLEM

- What is your end goal or desired future state? What does it look like when the problem is corrected?
- Use Gap Analysis to compare actual performance/conduct/behavior with the desired performance/conduct/behavior.
- What will you accomplish if you fix this problem?
- What is the desired timeline for solving this problem?

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POMS PROBLEM-SOLVING WITH THE EMPLOYEE

STEP 3: DEFINE GOALS AND EXPECTATIONS TO CORRECT THE PROBLEM

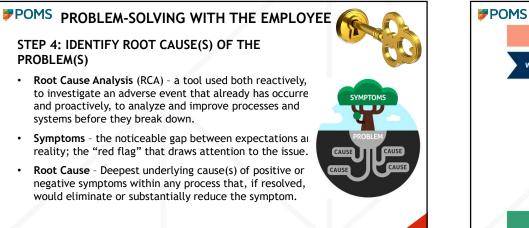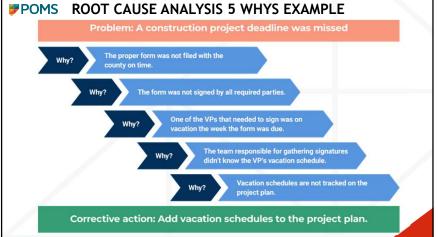- What is your end goal or desired future state? What does it look like when the problem is corrected?
- What will you accomplish if you fix this problem?
- What is the desired timeline for solving this problem?
- Identification of the real problem is extremely important.
- *If the wrong cause and solution 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

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POMS PROBLEM-SOLVING WITH THE EMPLOYEE

STEP 4: IDENTIFY ROOT CAUSE(S) OF THE PROBLEM(S)

- Determine the root cause of the problem.
- Distinguish between the problem, and symptoms.
- Use a tool such as "The 5 Whys?" to identify the root cause(s).
- Identify possible causes of the problem.
- Prioritize possible root causes of the problem.
- What information or data is there to validate the root cause?
- 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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PROBLEM-SOLVING WITH THE EMPLOYEE

POMS

STEP 4: IDENTIFY ROOT CAUSE(S) OF THE PROBLEM(S)

- **Root Cause Analysis** (RCA) – a tool used both reactively, to investigate an adverse event that already has occurred, and proactively, to analyze and improve processes and systems before they break down.
- **Symptoms** – the noticeable gap between expectations and reality; the "red flag" that draws attention to the issue.
- **Root Cause** – Deepest underlying cause(s) of positive or negative symptoms within any process that, if resolved, would eliminate or substantially reduce the symptom.

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ROOT CAUSE ANALYSIS 5 WHYS EXAMPLE

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Problem: A construction project deadline was missed

- Why? The proper form was not filed with the county on time.
- Why? The form was not signed by all required parties.
- Why? One of the VPs that needed to sign was on vacation the week the form was due.
- Why? The team responsible for gathering signatures didn't know the VP's vacation schedule.
- Why? Vacation schedules are not tracked on the project plan.

Corrective action: Add vacation schedules to the project plan.

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ROOT CAUSE ANALYSIS 5 WHYS EXAMPLE

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STEP 4: IDENTIFY ROOT CAUSE(S) OF THE PROBLEM(S)

- **EVENT:** You are operating a tug that is towing a Gulfstream IV. Suddenly, the tug becomes uncontrollable, which causes the tow hitch to break and extensive damage to the aircraft results, costing time and money to fix, and lost revenue.
- **PROBLEM: There was damage to the aircraft that should have been avoidable.**
1. **Why**? Did the aircraft become damaged? *Because the tow bar hit the aircraft*
2. **Why**? Did the tow bar hit the aircraft? *Because the tow hitch broke*
3. **Why**? Did the tow hitch break? *Because the tug was out of control*
4. **Why**? Was the tug out of control? *Because the aircraft was being pulled with a tug rated below the 10,000 lb. draw bar pull needed for the aircraft*
5. **Why**? Was a tug with a rating below minimum being used? *Because the tug operator was unaware of the tow ratings guidance.*

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ROOT CAUSE ANALYSIS 5 WHYS EXAMPLE

POMS

STEP 4: IDENTIFY ROOT CAUSE(S) OF THE PROBLEM(S)

6. **Why**? Wasn't the tug operator aware of the tow ratings guidance? *Because the tug operator was new and had not been trained on the guidance.*
7. **Why**? Hadn't the new employee been trained? *Because there were no clear procedures for processing new employees to identify training requirements prior to starting work.*
8. **WHY?** *... and so on, as needed to analyze the root causes of the problem(s).*
- **This process can go on if it is determined that additional factors have a direct bearing on the outcome.**

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POMS PROBLEM-SOLVING WITH THE EMPLOYEE

STEP 5: WORK COLLABORATIVELY WITH THE EMPLOYEE TO IDENTIFY ALTERNATIVE SOLUTIONS

- **Develop possible solutions** for each problem to be addressed. What does the employee need to do, to solve the problem? What do you need to do to help?
  - Initially, elicit suggestions from the employee – remember – this is a collaborative problem-solving process.
  - In some cases, everyone affected by it and consult those who may have more experience with the type of challenge you're experiencing. You can also use surveys and discussion groups to generate ideas.
  - Make sure the ideas generated are consistent with the goals and expectations you have, and the changes the employee needs to make to solve the problem(s).
- **Evaluate the possible solutions** to determine which of them (there may be more than one chosen) you and the employee reasonably believe will solve the problem and help the employee to be successful in their job.

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POMS PROBLEM-SOLVING WITH THE EMPLOYEE

STEP 6: WORK WITH EMPLOYEE TO SELECT AND AGREE ON SOLUTIONS

- **Select and agree on the solution(s) for each problem identified.** Consider to what extent a solution meets the following objectives:
  - It solves the problem smoothly without creating another problem
  - It is practical and can be implemented
  - It is acceptable to you and the employee, and you commit to do what you agreed to.
- **Be sure to consider implementation when choosing a solution:**
  - The employee's responsibility and ability to execute the solution
  - How the employee will implement the solution
  - The amount of time and resources needed to implement the solution
  - The support and commitment you need to make to support the employee in implementing the solution to address each problem.

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POMS PROBLEM-SOLVING WITH THE EMPLOYEE

STEP 7: DEVELOP A PLAN, AND IMPLEMENT THE CHOSEN SOLUTION(S)

- **Develop an action plan to implement the solution(s).**
  - Generate a list of specific actions that you and the employee need to do.
  - Define objectives and measurable targets to monitor the implementation.
  - Assign timeline for implementation of each action, with relevant deadlines.
  - Assign roles and responsibilities to other parties if needed.
  - Develop feedback channels for you and the employee to use during the process.
  - The action plan should include actions to be taken if something goes wrong or doesn't go just like as you thought it would.
- **Implement the action plan:**
  - Implement action plan to address the root cause(s) of the problem(s).
  - Communicate regularly to discuss progress, identify any obstacles, and adjust the plan if necessary
  - Verify that actions, objectives, and targets are completed.

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POMS PROBLEM-SOLVING WITH THE EMPLOYEE

STEP 8: MONITOR AND EVALUATE THE RESULTS, ADJUST AS NEEDED

- **Monitor and evaluate whether actions are fixing the problem(s)**
  - Are you and the employee doing the things that you agreed and committed to do?
  - Are your goals, objectives, deadlines, and targets being met?
  - Are you and the employee communicating regularly and getting/giving feedback to ensure that the solution is meeting your needs, and solving the problem?
  - Have you identified any issues that may have arisen, and addressed them promptly?
  - Are the actions achieving the results you hoped for? What do you need to do differently?
- **Continuously improve:**
  - Look for additional opportunities to implement solution.
  - Ensure problem will not come back and communicate lessons learned.
  - If needed, repeat the Problem-Solving Process to drive further improvements.

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WHAT CONSTITUTES LEGAL AND DEFENSIBLE DOCUMENTATION UNDER COMMON LAW?

POMS

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DOCUMENT, DOCUMENT, DOCUMENT!

HOW to document is even more important than the "document, document, document" mantra.

- Remember **the "fairness doctrine,"** and documentation of the fair process you used
- **Proper documentation,** which includes all of the information required, so that it is solid evidence to support and defend your case.
- *"Poor or missing documentation is the plaintiff attorney's best friend."*

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POMS YOUR DOCUMENTATION IS YOUR EVIDENCE

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 show, 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, at which point *a credible charge against the employer has been made.*

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POMS YOUR DOCUMENTATION IS YOUR EVIDENCE

BURDEN OF PROOF IN EMPLOYMENT CASES:

- Once a claim/charge is "justified" (shown to be a credible claim) by the plaintiff to the court (or other adjudicating body), *the burden of proof will shift to the employer* and other named defendants *to disprove the claim/charge by proving that the plaintiff's charge is false or unfounded*.
- The way you prove your case is by submitting evidence to the court or other adjudicator.
- Your documentation is, quite simply, the evidence you need to prove your case.
- **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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POMS — YOUR DOCUMENTATION IS YOUR EVIDENCE … Period.

MEETING 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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POMS — WHY SHOULD I DOCUMENT?

- In most jurisdictions and employment-related cases, the burden of proof in an employment-related claim by an employee against the company and supervisor is on the employer and the supervisor.
- "If its not written down … it didn't happen." Then you have no proof, 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.
  - *Prima facie evidence is evidence that, standing alone, unexplained or uncontradicted, is sufficient to establish a given fact or facts constituting the party's claim or defense.*
  - *Prima facie evidence is the bare minimum of evidence necessary to sustain a position by the side offering the evidence.*

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POMS COMMON LAW STANDARDS IN DOCUMENTING PPCDA

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.

- In employment cases, the employer has the burden of proof, which requires it to present prima facie 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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POMS COMMON LAW STANDARDS IN DOCUMENTING PPCDA

Employee Has the Right to:
1. Know clearly what policies, procedures, and work rules must be followed
2. Be informed of expected standards of performance *-e.g. job description, work procedures*
3. Be given appropriate feedback
4. Be given the chance for improvement
5. Receive professional assistance, training, and other support, if necessary

Employer Should:
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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POMS COMMON LAW STANDARDS IN DOCUMENTING PPCDA

"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?
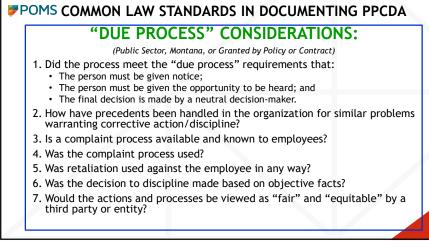
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POMS COMMON LAW STANDARDS IN DOCUMENTING PPCDA

"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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POMS COMMON LAW STANDARDS IN DOCUMENTING PPCDA

"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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MEETING COMMON LAW STANDARDS IN DOCUMENTATION

POMS

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POMS 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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POMS 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.

- *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.
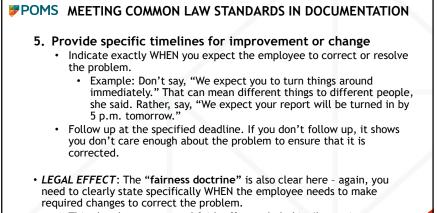
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POMS MEETING COMMON LAW STANDARDS IN DOCUMENTATION

3. **Listen to the employee's explanation of "what happened," and <u>partner with employee to find a solution</u>**
   - 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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POMS 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 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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POMS   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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POMS   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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POMS   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.

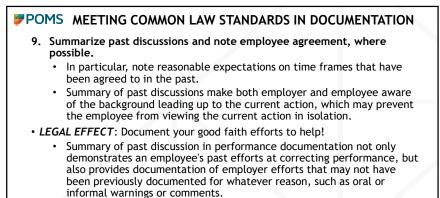- *LEGAL EFFECT*: Employees should clearly place the responsibility on the employees, rather than on themselves, for improvement.
  - Clear responsibility helps to combat an employee argument that performance problems stem from a failure by the employer.
  - Giving time for an employee to correct the 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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POMS   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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POMS 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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TOP TEN (?) BEST PRACTICES IN POSITIVE PROGRESSIVE CORRECTIVE AND DISCIPLINARY ACTION

POMS

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POMS TOP TEN BEST PRACTICES IN DOCUMENTATION

1. USE AN OFFICIAL EMPLOYEE CORRECTIVE ACTION or DISCIPLINE FORM
   - 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.

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POMS TOP TEN BEST PRACTICES IN DOCUMENTATION

2. UNDERSTAND THE PROBLEM: 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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POMS TOP TEN BEST PRACTICES IN DOCUMENTATION

4. BE OBJECTIVE AND FACTUAL

- In completing the form, it is important that the manager be objective in describing the incident.
- The manager or supervisor should describe the conduct 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.

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POMS *Tip 4 Continued:* **BE OBJECTIVE AND FACTUAL**

- Factual statements focus on employee conduct, behavior, and/or performance - **not** on the supervisor's conclusions.

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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POMS TOP TEN BEST PRACTICES IN DOCUMENTATION

5. 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.*
  - *For example: "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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⬛POMS *Tip 5 Continued:* **BE CLEAR AND SPECIFIC**

- 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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⬛POMS TOP TEN BEST PRACTICES IN DOCUMENTATION

6. COMPLETE THE FORM WHILE THE 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 discipline form as soon as possible after the misconduct occurred so that their recollections will be clear and accurate.
  - If there is too much time between documentation and the event, the accuracy of your memory will be attacked.
    - *"Tell me … do you remember what you had for breakfast on the morning of the meeting?*

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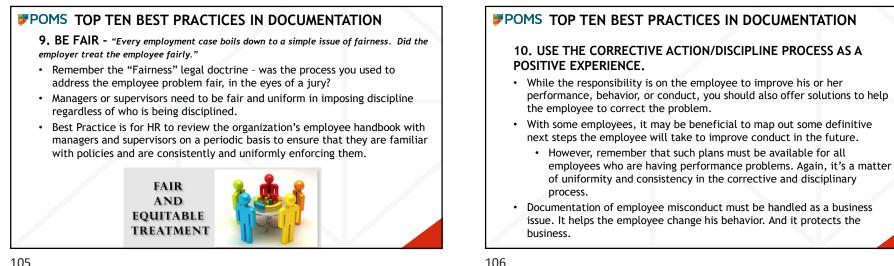**⬛POMS** TOP TEN BEST PRACTICES IN DOCUMENTATION

7. GET THE EMPLOYEE'S ACKNOWLEDGEMENT.
- Managers should make sure that they review the completed form with the employee and have the employee sign it.
  - Such an acknowledgement shows that the employee has been told that that his action was a violation of a company policy or work rule and prevents the employee from claiming in the future that he did not know of the problem.
  - NOTE, however, that there is no legal requirement that that the employee has to sign the document.
- In the event that the employee refuses to sign the form, managers should:
  - Note that on the form and record the date and time.
  - Write *"I reviewed this form with the employee, who then refused to sign the form.*
  - The manager who heard the refusal should sign and date the form. Have a witness, if possible, but not necessary.
  - Give the employee a copy of the form – original to the employee file.

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⬛POMS TOP TEN BEST PRACTICES IN DOCUMENTATION

8. 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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POMS TOP TEN BEST PRACTICES IN DOCUMENTATION

9. BE FAIR - *"Every employment case boils down to a simple issue of fairness. Did the employer treat the employee fairly."*

- Remember the "Fairness" legal doctrine – was the process you used to address the employee problem fair, in the eyes of a jury?
- Managers or supervisors need to be fair and uniform in imposing discipline regardless of who is being disciplined.
- Best Practice is for HR to 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.

FAIR AND EQUITABLE TREATMENT

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POMS TOP TEN BEST PRACTICES IN DOCUMENTATION

10. USE THE CORRECTIVE ACTION/DISCIPLINE PROCESS AS A POSITIVE EXPERIENCE.

- While the responsibility is on the employee to improve his or her performance, behavior, or conduct, you 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 and consistency in the corrective and disciplinary 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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POMS BUT THIS TOP TEN LIST GOES TO ELEVEN !!!

11. THINK OF YOURSELF AS A COACH AND ADVISOR.

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

- 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
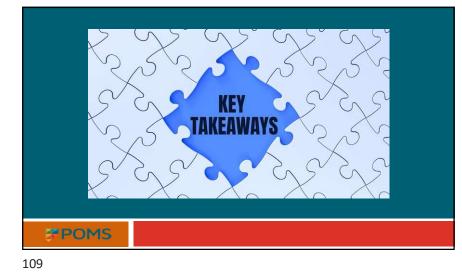 - Again, your goal is to improve performance!

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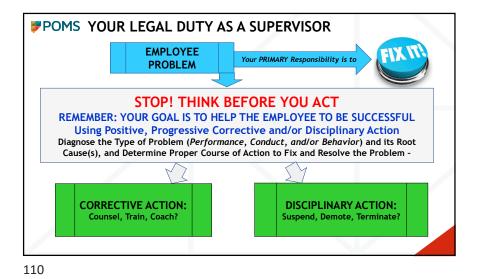## POMS BUT THIS TOP TEN LIST GOES TO … TWELVE?

12. FOCUS ON SOLVING THE PROBLEM – *NOT ON BLAMING THE PERSON*

- Concentrate on working with the employee to correct the performance, incident, 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.)

It's not personal It's just business

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KEY TAKEAWAYS

POMS

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POMS YOUR LEGAL DUTY AS A SUPERVISOR

EMPLOYEE PROBLEM   *Your PRIMARY Responsibility is to*   **FIX IT!**

STOP! THINK BEFORE YOU ACT
REMEMBER: YOUR GOAL IS TO HELP THE EMPLOYEE TO BE SUCCESSFUL
Using Positive, Progressive Corrective and/or Disciplinary Action
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 –

CORRECTIVE ACTION:
Counsel, Train, Coach?

DISCIPLINARY ACTION:
Suspend, Demote, Terminate?

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POMS BEFORE TAKING CORRECTIVE OR DISCIPLINARY ACTION:

YOUR FIRST THOUGHT MUST BE TO ASK YOURSELF:

- Is there anything I have done, or have failed to do, that may have contributed to this being a problem?
- Have I been fair to the employee in dealing with this problem?
- Have I made reasonable efforts to create an opportunity, and to provide support to the employee to resolve the problem and be a success?
- Have I trained the employee properly on how to do their job, and communicated the expected performance standards, and how they will be measured and evaluated?
- Do I have documented evidence that the employee has been trained, that performance objectives, behavioral standards, work rules, and policies have been clearly communicated to the employee?
- Have I clearly stated my expectations of the employee?

"You need to get that report done as soon as possible!"   *Vs*   *"I need the production report before 2 o'clock this Friday."*

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POMS DOCUMENTATION DO's

- Distinguish between **PERFORMANCE, CONDUCT**, and **BEHAVIOR** problems.
- Be sure to analyze the **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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POMS   DOCUMENTATION   DO's

- **Do state what happened.** Try to be specific.
- **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 suggestions.
- **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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POMS   DOCUMENTATION   DON'Ts

DON'Ts include:
- Avoid expressing personal opinions, accusations, or judgments
- Be careful of using generalities, overstatements, or exaggerations
- Avoid using words and phrases that don't have detailed, objective descriptions or statements of what happened.
- Be careful not to assume or reach conclusions without all the facts
- You're not an attorney – avoid drawing legal conclusions
- Be careful of using absolute expressions and hyperbole, unless completely accurate – such as: Always, Never, Every time, Invariably
  - E.g., "You're always late," rather than specifics of dates and times when the employee was late.
- Avoid documenting anything for the record/file that you have not already communicated directly to the employee, but once you've communicated directly to the employee, **PROPERLY DOCUMENT THE DISCUSSION for the file.**

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POMS   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 too 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 reprimand or terminate an employee 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 reprimand.

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POMS   FINALLY, REMEMBER TO START PPCDA WHEN...

The short answer? *Immediately after you see a problem or issue that needs to be addressed*. *Immediately*.
- When you see a pattern emerging
  - e.g. absenteeism, missed deadlines, violation of policy, etc.
- The conduct causes disruption in the office
- A policy or rule is violated
- Performance hasn't improved despite Corrective Action
- Don't wait to address the problem.
- Don't diminish or alter responsibilities.
- Follow through on "promised" corrective action or discipline, particularly on the support you've agreed you will provide the employee to help correct the problem.

Cases have been lost when problems are allowed to continue without being addressed; adjudicators will be able to credibly say, "Well, ladies and gentlemen of the jury, as you can see from the employer's actions ... or lack of action ... the problem simply wasn't that big of a deal.

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POMS   **QUESTIONS**

➢ This is the chance to address issues that may not have been covered to your satisfaction:

  ➢ To ask a question.

  ➢ To expand on a point; or

  ➢ To clarify a point.

➢ If there are any further questions which we were not able to get to today, please feel free to contact the instructor(s).

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