

Deconstructing Documentation

Examine your assumptions about whether it's advisable, necessary or a necessary evil.

By Jonathan A. Segal

Document! Document! Document! If only it were so simple. While documentation obviously is vitally important in managing employees' performance and behavior, its legal necessity is sometimes overstated. Indeed, there are times when an employer may be better off, for example, providing no documentation prior to terminating an employee. Even when documentation is desirable, it may cause more problems than it solves if it does

not record *behavior* as opposed to subjective and conclusory *judgments about the behavior*.

Is the conventional wisdom about workplace documentation truly wisdom? Or is it merely conventional? It involves a hefty dose of both, in my opinion. So let's get radical and poke at some of our assumptions about documentation, and see if we can become wiser and less conventional in the process.

As background for the discussion that follows, remember that documentation in human resource management serves several different but related purposes:

- It establishes a record of personnel actions taken and the reasons why. Memories fail, managers move on and other circumstances change. From a performance management standpoint, it simply makes practical sense to keep a written record to guide both the employer's and the employee's future behavior.
- It informs employees of where they stand with management, what is expected of them in the future and what may be the consequences if they don't meet expected results. In this sense, documentation serves as the "notice" component of what is often referred to in unionized settings as "industrial due process."
- It serves as evidence of the employer's business reasons for actions taken in the event an employee takes formal or informal steps to right a perceived wrong—confronts a manager, uses a dispute resolution procedure, files an employment discrimination charge or brings a lawsuit. >



Why Do We Need It?

Most employees are "at-will," and we remind them in our handbooks that we can terminate their employment at any time, with or without prior notice or cause, for any or no reason, for a good reason or a bad reason—just not for an illegal reason.

If you don't need a reason to terminate an at-will employee, why do you need documentation to support the reason you don't need to have? Have you not been asked that or a similar question by a senior manager clinging desperately to the at-will principle?

As frustrating as you may find the question, the manager is technically correct. Pretermination notice in the form of documentation is legally recommended but not legally required for an at-will employee. We as HR professionals (and attorneys) may lose some of our credibility with senior management by confusing "legally required" with "legally recommended."

The key is to explain to management why pretermination documentation for an at-will employee is legally recommended. Here are several reasons:

- First, a termination ordinarily should not be a surprise. In that context, surprise produces anger, and anger can result in visits to plaintiffs' lawyers. Pretermination documentation minimizes surprise and slakes some of the anger that often provokes an employee's decision to begin adversarial proceedings.
- Second, plaintiffs' lawyers usually are paid a contingency fee—a percentage of the recovery—as opposed to an hourly fee. In other words, if they don't recover, they have worked for nothing. The more documentation in the employee's file, the greater the obstacles to recovery. A plaintiff's lawyer who doesn't see dollar signs may reject the case. When this occurs, the employee may gain perspective through the insight of a third party.
- Third, to rebut a prima-facie case of discrimination, for example, an employer cannot simply roar, "I am an at-will employer and don't need a reason." Rather, the employer must articulate a legitimate, nondiscriminatory reason for the adverse employment action. In the absence of pretermination docu-

mentation to support the reason articulated, the employee may argue successfully that the reason now being given is not the real reason but rather a pretext for illegal discrimination.

- Finally, no matter how many times a judge may charge a jury in a discrimination case or other wrongful-discharge claim that the case is not about fairness, fairness always matters. Most juries cannot (and perhaps should not) divorce considerations of fairness from the deliberation process. If the process is fair and perceived as fair, a jury is less likely to second-guess the ultimate decision. Documentation adds to both the perception and the reality of fairness.

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For more information and other points of view on documentation and discipline, see the online version of this article at www.shrm.org/hrmagazine/06June. There you will find links to:

- An *HR Magazine* article on at-will employment and discharge for cause.
- An SHRM white paper on practical tips for progressive discipline.
- An SHRM white paper on the corrective action process.
- A sample termination policy and procedure.

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These are only some of the legal benefits that HR can and should raise when lobbying for pretermination documentation. What HR should not do is overstate the case by suggesting that such documentation is a legal must when dealing with an at-will employee.

Of course, the rules are different in a union shop, where an employer almost always needs "just cause" to terminate a non-probationary employee. Except for summary offenses narrowly defined (sexual assault, for instance), arbitrators generally require pretermination documentation before they will conclude that an employee was discharged for "just cause."

In the absence of clear (and progressive) documentation, an arbitrator is likely to treat the intended "divorce" as



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only a “temporary separation” and reinstate the relationship (with or without back pay). However, even in a union shop, pretermination documentation is usually only “legally desirable” as opposed to a “legal necessity.” Of course, the risk of not having adequate documentation obviously is greater in a union shop where a just cause rather than the at-will standard applies.

Biting the Hand That Documents

In light of all of the legal benefits of pretermination documentation, it may be tempting to conclude that there is no downside to applying progressive discipline and providing the employee with a documented record of it. Is documentation like chicken soup? It can't hurt?

While such documentation unquestionably mitigates an employer's exposure to a discrimination or other wrongful-discharge claim, it may open the door to a retaliation claim. Stated

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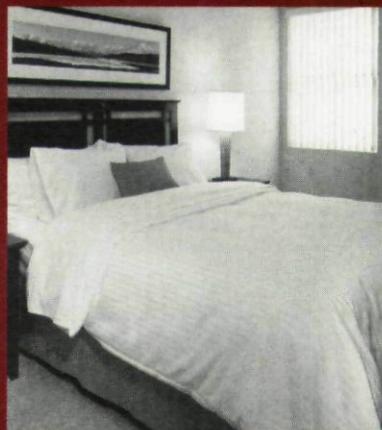
otherwise, pretermination documentation may signal to an employee that his or her job is at risk. To preserve the job, an employee who feels threatened may respond by alleging discrimination or harassment or disclosing a medical or other protected condition. It's sad but true that in some cases, allegations of the employer's unlawful conduct or the employee's disclosure of a protected status in response to disciplinary documentation are calculated to serve as the predicate for a retaliation claim if the employee ultimately is discharged.

The fact that the employer got to the employee first—documented discipline

preceded the complaint or disclosure—is helpful but not ironclad. If the employee is terminated, the employer still must prove in a lawsuit that it did not hasten the termination process in retaliation for the employee's protected complaint.

Accordingly, it is dangerous for HR to state that there is no downside to providing an employee with pretermination documentation. To the contrary, where the risk of a discrimination complaint is relatively low, the pretermination documentation may increase the employer's ultimate risk by opening a window of opportunity for an employee to raise some other kind of charge or to make a

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protected disclosure that serves as the foundation for a later retaliation claim.

There's no black-and-white answer. The one thing that is clear is that giving the employee pretermination documentation is not always the answer. For the employer, it's a question of risk selection, not risk avoidance.

Disciplinary Policies Raise Expectations

Where pretermination documentation is appropriate, the question becomes

how much is enough. That depends, in part, on the employer's written disciplinary policy.

Many disciplinary policies include specific steps to be followed by management before termination of employment—for example, oral warning, written warning and final warning. The number of steps and what they are called may vary from policy to policy, but the concept behind them is essentially the same: As the employee gets closer to termination, the disciplinary

documentation becomes progressively more severe.

The specificity in documentary steps is designed to allay some of the anxiety that at-will employees may feel. Just as important, it provides a road map for supervisors to follow, helping to ensure due process in general and consistency in particular.

Of course, there will be times when an employer will want to deviate from the standard set forth in the policy, and it should reserve the right to do so in the policy itself. Restating the at-will principle within the disciplinary policy itself also helps. Here's an example:

"Although your employment is at-will (either party may terminate the employment relationship at any time, etc.), the Company may utilize the following progressive disciplinary process. Etc."

Employers are well advised to use the discretionary "may" rather than the mandatory "will"—both as to the process in general and the specific steps in particular. Expressly reserve the right to skip steps or bypass the process altogether (for example, in case of serious misconduct, such as theft, harassment or insubordination, to name just three).

However, even so qualified, a formal progressive discipline policy still involves some legal risk. It raises employees' expectations as to what documentation they will receive before a termination. In their eyes, the steps are an entitlement. An employee who does not receive the "entitlement" may question the employer's true motivation for making an exception.

Legal claims are often a product of defeated expectations as opposed to legal wrongs. For this reason, it is generally better to overdeliver than to overpromise. This means that if pretermination documentation is the exception and not the rule in your organization, you may be better off with a disciplinary policy stating only that the employer may provide pretermination documentation or that warnings may be provided without specifying the particular steps.

Personal Vs. Personnel Files

But, not all performance or behavior problems result in formal discipline. Su-

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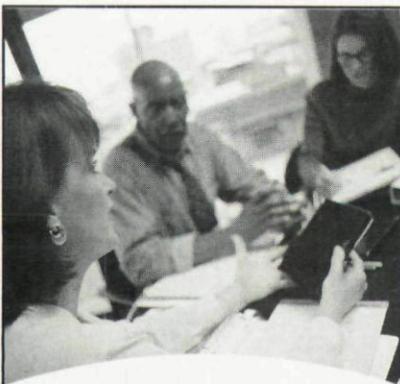
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Supervisors often keep notes "just in case" the problems they observe develop into a more serious issue warranting formal discipline or performance coaching.

Should these notes be put in an employee's formal "personnel" file (which gives an employee access to them in many states)? Or can supervisors keep separate "personal" files without allowing employees to have access to them?

Many HR professionals have legitimate concerns about supervisors keeping informal files, but prohibiting or discouraging them from doing so is often an overreaction.

One concern is the content of supervisors' informal notes. Without HR review, these informal notes may include references that suggest bias even if there was none. Informing supervisors that their notes are discoverable in litigation, and training them not to include anything in them they would not want a jury to see, minimizes this risk. HR's periodic audit of supervisors' files—to make sure they are saying what they should and not saying what they shouldn't—can further reduce risk.

Another concern is that informal files become the default in lieu of formal discipline. Making a note in one's own file is a confrontation-free alternative to the kind of bilateral dialogue needed for true performance management to occur. Allowing supervisors to retain shadow files risks ending up with nothing in the formal personnel file.

On the other hand, strictly prohibiting or strongly discouraging supervisors from keeping shadow files may have the unintended effect of eliminating any documentation whatsoever, especially for managers or supervisors averse to confrontation—as many are. While informal notes not shared with the employee do not provide notice from a due process standpoint, they may help to establish the legitimacy of the employer's motivation.

HR can minimize the risk that supervisors will make excessive use of side files by training them that their notes should memorialize, but *neither* supplant coaching and candid discussions with employees about performance and conduct *nor* substitute for appropriate use of, the employer's formal discipli-

nary and performance management procedures. In addition, remind managers and supervisors to review both the formal file and their own file before and in conjunction with taking any adverse employment action.

Focus on Behavior

Effective documentation—whether given directly to an employee and placed in the formal personnel file, or placed only in the supervisor's informal file—should focus on behavior. Documentation that fails to focus on behavior has minimal value and sometimes may be damaging.

Documentation that states general conclusions as opposed to describing specific behavior can create proof problems later. Recording that an employee has "bad judgment," for example, is worthless, without more explanation, from an evidentiary perspective.

Train supervisors to drill down and record what the employee did or did not do and did or did not say. Here's how this might work in the case of a bad attitude—one of the more subjective but still legitimate reasons to discipline an employee:

- "Bad attitude."
- Drill down: What did employee do or say? "Disrespectful."
- Drill down further: What did he say that was disrespectful? "Talked down to peers."
- Almost there; drill down a little more: How did he talk down to them? "Told a peer that the task was so simple that even he could do it."

Got it!

Use the same approach to address performance in general:

- "Poor performance."
- Drill down: What was inadequate? "Inadequate output."
- Drill down further: What kind of output? "Did not meet production standards."
- Almost there; drill down a little more: By how much did she miss production standards? "For the past four months, employee has produced only 68 percent of standard."

Bingo!

Focusing on specific behaviors also helps supervisors avoid superficially neutral descriptions for performance or

behavior deficiencies that a jury may interpret as proxies for unlawful bias in their application. Consider the following examples:

An employee is disciplined for being “too emotional.” Does the disgruntled employee allege race, gender, age or disability bias?

both cases, the language used to describe the behavior suggests bias.

In the first example, the employee lost



a particular project. That’s insubordination, certainly a legitimate reason for discipline. Yet many of us (including a jury of an employee’s peers) might agree that the label “rigid and resistant to change” smacks of age bias.

By focusing on what an employee did or did not do and did or did not say, we not only build a record of evidence necessary to support the employer’s legitimate reason for acting, but we also avoid sabotaging the employer’s defense by using words that will resonate with a jury as proxies for bias—even where none exists.

Avoid sabotaging the defense by using words that will resonate with a jury as proxies for bias.

What kind of discrimination does an employee disciplined for being “rigid and resistant to change” complain of?

In both examples, the employee’s behavior did warrant discipline, but, in

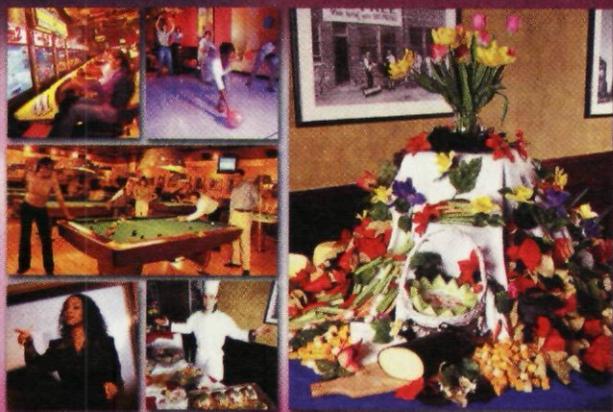
control and began to yell at co-workers. Legitimate reason for discipline? Sure, but the label “too emotional” reeks of gender bias, right?

In the second example, the employee refused to use new technology to execute

Avoid Conclusions About Law, Intent, Causes

Focusing on behavior in documentation also helps supervisors avoid making legal conclusions that may come back to haunt the employer in litigation. Suppose an

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employee is disciplined for "unlawful harassment." This creates an opening for the employee to argue that his conduct was not sufficiently severe or pervasive to be unlawful.

What if the victim later sues the employer for failing to take appropriate corrective action? Documentation stating that the wrongdoer engaged in unlawful harassment undermines the employer's defense that, as a matter of law, the conduct did not rise to that level.

The employer could have avoided both problems if the disciplinary documentation had stated that the employee was disciplined for "telling inappropriate jokes of a sexual nature" without drawing any legal conclusions.

Focusing on behavior also means that supervisors should refrain from characterizing an employee's intent by saying things such as "You don't try" or "You don't care."

You cannot prove whether someone

tries or cares. Plus, an employee's intent is, for the most part, irrelevant. One employee may try but fail, while another employee succeeds without trying. It hardly makes sense to reward the former and punish the latter, but focusing on intent, or motivation, could suggest just that. More important, focusing on intent makes criticism sound like a personal attack. Employees who feel personally attacked often attack back.

Finally, train supervisors to refrain from recording perceived causes of problem behavior and stick to the behaviors themselves. Ordinarily, they should not inquire or speculate as to whether a physical or emotional problem contributes to unacceptable behavior. Practically speaking, supervisors are not qualified to diagnose. Legally speaking, speculation or inquiry into these areas may give rise to a claim under the Americans with Disabilities Act that the employer perceived the employee to have a disability.

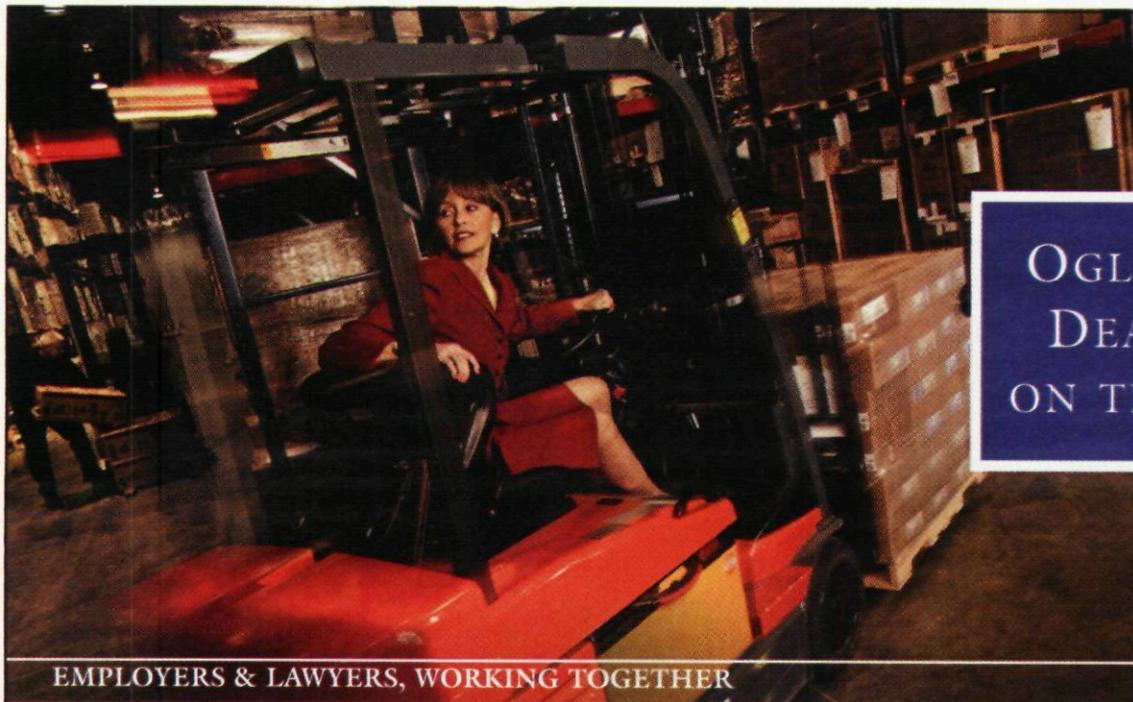
Conclusion

Even with its limitations as addressed in this article, documentation remains a critical element of performance management. But it's not a bulletproof response to every problem. Consider whether, when, where and how.

"Document! Document! Document!" still works, but only if we add, "Think! Think! Think!" ■

Author's Note: This article should not be construed as legal advice or as pertaining to specific factual situations.

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