

BEST PRACTICES FOR BEGINNING, MAINTAINING AND ENDING THE EMPLOYMENT RELATIONSHIP

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I. BEST PRACTICES FOR BEGINNING THE EMPLOYMENT RELATIONSHIP

A. Job Description

1. Need to establish qualifications for the position (e.g., education, experience, certifications, etc.) and essential functions. Be prepared to demonstrate a business necessity for each of the qualifications and essential functions selected. Best practice is to prepare/have an accurate job description, updated annually.

B. The Application

1. Ensure that all information on application has been completed (don't just allow "see attached resume."). Make sure application has been signed and dated where required.
2. Review all applications/resumes to determine if each candidate meets minimum job qualifications.
3. Be especially wary of gaps in employment, history of short-term jobs or refusal or inability to provide information about former jobs/references.

C. The Interview

1. Be consistent in personnel who conduct interviews, types of interviews conducted (i.e., phone, screen vs. in-person) and number of interviews conducted.
2. Avoid any statements during interview process that could be construed as an offer of employment, until and unless you specifically intend to make an offer.
3. Don't assume anything in the interview or hiring process is "off the record."
4. Be consistent in the subject areas explored and the types of questions asked during interviews. Develop a standard set of questions to be asked of all applicants, and keep a record of the questions used.
5. Consider completing a written interview report following each interview. The report should contain only information that is directly related to an applicant's qualifications for the position and his/her ability to perform the duties in question. The report should identify the specific basis for the interviewer's overall assessment of

whether the candidate is a good prospect for the position. Keep in mind that such reports (and any other interview notes or hiring documents) are discoverable in litigation.

6. Make sure that all interview questions are legitimate, business-related and non-discriminatory. If a question does not relate directly to an applicant's qualifications for the position and his/her ability to perform the required duties, you should probably not ask it.
7. Design interview questions to elicit the most effective information to make an informed decision. Examples of effective interview questions:

- **Current/Prior Job**

Describe your major responsibilities in your current/last job?

Describe the advancement opportunities that existed in your current/last job? Did you achieve them?

What training did you receive in your last job?

Did you receive raises? How often? How much? Were the raises based on merit?

Describe the equipment/technology you used in your last job.

Describe your thought process in deciding to leave your current/last job.

What are you looking for in this job that you are not obtaining in your present job (or did not obtain in your last job)?

- **Job Satisfaction/Motivation**

In your current/last position, how do/did you measure whether you are/were performing successfully?

What has been your most satisfying work accomplishment?

What contributed most to any success achieved in your current/last job?

What specific job elements are important to you and why?

Are there any job elements you would like to avoid, and why?

Of all your duties, which presented the most difficulty for you? How did you deal with the duty that presented the most difficulty for you? As you look back, would you change anything about the way you handled that difficulty?

What is the most effective way to motivate you? Why?

- **Leadership**

Describe your supervisory experience.

How would you describe yourself as a manager?

What methods do you use to motivate your subordinates?

Do you consider yourself to be a leader? Why?
How do employees respond to your management style?
How do you set priorities?
What aspects of your management style are the least effective?
What is the best way to handle employee problems and complaints that arise on the job?

- **Attitude**

If you could have changed anything in your current/last company, what would you have changed?
If you had a complaint or a problem with your supervisor, how would you handle it?

- **Education**

What subjects did you prefer at school? Why?
What subjects did you like the least? Why?
What did you choose as your major? Why?
Did you work at an outside job while at school?
How did you balance your various responsibilities?
Are you interested in furthering your education? Why?
When?
How does your educational background relate to this job?

- **Career Goals**

What are your career objectives and what have you done to enable yourself to achieve your career objectives?
What goals do you want to attain in this job?
Do you want to be in this job in five years? Why or why not?

- **Fit with Company**

How did you become interested in our company?
Why do you want to work for our company?
What is your understanding about the job that you are applying for?
What do you think you would enjoy most about working for our company?
How did your last job prepare you for the job we currently have open?

D. Pre-Employment Written Tests (Skills/Traits)

- Permissible to conduct written testing to evaluate skills or traits (such as honesty, integrity, working styles) either before or after job offer. Cannot be used if medical in nature or designed to identify mental disorders.
- All tests must be directly related to the specific responsibilities of the position in question and must be valid predictors of successful performance of such responsibilities. Even then, if they have an adverse impact on protected groups, they cannot be used.

E. Pre-Employment Drug Testing and Medical Examinations

1. Drug Testing

- a. Employment may be denied on the basis of one positive and properly confirmed drug test result or if an applicant refuses to submit to a drug test.
- b. Past addiction to illegal drugs with no current usage may not be used as a basis for denying employment.

2. Medical Examinations

- a. May only be required after an offer of employment has been made.
- b. Employment may be conditioned on passing a complete medical examination, including providing a complete medical history, workers' compensation history, and acknowledgment of pre-existing injury.
- c. Should be required of all entering employees in all (or particular) jobs; not selectively required.
- d. A job offer may not be withdrawn based on a medical examination unless the medical impairment (with or without reasonable accommodation) prevents the applicant from performing the essential functions of the job, or the individual poses a direct threat to himself or others and there is no reasonable accommodation that would enable the employee to safely perform the job.

F. Reference & Background Checks / Arrest & Conviction Inquiries

1. Verify qualifications and check references
 - a. Check references, including using prior employers listed on the application.
 - b. All reference questions must be directly related to the applicant's qualifications and ability to perform the job in question. Questions that are impermissible in the application/interview context are equally improper in the reference-checking stage.
 - d. Just as in the interview context, remember that nothing is "off the record." The contents of reference checks will be discoverable in litigation.
 - e. Develop an appropriate reference check form specifically related to the qualifications for the position in question, and then use the form consistently.
 - f. Be aware of the statutory hurdles with respect to obtaining employment and educational references (e.g., Connecticut's Personnel Files Act - confirmation of salary, dates of employment and job title).
 - g. Reference and background checks require signed authorization forms and compliance with The Fair Credit Reporting Act and Connecticut's Credit Report Act.
2. Criminal History Requests to Applicants/Employees
 - a. Best practice to require applicants to undergo criminal background check for convictions, regardless of type or date. Rejecting an applicant based on criminal history requires individualized assessment of: (i) the nature and gravity of the offense or conduct; (ii) the time that has passed since the offense, conduct and/or completion of the sentence; and (iii) the nature of the job held or sought.
 - b. Employers are prohibited from requiring a job applicant (or employee) to disclose the existence of any arrest, criminal charge or conviction that has been "erased" under Connecticut law and from refusing to hire, otherwise discriminating against, or discharging on this basis.

G. Credit Checks

1. The Fair Credit Reporting Act ("FCRA")

- a. Applies to an employer's use of background "consumer reports" to investigate applicants for employment and/or to make employment decisions about existing employees.
 - i. "Consumer reports" include information about credit status, character, general reputation, or criminal background of a consumer.
 - ii. A "consumer" includes an applicant for employment or a current employee.
- b. An employer cannot obtain a report for employment purposes unless a clear and conspicuous disclosure has been made to the individual and the individual has authorized the procurement of the report.
- c. Except in the case of an investigation into misconduct, an employer cannot use a report in connection with an employment decision unless it first provides to the individual a copy of the report and a summary of the individual's rights under the FCRA and the opportunity to provide a written explanation.
- d. An employer cannot reject an applicant for employment until after the time for providing a written response has passed without a response or until after considering the written response. Employer must send final action notice in writing to applicant.

2. Connecticut Credit Reporting Act

- a. Except for certain circumstances, Connecticut employers are prevented from requiring an applicant or employee to consent to a request for a "credit report" as a condition of employment and from using credit scores in making hiring or employment decisions.
- b. A "credit report" is something that contains information about the credit score, credit account balances, payment history or savings or checking account numbers or balances of the applicant or employee.

- c. This prohibition does **not** apply when: (a) the employer is a financial institution (i.e., bank, savings and loan association, credit union, insurance company, investment advisor or broker-dealer); or (b) when the report is required by law; or (c) when the employer “reasonably” believes the employee engaged in any activity that constitutes a violation of the law related to his/her employment; or (d) when the report is “substantially” related to the applicant or employee’s current or potential job or when the employer has a bona fide purpose for requesting or using the information in the credit report that is substantially job-related and is disclosed in writing to the employee or applicant.

H. Social Media Checks

1. Employers may check all public information available on social networking sites to obtain information regarding applicants (or employees) and may use such publically available information when making employment decisions (in same lawful manner as background information is otherwise obtained and used).
2. Best practice to follow FCRA rules (obtain authorization prior to checking and provide opportunity for explanation and verification before taking adverse action).
3. Employers in Connecticut may not require applicants or employees to provide social networking passwords as condition of employment (several other states and local governments have similar bans).
4. Best practice to implement social media policy that is compliant with current restrictive view of the National Labor Relations Board (“NLRB”), until courts say otherwise.

I. Employment Contracts

1. Determine whether all employees are “at-will” or whether certain employees require additional protections or additional obligations.
2. Basic elements of an employment agreement could include:
 - Description of or reference to required duties;
 - Wage and benefit information;
 - Conditions for any raises or bonuses;
 - Confirmation that employee is not restricted to work (e.g., has no non-compete or non-solicitation or similar agreement with prior employer precluding employment)

- Non-compete, non-solicitation and non-disclosure provisions (as applicable)
- Acknowledgement to review and abide by company policies/handbook, and understanding of company's rights to change, delete, add to or discontinue policies
- Acknowledgement that employment is "at-will" or alternatively description of how employment can be terminated (e.g., by employee and/or employer for cause and/or without cause, and including the definition of cause)
- Provision providing for resolution of any disputes (e.g., through mediation, arbitration and/or, court)
- Acknowledgement that agreement supersedes all prior understandings, contains the parties' entire agreement, and can only be modified by subsequent written agreement.

J. Communicating with Successful & Unsuccessful Applicants

1. Making the Offer/Acceptance of Offer
 - Do not make offers until all steps in the pre-employment process have been completed. Develop and use a checklist.
 - All offers of employment should be made in writing specifying that the writing sets forth the complete terms of the offer and supersedes any prior oral or written representations to the contrary and does not constitute a contract of employment. When including any information about benefits, be careful to specify that benefits are subject to change.
 - Specify any and all contingencies (such as):
 - i. Results of reference/credit/criminal background checks
 - ii. Completion of I-9 Form.
 - iii Drug test.
 - iv. Post-offer medical examinations.
 - v. Employment Contract
 - Specify when the offer will expire (optional).
 - Make applicant accept offer by signing offer letter.
2. How to Turn Down Applicants – Do's and Don'ts
 - DON'T set expectations too high during application/interview.
 - DO provide a timely written response to (at least) every applicant who was interviewed in person.
 - DO keep the response succinct: "Thank you for your interest. We have selected another candidate to fill the position."
 - DON'T engage in discussing with the rejected applicant his//her qualifications compared to those of the person selected. Instead, use phrases like: "We have selected the person who we believe is the best fit."

II. BEST PRACTICES FOR MAINTAINING THE EMPLOYMENT RELATIONSHIP

A. Importance of Performance Management

1. Approximately 20% of employees are considered to be “problem” employees. But, managers spend approximately 80% of their time dealing with issues related to these “problem” employees.
2. Allowing “problem” employees to remain employed imposes significant costs, such as: low productivity; time spent dealing with performance problems; and negative impact on morale of others.
3. Employers need to find an effective way to avoid devoting excessive management time to “problem” employees without incurring litigation.
 - a. Likelihood that a terminated employee will challenge his/her former employer’s decision is increasing;
 - b. Cost of defending against employment-related claims is increasing;
 - c. Juries are increasingly sympathetic to employee claims of wrongful discharge and unsympathetic to management (runaway damage awards).

B. Performance Counseling and Performance Improvement Plans

1. For a first time performance problem, or a minor violation of company policy, or when there have not been other issues with employee performance/conduct, managers typically need only counsel employee in a timely and clear manner.
2. Any counseling (sometimes also referred to as verbal warning) given to employees should be done in person and is best memorialized in writing with an acknowledgement of receipt by the employee and an opportunity to respond. See Tab 1.
3. Minimize (or avoid, if possible) having non-privileged discussions about employee performance issues via e-mail or otherwise. If written communications occur, **JUST STICK TO THE FACTS!** Do not provide any extraneous personal commentary or opinions.

4. For recurring performance problems, or for employees with multiple performance deficiencies, or when counseling has not resulted in correction, performance improvement plans (“PIPs”) are typically warranted, in lieu of or in addition to disciplinary action. See Tab 2.
5. PIPs should be prepared in consultation with appropriate higher-level manager and Human Resources.
6. PIPs are typically not employed if there are only issues of misconduct that need to be addressed, though any PIP that may otherwise be issued to address performance deficiencies could also reference any conduct that must be corrected.
7. PIPs are typically issued to give employees a “final chance” to correct deficiencies prior to taking more significant adverse action (i.e., suspension/discharge).
8. PIPs should describe any past history of counseling and disciplinary action taken against the employee, identify each continued area of deficiency by providing specific examples of the same, identify what the specific expectations/goals the employee needs to accomplish going forward and the time frame (generally 30 to 60 days) to accomplish the expectations, and the consequences for failing to improve. Employee must be allowed to file response.
9. Copies of the PIP should be provided to the employee and the employee must acknowledge receipt of the PIP, or if the employee refuses to sign, the manager must acknowledge that the employee has refused to sign but has been given a copy of the PIP.

C. Performance Evaluations

1. Performance evaluations should be done at least annually to provide employees with honest feedback on how well they are (or are not) meeting their employer’s expectations. Ideally, having that information will allow employees to be motivated to change in ways that will advance the organization's business goals.

D. Common Shortcomings in Performance Evaluations

1. Reviews are not done. If reviews are not performed as scheduled for some or all employees, there will be lack of “back-up” documentation if discipline or discharge becomes necessary.
2. The established review process has not been followed, including doing review within designated time frames. Differences in the process create questions as to consistency and discrimination.
3. Performance coaching and feedback has not happened on a regular basis prior to the review and employee is “surprised.”
4. Many organizations experience difficulty in the evaluation process because supervisors are reluctant to provide honest critical evaluations so as to avoid friction between themselves and their subordinates with whom they must interact.
5. Out of a desire to avoid conflict, many performance evaluations end up being glossed over assessments of employee performance with each employee receiving an overall rating of satisfactory or better.
6. “Grade inflation” through performance evaluations frequently ends up hampering the employer’s ability to take adverse employment actions.
7. Juries view “average or better” ratings as evidence that a manager who testifies that the employee’s poor performance was the reason for the discharge is covering up an unlawful motive for the termination. Juries are unwilling to accept the idea that “average” means something less than meeting the employer’s expectations.
8. Failure to mention specific examples of positives and negatives, or failure to make specific suggestions on how to correct negatives often leads to employee confusion and difficulty in substantiating future disciplinary actions.

E. Preparing and Delivering Effective Performance Evaluations

1. The following steps should be taken to make sure that each evaluation is accurate and fairly administered:
 - a. The person performing the evaluation should have (or obtain when possible) actual knowledge of the employee’s performance, acquired over a reasonable period of time.

- b. The evaluator should accurately and specifically describe the employer's expectations of the employee -- what they are supposed to do and how (or how quickly) they are expected to accomplish it.
- c. A supervisor should have similar expectations for employees in same position with similar experience levels.
- d. The evaluation should accurately and specifically describe how the employee performed on each expectation.
- e. The evaluation should provide specific examples of how and when the problem manifested itself and what the consequences were for the employee's co-workers or other third parties (as applicable) and the company's ability to achieve its objectives.
- f. The supervisor should review prior evaluations and any disciplinary records created during the review period to make sure nothing is left out. The evaluation should be completely consistent with any earlier oral or written communications from management.
- g. Performance evaluations should be reviewed prior to receipt by the employee by at least one other member of higher-level management and/or Human Resources to ensure consistency and to help avoid discrimination.
- h. Remember that no one is perfect and so each evaluation should include a discussion of items for improvement.
- i. Give critical feedback or poor ratings when they are deserved. Remember, employees cannot be expected to improve their performance unless and until they receive accurate feedback that they need to do so.
- j. If an employee's performance requires dramatic improvement, say so. Be candid about consequences if the employee fails to meet expectations within an expressed time frame. Avoid problem of terminated employee successfully pursuing legal claims because they were discharged shortly after receiving a performance evaluation that did not describe the seriousness of their performance problems or warn them about potential termination.

- k. Supervisors must deny or limit raises or bonuses to employees whose performance is unsatisfactory.
 - l. The evaluation should not focus on personal characteristics. A supervisor should not let his/her personal relationship (like/dislike for an employee) affect the assessment.
2. Practical tips on how to administer the performance evaluation:
- a. Present the evaluation in person. Avoid evaluating performance via e-mail whenever possible.
 - b. Prepare the review in a timely manner within the company's schedule. Meet with the employee shortly after the review period has ended, not months later.
 - c. Give the employee a copy of the evaluation to review as it is discussed and allow employee to keep a copy for guidance.
 - d. Discuss both where the employee has done well and has performed poorly. Do not gloss over performance problems; do not overstate problems.
 - e. Never promise employees that their jobs are secure unless their performance falls below a certain rating.
 - f. Allow the employee to respond to the evaluation by giving comments in writing on a designated section of the performance appraisal. If the employee does not take this opportunity, he/she will be hard-pressed later to prove that he/she disagreed with the evaluation.
 - g. When discussing and reviewing performance evaluations (or any counseling or disciplinary actions) with employees, neither the manager nor the employee should be confrontational. If the employee gets confrontational, the manager should first instruct the employee to act professionally, and if the employee refuses or is unable to do so, the manager should end the discussion and send the employee home and then contact their supervisor and/or Human Resources to determine further action.
 - h. Have the employee sign and date the evaluation at the time it is presented, with an acknowledgment that the employee has received, read and understood the evaluation.

III. BEST PRACTICES FOR ENDING THE EMPLOYMENT RELATIONSHIP

A. Necessity of Discipline/Termination

1. Recruitment and training costs and labor market conditions can make employee turnover a huge business expense.
2. The purpose of disciplining employees about poor performance (or misconduct) is to achieve better performance (or eliminate the offensive behavior).
3. While the administration of discipline for poor performance and misconduct must be consistent and firm, it should also be done in a way that makes employees understand that it is the intent for them (and the employer) to succeed, not fail.
4. Discipline in the form of written warnings and/or suspensions is typically employed when counseling and/or PIPs have failed to correct the problem, or when the issue involves more significant policy violations or acts of misconduct (even if first time offenses).
5. An employee may always be terminated “at-will” for any lawful reason at any time. Typically, for performance related issues, termination should only occur if progressive discipline has failed to correct the problem. When the issue involves more significant violations of company policy or acts of misconduct (even if first time offenses), progressive discipline may not be warranted.
6. Discipline (or dismissal) should rarely be a surprise to the employee (unless imposed for significant, first time infraction or misconduct).

B. Common Shortcomings in Taking Disciplinary Action

1. Failure to discipline in timely manner (“letting things slide”).
2. Failure to thoroughly investigate all the facts, including the employee’s side of the story, before taking disciplinary action. Typically, any investigation will require obtaining signed written statements by the complaining party and any witnesses as to who, what, where, when, why; gathering and reviewing any audio or video footage of the incident; and gathering and reviewing any relevant documentation about any prior counseling/disciplinary action. Do not settle for general or conclusory answers; be sure to get the full picture.

3. Inconsistent treatment (management should respond to similar circumstances in a similar manner).
4. Inappropriate penalties: Serious offenses receive little or no penalty, and minor offenses are punished severely. Aggravating and mitigating circumstances are not properly weighted.
5. Failure to impose discipline in a progressive manner if circumstances appropriately warrant doing so, consistent with any company policy or practice.
6. Failure to identify and evaluate any recent potential protected activity or positive performance reviews/bonuses/raises: avoiding bad timing.
7. Improper communication of disciplinary action (including having non-privileged discussions about employee disciplinary issues via e-mail). If written communications occur, **JUST STICK TO THE FACTS!** Do not provide any extraneous personal commentary, opinions or thoughts.
8. Poor documentation and record-keeping practices regarding any disciplinary action taken.

C. Preparing and Delivering Discipline & Appropriately Terminating Employees

1. Documentation of disciplinary action is crucial.
2. All disciplinary documents should contain the following information:
 - a. Factual explanation of the events, behavior or deficiencies which led to the disciplinary action.
 - b. Listing of rule(s) or standards which were violated. Include all which might reasonably apply.
 - c. Reference to any prior counseling/discipline.
 - d. If applicable, nature and amount of improvement required, and time frame in which results are expected with specific suggestions on how to improve as appropriate.
 - e. If applicable, consequences of failure to correct problem.
 - f. Acknowledgement of receipt & understanding by employee.
 - g. Notification to employee that s/he can submit response.
3. Document all reasons for any disciplinary decisions taken. Give the real and complete reasons! (i.e., don't disguise a performance-based discharge as a layoff).

4. Typically use “Employee Disciplinary Notice” checklist form to address problems involving non-managers or for initial and/or more routine disciplinary actions. See Tab 3.
5. Typically use “narrative” memorandum when taking disciplinary action against management employees or for issues that are more complex in nature (such as when investigation has taken place or for discipline that involves multiple issues) or for subsequent or final disciplinary actions. See Tab 4.
6. Depending on the nature of the incident, and only after consultation with the higher level manager and/or Human Resources (and outside counsel when necessary at the request of higher level manager and/or Human Resources), a determination needs to be made as to whether to issue a notice of proposed disciplinary action before issuing discipline (particularly when termination of employment is contemplated). See Tab 5.
7. Typically, manager should meet in-person with employee when taking any disciplinary action (including termination) and have higher-level manager and/or Human Resources present.
8. Understand that the direct supervisor will be the key witness regarding any discipline/termination decision. Be prepared to be able to answer “Yes” to the following questions:

Is my decision based on accurate facts and reasonable belief, not suspicion or emotion?
Have I documented all facts and actions?
Have I assembled and preserved the supporting records?
Have I reviewed the employee’s past counseling, performance and disciplinary record?
Will the employee know why this action is being taken?
If applicable: has the employee had sufficient time to correct the condition that led me to take this disciplinary action?
For terminations (where appropriate): have reasonable steps been taken to attempt to “salvage” this employee? (e.g. training, transfer, demotion or job restructuring)
If applicable: has the employee had notice of the potential for discipline and opportunity to present his/her side of the story?

Is discipline consistent with any past practice in similar situations?
Has this decision been discussed with and approved by appropriate levels of higher management and Human Resources (including possible review by outside counsel as necessary)?
Am I ready to take full responsibility for the decision?

9. Don't humiliate the employee (handle discipline/termination privately with minimal embarrassment to the employee).
10. Don't treat the employee "like a criminal" (i.e., the "perp walk" out of the building), unless there is good reason (i.e., the employee is disrupting the workplace or is being terminated for an act of violence).
11. At time of employment termination, provide written notice of termination. See Tab 6.
12. If employee resigns, obtain resignation letter. If manager is notified of resignation via phone, typically send letter confirming and accepting resignation.
13. Don't give references for former employees.
14. Don't discuss discipline/termination with others who do not need to know and stop others from doing so.
15. Send all original, signed disciplinary and termination paperwork to personnel file/Human Resources.
16. Ensure unemployment compensation paperwork coincides with the termination reasons given to employee.
17. Properly pay departing employee pursuant to legal requirements.
 - a. Employees who quit and those who are laid off must be paid final wages on next regular payday.
 - b. Employees who are discharged must be paid final wages by next business day.
 - c. Make only proper deductions from final pay.
 - d. Comply with vacation pay policy/practice.

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