101 SAMPLE WRITE-UPS for DOCUMENTING EMPLOYEE PERFORMANCE PROBLEMS

SECOND EDITION

A Guide to Progressive Discipline & Termination

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5 Commonly Asked Questions and Practical Answers to Tricky Employee Relations Issues

In this chapter are sample responses to the most common questions asked by managers when implementing this system of progressive discipline. These responses will help you to better understand important issues that surface in typical progressive disciplinary or discharge meetings.

Now that we've dissected the various elements of our write-up model, how do I best deliver my message to the employee when conducting a face-to-face meeting?

There are a few simple rules to follow.

First, when meeting with your employee, explain the nature of the problem as you see it, and then ask the employee for feedback. Unless you give workers a verbal recounting of your perception of the events, you won't know if you've missed any extenuating circumstances.

More important, by bringing someone into your office who has already been "judged," so to speak, you make that person feel that she has already been tried and found guilty. That will cut off open communication right from the start of the dialogue, so always talk before you address anything on paper.

Second, you may already have prepared a written performance correction before the meeting begins, or you may opt to wait until after the meeting is concluded to prepare the document. That's your choice. In the first case, keep the paperwork concealed until your suspicions are confirmed. Once you are confident that your write-up is an accurate reflection of your version of the events, pull it out to show the employee.

On the other hand, if you wait until after your meeting to compose the write-up, invite the employee back into your office to review what you've written. Don't make a blind delivery where you simply place it on the employee's desk or e-mail it. That will appear cold and heartless, and no one should have such a serious document handled so inconsiderately.

Third, and most significant, read your disciplinary write-up aloud to the employee before handing it to her. When managers and supervisors are first introduced to this system

of progressive disciplinary write-ups, their first response is always, "Wow, this is really long!" And that's exactly what we want it to be because the length, in and of itself, is a deterrent factor. A long, detailed document lets the employee know in no uncertain terms that you're very serious about the whole matter. (In contrast, a half-page memo with little content or discussion of consequences or action plans shows that you've made very little investment in the process.)

Therefore, you don't want to shock the individual by handing over a four-page write-up and forcing her to evaluate its various elements on the spot. It makes a lot more sense for you to read the document aloud first; emphasize the important elements in each section; gain agreement orally; and then, after you find out that the person has no further questions, turn the document over to her.

In essence, that three- or four-page write-up will confirm your serious intentions as you've discussed them. You'll have treated the person with dignity and respect by not embarrassing her with a "scroll" or "litany" of documented problems, and you'll find that the entire communication will typically yield much more positive results. Besides, you'll have discussed the positive consequences of improving performance, your commitment to support the individual, and possibly outside training and an EAP referral. Few employees will walk out of such a meeting feeling that they have not been treated fairly or considerately.

Is there a way to communicate my dissatisfaction with an employee's performance or conduct without resorting to formal discipline?

Of course! Formal discipline is only one method of proactively rehabilitating workers by focusing their efforts on changed behaviors or heightened performance. It's often the case that an informal "counseling session"—typically the first natural step in the communication process—will work wonders and fix the problem right from the start.

On the other hand, if the initial verbal counseling session doesn't bring about the desired results, a letter of clarification may be just what the doctor ordered. Let's say, for example, that several weeks after verbally notifying a hospital orderly, who's responsible for pulling patients' charts and transporting patients in wheelchairs, that you're not satisfied with the level of commitment and patient focus that she appears to be exercising, you notice the same apathetic behaviors setting in again. Janet's not returning medical files, she's not using the department's magnetic scoreboard to show when she's out of the office, and then a patient complains about Janet sitting her in a wheelchair that was wet from the rain.

Is it time for a formal written warning, or are you afraid that might be too harsh since the infractions are fairly minor? Well, fear not. You no longer have only two modes at your fingertips: verbal counseling, on the one hand, versus formal progressive discipline, on the other. A letter of clarification might be the right tool to impress upon Janet the seriousness of her infractions. On one hand, letters of clarification are presented to the employee in written format and require the employee's signature. Logically, when things are written down, they are perceived more seriously.

In addition, when employees sign their names to documents related to their performance

or conduct, they develop a healthy sense of paranoia that those documents may be used later down the line to establish some pattern of past history in their actions. That's what progressive discipline is all about:

- Showing employees what is wrong with their performance or conduct
- Telling them what they need to do to fix the problem
- Giving them a reasonable amount of time to fix the problem
- Clearly documenting the consequences of failing to meet your expectations

The letter of clarification will accomplish the first three (positive) goals of progressive discipline without having the sting of the fourth criterion regarding consequences—language along the lines of "further disciplinary action up to and including termination."

In fact, letters of clarification should specifically state that they are not disciplinary documents. As such, they don't carry the heavy stigma of "being written up." Here is what Janet's letter of confirmation looks like:

Janet, over the past three weeks, I've shared with you my concerns regarding your performance and conduct. Specifically, I've told you that you are not handling patients' files correctly because items are being misfiled and files are being left in the offices without being returned to the central filing area. In addition, a patient complained that you delivered a wheelchair that was still wet from the rain to the patient pickup area. Finally, you have failed on several occasions to use the magnetic location board to show when you were on break or lunch. As a result, the schedulers were not able to locate you in a timely fashion.

This isn't a disciplinary document, Janet. It will not be placed in your formal personnel file and will not be shared with other members of management at this time. However, I have put my concerns in writing to impress upon you the seriousness of these multiple, smaller errors. My greatest concern lies in the fact you appear less focused on your work now than at any time in the past five years. You also appear to be apathetic about the outcome of your assignments, and several of your coworkers have asked me if you were feeling okay because they too noticed a change in your work.

I want you to know that I'm here to help you in any way I can. On the other hand, I am holding you fully accountable for meeting all hospital expectations regarding performance and conduct. I recognize that you may have certain ideas to improve your performance. Therefore, I encourage you to provide your own personal improvement plan suggestions.

Please sign this document to evidence not only that you received it but also that you agree to accept full responsibility for fixing these problems and changing the perception problems that exist. I know you can do it, and I'm here to support you. Thank you.

X _____ _____

Employee Signature **Date**

Could this document later be used to justify formal disciplinary action if the employee doesn't clean up her act? Absolutely! Indeed, a written warning will make more sense after this informal, written clarification letter is given to the employee. Consequently, this letter could help strengthen a future case that you've provided the employee with ample notification—both informally and formally—that her performance was substandard. As such, it would be much harder for a plaintiff attorney to successfully argue that you've denied the employee workplace due process.

So when's the best time to use such informal letters? Either when individual infractions are repetitive and fairly minor in nature (like Janet's case) or when group infractions need to be remedied quickly. In another example, if you learn that several of your line managers are sharing employment-related references regarding past workers, then a verbal announcement to the staff may not be enough to show how serious you are about fixing the problem. Still, writing everyone up wouldn't make sense since following the "no references" policy hasn't been formally enforced in the past. Your best bet? Try a letter of clarification like this:

To All Engineering Staff:

Company policy strictly prohibits providing prospective employers with reference information on past workers. All requests for references must be forwarded to Human Resources. Human Resources will then provide the former workers' dates of employment and last title held.

Subjective references that reveal information about past workers' performance, character, or work habits—especially if negative—could expose our organization to lost wages litigation and claims of defamation. Since any managers who provide such references could be named individually in a lawsuit arising from a claim of defamation, it is critical that you all conform to this existing policy. Thank you.

I agree not to release any reference-checking information to any outside employers, employment agencies, or search firms, and I will forward all future calls to Human Resources.

X _____ _____

Signature **Date**

When issuing such group confirmation letters, always require that employees individually sign separate documents. Advise them that you will keep their signed letters in your department file for future reference. That should cement in their minds the commitment you've made and they've now made to following company procedures and placing a particular rule "back on the front burner." If further violations occur, however, that signed document will also establish clear grounds for further disciplinary measures.

Letters of clarification, viewed by many employees as precursors to formal discipline, have the same prophylactic effect as formal discipline without the negative trappings. Added to your performance management toolbox, this alternative could strengthen communications

by clarifying your expectations and, more important, involving employees in their own rehabilitation by treating them with dignity and respect.

Is this disciplinary system more or less likely to make an employee go out on a workers' comp stress leave?

Discipline is a difficult but necessary part of business life. Whether this action sends an employee over an emotional threshold and causes a workers' comp stress leave depends on the individual's tolerance for dealing with adversity.

First of all, understand that certain states, such as California, Colorado, and Maine, don't recognize stress claims resulting from disciplinary action. In those states, claims must arise "primarily from workplace conditions and not ground themselves in circumstances common to all fields of employment."[1] In other words, no coverage is permitted for psychological injuries that were substantially caused by lawful, nondiscriminatory personnel actions. An employee may consequently be barred from claiming a stress leave based on discipline. Be aware, however, that workers' comp lawyers will attempt to paint disciplinary action as a cause of stress whenever possible.

Second, the employee's perception of the disciplinary action will affect her decision to go out on stress leave. This write-up template is indeed a serious format that conveys a hard-line message of low tolerance for unacceptable performance. On the other hand, the notice counters the negative consequences of continued transgressions with the manager's commitment to concrete help, supervision, and training. Whether these positives are enough to outweigh the perceived negatives can be answered only on a case-by-case basis.

Finally, if your organization has historically handed out half-page disciplinary notices with little or no documentation of consequences, improvement goals, or training and special direction, an employee may view this new document format as an attempt to "paper" her out of the company. The length alone—if it is significantly different from the format you used previously—can easily scare a worker. Therefore, when using this format with employees who are used to a different system, be sure to explain that this is a new system that you are using for *all* employees from this point forward in order to confirm your commitment to help.

If an employee goes out on stress or block FMLA leave after being given a progressive disciplinary document, will the active windows of discipline be frozen for the period of time that the employee remains out?

Yes. The "stop the clock rule" says that an employee who goes out on extended leave after receiving discipline will have his "active" window suspended until he returns. In other words, if the employee is placed on a thirty-day warning but then goes out sick for thirty days, he will return to work with the original thirty-day warning still in place. The clock, in essence, stops ticking until the employee returns.

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[1] James Walsh, *Workers Comp for Employers: How to Cut Claims, Reduce Premiums, and Stay Out of Trouble,* 2nd ed. (Santa Monica, CA: Merritt Publishing, 1994), 121.

How do I determine what level of discipline is appropriate for a given offense?

Remember that while you are responsible for treating similar cases alike, this doesn't mean that you will necessarily treat everyone the same way. For example, an employee caught sleeping at his desk may receive a verbal warning if he's a long-term worker with an excellent track record. A new hire in his probationary period might be given a written or even a final written warning for that same offense.

In addition, an accountant sleeping at his desk may be disciplined via a written warning. A nurse on the night shift who is responsible for ensuring patient care and safety may be placed on final written warning for the same offense. And an anesthesiologist sleeping in the operating room may be summarily discharged. Sleeping is not the only issue—the circumstances surrounding the act of sleeping also play a crucial role when determining what remedies are available to you in ensuring that the behavior isn't repeated.

Therefore, the four criteria that will help you determine the most appropriate level of discipline to employ in any particular instance will be:

1. The severity of the offense
2. The employee's past performance record
3. The employee's length of service with your organization
4. Your past practice in dealing with similar infractions

Should I remove disciplinary documents from employees' files after a certain amount of time free of any infractions?

This is a subject of debate among employers and labor experts and must be decided on a case-by-case basis. It is purely optional to include a statement in the Positive Consequences section of the write-up template that states:

> This write-up will be removed from your personnel file one year after the active period expires.

Dick Grote, in his book *Discipline Without Punishment*, reasons that having the opportunity to remove an unfortunate incident, mistake, or judgment call from an otherwise clean record is reason enough for an employee not to repeat a problem behavior. It's also just the type of carrot, argues Grote, that today's worker strives for. "No one's perfect," reasons the employee, "so just give me the chance to erase that unfortunate exception to my work record, and I'll be sure it doesn't happen again."

This is certainly a noble sentiment, but many labor attorneys quickly point out the practical dangers of such "corporate amnesia." Once a disciplinary document has been removed from a worker's personnel file and placed in some other holding area, your own policy may preclude you from resurrecting the expunged document if the problem surfaces again in the

future. In addition, unless you are still around a few years down the line and you happen to remember that an employee was previously disciplined for a given infraction, the new transgression will be treated like a first-time offense.

For example, if an employee in your department store was engaged in the inappropriate discounting of merchandise at the point of sale two years ago, and you are now disciplining her for that same offense, you will have lost an important historical link to the current problem if you forget about—or are not allowed to consider—the prior violation. It's certainly a lot easier to forget when the historical document is missing from the worker's personnel file. It's also very frustrating to miss an opportunity to demonstrate an ongoing behavior pattern because of your own policy of wiping the slate clean. Of course, personnel records management goes beyond the scope of this book. However, you should discuss with your labor attorney the positive and negative ramifications of employing this methodology in your disciplinary write-ups. Your decision to adopt such a measure should be based on your company's disciplinary history, mission statement, and corporate culture, and on the state laws that govern your organization.[2]

One special caveat about the removal of disciplinary documents from a personnel file: Although removing disciplinary warning notices one or two years after the incident usually has a motivational effect on employees, it isn't ever appropriate in cases involving sexual harassment, workplace violence, or discrimination. These types of workplace issues have a tendency to repeat themselves over time, especially if they are part of an individual's intrinsic beliefs or way of doing business.

Therefore, in order to wipe out institutional discrimination and to protect the safety of all workers, this one-year removal clause should be discarded when dealing with sexual harassment, violence, and discrimination. The law has a long memory, and your deliberate erasure of historical records that codify prejudice and intolerance can be seen as irresponsible or incriminating.

If an employee writes a rebuttal to a progressive disciplinary document, should I, as supervisor, rebut the employee's rebuttal?

Typically, not unless there is new information that has surfaced since the original disciplinary notice was constructed. The employee may have the last word in the write-up, since

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[2] Realize that if you add this incentive to your write-up template, you'll be providing your employees with rights that have historically been offered only to union employees through the collective bargaining process. Namely, many union contracts provide provisions like this:

> Any written discipline report for behavior that is subject to progressive discipline shall be transferred from the employee's file to a "confidential file" in the department of human resources after a period of twenty-four months free from any documentation of progressive discipline. Such reports shall not be part of the record for use in future progressive disciplinary actions.

The question you'll need to ask yourself is, Will the morale upside of removing records of disciplinary actions from the personnel file after a certain period of time outweigh the potential legal costs?

the disciplinary notice can have serious negative effects on her future with the company. What you don't want is a continuous "paper chase" in which both parties continue to challenge the other's allegations. Simply stated, supervisors are responsible for stopping any merry-go-rounds of rebuttals that might ensue. Therefore, generally speaking, allow the employee to have the last word.

What happens when an employee survives an initial probationary period (for example, after a written warning for performance) only to fail after the active period expires? How many times must I grant progressive discipline for the same, or a similar, offense when the employee stays clean only long enough to squeak by the probationary time window?

You have the right to add a mechanism to your write-up that stops this proverbial merry-go-round. The only caveat here is that you must let the employee know very clearly that this is your intended plan of action.

Here's how one company handled it: An employee was given an oral correction in September for excessive absenteeism and failure to notify her supervisor directly that she was going to be out. (This employee simply continued to leave messages on the department's answering machine or instructed her coworkers to tell the supervisor that she was going to be out.) The oral correction was followed by written corrections in November and December. In April, when the employee reported that she was sick via the departmental answering machine, here was the human resources manager's direct response in the Negative Consequences section of the write-up:

> Mary, you must understand that failure to follow proper procedures in reporting your absences will result in disciplinary action up to and including dismissal. In addition, you are now being placed on a ninety-day probation *again* for excessive absenteeism. If you incur an unauthorized absence again at any time during the next ninety days, you will be dismissed.
>
> In addition, if you successfully complete this probation and your absenteeism becomes excessive again within six months after this probation period ends, you will not be placed on probation again. Instead, you will be subject to immediate dismissal, since this is your second probationary period in the last six months.

In this case, the employer is totally within her rights to end the cycle. Still, the employer has an obligation to pinpoint the exact consequences of a repeated violation so that the employee can't later claim that she was unaware of the seriousness of the problem.

Remember, one of the critical elements of employee due process is that the worker has a clear understanding of the consequences of her actions. If your termination blindsides the employee because you arbitrarily determined that her repeated problems were excessive, you may end up convincing an arbitrator that you denied due process. As a result, you could easily find yourself on the losing end of a wrongful termination charge.

Can a union employee demand a labor union representative at a disciplinary meeting?

Yes. The Weingarten rights[3] permit unionized employees to have union representation at disciplinary meetings or other meetings at which decisions about the employee's future are being made. If you're planning a meeting to discuss a potential disciplinary issue, you should tell your subordinate that the meeting is regarding possible discipline and that she has the right to invite a union steward to be present.

If a union steward isn't available at the time you're planning on having your meeting, you should reschedule. Forcing a meeting when a steward is unavailable will only give the union a separate cause of action against you. Remember, though, that union stewards don't automatically have to be present; their attendance is necessary only if an employee requests it.

How does the Family Medical Leave Act (FMLA) limit my right to discipline employees with attendance problems?

The FMLA substantially limits your right to discipline employees with attendance problems. The FMLA was enacted in 1993 by Congress in an attempt to protect workers faced with certain "life circumstances" from losing their jobs. As an employer, you are governed by the FMLA if you have more than fifty full-time, part-time, and temporary employees.

The FMLA states that if an employee (1) develops a chronic or serious health condition, (2) needs time away from work to care for an ailing spouse, parent, or child, or (3) requires time off to care for a newborn or newly adopted child, then the employee's job should be protected. You, the employer, have the right to obtain medical certification from an authorized health care provider to prove that the employee has a legitimate illness, for example, or is required to take time off to care for an ailing parent. However, once the claim is legitimized by the appropriate medical certification, you cannot take adverse disciplinary action against the person.

FMLA allows employees 12 weeks (480 hours) per year off without pay to care for themselves or their loved ones. To qualify, employees need to have worked for your organization for at least one year and have worked a minimum of 1,250 hours (about 24 weeks) preceding the leave. Time can be taken off consecutively ("block" FMLA leave) or incrementally ("intermittent" FMLA leave), say, for doctors' appointments.[4]

A typical scenario looks like this: A doctor certifies that one of your plant engineers is subject to migraine headaches that may occur unexpectedly once a month and usually last a day. If the plant engineer calls in unscheduled and announces that she's home because of a

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[3] The Supreme Court case *NLRB v. Weingarten, Inc.* ruled that employees in a unionized organization have the right to union representation during an investigation interview if the employee reasonably believes that the meeting may result in disciplinary action (995 S. Ct. 959 [1975] 402 U.S. 251, 43 L. Ed. 2nd 171).

[4] Generally, FMLA leave is unpaid. However, under certain circumstances, FMLA permits an eligible employee to choose to substitute paid leave for FMLA leave. Consult a labor specialist for more information regarding requiring employees to use their vacation, holiday, or sick leave accruals to care for their own chronic health conditions or to care for sick family members.

migraine, then this incident of unauthorized absence is protected by the FMLA and may not be counted as an "occurrence" of unscheduled absenteeism under the company's progressive discipline policy.

FMLA designation and authorization go well beyond the scope of this book. However, Write-Ups #82 and #83 address situations where an employee either fails to provide the appropriate medical documentation to justify his FMLA claim or takes time off in excess of the terms outlined in his medical certification. Simply remember to check if the worker's time off qualifies as FMLA by contacting your company's human resources department before documenting discipline for unscheduled absence.

Is it acceptable to incorporate progressive disciplinary language into an employee's annual performance evaluation?

Sure. Rather than handing an employee a performance evaluation plus a separate written warning, it's better to incorporate the information into one combined document. There's no rule that states that discipline must occur on Performance Correction Notice letterhead. Besides, having all the information in one place allows you to connect the specific discipline to the worker's overall performance.

To do this, simply add an addendum to the end of the performance appraisal. Be sure to include the key elements of our write-up paradigm in your narrative text. Figure 5-1 shows how it might look.

Note, however, that it isn't acceptable to document discipline on an annual evaluation if the incident in question is old. In other words, you can't state, "Because of your inability to provide acceptable customer service to John Doe six months ago, this performance evaluation also serves as a disciplinary write-up." That simply wouldn't be fair. Just as you can't discipline an employee for something that's old and long forgotten using a Performance Correction Notice, you shouldn't include disciplinary measures for stale issues in an annual performance appraisal.

When I've got multiple disciplinary issues to document, is it better to give the employee separate write-ups or to include the various transgressions in one written communication?

It's always best to include as much information in one written communication as possible. Otherwise, it will appear that you're creating a barrage of paperwork to excessively punish the employee.

The previous example, like others throughout this book, demonstrates how multiple infractions can be incorporated into one disciplinary write-up. As long as you clearly outline the issues in the Incident Description and Supporting Details portion of the template, putting multiple infractions together in one document is perfectly acceptable. At that point, you will have differing Disciplinary Levels, Subjects, and Outcomes and Consequences for each individual transgression. As long as the employee clearly understands how each consequence relates to each separate infraction, you will have accorded the employee due process.

Does an employee have the right to appeal my disciplinary action?

Yes, but how this is handled depends on whether you're governed by a collective bargaining agreement or not. If you're unionized, you must follow the grievance procedure outlined in your collective bargaining agreement. This process typically begins with a "step one" grievance between the employee and the supervisor with a union steward present. If the employee and the union steward believe that the issue was not properly resolved at that initial level, further steps in the grievance process will follow, up to and including binding arbitration.

In fact, it is very important for employees to challenge discipline early in the process; if the time limit for grieving disciplinary action (approximately ten days after the event) is not observed, employees may be precluded from challenging that disciplinary action later on should further disciplinary measures be taken. In other words, employees may have a difficult time grieving a current written warning by arguing that their previous verbal warnings were unjustifiable.

Figure 5-1. Addendum to performance appraisal.

Sylvia,

In addition to your overall score for this annual performance review showing that your performance does not currently meet company expectations, this annual review will also serve as a formal written warning. This addendum serves as a disciplinary document to impress on you the urgency of immediately improving your performance. There are two primary issues of concern:

Issue 1: Unscheduled Absence. **My audit in preparation for this review shows that you have incurred ten incidents of unscheduled absence in the rolling calendar year. Company policy states that ten incidents of unscheduled absence in a rolling calendar year will result in a final written warning. However, because of a clerical oversight, these incidents were not brought to your attention earlier. Therefore, we must start the disciplinary process with a *verbal correction*.**

The dates of these ten incidents follow:

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-
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This number of incidents has impeded the work flow in our unit and could have caused our department to incur unscheduled overtime because others have had to carry an extra workload. Our company's attendance policy is attached. You are now formally warned that any further occurrences of sick leave must be substantiated by a doctor's note. Without the appropriate medical release, you will not be permitted to return to work.

Issue 2: Sleeping on the Job. **On September 2, the wife of patient #54321 requested that you be reassigned from caring for her husband. She stated to the charge nurse on duty that she saw you sitting at your desk "sleeping" two times the night before. When questioned, the wife specifically stated that at 3:00 A.M. she saw you sitting in your chair with your head down on the desk and with your eyes closed. When she returned from her husband's room approximately 15 minutes later, she saw you in the same position.**

(continued)

Figure 5.1 (continued)

When the charge nurse approached you, she called your name two times, but you did not respond. When she tapped you on the shoulder, you appeared to jump up in a state of surprise and stated, "What is it? What's the matter?" The charge nurse noticed that it took a moment for your eyes to adjust to the light. She asked you if you were sleeping, and you told her that you were indeed sitting down with your head on the desk and with your eyes closed, but you denied having been asleep. I expect that you will never again sit with your head on the desk with your eyes closed. You must not engage in any activity or assume any position that gives the appearance that you are sleeping. Therefore, you are now being placed on *final written warning* that should you ever again sleep or appear to be sleeping at your workstation, you may be immediately dismissed.

Our Employee Assistance Program (EAP) provider, Prime Behavioral Health Group, can be confidentially reached to assist you at (800) 555-5555. A booklet regarding the EAP's services is available in Human Resources.

Sylvia, if you would like to provide your own input regarding this addendum, please provide it here:

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Please understand that failure to demonstrate immediate and sustained improvement may result in further disciplinary action up to and including dismissal.

I have received a copy of this notification. It has been discussed with me as part of my annual performance review, and I have been advised to take time to consider it before I sign it. I have freely chosen to agree to it. By signing this document, I commit to following the hospital's standards of performance and conduct.

_____	_____	_____	_____
Employee Signature	**Date**	**Supervisor Signature**	**Date**

If your unit or organization is not unionized, on the other hand, you would typically follow a conventional step-review appeal procedure as outlined in your policy manual. In such organizations, unlike unionized settings, there is usually no neutral third party (such as an arbitrator) to serve as a judge or an arbiter of last resort. Instead, a corporate officer such as the president, plant manager, or director of labor relations will act as the final authority and have final decision-making authority.

What if I fear that an employee might become violent during a progressive disciplinary meeting?

Violence in the workplace is a major concern throughout corporate America. Statistics paint a scary picture of violence on the rise on factory floors and in corporate suites. Disgruntled workers returning to the office after having been discharged or disciplined is a common scenario.

If you expect a worker to react violently to your message, invite an undercover, armed security officer to the meeting. Large security firms have personnel available on a moment's notice for such interventions. Post the security agent within earshot, but be sure that he or she remains unseen (e.g., right outside the closed door of your office). The security and safety you'll provide for yourself and other members of your staff should your suspicions prove true is well worth the extra expense.

If you're terminating the employee, inform him that he is not to return to company property without your (and only your) express permission. State that this policy is uniformly implemented in all cases of employment separation and that corporate security or building security (if available) will be made aware that he is not to enter the property without a pass.

Finally, if you suspect that this worker may indeed return to the workplace with a weapon, hire armed security officers for an appropriate amount of time to ensure your workers' safety. Statistically, workplace violence usually occurs on Mondays, since most workers are terminated on Fridays. Buy yourself added security by ensuring that armed staff is in place to deter such aggression.[5]

How long do I have to terminate an employee after an egregious offense like gross misconduct occurs?

Typically not more than a few days. If you fail to terminate an employee very soon after an offense like gross misconduct occurs, your failure to act may be interpreted by a court as an acceptance of the employee's conduct. The plaintiff's attorney will argue that you condoned the behavior by failing to act on it within a reasonable amount of time and that you should consequently be precluded from changing your mind at a later, more convenient date.

Since any delay of more than a few days could imply an acceptance of the misconduct, your subsequent discharge of the employee could be challenged. Remember that you can be held to have violated the implied promise of good faith and fair dealing if your decision to summarily discharge the worker appears to be pretextual, capricious, or unrelated to business goals or needs.

If I have to terminate an employee, when is the best time to do it?

The best time to terminate a worker is early in the day and early in the week. "Early in the day" makes sense, since you want to remain accessible to the individual if questions arise regarding benefits continuation, unemployment insurance, outstanding 401(k) loans, and the like. More important, people often feel the need for more explanation regarding the company's decision, and your availability is critically important to ensure that the individual has his questions answered and needs met.

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[5] You may also want to look into filing for a temporary restraining order and an injunction against unlawful violence or credible threats of violence by an employee. State laws differ on how this can be done, so consult with legal counsel for guidance.

"Early in the week" is also an optimum time because, for the very same reason, you'll want to give the employee immediate access to you the next day, after she's "slept on it." Violent tendencies usually increase if the ex-employee goes over the story again and again in her mind without facts to balance her judgment. Violent tendencies decrease in the face of information and open communication.

For example, if an employee is terminated on Tuesday, she can call you on Wednesday and receive clarification or justification for your actions. On the other hand, if she is terminated on Friday and is all alone on Saturday and Sunday, she may develop a "vacuum mentality" in which anger grows unchecked. By Monday, a deranged mind may have justified doing damage to a former boss or previous coworkers (which is why workplace violence often occurs on Mondays). As a result, you should avoid Friday terminations whenever possible.

This book maintains that accurate and specific termination letters are my best bet because they dissuade plaintiffs' attorneys from taking on a case. However, I've heard defense counsel recommend that generic letters with little or no detail are preferable. Which style is better?

It depends on your writing style. Most defense lawyers will tell you that a well-written, accurate, and firmly founded letter of termination is a true feather in your cap when it comes to warding off lawsuits. They will also argue that documenting your arguments is a healthy exercise that helps you ensure that termination is the correct remedy for the situation. Besides, that documentation will come in handy if you're challenged later down the road to reconstruct the circumstances surrounding the discharge.

On the other hand, if the termination letter is poorly written and includes incorrect or incomplete facts, then you could really damage your case. When in doubt, write a vague letter that simply states, "You are being terminated for violation of company standards of performance and conduct" and leave it at that. There's nothing wrong with a one- or two-sentence termination letter. This way, if your lawyer has to defend your company against this action sometime in the future, she'll be able to start with a clean slate and not have to dig herself out of a hole.

And remember, of all the decisions managers make, termination decisions are the ones most likely to get you sued. As we've stated throughout the book, reviewing termination decisions with an attorney prior to taking any adverse action against an employee is a worthwhile investment. However, remember that billable hours add up quickly. To minimize the amount of time it takes to convey the facts to your lawyer, you're better off faxing or e-mailing the termination letter rather than trying to explain everything from scratch.

In addition, some companies choose not to employ termination letters of any kind. Instead, they limit termination meetings to only verbal discussions. This is clearly a matter of style and choice and should be determined in advance by speaking with qualified legal counsel.

What are the two biggest mistakes that employers make when documenting discipline?

First, many employers give themselves extra hurdles to jump through by documenting "state of mind" offenses. In an attempt to demonstrate an employee's carelessness or lack of

discretion, employers will use qualifying terms like *willfully, deliberately, recklessly, purposely,* and *intentionally.* This may help them communicate the depth of their dissatisfaction with the employee's substandard performance; however, it may create an additional burden of proof if they are forced to substantiate their contentions. Therefore, you should avoid mental element qualifiers as much as possible so that you don't have to prove an employee's state of mind at the time a particular offense was committed.

Second, many employers fail to realize that disciplinary documentation is legally discoverable and may be used against them by a current or former employee. For example, if you state, "Your failure to properly . . . *has compromised* an entire pool of loans," then you are codifying the damage done to the banking institution. That disciplinary document, in the wrong hands, could easily become a leveraging point to substantiate a plaintiff's claim for damages.

This becomes even more important in sexual harassment claims. Of course, if an employee engages in activities that, in your opinion, create a hostile or offensive working environment, you'll want to impress upon him the seriousness of his actions. However, if you state, "You *have created* a hostile and offensive working environment," that discoverable document could be used by a plaintiff's attorney as clear evidence that harassment did indeed occur.

To remedy these potential pitfalls, you're best off stating, "Your failure to properly . . . *could have* compromised an entire pool of loans" or "Your actions suggest that a hostile and offensive working environment *could have* been created." This way, the responsible disciplinary action that you took won't as easily be misinterpreted as confirmation that wrongdoing actually occurred. Be careful not to let your own documentation incriminate you.

How do I make a document or an e-mail attorney-client privileged?

While undertaking an internal investigation, you may want to protect certain communications or recommendations from being discoverable in later litigation. The attorney-client privilege, if utilized properly, should help you accomplish that goal.

The attorney-client privilege may be used when a complaint involves potentially serious concerns (including potential criminal claims), may develop into a lawsuit, or may involve a large number of employees, therefore having class action potential. Under such circumstances, you can do your best to invoke the attorney-client privilege to protect documents from a plaintiff attorney's future discovery efforts (although it's not guaranteed: a judge will determine if the attorney-client privilege stands or is revoked due to a failure to follow appropriate legal procedure).

Invoking the attorney-client privilege successfully will entail the following steps:

1. Address the communication directly to your attorney (either in-house or outside counsel).
2. Ask the attorney in the body of your correspondence for a legal analysis and recommendation (i.e., legal opinion) based on the facts outlined.

3. If you need to copy anyone in the memorandum or e-mail, limit copies to only those who have a legitimate business need to know. For example, if your boss is copied in an e-mail to your attorney, that's logical. However, if fifteen people are copied instead, it may be difficult for a judge to conclude that the document was strictly confidential in nature, and the privilege may be lost. To be on the safe side, don't forward privileged e-mail messages unless you're sure they would remain within the zone of confidentiality.
4. Label the top of the communication itself (and the Subject line in an e-mail): "Privileged and Confidential: Attorney-Client Communication."

Finally, keep in mind the following caveats:

- The privilege does not protect communications between people where no attorney is present and no legal analysis or opinion is sought.
- Simply labeling a document "Privileged and Confidential" does not invoke the legal privilege or make that communication confidential.
- Do not communicate the information discussed with the attorney with others unless instructed to do so. Loose lips can overturn the privilege.
- Remember that despite your best efforts, a judge may not grant the privilege, even if you've followed all of the previous steps. Therefore, always assume that your communication may be used as evidence against your company in court someday. Similarly, never vent your feelings about a claim or a person in an e-mail just because you believe the communication may be privileged. Without a crystal ball to tell the future, you won't know if the privilege will ultimately be granted, and that e-mail record could be blown up in front of a jury on a large easel with your condemning words highlighted in yellow. Then you'll really have some explaining to do!

As the saying goes, the "e" in *e-mail* stands for "evidence." Don't make an electronic record of any communication that you wouldn't expect to be blasted across the front page of the *New York Times*—attorney-client privileged or not!

I've heard that certain employment experts recommend doing away with progressive discipline altogether to protect a company's employment-at-will relationship with its workers. If that's true, wouldn't all these self-imposed "due process" obligations and written warnings simply place extra burdens on my company without providing much benefit in return?

A small number of employment lawyers and experts do indeed recommend that companies do away with progressive discipline of any kind. In theory, if a company provides no progressive discipline to anyone, then it should be able to maintain a pure "employment-at-will" relationship with all of its workers who can be terminated at whim.

Although a company may opt to follow this advice, there are several serious shortcomings

to this strategy that need to be kept in mind: First, employment at will has a number of exceptions, including discrimination, public policy exceptions (like retaliation), breach of an implied covenant of good faith and fair dealing, and implied contract exceptions.

Therefore, without a crystal ball, a company won't know for sure if it will be able to win a summary judgment (aka immediate dismissal of the case) at the hearing stage based on the employment-at-will affirmative defense. Put another way, you can't know what kind of spin a plaintiff attorney will place on a case six months to a year from now, and a judge may or may not grant an immediate dismissal of the case. That's especially difficult to second-guess in cases of high-risk situations (i.e., potentially terminating someone in multiple protected classes plus protected activity). So if there's no progressive discipline on file at the time of the trial, your company risks not being able to defend itself, prevail, or even mitigate damages if the judge asks you to demonstrate good cause to justify the termination.

Second, and equally important, even if you could insulate your company from liability by denying anyone notice of substandard job performance before moving to termination, would you really want to? It may sound tempting, but think of some of the unintended consequences:

- Employees may work for you to earn a paycheck, but they'll probably only give so much when they know that they could be terminated at whim, for any reason or for no reason at all—especially if they've seen that happen to some of their coworkers.
- Providing no prior notice of substandard job performance before firing someone may significantly damage your corporate culture and worker motivation. In short, although such a program may benefit your employee relations practice, it will wreak havoc on your recruitment and retention activities. After all, few people will want to join a company that's known for treating its workers unfairly or not considering their needs before doing something as significant as terminating them.
- Without a properly documented disciplinary record, it could be more difficult for your organization to contest unemployment insurance claims.

Remember that the number one reason why workers originally organized and joined unions after World War II wasn't to collectively bargain for wages and benefits (as is commonly thought). Although that was certainly an important reason, what they wanted even more so was to be engaged in a "termination for just cause only" type of employment relationship. "Employment at will," most workers argued, was inherently unfair because they had no control over their futures. Union contracts, in comparison, would at least give them a fair shot at keeping their jobs because they would have to be warned before being terminated.

It wasn't until employment at will was challenged by a California court in 1980 and exceptions to the employment-at-will relationship were established that workers felt more secure without a collective bargaining agreement behind them. In short, in a knowledge-based economy where your most important assets walk out the door every night, there's little need to create an antagonistic relationship with your "human capital" by pulling any modicum of job security out from underneath them.

What are my options for separating an employee who has not been granted progressive discipline? How do you go about terminating someone whose presence poses a problem but who has no progressive disciplinary actions or unacceptable performance evaluations on file?

This is the toughest question of all. You may have the right to terminate employees at will. Even so, if you're challenged, you will have to prove that you followed your organization's policies and past practices in arriving at that decision. If your defense isn't adequate and the employee's attorney can prove that the employment relationship was indeed not at will and that termination required good-cause justification, you will most likely have to settle out of court.

When you are faced with this predicament, consider meeting with the employee and explaining the situation openly. If you are fair with the person and allow for a transitional period, you will likely increase your chances for an amicable parting. Perks that you can offer to entice an employee to agree to a "separation by mutual consent" or a "negotiated termination" include the following:

- Separation packages [6]
- Outplacement (career transition) services
- Uncontested unemployment benefits
- A neutral letter of recommendation strictly based on historical performance evaluation feedback[7]

Hopefully, your cooperation in focusing the individual on a future career in a different company will be viewed as realistic and fair. That path of least resistance may give the worker an easy way out that simultaneously allows her to save face. And once again, you'll maintain a workplace that fosters respect, dignity, fairness, and open communications.

On the other hand, be sure to let the employee know that this will be her choice and that you'll respect whatever decision she makes. (After all, you're paying now for some other supervisor's failure to document performance problems clearly both in annual performance reviews and in written warnings.) For example, you might say:

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[6] Separation payouts should be awarded only after signed releases have been obtained. The separation money is the legal "consideration" in exchange for the release. And remember that the Older Workers Benefit Protection Act (OWBPA), which amended the Age Discrimination in Employment Act (ADEA) of 1967, mandates that workers over age 40 be given a minimum twenty-one days of notice and an additional seven days in which to rescind the agreement.

[7] Be wary of stilted letters of recommendation that portray only positive attributes. You have a moral and legal obligation to provide both positive and negative information in the assessment. In addition, you're obliged to provide truthful, objective information in good faith and without malice to a prospective employer who requests the information and has a need to know. If the material you provide the prospective employer is false or misrepresentative and the company relies on your recommendation and hires the individual, you could be named in a negligent hiring lawsuit further down the road if that employee later becomes violent, sexually harasses another person, or commits a similar substantial breach of conduct (assuming that you're separating the employee for one of those reasons). On the other hand, the employee can sue you for defamation if your characterization in the letter appears biased. It's not hard to see why providing references on past employees is a catch-22, no-win situation for most employers.

> "Heidi, I'm guessing that you're not totally happy with our working relationship, and truth be told, I'm not either. I've discussed this with our division head and also with human resources, and I've asked Ashley from human resources to join us in this meeting so that we could discuss some options.
>
> In fairness, I want you to know that I told Ashley that I need to begin the progressive discipline process and draft a written warning for you based on the events that occurred yesterday. Still, I feel like there's a bigger issue at hand: You're not happy, I'm not happy, and to start initiating progressive disciplinary measures that could lead to your termination may not do either of us much good.
>
> Ashley thought that it might be better for us to sit down with her and lay our cards on the table. In short, if you're not happy in this role and want to avoid blemishing your record with written warnings and substandard performance reviews that could ultimately lead to a termination for cause, maybe we could work out some terms that will allow you to remain in control of the situation and walk out with your head held high.
>
> I've gotten approval to offer you a three-month separation package that will allow you to continue paying for your medical benefits at your current rate. If you choose to accept that package, you'd need to sign a release absolving the company from liability. And you don't have to answer us now: You could think about this and sleep on it and let us know later this week if it's an option you'd like to pursue.
>
> I don't want to discount the years that you've worked for us. I just figure that if it were me, I would prefer that my boss had enough respect for me to tell me openly and honestly that it might be better for me to pursue different teams in other leagues.
>
> If you choose to accept the package, we won't contest your unemployment. You can tell everyone on the team that you're leaving for whatever reason you deem fit, and of course when you apply at other companies and fill in that "Reason for Leaving" line on the employment application, you could show that you left us rather than vice versa.
>
> If you choose not to take this offer, that's fine too. At that point, though, I'll ask Ashley to help me draft the written warning that we were going to prepare before we started this meeting today. Again, I'll respect whatever decision you make, and just let me know in the next few days how you're feeling about all of this, okay?"

It's important that you have a third-party witness (in this case, human resources) at a meeting like this; otherwise, the employee could argue that you forced her to quit by threatening termination if she didn't. That could lead to a "constructive discharge" claim, which looks for similar remedies under the law as a wrongful discharge claim. A situation of one word against the other may make it very difficult for you, as the employer, to defend yourself against the employee's allegations.

For the same reason, it's important that the employee realize that if she doesn't agree to accept the separation package, she'll receive a written warning. Heidi needs to know that up front before she makes her decision. Otherwise, it will appear as if you're giving her a warning after she decides not to resign, and in a judge's or an arbitrator's eyes, that could

easily appear to be retaliatory behavior on your part. It goes without saying that your strategy session with human resources or outside counsel in a situation like this is critical *before* you engage in any conversations with the employee.

Finally, your offer doesn't have to include a separation package in exchange for a release. Instead, you may simply opt to allow the employee to look for another full-time job while employed with your company:

> "Heidi, I'm guessing that you're not totally happy with our working relationship, and truth be told, neither am I. I've discussed this with our division head and also with human resources, and I've asked Ashley from human resources to join us in this meeting so that we could discuss some options.
>
> If you'd like to pursue looking for a full-time position elsewhere, I would support that. I'd rather we be honest and up front with one another right from the start so that you don't have to feel like you have to walk on eggshells or make up an excuse every time you land an interview. I also want you to feel like you have some level of control regarding your career options.
>
> If you'd like to pursue this option, though, please keep two things in mind: First, we still come first. You'll need to give me twenty-four hours' advance notice whenever you've got an interview planned so that we could divvy up the workload and reassign responsibilities as appropriate. Second, it's time that we put our concerns down in writing in the form of a formal, written warning. This has been necessary for quite some time now, and your choosing to launch a job search, if that's indeed what you choose to do, really can't get in the way of the written record that we need to create.
>
> For now, we'll prepare the written warning. Please give some thought to the option of initiating a job search, and I'll be as flexible for you as I can. What are your thoughts about that?"

The written warning at this point is important because Heidi's willingness to launch a job search shouldn't hold you back from managing her performance and holding her to high expectations. Many unsuspecting employers have allowed individuals to begin interviews elsewhere only later to find that they have taken advantage of the situation and not kept their word. If that's the case with Heidi, then having that written warning on file now gives you a lot more leverage to move through the progressive discipline system a month or two from now when you learn that she's not keeping her end of the bargain. In short, protect yourself and your company by placing a stake in the ground the day you hold this conversation so that you don't lose a few months in the progressive discipline process by having to start from scratch—after you've been taken advantage of.