

Employment Law For Municipal Managers: *Be On The Right Side Of The Story*

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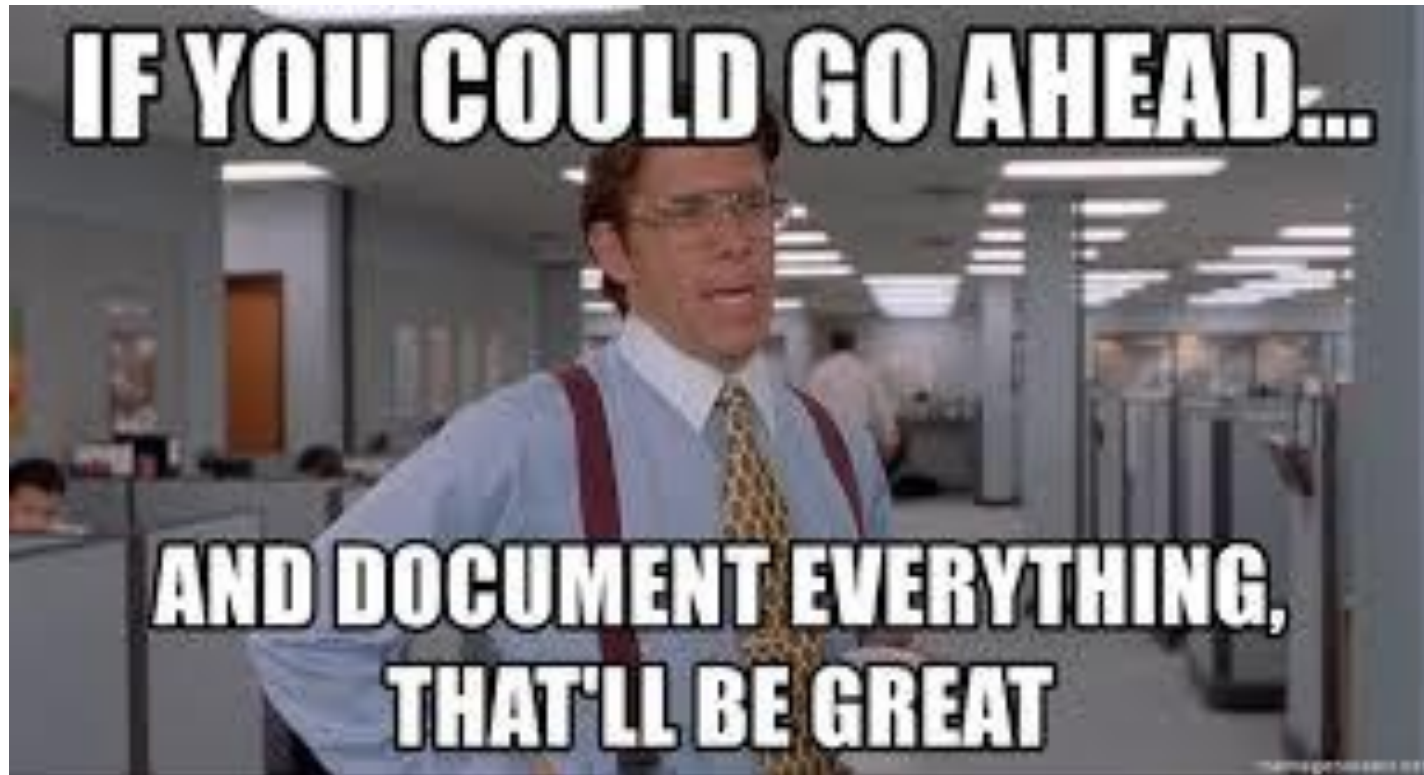
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If I could sum up this presentation
in one slide . . .



Why?



Proper documentation helps tell our side of the story.

We've Got To Get It Right

- Every employee is an investment– proper documentation protects and enhances the investment
- Proper documentation promotes organizational and individual success through better retention, morale and productivity
- Documentation is the cornerstone of effective risk management

Agenda

- Documentation in the workplace
 - The “Super Seven” for managers
 - Key moments and key documents
 - Hiring
 - Performance and status
 - Documenting misconduct
 - Overview of relevant legal concerns
 - When medical issues affect performance
 - The 7 Standards of Good Documentation
- 5–Minute Legal Update

Documentation: The “Super Seven” For Managers

Documentation Keys To Success

1. Document promptly or “in the moment”
2. Document diligently
3. Document accurately
4. Document completely
5. Document properly
6. Document with specificity
7. Document professionally



Key Moments And Key Documents

Documentation In Hiring



- What are we trying to demonstrate?
 - Organization evaluates all candidates based on business / job-related reasons
 - Organization evaluated this particular candidate based on business / job-related reasons
 - Organization investigated the candidate's background
 - Organization communicated its job expectations to the new hire
 - Organization communicated its organizational expectations to the new hire

Documentation In Hiring



- Lawful sources of information
 - Employment references
 - Personal references
 - Licensing / Certification records
 - Background checks
 - Motor vehicle records
 - Criminal records
 - Other job-related aptitude or performance testing
 - Drug testing
 - Physical ability testing
 - Personality profiles
 - Medical exams/inquires*

Documentation In Hiring



- Key Documents
 - Application form
 - Reference authorization form
 - Job Offer letter
 - Rejection letter
 - Affirmative action disclosures /self-identification
 - Background check forms
 - Interview forms
 - Job descriptions / position advertisements
 - Initial personnel forms
 - Signed acknowledgments / receipt

Interview Preparation



- Review the file: Applications, resumes, other information that has been gathered
 - Identify potential “red flags” in job applications
- Lawful and unlawful subjects: Interviewers and decision-makers need to know them
- Discussion topics for interviews: Prepare in advance



Document Your Decisions

HIRING!



- Evaluating the candidates
 - Notes and evaluation should be based on job-related observations
 - Subjective impressions are real and may be considered: enthusiasm, creativity, ideas, poise, etc.
 - Evaluation may be based on comparison with other candidates

Document Your Decisions



- Base selection and rejection decisions on stated standards or criteria
- Avoid “pre-announcements”
- Apply decision criteria consistently
- *SAY WHY* (internally) when a candidate is rejected

Document Your Decisions



- Communications to applicants
 - Confirm decisions in writing to each applicant, and do it promptly
 - Acknowledgment of applications / resumes
 - Rejections
 - Offer letters



Documentation: Performance And Status



- What are we trying to demonstrate?
- Every employee is an investment
 - Preventing and correcting problems enhances the value of that investment
- Every employee is a human being
 - If an employee is off track, does he or she deserve
 -
 - To know that?
 - To have an opportunity to correct it?
 - What if it were you?

Documentation: Performance And Status



- What are we trying to demonstrate?
- Not tolerating poor performance or negative behavior is:
 - Expected and appreciated by most employees – often including the offender
 - An important tool for managing legal risks
 - Good for the bottom line

Documentation: Performance And Status



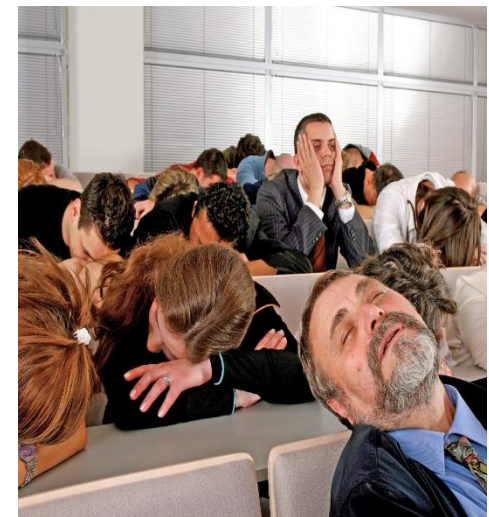
- Attendance documents
- Leave of absence documents
- Medical / disability / ADA / FMLA matters (confidentiality concerns)
- Training documents
- Performance evaluation documents



Performance Evaluations



- The most common management reactions:



Performance Evaluation Checklist



1. The Performance Management System

- Follow the company's evaluation schedule and format (at least)
- Have a system for assembling and maintaining relevant information over the course of the review period
- Evaluate based on concrete, objective standards
- If you use a rating system, make sure it allows you to say what you mean

Performance Evaluation Checklist



2. Preparing the Evaluation Document

- Set aside sufficient time to think about and write the evaluation
- Consider an opportunity for the employee to provide input before the final document is prepared
- State objective facts, not conclusions or generalizations
- Give facts and examples to support every comment or rating

Performance Evaluation Checklist



- Identify performance expectations or goals for the next review period as clearly and objectively as possible
 - Consider employee input in defining future duties, expectation, goals
- Consider centralized review of evaluations – HR or another level of management – before finalized



Performance Evaluation Checklist



3. The Review Meeting

- Discuss the evaluation in person with the employee. If there are serious problems, include HR or another level of management
- Give the employee an opportunity to respond, preferably in writing on the same form
- The evaluation should be signed
- Document the employee's reaction

The “Why” of Performance Evaluations

- Evaluating employees effectively is a continuous process – you’re never done



Legal Impact of Evaluations

Case Study: The Positivist

- Miranda is an administrative assistant. Her position is salaried, but non-exempt.
- Pursuant to department rule, she needs to be pre-approved before working overtime. The department really doesn't like granting overtime.
- Problem: Miranda's time management skills are not great



Legal Impact of Evaluations

Case Study: The Positivist

- But Miranda's supervisor wants to turn lemons into lemonade... not when it comes to fixing procrastination issues, but instead when it comes to spinning how Miranda performs:
 - “Miranda is always willing to work late, even taking assignments home at night for dictation!”
- Problem: You've violated the FLSA

Legal Impact of Evaluations

Case Study: The “Time Bomb”

- Susan is a 16–year employee of the City of ACME. Pursuant to City policy, her performance was reviewed annually... up to 2012, when she stopped being eligible for employee pay increases, so her supervisor stopped doing the evaluations formally. Each of her reviews was uniformly excellent.



Legal Impact of Evaluations

Case Study: The “Time Bomb”

- In 2014, Susan was provided a formal written warning for abusive conduct towards subordinates. In 2016, she was suspended for yelling at a junior administrator in front of other employees. Each of these write-ups were well documented.
- In 2018, Susan spoke at a City Council meeting, and expressed criticisms about a City initiative involving the Department of Public Safety.
- In 2019, Susan made a temp cry after she yelled at the temp for allegedly sending too long of an email.
- Result?

Legal Impact of Evaluations

Case Study: Inconsistent

- Autry is hired as a salaried engineer
- “Supervisors’ Manual” states that new hires are to be reviewed within three to six months after hire, and annually thereafter
- Autry had to ask at least twice for a performance review



Legal Impact of Evaluations

Case Study: Inconsistent

- He received a total of four evaluations:
 1. First evaluation: 17 months after his hire, conducted by first supervisor: “Satisfactory”
 2. Second evaluation: “Satisfactory,” but included “highly subjective personal criticisms and characteristic impressions” from the same supervisor
 3. Third evaluation: “Satisfactory–Plus,” by a new supervisor
 4. Final evaluation: 17 months after the third review, but covered only the previous 5 months; rated “Unsatisfactory” by third supervisor

Legal Impact of Evaluations

Case Study: Inconsistent

- Less than 4 years after his hire, Autry was discharged for “attendance reasons”
- Autry sued for race discrimination
- The Judge said:
 - The employer’s “untimely,” “inaccurate and clearly biased performance reviews” were evidence of discrimination
 - Autry was entitled to reinstatement, monetary damages and attorney fees

Evaluations: What We're Trying To Avoid



Documenting Misconduct

Documenting Misconduct: Standards

- Collective Bargaining Agreement
 - “Just Cause” standard
- At-Will Employment

Just Cause Employment

What does “just cause” employment mean?



Just Cause Employment

- Achieve this status through various means:
 - Covered by union CBA
 - Term of employment contract
 - Pursuant to employment policy
- Although the principles of at-will employment are important to understand, the majority of your employees might be just cause employees

Just Cause Employment

Q. And how does an employee's just cause status impact documentation?

A. Documentation can support – or undermine – the validity or authenticity of the employer's reason for terminating an employee

At-Will Employment

- An at-will employer may establish its own standards for performance, conduct, attendance, quality, etc.
- Management may enforce those standards according to its best judgment
- Without being second-guessed by a judge, a jury, or any other third party



At-Will Employment

Q. Does being “at-will” mean you can or should make employment decisions arbitrarily?

A. No. It means you make decisions based on the right thing to do, in your best judgment, in the best interest of the organization

At-Will Employment

Q. Q: Does being “at-will” mean you don’t need to worry about proper documentation in the workplace?

A. Absolutely not!

Recommendation

- Legally: At-Will
- Practice: Just Cause



Basic Elements Of “Just Cause”

- Reasonable rule or standard
- Clear notice to employee
- Proper investigation – timely, thorough, fair, objective
- Substantial evidence of guilt
- Consistent treatment
- Appropriate consequence

Reasonable Rule Or Standard

- “Reasonable” means reasonably related to the
 - Orderly, efficient and safe operation of the employer
 - Performance that the employer can properly expect from the employee

Reasonable Rule Or Standard

- What if the employee thinks the rule or order is unreasonable?
 - Employee must “obey now, grieve later”
 - Unless there is a serious and immediate threat to health or safety
 - Establish an outlet

Reasonable Rule Or Standard

- Typical problems in proving a reasonable rule or standard:
 - Identifying the rule / standard that applies
 - Interpreting the rule / standard that applies
 - What was the order or instruction that was given?
 - Can we prove that it was given?
 - Can we show the business reason for the rule or standard?

Clear Notice To The Employee

- Clear notice to the employee
 - Requires notice of both:
 - The rule
 - The consequences of violating it
 - Published work rules generally fulfill this requirement, where they apply (but only if they are well written!)
 - But also documented discussions, corrective action, performance improvement plans, annual evaluations, etc.

Timely, Thorough, Fair And Objective Investigation



- Timely means:
 - Before a disciplinary decision is made
 - (but administrative leave pending investigation is OK if immediate action is required)
 - Promptly, for practical reasons
 - (before the facts get stale, witnesses disperse, documents go into hiding)
 - Promptly, for legal reasons
 - (usually no set time period, but the clock is ticking...)

Timely, Thorough, Fair And Objective Investigation



- Thorough means:
 - Interviewing all witnesses who may have information (pro or con) about whether the employee did what he/she is accused of doing
 - Gathering and examining all relevant documents (pro or con)
 - Gathering and examining all information relevant to the employee's defenses

Timely, Thorough, Fair And Objective Investigation

- Fair and Objective means:
 - The employee's version of the facts, and her explanations, excuses, and justifications, are considered and examined in good faith
 - The people who investigate don't have a personal stake in the outcome; e.g., a single manager should not be "witness, prosecutor and judge"



Substantial Evidence Of The Employee's Guilt



- Substantial means:
 - More than flimsy
 - Not necessarily perfect; not “beyond a reasonable doubt”
 - When viewed fairly and objectively, more persuasive than the evidence supporting the employee’s innocence

Substantial Evidence Of The Employee's Guilt

- Typical problems in showing substantial evidence
 - Poorly conducted or poorly documented investigation
 - Failure to take into account the credibility or lack of credibility of the relevant witnesses
 - Evidence of pre-determination
 - Lack of attention or objectivity in judgment and assessment

Consistent Treatment

- Consistent means:
 - Rules, orders, and penalties have been applied in an even-handed, non-discriminatory manner
 - Management has not been lax in enforcing the rule in question
 - The penalty is not more severe than those in prior similar cases



Consistent Treatment

- Typical problems in proving consistent treatment
 - Failing to investigate or consider prior cases at all (often, a failure to consult the people who would know)
 - In prior cases, failing to document clearly the entirety of the circumstances
 - In prior cases, failing to document clearly why an employee was given a break
 - Failing to inform employees clearly that a previously unenforced rule will be enforced

Appropriate Consequence



- Appropriate Consequence means one that is reasonable in view of:
 - The seriousness of the employee's proven offense
 - The employee's overall work record
 - Any mitigating or extenuating circumstances

Document The Decision

- Assume the document will be “Exhibit A” in any legal proceeding
 - “Short and sweet”
 - “Detailed and defensive”
- Include a description of the investigation, the results, and the employer’s reasoning
- If the employer is concerned about exposure, consult with legal counsel before recording or internally communicating sensitive information or liability concerns

Document The Decision

- Contents for memos / letters of discipline / discharge:
 - Facts established by investigation
 - Rules / policies violated
 - Seriousness
 - Previous notice/discipline
 - Impact on employer and public
 - Consequences
 - Notices / expectations / strategies
 - Sign off



Why Is Any Of This Important?

Discrimination

- What is “Employment Discrimination”?
 - An illegal reason makes a difference in an employer’s decision that affects an individual’s employment.



Discrimination

- The “Illegal Reasons” Include:
 - Legally-protected characteristics
 - Legally-protected activities



Discrimination

- “Protected characteristics:” It is unlawful to base an employment decision – in whole or in part – on any of these factors:
 - Age
 - Race
 - National origin
 - Religion
 - Color



Discrimination

- Sex: Not only being male or female, but:
 - Sex “stereotyping” – non-conformance with stereotypes for gender-related behaviors
 - Female perceived as too assertive
 - Male perceived as having effeminate behaviors
 - Transgender status
 - Sexual orientation or preference (a grey area)
- Pregnancy, childbirth, or related medical conditions



Discrimination

- Disability (mental or physical) includes:
 - Actual disability
 - History of a disability
 - Being “regarded as” having a disability
 - Association with a person with a disability



Discrimination

- “Protected Activities:”
 - Making a claim under almost any employment law – for example:
 - Discrimination laws
 - Wage-hour laws
 - Workers compensation laws
 - Occupational safety laws
 - Requesting accommodation of a disability



Discrimination

- Rejecting, reporting, or opposing harassment or discrimination
 - Based on sex, race, disability, religion, etc.
- Requesting or taking FMLA leave
- Refusing to perform an illegal act
 - E.g., refusing to falsify company tax returns
- Complying with a legal obligation
 - E.g., testifying in response to a subpoena

Discrimination

Q. What's the moral of this story?

A. Assume every employee can find a “protected” category

Discrimination

Q. So how does documentation play into this whole mess?

A. It serves as a basis to prove that your decisions were based on non-discriminatory reasons

How to Prove- or Disprove- Discrimination



- The most common ways for a plaintiff to infer an illegal motive:
 - Manager remarks about a protected characteristic
 - “My boss told racial jokes to the rest of the group when he thought I couldn’t hear”
 - “My boss sent me an email suggesting it was about time that I retire”
 - “My boss imitated my stutter and laughed about it”
 - Cannot be tolerated

How to Prove- or Disprove- Discrimination



- Inferring an illegal motive:
 - Disparate treatment of someone outside the protected group
 - “They said I needed a degree, but the male they hired didn’t have one, either”
 - “They said I got downsized because of my performance ratings, but they kept the young guy, and everybody knows he’s a terrible performer”
 - The EEOC / MDCR’s favorite evidence if they can’t get anything “direct”

How to Prove- or Disprove- Discrimination



- Inferring an illegal motive:
 - Selection of someone outside the protected group
 - “They fired me and hired someone much younger”
 - Timing of discipline after protected activity
 - “I was my boss’s right hand man until I had to leave for National Guard duty. Two weeks later I’m fired.”
 - Statistics
 - “The last 37 people they hired were of the Christian Reformed faith”

How to Prove- or Disprove- Discrimination



- Inferring an illegal motive:
 - Incomplete, inaccurate or inconsistent manager accounts
 - Evidence of bias, assumption, predetermination
 - Lack of documentation
 - Sloppiness

How to Prove- or Disprove- Discrimination



- Second step: The employer must present (with evidence) the legitimate non-discriminatory reasons for its decision

How to Prove- or Disprove- Discrimination



- Legitimate employer reasons
 - The employer is entitled to apply its own standards for performance or conduct
 - The employer's decision does not have to be wise, shrewd, or even "fair" (but it helps)
 - The employer does not have to be "correct"
 - A reasonable, good faith belief is enough to disprove a discriminatory reason

How to Prove- or Disprove- Discrimination



- Legitimate employer reasons
 - Bottom line: The employer simply needs to be willing and able to state (and credibly support) its reason



How to Prove- or Disprove- Discrimination



- Final step: “Pretext”
- The employee must show that the employer’s articulated reason is a “pretext” or a “sham” to conceal an illegal reason
- The law recognizes three ways to show pretext

How to Prove- or Disprove- Discrimination



- Three types of pretext
 1. The reason has no basis in fact, so the employer could not reasonably have believed it
 2. The reason was not applied consistently to “similarly situated” employees
 3. Other evidence suggests that the reason is a sham designed to cover up unlawful discrimination

How to Prove- or Disprove- Discrimination



- Translation: For any discharge decision (or refusal to hire), a manager must be prepared to show a legitimate reason that is:
 - Job-related or business-related
 - Sensible
 - Honest
 - Consistent and
 - Provable (e.g., documented)
- OR expect to be sued, and to pay!

When Medical Issues Affect Performance

When Medical Issues Affect Performance

- When health affects performance
 - Whether reported by the employee or observed by the manager or others
 - This raises potential legal issues of “disability accommodation” or “disability discrimination”



When Medical Issues Affect Performance

- When health affects attendance
 - Whether reported by the employee or observed by the manager or others
 - Any absence from work for health reasons might be protected by the
 - Family and Medical Leave Act (FMLA) or
 - Michigan's Paid Medical Leave Act
 - Includes tardiness, partial day, full day, or multiple day absences

When Medical Issues Affect Performance

- Manager's role in health issues
 - Contact HR immediately, for help in managing the issue in the legally appropriate way
 - Do not discuss employee medical issues – in person or in documents – with the employee or others, without HR support
 - Do not share any employee's medical information with anyone

Medical Issues and Performance

Case Study: The Medical Criticism

- Manager criticizes Bob on his evaluation for leaving work unfinished at the end of the day, and for refusing to work overtime
- But the employer offered Bob an ADA accommodation allowing him to avoid working overtime, due to a health condition
- Bob is later fired for poor gross productivity, including failure to complete the same number of weekly tasks as other employees.
- Problem?

Medical Issues and Performance

Case Study: The Unwritten Issue

- After a 3-month probationary period, Gail's supervisor gives her a "satisfactory" review and offers her a permanent position:
 - "Three month review. I have worked with Gail for 3 months and 2 weeks now. She has proven to be a quick learner, very task oriented, and very dependable. At this time I am making an offer from temporary employment to holding the position of claims specialist"
 - During formal review meeting, supervisor tells her that typing speed must improve because she does not draft a sufficient number of reports per day

Medical Issues and Performance

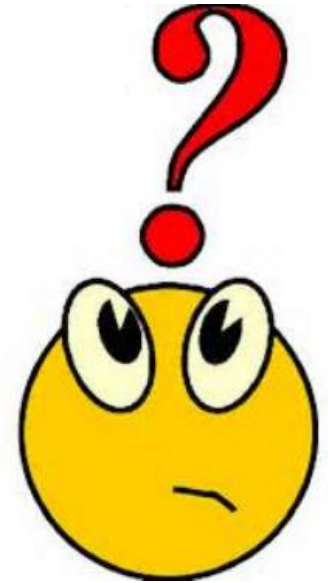
Case Study: The Unwritten Issue

- Three months later, Gail’s supervisor tells her she’s fired because “the employment deficiencies noted in [her] 30- and 60-day reviews had escalated” to the point that “her overall job performance was unsatisfactory.”
- Whoops – written review does not detail performance concern!
 - Gail suffers from rheumatoid arthritis
 - Gail sues claiming that she was fired because of her disability

The Seven Standards Of Good Documentation

The Seven Standards

1. If you can't see it or hear it, it's not real
2. If it's not written down, it didn't happen
3. If it wasn't discussed with the employee, it doesn't count



The Seven Standards

4. If the employee didn't get a copy, it wasn't serious
5. If you haven't heard the employee's story, get it
6. If the employee hasn't seen the "Fired" word before the "Fired" word happens, think again



What to Do

The Seven Standards

7. Do unto your employee as you would have your boss do unto you.



5- Minute Legal Update

5-Minute Legal Update

- Michigan's Paid Medical Leave Act
 - What does the law say?
 - What does LEO say?
 - Status of legal challenges
- Recreational Marijuana
 - What does the law say?
 - What does your policy say?
 - The hiring squeeze





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