

**DOCUMENTING EMPLOYEE PERSONNEL FILES
WITH RESPECT TO PERFORMANCE EVALUATIONS,
DISCIPLINE AND TERMINATION**

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Employment related litigation can be very costly, particularly when a Japanese company is sued for employment disputes or discrimination claims, since the Japanese company is often targeted for extensive adverse media coverage. The adverse media coverage and litigation causes the company to not only incur legal fees, but the litigation itself interferes with business since it takes considerable amounts of time, and adversely affects the company's reputation in the business community. Sales of the company's products could drop, and employee morale may suffer. It is difficult and expensive to rehabilitate a good reputation in the business community.

Proper documentation is an essential element of any Human Resources ("HR") program. Documentation is most critical in

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litigation since employers must explain or support their actions or decisions. Proper documentation is the key to supporting any action that was taken by the employer with regard to an employee. This article will focus on properly documenting Personnel Files with respect to Performance Evaluations, Discipline and Termination.

I. INTRODUCTION

A. THE LEGAL RISKS

The most significant legal risks associated with employment decisions and the documents in the personnel files are discrimination claims which result from the unfair or discriminatory administration of the evaluation process, harassment claims, and wrongful termination claims based on assertions that a employee was discharged either for inappropriate reasons or reasons that did not justify termination under terms of an express or implied agreement.

In any disputes or lawsuits including discrimination claims or wrongful discharge claims, the performance evaluations, if

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properly prepared and maintained, form the foundation of the employer's defense. It is critical that employers prepare and maintain proper personnel files and personnel evaluations to avoid or minimize potential employment litigation.

B. DISCRIMINATION

Litigation can result from an evaluation which unlawfully discriminates based on sex, race, color, religion, national origin, age, or certain other characteristics protected by state or federal law. When preparing an evaluation, supervisors must focus on the objective evidence of an employee's performance and apply the employer's standards in a consistent manner.

C. WRONGFUL DISCHARGE

If the evaluation for an employee indicate a satisfactory or superior performance record when that employee's performance is actually unsatisfactory, or materially deficient, litigation can be expected if the employee is terminated. In contrast, if the evaluations fairly disclose a history of a performance problems or misconduct, the employee is more likely to

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understand the reasons for the employer's actions and hopefully, accept with the employer's decision without litigation.

II. EMPLOYMENT APPLICATIONS

Although preprinted job applications are available, employers should compose their own forms. There are some differences between state and federal law, and a preprinted form may not comply with the law. Using the preprinted forms is also risky because the employer does not know who reviewed the form to see if it complies with state and federal laws.

If an employer composes its own forms, the employer should have legal counsel review the employment application on a periodic basis to ensure that the topics covered and the words used are in compliance with local, state and federal laws and regulations.

Before asking any question on an employment application or in an employment interview, employers must first ask if there a business reason to know the answer. All questions must be job-related. If an employer asks questions which have nothing to do

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with the job and the responses are to be used in making hiring decisions, the employer may be exposed to litigation based on a discrimination claim that the employer made a hiring decision based on information unrelated to the job.

A. RECOMMENDED POLICIES ON EMPLOYMENT APPLICATION FORMS

Telling applicants about certain company policies on the employment application form may help avoid liability even if an employee files a lawsuit after the employment relationship is terminated. The following are common disclaimers and statements used on employment application forms.

1. Company Compliance with the Law

The Company application form should expressly state the Company's compliance with all laws. One suggested statement is as follows:

"The Company is committed to a policy of equal employment opportunity for applicants and associates. Employment decisions shall comply with all applicable laws prohibiting discrimination in employment, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, the Immigration and Nationality Act, and any applicable state laws."

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2. Employment at Will

Application forms should include a clear statement that the company has an "at will" policy of employment. One suggested "at will" statement to be included on the application is as follows:

"If employed by the Company and in consideration of my employment, I agree to abide by the policies and procedures of the Company, I understand and agree that my employment and compensation can be terminated at will, with or without cause, with or without notice, at any time, either at my option or at the option the Company. I understand that no management representative has any authority to enter into any agreement of employment for any specified period of time, or to make any agreement contrary to the foregoing, except the President. Any such agreement must be in writing and signed by both the President and myself."

3. Release for Reference Checks

The employment application should include a signed release in which the applicant authorizes the potential employers to contact the applicant's prior employers and references. One suggested Release is as follows:

"I authorize prior employers, references, and others identified in this application as sources of information regarding my character, qualifications,

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work history, and background to provide information without limitations pertaining to those subjects. I expressly waive any rights of privacy that may be attached thereto. Further, I expressly release all parties and persons from any and all liability for any damages that may result from furnishing such information to the Company, as well as from the use or disclosure of such information by the Company or any of its agents, associates, or representatives."

4. False Statement Warning

The application should give a prospective employee notice that the submission of a false statement in the employment application will be grounds for dismissal.

5. Conditional Offer

The application should inform an applicant that the offer is conditional upon the legal right to work and identity as well as reference checks and satisfactory results for an alcohol and drug test. A sample statement is as follows:

"I also understand that all offers of employment are conditioned on the provision of satisfactory proof of my identity and legal authority to work in the U.S. Offers of employment are also conditioned on the Company's receipt of satisfactory responses to reference requests and the satisfactory completion of tests for drugs and/or alcohol at the Company's expense."

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III. EMPLOYMENT INTERVIEW

It is critical to document each employee interview and to document each interviewer's evaluation of the applicant.

Employers must specify how employment interviews are to be documented by all staff who represent the company in an interview. Employers should consider the following suggestions:

1. Use the job description as the basis for designing interview questions.
2. Have the questions to be asked during an interview written and reviewed prior to the interview. Certain questions can lead to discrimination claims. All questions should be reviewed carefully to make sure they seek information relevant to the job.
3. Immediately after an interview, each interviewer should complete a company-designed form that focuses on the significant job requirements and includes a space for the interviewer to comment on the applicant's credentials for each job requirement.
4. All interviewers should be trained on how to take notes during an interview.
5. Prohibit the use of subjective language even if it is complimentary to the applicant. Instruct all interviewers that all comments should be objective.
6. Caution interviewers against providing their opinions without supporting the opinion with objective facts.

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7. Describe the applicant's behavior, speech, attire or mannerisms objectively. This enables an interviewer to specifically identify an applicant.

Examples are:

-Chewed gum during interview

-Smiled throughout the interview

Descriptive statement must not subjective or discriminatory. One should avoid remarks that may be viewed as sexist or discriminatory, such as "nice legs" or "seemed sick or uncoordinated".

8. Preserve the record. All notes and evaluations should be kept by HR.

A. INTERVIEW QUESTIONS TO AVOID

As mentioned above, certain questions may lead to discrimination claims. The intent of a supervisor or manager when asking this question is not at issue. Only the form of the questions is at issue. State and/or federal law protects applicants who fall into certain categories and applicants cannot be asked about age, national origin, marital status, disability, religion, etc. If a interviewer asks a non-job related question regarding these subjects and the applicant believes that he or she was discriminated against because of improper information obtained during the interview, the applicant could file a lawsuit.

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Even if a applicant discloses such non-job related information during the interview voluntarily, the company may still be liable for asking an improper question. To avoid such liability, the interviewer must not ask any questions regarding these subjects and should immediately let the applicant know that the information is not relevant to the interview if the applicant volunteers any non-job related information.

It is very important that interview questions be written and reviewed prior to the interview, to avoid asking improper questions which may give rise to discrimination claims. If possible, it preferable to consult an attorney regarding the interview process, including questions to be asked applicants.

Examples of questions which are prohibited are as follows:

1. How old are you? What year were you born? When did you graduate from high school?
2. Where were you born? Are you a U.S. citizen?
3. Are you married? Are you planning on having children in the next few years? Can you make adequate provisions for child care?
4. Would your religion prevent you from working weekends?
5. Are you disabled? Do you have any previous major medical problems? Have you ever filed for worker's compensation? How many days were you sick last year? Do you have AIDS? What prescription drugs are you

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currently taking? Have you ever been treated for alcoholism or mental health problems?

6. Have you ever been arrested?

7. Have you ever declared bankruptcy or had your wages garnished?

IV. PERFORMANCE EVALUATIONS

Performance evaluations forms should be carefully written and should be reviewed by HR prior to giving the evaluation to the employee. All performance evaluations should be in accordance with the procedures and policies in the Employee Handbook. The performance evaluations provides a good opportunity to remind the employee that the supervisor intends to monitor a particular area of the employee's behavior and expects improvement.

Evaluation forms will vary widely depending on the evaluation system that the employer adopts. It is important that the evaluation form includes instructions about evaluation standards so that the evaluation process is common to all employees and as objective as possible. For example, "OUTSTANDING" means "the performance consistently exceeds the standards established for the job."

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Evaluations should be shown to the employee after they have been reviewed by HR. The supervisor (and the HR manager) should schedule a meeting with the employee to discuss the performance evaluation and to answer any questions. Once the employee has had the opportunity to review the evaluation, the employee should sign at the bottom of the evaluation form that they acknowledge receipt of the evaluation. The employee should be given an opportunity to add their own comments on the performance evaluation form. This way, the employee can indicate his or her agreement or disagreement with the supervisor's observations. If the employee refuses to sign the performance evaluation form, then the employer should give a copy to the employee, and the employer should write "Copy given to employee on date at time and discussed with employee. Employee refused to sign the form." Many employers permit employees to provide written responses to evaluations.

V. DISCIPLINE AND TERMINATION

The company should follow the procedures and policies in the company's Employee Handbook. What is critical is the

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perception of fairness by the company. Discipline should be received and acknowledged by the employee. Secret memos to an employee's personnel file which are not shown to the employee are not recommended.

Employee discipline should be documented as soon as possible to ensure accuracy. The managers should carefully note the facts of the event giving rise to the discipline. There are several documentation methods that can be used, such as a verbal warning, or a supervisor's short hand written summary, or a more detailed report on each incident, including witness statements and supporting evidence. Whichever method of discipline is used, it is important that the employer focuses on the disciplinary policy and the method of documentation. Following a fair and consistently applied discipline policy will demonstrate to a third party that the company is committed to fairness and ethical dealing with its employees.

A. CONTENTS OF DISCIPLINARY DOCUMENTATION

It is important that a company's discipline policy include a section specifying what must be contained in the documentation

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of disciplinary actions. The following points should be considered:

1. Specify the form or the format to be used.
2. Include the date that the violation occurred and the date the disciplinary document was created. The absence of a date can render certain documents useless.
3. Identify the performance problem or misconduct at issue and the disciplinary action imposed on the employee. The explanation of the misconduct or performance problem should be as clear as possible.
4. Identify what the employee must do to improve his performance to an acceptable level. It is difficult for a disciplined employee to take advantage of the opportunity to improve his or her performance if he or she does not comprehend the nature of the criticism or has no idea what must be done to correct it.
5. The employee should be advised of the period he or she will have to correct the problem and improve his or her performance. Fairness should be considered when determining the length of period.
6. The documentation should include what will happen if the individual fails to correct the problem or improve his or her performance.
7. The supervisor must sign the form and the employee should be given an opportunity to sign it as well. If the employee refuses to sign the form, but was given the opportunity to sign the form, the fact that the employee was given an opportunity to sign it and refused should be written on the form and the supervisor's superior should also review the document and sign it.
8. In addition to space for the employee signature, the form should have a space for employee comments. This technique provides evidence that discussion occurred and allows the manager to assess whether or not the message came across to the employee. It also clearly

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creates a record of the opportunity for employee participation in the event of a future challenge to the process.

B. WITNESS STATEMENTS

Some employers ask an employee who witnessed a violation to prepare a report regarding which the employee's suspected performance problems and/or misconduct in their handwriting and sign and date the report. However, more accurate and more effective statements may be obtained if an investigator interviews the witness, prepares a concise statement, and then requests the witness to read, sign, and date the statement. This method is entirely proper as long as the statement is fairly and accurately prepared.

**C. REQUIRED AND RECOMMENDED DOCUMENTS TO GIVE TO
TERMINATED EMPLOYEES**

This list will summarize the documents which you are required or recommended to prepare or to give to all terminated California employees:

1. Termination Report (with the reason for the termination);
2. Final Paycheck (Required);
 - a. All accrued salary through final date of employment;

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- b. All accrued but unused vacation (legal obligation to pay for vacation);
 - c. All accrued but unused sick leave (if allowed by Company, no legal obligation to pay unless Company policy or practice has paid for accrued but unused sick leave);
 - d. Severance (no legal obligation to pay unless promised in Company Employee Handbook or past practices).
- 3. Change of Status Form (Required);
 - 4. California Employment Development Department (EDD) Unemployment Insurance Benefits Booklet "For Your Benefit" (Required);
 - 5. COBRA Notices (Required if Company has 20 or more employees who receive medical benefits from the Company)
 - a. Notice of Right to Continuation Coverage Under COBRA;
 - b. Notice of Right to Elect COBRA Continuation Coverage;
 - c. Receipt of Notice of Right to Continuation of Coverage Under COBRA.
 - 6. Health Insurance Portability and Accountability Act ("HIPAA") Notice (Required);
 - 7. HIPAA Explanation Memorandum (Required);
 - 8. Notice to Terminating Employee regarding California Health Insurance Premium Program ("HIPPP") (Required);
 - 9. Notices regarding 401 (K) Plan (if applicable);
 - 10. Employee Assistance Plan ("EAP") Brochure (optional, not required);
 - 11. Exit Questionnaire (not required, but it is recommended).

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CONCLUSION

Supervisors must be trained to prepare proper and effective documentation. Supervisors should be familiar with the discipline system and philosophy of the company, because all documentation which will be included in an employee's personnel file should be in accordance with company written procedures.

Documentation skills must be acquired, developed, and taught. Employers should make supervisors clearly recognize that the ability to create a well written and convincing document is an indispensable skill in their role as a manager. The laws vary from state to state, so is recommended that employers and managers consult an attorney who is knowledgeable in employment law matters.