Employment Law Corner

Monthly Report

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August Updates

How to Keep the Summer Work Outings Fun

PFML: Four Letters, Fifty Playbooks

Your Employees Are Already Using AI. Do You Have a Policy?

The Supreme Court Just Reshuffled the Deck on Employment Law Enforcement

Effective Performance Management

Your Best Defense

Performance management is one of those topics that employers think they understand until they are sitting across from a plaintiff's attorney who has pulled together every performance review, every email, every text and every Slack message about the terminated employee. What looked like a straightforward termination for poor performance can suddenly look less clear-cut, or worse like pretext, when the documentation is not available to prove that the employee was not meeting the required standard of performance. Effective performance management is not just a good HR practice: it is a risk management shield to defend against lawsuits.

Why Performance Management Often Undermines the Employer

Most performance management failures aren't the result of bad intentions. They're the result of managers who are uncomfortable with difficult conversations, inconsistent processes, and documentation that either does not exist or actively undermines the employer's position. Courts and juries look closely at the paper trail. When the paper trail tells a different story than the termination decision, employers lose.

The most common hazards:

- <u>The stellar review problem</u>. An employee receives satisfactory or above-average performance reviews for years, then is terminated for performance reasons. (A conflict adverse manager gives everyone satisfactory reviews.) The plaintiff's attorney introduces every positive review into evidence. The employer has no contemporaneous documentation of the performance issues that actually led to the decision. The termination looks pretextual—an excuse for discrimination.
- <u>The undocumented verbal warning</u>. A manager has three conversations with an employee about performance problems. None of them are documented. When the employee is eventually terminated, there is no record that the

issues were ever raised, that the employee was given an opportunity to improve, or that the employer followed any process at all. **If it is not in writing, it never happened.**

- Inconsistent application. The employer disciplines one employee for conduct that other employees engage in without consequence. The disciplined employee is a member of a different protected classification than those who were not disciplined. This is the comparator evidence that plaintiffs use to establish disparate treatment, and it is often persuasive to a jury.
- Timing that looks retaliatory. An employee files an internal complaint, requests FMLA leave, or raises a wage concern. The employee is placed on a performance improvement plan (PIP) shortly thereafter. Even if the performance issues were real and pre-existing, the timing creates an inference of retaliation. The inference is difficult to rebut without contemporaneous discipline or poor performance documentation that came before the protected activity.

Building a Defense through Performance Management

The goal is a system that is consistent, documented, and applied even handedly.

1. **Set Clear, Written Expectations -** Performance issues cannot be documented if expectations were never established. Job descriptions, performance standards, and conduct expectations should be written, communicated at hire, and revisited regularly.
2. **Conduct Honest, Accurate Performance Reviews -** Managers who inflate reviews to avoid difficult conversations are creating evidence that will be used against the company in litigation. Train your managers to give a timely, honest and accurate performance review.
3. **Document Ongoing Feedback and Counseling -** Performance management is not an annual event. Managers should document informal coaching conversations, warnings, and counseling sessions in real time. A brief email to the employee is an easy, effective way to create a record.
4. **Use Performance Improvement Plans Correctly -** The Performance Improvement Plan (PIP) is widely misused. In many organizations, it has become the last stop before a termination decision that has already been made—a formality that fools no one and creates legal exposure without serving any legitimate purpose. If you already know you are going to terminate the employee regardless of their performance during the PIP period, issuing a PIP is not honest and is not legally sound.

A PIP should be used when the employer genuinely wants the employee to succeed. Include: specific, measurable performance deficiencies; concrete improvement targets with timelines; the support the employer will provide; and clear consequences if the plan is not met. It should not be vague, it should not be impossible to achieve, and it should not be issued simultaneously with a termination letter that is sitting in a drawer.

Documentation:

Documentation wins and loses cases. The content matters.

Do Write:

- Specific, observable behavior or performance deficiency, with dates and examples;
- The standard that was not met and where that standard was communicated;
- Prior instances when the issue was raised and the employee's response;
- The impact of the performance deficiency on the team, department, or business;
- What improvement is expected and when.

Do Not Write:

- Anything that references protected characteristics, even obliquely.
- Speculations about the employee's motivations or personal life.
- Expressions of personal frustration or animosity toward the employee.
- Inconsistencies with what you have written previously about the same employee.
- Conclusions without facts.

And a practical note: treat every work communication—email, Slack, Teams, text—as a potential exhibit. Managers who vent about difficult employees in digital messages are creating unfavorable and discoverable evidence. Train your managers on these issues.

Consistency Is Not Optional

Before you discipline or terminate an employee, ask whether other employees have engaged in the same or similar conduct. If they have, what happened to them? Be consistent!

This doesn't mean identical conduct always requires identical discipline. Relevant differences in an employee's role, prior disciplinary history, or the severity of the specific incident can justify different outcomes. But those distinctions need to be identified and documented at the time of the decision. HR should be involved in all significant disciplinary decisions specifically to assess consistency.

Protected Activity and Performance Management

One of the most legally dangerous situations an employer faces is managing a genuinely poor performer who has also engaged in protected activity. The performance issues may be entirely legitimate. The action may be entirely warranted. But the timing creates a retaliation narrative that is difficult to overcome without careful documentation.

The best protection is documentation that predates the protected activity. If performance concerns were documented before the employee filed a complaint or requested leave, the retaliation claim is significantly weaker. If the performance documentation only appears after the protected activity, the inference of retaliation is almost inevitable.

When Termination Is the Right Decision: Getting It Right

When performance management has run its course and termination is the appropriate outcome, the decision should be treated as a legal event, not just an HR process.

- **Review the full record.** Does the documentation support the termination? Are there inconsistencies between the documentation and the reason for termination?
- **Wrongful Termination issues.** Assess the facts for potential claims of protected class, protected activity and retaliation.
- **Conduct a comparator analysis.** Have other employees engaged in similar conduct? Were they treated consistently?
- **Prepare the termination meeting carefully.** Clearly identify and stay consistent with the stated reason for termination. Do not introduce new reasons at the meeting. Be direct and succinct. It is often hard to tell someone they were not doing a satisfactory job, but it must be done in order to minimize the risk of a successful claim for wrongful termination.
- **Consider whether a separation agreement is appropriate.** For certain tricky situations, a severance and release agreement may be worth considering.

The Bottom Line

Effective performance management is not about building a paper trail to justify decisions you have already made. It is about creating a system of honest, consistent, well-documented feedback that helps employees succeed, and when they fail, it clearly supports the business decision to part ways. If your performance management process has not been reviewed recently, or if your managers have not been trained on documentation and consistency, now is the time to address it. The cost of getting it right proactively is a fraction of the cost of defending a termination that went wrong.

If you would like more information on how we can assist you, please click on the following link ***Foley Fundamentals - Foley & Foley, PC*** *or* ***reach out to us*** *to schedule a call with an attorney!*

significantly by state and circumstance. Please contact our office regarding your specific situation.

Do You Have Questions?

We can help! Our **Employment Counsel On-Call Triage Service** is a perfect resource for employers of all sizes looking to receive guidance on employment law and HR-related questions. We work with clients day in, day out to help them navigate complex legal issues and implement best practices. We receive unique questions every day through the **On-Call Service** and are ready to tackle any issue where you need help!

Who We Are:

• We represent employers exclusively from coast to coast in all facets of employment law and litigation. Our mission is solving problems and anticipating issues so you can concentrate on your business.

• We are constantly searching for the trends and upcoming issues in the law that will impact our clients. We want our clients to be informed and ready. Our familiarity with the workplace and our approach sets us apart from other law firms, making us well equipped to handle your unique needs.

• We are not like other firms: Anyone can tell you what the law states and its limits. That is easy. We find creative solutions within those restrictions that move your business forward. We seek to minimize your risk so you can get back to business. Learn how we can help your business: **Foley & Foley PC attorneys specialize in Employment and Labor Law in the Public and Private Sectors (foleylawpractice.com).**

Meet Timothy Kenneally

Attorney Tim Kenneally has practiced law with Foley & Foley PC since 2008 and has been a litigator his entire career. Attorney Kenneally's practice involves the representation of clients in matters involving employment and labor law, data security/personal information protection, insurance, contracts and litigation.

For more info, check out his full bio here!

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