



Guidance on Managing the Problem Employee

Date/Source: Spring 2009 Personnel Peeks (Reviewed October 2009)

Archived newsletters of the Personnel Peeks publication can be found on the MCHRMA site.

Ever wonder about the single most damaging cause of poor employee morale? How about the most likely source of unnecessary employee expense, including legal challenges? Identify the absolute worst performer in your organization and you likely have the answer to both questions.

Regrettably, we live in an era when the fear of legal challenges, and the desire to avoid confrontation, often outweighs the understandable and appropriate need to terminate bad employees. Of course, lawyers share responsibility for this sad state of affairs, but timid management plays a prominent role as well. The unfortunate truth is many managers lack the commitment, or confidence, to effectively manage a problem employee, up to and including discharge. While a manager's internal commitment is beyond the reach of this article, confidence is not. Read on for a "how to" guide on managing the poor performer.

1. Define The Unacceptable Behavior.

It's not good enough to announce that you are "not happy," or that a particular employee is "hurting" the county, or that you've "reached your wits' end." Just as weak is the ambiguous label of "poor attitude" that is often applied by managers seeking to fire an employee without proper foundation. You must precisely define the problem behavior before you can manage it effectively. Consider, for example, the following nonexclusive list of common performance problems:

- Low productivity
- High absenteeism
- Careless or negligent work product
- Inability to maintain healthy coworker relationships
- Refusal/failure to follow instructions
- Dishonesty
- Violation of specific conduct or performance standards

When you articulate the exact problem behavior, you can then develop a strategy to effectively manage the behavior.

2. Investigate Past Practice.

Before you hold anyone accountable, fairness dictates that you verify whether the standard you are attempting to enforce has been consistently applied in the past. If the answer is yes, proceed to the next step. If the answer is no, you cannot take disciplinary action without violating the fairness doctrine, and perhaps any applicable anti-discrimination statutes.

Remember, however, you are not paralyzed by inconsistent past practice. If you discover your performance or conduct standards have not been consistently enforced historically, then publicly announce to the entire affected work group that the future will be different. In other words, communicate to employees the exact standard about which you are concerned, admit the standard has not been consistently enforced in the past, and further clarify your future enforcement intent. With an unambiguous warning of your intent to enforce in the future, employees have no prospective defense of "no notice" or "disparate treatment," so long as the standard is, in fact, consistently applied in the future.

3. Devise an Enforcement Strategy.

Once you've precisely defined the problem and confirmed you have the flexibility to act, consider how you intend to specifically implement.

Do you have the evidence you need? Will additional investigation be required? Is progressive discipline appropriate? Are there any employee defenses that may apply, such as lack of notice, or other mitigating circumstances? Each of these questions should be asked and answered before you act.

4. Weigh the Evidence.

Having the legal right to hold an employee accountable for poor performance, and being able to prove poor performance, are two different standards. Do not rely on "employment at will" to cover shoddy investigations, or your inability to demonstrate through reliable evidence that an employee actually committed the offense upon which you base your proposed disciplinary action. Stated alternatively, if you can't prove the crime to a third party investigator, judge or jury, don't impose the penalty.

5. Follow Progressive Discipline Principles.

There are limited and rare circumstances, such as theft, violence, or gross insubordination that justify immediate discharge, even for a first offense. Far more common are the run of the mill performance or conduct problems that dictate, as a matter of fairness, some form of corrective disciplinary action before the ultimate discharge penalty is imposed. Most employers follow the traditional pattern of counseling, warning, and possibly suspension, all before discharge.

The goal is to provide employees with adequate notice of their deficiencies, and a reasonable opportunity to improve. Employees should be told in advance of the consequences of future occurrences at each stage in the process. Do not let them be surprised about what happens next if they fail to meet your reasonable expectations. Remember, the temporary satisfaction you may gain from a quick or immediate discharge is far outweighed by the agony of potential reinstatement, or expensive legal challenges, if you allow impatience to trump reasonableness and sound management

practices. Lawyers make a lot of money as a result of impatient managers who fail to get their “ducks in a row” before a termination.

6. Before Termination, Pause and Contemplate.

This is the time to reflect, and to once again consider whether your actions are well reasoned and defensible. Double check your facts and prior actions. The time to second guess is now, not after the discharge has already taken place. Is a “Last Chance” agreement more appropriate than immediate discharge? How about severance in exchange for the employee’s full release of all legal claims that may apply? These are ideas to consider before termination occurs.

The truth is that managing a poor performer is not all that difficult, practically or legally, so long as sound management practices are employed. More often than not, the lack of management confidence or commitment presents greater obstacles than does fairness or legal considerations. Focus on the little things such as clearly articulating the standard, accurately measuring performance against the standard and consistent enforcement through progressive discipline. If you take care of these little things, the big decisions are much easier to justify.

The following article is reprinted with permission from the May/June 2008 issue of the Nebraska Intergovernmental & Risk Management Association (NIRMA) newsletter. It was written by Mark McQueen and Pamela Bourne of the Spencer Fane Britt & Browne law firm in Omaha who write a regular “Personnel pointers” feature for the newsletter – www.spencerfane.com.

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