



The Worst Documentation Mistakes Made by Employers and How to Avoid Them

By: Douglas P. Seaton

Many employer mistakes with documenting (or omitting to document) in employment and labor situations reoccur again and again. We thought it would be helpful to our employer-clients and friends if we were to describe these situations and provide advice about how to avoid them. Documentation sometimes seems like needless “busy work,” but the fact of the matter is that documentation is the key element in allowing employers to defend themselves against frivolous and overreaching claims from employees and ex-employees, regulators, unions and plaintiff’s lawyers. The absence of key documentary evidence, or the inadvertent creation of what may appear to be “smoking gun” documentation, are key problems in our defense of our employer clients in every kind of labor and employment setting. Reviewing the following items, and working with us to plan on how your firm can avoid them, will pay you multiple dividends in risks avoided and better managed.

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1. Please Put That In Writing. Waiting for the employee to provide the documentation on employment events. Solution: If you don’t get prompt written confirmation from the employee of a resignation, leave request, complaint or other significant employment event, confirm the matter yourself, in writing, and specify the follow-up action or consequences that are pertinent.

2. The Empty File Syndrome. Failing to confirm disciplinary problems and warnings in writing. Solution: Put all discipline (after the employee’s first verbal warning) in writing and copy to the employee and the employee’s personnel file.

3. The Paralysis Phenomenon. Waiting for the problem to “go away”. Solution: Get advice, then act; the problem will only get worse if you don’t, never better.

4. The Legalese/Overkill Mistake. Using unnecessary and risky legal terms or provocative accusations in disciplinary documents and employee communications. Solution: Describe the actual facts (“you put company tools in your van, without any direction to do so”) and then state the discipline that will follow. You can discipline for whatever you say you will. Calling the employee’s actions theft, insubordination, harassment or other provocative terminology only complicates your position and should normally be avoided.

5. The “We Have Nothing To Hide” Syndrome. Letting investigators and auditors run amuck. Solution: Investigators and auditors are not your friends – they are looking for citations and/or liability; call your lawyer immediately upon notice of any such audit or investigation and politely decline to talk or to provide access to records until you’ve had an opportunity to do so – only OSHA (or the

police with a subpoena or court order) have the right of immediate access to your premises.

6. There's Nothing To This Complaint, Why Should We Respond? Ignoring the complaint can give a frivolous complaint plenty of life. Solution: Every complaint must be acknowledged in writing and investigated, then appropriate action taken and confirmed in writing. If not, you create liability for what may be a frivolous complaint.

7. We Don't Need Policies, Disciplinary Rules Or A Handbook; They'll Just Tie Us Down. This is like playing the game with no defense, makes you a sitting duck for "promise" claims and discrimination charges and leaves us without much chance to obtain summary judgment or dismissal on your behalf at an early stage. Solution: Get advice and prepare an up-to-date employee handbook with disciplinary rules which will meet legal requirements, include legally required policies and protect you from false claims.

8. Let's RIF Our Problem Employees And Avoid Confronting Their Performance/Conduct Problems. Calling a termination a lay-off always looks like pretext and ignites righteous indignation, even in guilty employees. Solution: Call a discharge a discharge and, at least when requested by the employee, include a written statement of all reasons, including prior record. The term layoff or RIF should only be used when employment is discontinued for non-performance based reasons under circumstances of lack of work.

9. We Don't Need Job Descriptions; It's Too Much Work And We'll Just Have To Change Them In A Year. Without them, you will be unable to impose any physical or mental requirements for your positions. Solution: Review and update your job descriptions to keep control over who you hire and to establish performance and conduct standards you can enforce. The descriptions will also allow you to "get real" about performance during employment.

10. Failing To Document Key Terms And Conditions Of Employment In Applications And Hiring Documents. Invites "I was promised the world" claims, prevents summary judgment and guarantees you a jury trial. Solution: Prepare legally-adequate documents, with advice of counsel, to put employees on notice of key employment terms from at-will employment to required travel or overtime and to minimize the risk of failure to hire claims of all types.

11. We Can Write Our Own Application, Non-Compete Agreement, Handbook, Employment Agreement, Bonus Plan, Etc.; What Can Be So Hard About It? Critical employment documents which are legally insufficient spell trouble, liability and expense. Solution: Don't be a "jailhouse lawyer" of employment documents which can avoid (or create!) serious liability risks. Get advice from counsel and prepare these critical documents correctly.

12. Failing To Document Hours Of Work And Other Key Compensation Related Data. Failure to document in this area maximizes the risk of disputes about money due, which always lead to litigation on other subjects as well. Solution: Time records, even for salaried employees, are key to limiting wage and hour exposure and regulatory offenses, just as sales and production-related data can be key to avoid conflicts over bonus and commission payments.

13. Mishandling Sensitive Medical, Drug And Alcohol Testing Or Investigative Information. Failing to file properly and limit access to this information provides ready-made excuses for the problem employee and invites regulatory wrath. Solution: A separate, limited access medical/worker's compensation file is critical for all employees and so are entirely separate supervisory files and investigative files on complaints and internal investigations of serious employee misconduct.

14. Let's Not Spell Out All The Termination Reasons Or Mention Dick/Sally's Past History In The Termination Memorandum; This Last Event Is "Enough." You may need every reason and defense you have and termination is usually supported by an accumulation of problems, not a single incident. Solution: "Throw the kitchen sink" at a termination – problems with evidence or claims of retaliation/discrimination may undercut the reason which you thought was "enough." Always include all of the genuine reasons that affected the decision to discharge, and always refer to the prior record.

15. Who Needs Written Hiring Criteria; We'll Just Use The "Smell Test" For Candidates. Using the smell test doesn't pass the smell test with agencies, judges and juries. Solution: Write out your hiring criteria, generally and for the specific position. Even subjective criteria look more objective in writing, especially when they were prepared before a claim or charge is made, and can help you create "institutional memory" of predictors of success in applicants.

16. Let's Tell This Applicant Everything About Our Hiring Process, Just Because He/She Asked. You don't have to, and the more you say, the more trouble you create. Solution: Acknowledge applications and hires, but don't tell unsuccessful applicants anything except that you have made a hiring decision and that it is not them. Don't discuss the reasons for your choice or the process or criteria used.

17. Because We're A Third Millennium Employer, We Can't Give "Orders," Especially In Writing. Employees who are trying to escape work and responsibility (or simply don't get it) need to get clear direction in writing and you need it to hold their feet to the fire. Solution: Warnings should be direct: remind employees of the rule, their violation and demand concrete compliance in specific terms they will understand in the future. Despite "new age" trappings, employment is still a power relationship – either the employer or the employee has it. If you don't "clarify" the rule and make specific demands on problem employees for compliance, they will soon be running the store, and not you.

18. Failing To Document "The Issue" In Writing From The Employer's Point Of View When Employee Personal Problems Or Complaints (Coincidentally Of Course) Arise During Performance Review Or Discipline. Waiting for the witness stand is not a good plan for establishing facts about an employee's performance and conduct problems and avoiding "changing the subject" to the employee's personal problems and complaints. Solution: Don't allow the complaining, excuse-making or "whistleblowing" employee to escape the consequences of their own poor performance or conduct. Address the complaint, whistleblowing or other "collateral" issue in writing (see #6 above), but also respond to the conduct or performance problems in writing (see #3 above).

Documentation can be a nuisance, but it is serious business for employers who want to preserve their own flexibility and authority in the employment relationship, and successfully manage their labor and employment-related risks. If you don't document, it's like leaving the cash drawer open for the 5% of your employees who do not want to work for a living or who enjoy the litigation game.

UPCOMING SEMINARS

THE DEFINITIVE GUIDE TO EMPLOYMENT LAW FOR HR PROFESSIONALS IN MINNESOTA

Sponsored by the **Council on Education in Management**, this two-day seminar is designed to give HR professionals the knowledge and tools to understand the principles of state and federal law, and gain the confidence to handle the most complex legal issues impacting HR. You will discover how to: ensure lawful employment practices and avoid expensive litigation; untangle the FMLA, ADA and workers' comp overlap; protect your organization from discrimination, harassment and retaliation liability; stay in compliance with the FLSA; and much more. Our firm attorneys Alec Beck, John Bowen and Greg Peters will be among the eight member panel of Minnesota's leading employment law attorneys.

April 28-29, 2003

Contact Council on Education in Management for event location and registration information

Phone 1-800-942-4494 or www.counciloned.com

MINNESOTA LABOR & EMPLOYMENT LAW

Sponsored by the **National Business Institute**, this basic-to-intermediate level seminar is geared for personnel and industrial relations professionals, business owners and managers to help formulate a strategy for successfully preventing and handling problems when they do occur. Learn how to be proactive in preventing lawsuits for wrongful termination; understand the impact of the ADA on redefining discrimination; learn the pros and cons of having an employee handbook; discover how to develop an effective sexual harassment policy; and gain insight into the worker's compensation claims process. Our firm attorneys Alec Beck and John Bowen will be among those presenting.

May 21, 2003

Contact National Business Institute (NBI) for event location and registration information

Phone 1-800-930-6182 or www.nbi-sems.com