

Bulletproof Documentation

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EXPAND YOUR EXPECTATIONSSM

**Seldom does a day go by when a client
does not call and say:**

***“We are having a problem with an employee
and I want to talk about options”***

or

***“We had an incident today involving an
employee that I think may sue us, can we talk
about how we can reduce that risk?”***

**There is one word that
will be common to every
situation:**



DOCUMENTATION

**There is one thing that
can make or break a
defense to employment
litigation.**



DOCUMENTATION

How Much Documentation Is Enough?







ROADMAP TO BULLETPROOF DOCUMENTATION

We will discuss the do's and don'ts of good documentation as it relates to:

- A. Personnel Files**
- B. Performance Evaluations**
- C. Investigations**
- D. Discipline**
- E. Electronic Signatures & Record-Keeping**

A. PERSONNEL FILE DOCUMENTATION

A company should maintain personnel files on each employee from the date of hire. These files contain documentation regarding all aspects of the employee's tenure with the company.

Retention of Documents

- Once a documentation system has been put in place, an employer must also create a document retention policy.
- The most basic policy should include:
 - General types of documents to be retained.
 - Who's responsible for maintaining them.
 - Where the documents will be housed.



What to Keep

- **Basic information such as employee's name, address, Social Security number, date of birth, occupation and job classification.**
- **Job application and/or resume.**
- **Offer of employment.**
- **Job description for the position.**
- **IRS Form W-4.**
- **Forms providing next of kin and emergency contacts.**
- **Receipt or signed acknowledgement of employee handbook or other key policies (Non-Discrimination Policy, Confidentiality, key work rules).**
- **Training or certification records.**

What to Keep (Cont.)

- Attendance records.
- Records of employment actions such as promotions, demotions, transfers, layoffs, recalls, performance evaluations, commendations, attendance and/or tardiness, leave records, warnings and/or disciplinary actions, and other work-related matters.
- Complaints from customers and/or co-workers.
- Any contract, written agreement (non-compete, employee contract).
- Documents relating to the worker's departure.

What NOT to Keep in a Personnel File

- **Medical Records.**
- **I-9 Forms and e-Verification Documents: Separate Master file for Company, one for active employees, one for terminated employees.**
- **Child Support Orders/Garnishments.**
- **EEO/invitation to self-identify, disability, or veteran status records.**
- **Complaints or complaint investigation files.**
- **Litigation files, including EEOC Charges and worker's compensation documents.**

Medical Records

Medical records should be kept separate from all other non-medical records and should be kept in a locked cabinet with one or two persons designated as having access to the files.



Confidential Medical Records File

- **An employer may keep a single confidential medical file, separate from the usual personnel file, containing FMLA, ADA and GINA-related medical information if the employer follows the ADA confidentiality standards. This includes following the ADA interpretations of those confidentiality exceptions that are set forth in the ADA, FMLA, and GINA regulations. For example, employers may not give supervisors and managers unlimited access to the medical files. However, employers may give supervisors and managers information concerning necessary work restrictions and accommodations.**

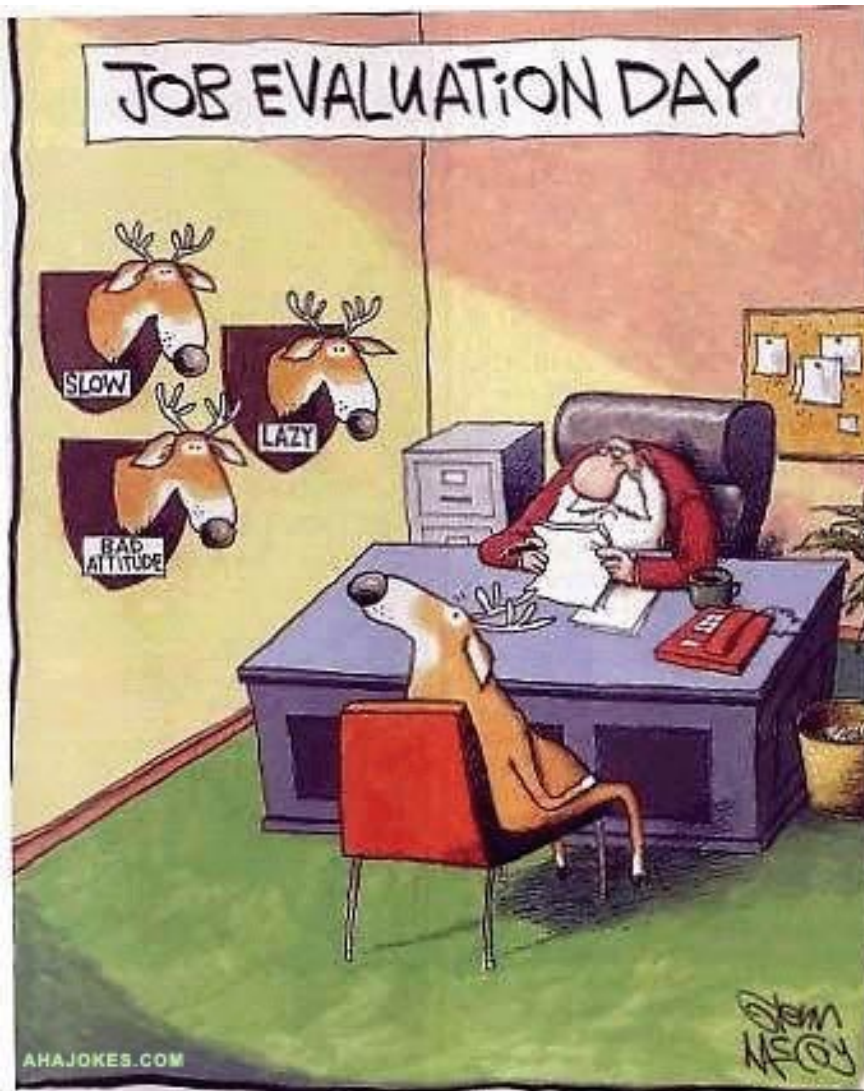
EMPLOYER RECORD RETENTION

- **If a Charge or lawsuit has been filed, all records for the employee SHALL be retained until the “final disposition” of the matter.**
- **This means that a “litigation hold” memo should immediately go out to all relevant departments and individuals.**

Employer Record Retention Requirements

ADA/Title VII/ADEA	1 year from the making of the personnel record or from taking a personnel action/providing an accommodation
Equal Pay Act and FLSA	3 years
FMLA	3 years
FICA	4 years from the date the tax is due or is paid
ERISA	6 years

B. Performance Evaluations



Performance Evaluations- Why they are important

- They provide a concrete measurement for determination of salary increases or bonuses, and can be used to motivate and encourage employees.

But, potential problems:

- Grade Inflation
 - ✓ False sense of security
 - ✓ Deprives employees of opportunity to improve
 - ✓ Fails to provide history of poor or mediocre performance
 - ✓ Gives terminated employees incentive to sue
- Insufficient Detail
 - ✓ No real feedback

Performance Evaluations- Why are they important?

**They are one of the Company's
primary lines of defense in
responding to employment claims.**

C. Investigations

- When any information comes to light in any way regarding unlawful discrimination or possible violations of company policy.

From sworn complaints to water cooler gossip



Goals of An Effective Investigation Procedure

1. **Confidential**– Mitigates the fear and likelihood of retaliation
2. **Prompt** – Evidences reasonable care to prevent future misconduct
3. **Thorough and impartial** – inspire employee confidence and help prevent lawsuits

INVESTIGATION PROCEDURE

Step 1: Talk to Complainant, get statement.

Step 2: Conduct witness interviews, get statements. Gather documentary evidence.

Step 3: Note facts without conclusions/theories.

Step 4: Determine credibility/weigh evidence.

Step 5: Reach a conclusion.

Step 6: Take appropriate corrective action.

“REACH A CONCLUSION”

- Alleged conduct **did** occur.
- Alleged conduct did **not** occur.
- Investigation is inconclusive/cannot be substantiated.

DO NOT WRITE LEGAL CONCLUSIONS IN A REPORT

YES: “Manager Smith was found to have violated the Company’s Anti-Harassment Policy.”

NO: “Manager Smith is guilty of sexually harassing Hourly Employee Jones.”

He said/she said---What do I do now?

- Sensibility– Does the interviewee’s story make sense when considered alone?
- Demeanor– Did the interviewee’s body language and tone indicate that the interviewee was telling the truth?
- Motive to Falsify– Consider what reason each interviewee may have for lying.
- Supporting Evidence– Does the physical evidence tend to support one interviewee’s account over another’s?
- Past Behavior– Does alleged harasser have a history of similar behavior?

D. DISCIPLINE

Discipline should be:

- ✓ A warning and an expectation
- ✓ Consistent
- ✓ Properly documented – even verbal warnings

You are the coach, not the mom!

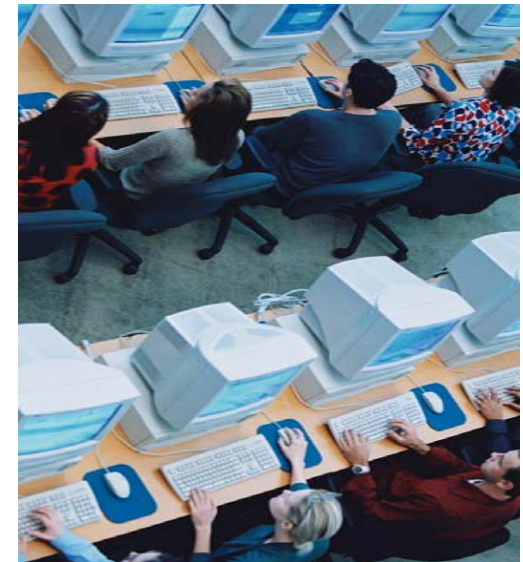
Elements of Disciplinary Documentation

- **Date it (date of occurrence & date of disciplinary action).**
- **State the reason – FACTS ONLY – witnesses.**
- **Reference policy.**
- **Reference prior discipline.**
- **Describe the consequences.**
- **If departing from a written progressive discipline policy, state the reasons.**
- **Future Expectations.**
- **Allow employee to respond.**
- **Have employee sign it!**
- **Follow up - document improvement or failure.**
- **Maintain a record of it in the employee personnel file.**

Train Supervisors

Why should a supervisor care about documenting discipline?

- 1. Consequences/Progressive discipline policy.**
- 2. Change in supervisors.**
- 3. Evidence in EEOC Response, Trial, or Unemployment Request.**



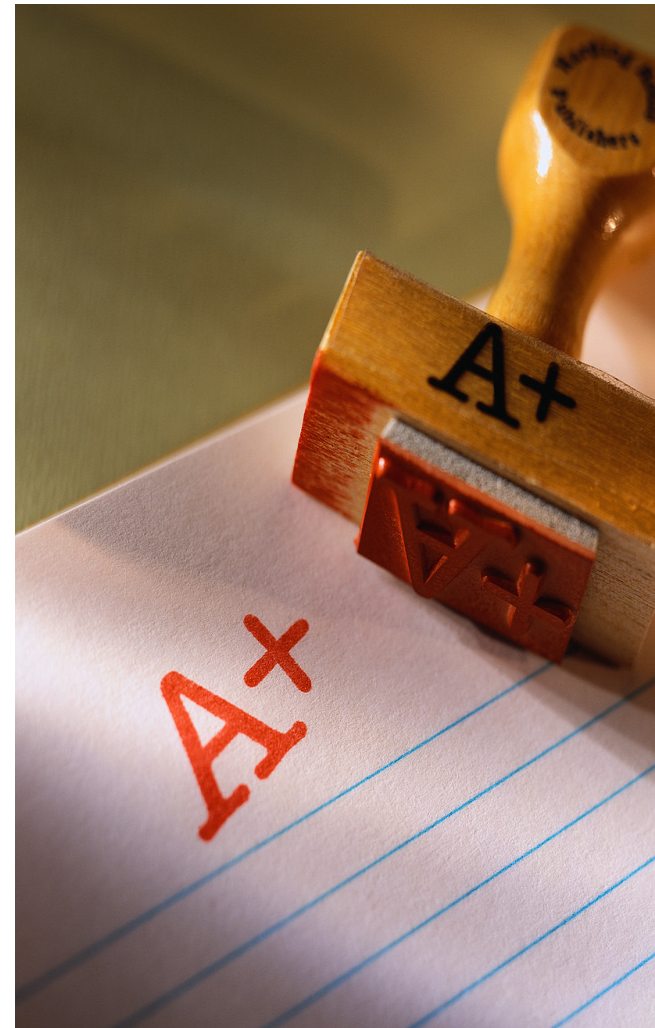
Lack Of Documentation Is The Primary Reason For Unfavorable Litigation Outcomes.

Consequences of Poor Documentation

- In *Conley v. NLRB*, 520 F.2d 629, 634-44 (6th Cir. 2008), an employee who allegedly reported for work while intoxicated, was frequently absent and often shirked his duties *prevailed* in litigation against his employer because his employer failed to document any infractions prior to his termination.
- In *Brockman v. Avaya*, No. 3:06-cv-923-J-16RK, 2008 WL 591930, at *4 (D.M.D. Feb. 28, 2008), a manager who failed to document a “coaching session” he had with an employee to discuss performance issues did not win a motion for summary judgment on the basis of poor documentation.

Documentation Exercise

- Describe company expectations; cite to a specific rule or policy.
- Describe the behavior that was found to have occurred and must change.
- Detail the action plan and goals.
- Describe the consequences if the unacceptable behavior continues.
- Describe the nature of the follow-up.
- Remember this is a professional document.



E. Electronic Signatures & Record-Keeping

Benefits to electronically stored records and signatures:

- ❖ Reduces paper and storage costs.
- ❖ Can be catalogued and searched quickly.
- ❖ Are less susceptible to being lost.
- ❖ Can be accessed by authorized personnel from any location.
- ❖ Companies can use e-signatures to obtain signatures for various types of employment-related documents:
 - A new social media policy.
 - Updates or changes to the employee handbook.
 - Arbitration agreements.
 - Restrictive covenant agreements.

Legal Framework for E-Signatures

Electronic Signatures in Global and National Commerce Act (E-SIGN):

- ❖ 15 U.S.C. § § 7001 - 7006.
- ❖ Enacted by Congress in October 2000.
- ❖ Created to “facilitate the use of electronic signatures and recordkeeping in transactions in or affecting interstate commerce.
- ❖ Provides that “a signature, contract or other record” relating to a transaction in or affecting interstate commerce “may not be denied legal effect, validity, or enforceability solely because it is in electronic form.” 15 U.S.C. § 7001(a)(1).

Legal Framework for E-Signatures

E-Signs Interactions with State Law

- ❖ E-SIGN limits a state's ability to modify, limit, or supersede its provisions by expressly preempting any state law concerning electronic signatures and records, unless such law fits into one of two exemptions.
 - ❖ E-SIGN does not preempt states who have adopted the Uniform Electronic Transactions Act (UETA), a model state law which was the precursor to E-SIGN. 47 States have adopted the UETA.
 - ❖ E-SIGN also does not preempt state laws which (a) provide alternative procedures that are consistent with E-SIGN, (b) are technologically neutral (do not favor one technology over another), and (c) reference E-SIGN if enacted after June 2000. Illinois, New York, and Washington have enacted non-UETA laws with respect to electronic signatures and recordkeeping.

E-Signature Case Law Not Enough

- In Kerr v. Dillard Store Services, Inc., 105 FEP Cases 1298 (D. Kan. 2009), Dillard required that associates execute an arbitration policy through the Dillard Intranet.
- Intranet was only accessible by Dillard employees.
- Each associate was first required to access the intranet with a unique, confidential password; then had to enter his or her SSN or associate identification number, a secure password, and click “accept.”
- Once signed electronically, the employer sent a confirming e-mail to the associate’s account, and permitted the associate to reply to the e-mail if he or she wished to deny having electronically signed the agreement.
- The employee claimed that another employee accepted the arbitration policy on her behalf, without her knowledge, and was able to prove that supervisors could log into an associate’s account by resetting the associate’s password. The employee also denied seeing or opening any confirmation e-mail.

E-Signature Case Law Enough

- In *Bell v. Hollywood Entertainment Corp.*, No. 87210 (Ohio Ct. App. Aug. 3, 2006), the court held that an employee's acceptance of an arbitration agreement, made while completing an electronic job application, was enforceable. (applying E-SIGN and Ohio UETA).
- The applicant was informed of the arbitration policy at the beginning of the online or electronic job application process.
- The screen addressing the arbitration agreement provided the location of copies of the arbitration program's summary and rules.
- The program required that applicants confirm that they were able to access the website that contained the summary and rules.

Finding the arbitration agreement was enforceable, the court noted that the employee "was sufficiently informed regarding the program."

Legally Enforceable E-Signatures

In order to protect the validity of the electronic records, employers must ensure that the document and the accompanying signature are properly archived:

- (1) Documents and signatures should be stored or retained exactly as presented to and signed by the signer (in an unaltered form);
- (2) Documents and signatures may later be accessed by the employer and employee; and
- (3) The entire process of storage or retention and retrieval (“chain of custody”) can be established as required by the applicable rules of evidence.

Consider both the procedure necessary to ensure an authentic signature and record, as well as the security of the overall process used to obtain the employee’s electronic signature.

Electronic Records Best Practices

DO's

- ❖ Be direct with employees about what they are signing and its legal significance, or the impact on future, at-will employment for failing to sign.
- ❖ Be able to demonstrate that each employee acknowledged and signed the documents, via a dedicated, password-protected verification system.
- ❖ Provide employees with sufficient time to print out, read, and consider the documents before signing.
- ❖ Send a confirming email to the employee stating that they have electronically signed the document, and asking them to contact the employer immediately if they are not the individual who electronically signed the document.
- ❖ Store the copy in a manner that is accessible by the employer and the employee after signing.

Electronic Records Best Practices

DON'Ts

- Do not force an employee to sign electronically, a paper option must always be made available. 15 U.S.C. § 7001(b)(2).
- Do not employ a system that allows the employee could add or delete language in the electronic record before signing.
- Do not employ a system that allows other employees access to the electronic signature system through any means. The system for recording the electronic signature and records should not have any feature that would allow any company personnel to input or alter any electronic signature or record.