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Attorneys and Counsellors at Law

# The Paper Trail to Success

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## The Paper Trail to Success

Employers, take heed: Good documentation practices pay off!

But you've heard this before, haven't you? And perhaps the following thoughts have crossed your mind: "The lawyers tell me to document my policies, practices, employees and every darn thing. Easy for them to say! They don't know how hard that is when I have one thousand other things to do for my business. I will do it later. Why should I do it at all?"

Then the lawsuit comes. What kind of lawsuit is it going to be? Take your pick:

- Discrimination claims under applicable federal and state laws, based on race, color, religion, gender, national origin, disability, age, veteran status, or military status,
- Retaliation claims under applicable federal and state law,
- Whistleblower claims (e.g. under Sarbanes Oxley or OSHA),
- FMLA claims,
- Wage and hour claims,
- NLRB and/or SERB claims (for state public employers),
- Invasion of privacy claims,
- False light claims,
- Wrongful discharge in violation of public policy claims,
- Emotional distress claims,
- GINA claims,

...just to name a few (though some claims may or may not apply to your particular business).

Common to all employment claims are the following basic questions, straight from your high school English class:

- What happened?
- When did it happen?
- Where did it happen (e.g. on company property or off)?
- How did it happen?
- Who did it happen to (or who was involved)?
- Why did it happen?

Good documentation allows you to answer these questions and establish your story. If you don't have documentation answering these questions, it's your word against the word of the disgruntled employee, person or entity. And, to make matters worse, often the disgruntled have the habit of coming up with "documentation" of their own (employee journals, clandestine cell-phone photos and recordings, that sort of thing). That means that they have their story locked down. If you don't have proper documentation, the disgruntled can make you look like you're making up your story as you go along. In that case, who is the jury or judge going to believe?

So, you're saying, "Okay, okay. I get it. But what exactly do I document?"



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Every business or place of employment is different, so there is not one-size-fits-all. Consult with your attorney for documentation recommendations particular to your business. However, here are some practical guidelines applicable to most businesses.

### 1. Document Performance Evaluations

Always document employee performance evaluations. Employee evaluations often play a critical role in employment litigation. Have evaluations regularly and ensure that those evaluations are preserved in writing.

Further, be objective and accurate on your employee evaluations. Sounds straightforward, right? Unfortunately, we often see employers giving problem employees overly generous performance ratings. Many times employers may feel that “you accomplish more with honey than vinegar.” Others may not want to hurt a poorly performing employee’s feelings. Sometimes employers feel that a poor performance review will prompt an employee to sue or otherwise be disruptive to the workplace. However, these are all the wrong reasons to fail to write an objective and accurate employee evaluation.

It plays out like this. After an overly rosy review, that poorly performing employee makes a predictable mistake that costs or endangers your company and/or your other employees. You fire or discipline that employee. That employee then sues you for (insert claim from above list here).

So, you tell your attorney, “That employee was lousy!” But that’s not what the performance review says. Now you’re faced with the dilemma of having to explain why that employee had performance problems in the past with contradictory documentation. Not a good place to be.

Secondly, overly flattering performance reviews do a disservice to the employee. Without constructive and documented criticism, that employee is deprived of the chance to take that criticism to heart and improve his or her job performance.

Lastly, employers may wish to reassess the performance review forms they are using to evaluate their employees. For example, is the performance review process based on objective criteria or subjective criteria? “Objective” is verifiable. “Subjective” is prone to bias and prejudice. Where a review form is mostly subjective, a company can get in trouble where the supervisor filling out a mostly subjective form does not belong to the same protected class as the employee he’s reviewing. Typical situations include instances where a white supervisor reviews an employee that is not white, or a younger supervisor reviews a much older employee, and so on. A disgruntled employee can argue that the subjective nature of a particular form allows for prejudice unchecked by objective evidence of employee performance.

### 2. Timely Document Performance Problems As They Occur

There is little worse than an employer trying to terminate an employee for poor job performance based on alleged problems that occurred months or even years earlier. For example, assume that an employer’s manager learns that his subordinate employee was rude to a customer. Then, the manager verbally (but not in writing) tells the offending employee that this misconduct will not be tolerated. For months, nothing happens. Later, however, the employee displays the same rude behavior towards a different customer. The manager reprimands the employee for this incident of rudeness and documents the reprimand. But, in addition to documenting the second reprimand, the manager also documents the first verbal reprimand from many months ago.



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Don't do this. Document performance issues and reprimands in a timely manner, while they are fresh in your mind or the minds of your supervisors. You will have confidence the report is accurate and that the incident is preserved. Delayed documentation could allow you or your supervisors to forget or confuse the names of customers, employees, witnesses or the time and place where the incident happened. Your disgruntled employee will certainly remember what happened. Will you?

Further, delayed documentation begs the question: if an incident/reprimand wasn't important enough to document when it happened, why is it important now? In the above example, that disgruntled employee will certainly say it is because the first reprimand wasn't really a reprimand and the second reprimand was so baseless that the manager needed to justify the second reprimand with alleged past problems. Also, a jury could perceive that you were out to get the employee for unlawful reasons. Again, this is not a good place to be, so keep up with timely documentation of incidents and reprimands. And always remember to insert a copy of any performance documentation in the employee's personnel file.

### **3. Avoid the Appearance of Selective Enforcement in Documentation**

Be aware of the problem of selective enforcement in documentation, where one employee is getting more (or less) documentation than other employees. If you know of a bad employee who either displays performance problems or ongoing misconduct, don't suddenly ramp up documentation of that employee beyond what is called for and what is your normal practice. Obviously, if an employee needs to get written up more often for performance problems, his file is going to be thicker than less problematic employees. But make sure that there is some legitimate, non-discriminatory and non-retaliatory reason for taking different action against one employee versus another.

### **4. Have a Document Management and Retention System**

So you do everything right. You document consistently and fairly. Your documentation is detailed and objective. One problem: you can't find any of it when you need it.

Under certain laws, including the federal and Ohio wage and hour laws, companies need to manage and retain certain records. But beyond that, having an effective management and retention system for employment documentation is vital to litigation should it arise.

Consider the long-time employee who is terminated after almost thirty years and files a claim for age discrimination against your business. Let us suppose that the ex-employee alleges that he was highly qualified for his job since for nearly thirty years he performed and received positive performance reviews and pay increases yearly. According to him, he was awesome.

"Well, I know that's baloney," you tell your attorney. "And all of those not-so stellar performance evaluations will prove him wrong. They are right over here, in this box. Wait, no. .... um. Let's see. Oh, Sandy knows where they are. She's retired and kinda sick, but I'm sure we can call her daughter to get in touch with her."

If you can't find it, it doesn't exist. Also, if your documentation is physically vulnerable, such as stored in damp conditions, it may soon not exist. If your documentation is digital and you have no backups, you're one hard-drive crash away from great unpleasantness.



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Your company should have a document management and retention policy. Your policy should itemize what types documents your business is keeping. Your policy should tell you where things your business is keeping go and in what form. Finally, your policy should indicate how long documentation is to be preserved and the manner of disposal for documentation that needs to be destroyed.

### **5. Proper Documentation Training**

Besides developing more effective documentation practices, ensure that those managers responsible for your business documentation are properly trained in those practices. Your managers should be familiar with who, what, when, where, why and how your company documents matters in their areas of responsibility. Further, do not rely on “institutional memory.” Enough of your managers should be trained in proper documentation procedures that when any given manager leaves your employment, gets sick or is incapacitated, your business is covered. If you have a “Sandy” that is the only person in your shop that knows where the paper goes, you have a problem. Take action to address that problem before a disgruntled employee takes advantage of it.

Even if you’ve heard all of this before, it bears repeating. This is especially true in our ever-evolving and increasingly litigious world. Hopefully, taking these points to heart or consulting your attorney to assist you with developing and implementing sound documentation practices will put you in the best position possible to successfully defend against a lawsuit from a disgruntled former (or present) employee.