

# **Dealing with Problem Employees**

---

10<sup>th</sup> Edition

Amy DelPo, J.D.  
Lisa Guerin, J.D.

# Table of Contents

---

<b>Introduction</b> .....	<b>1</b>
The High Cost of Problem Employees .....	1
Lawsuits .....	1
Employee Turnover .....	2
Poor Morale .....	2
The Bottom Line .....	2
How This Book Can Help .....	2
Who Should Use This Book .....	3
Who Should Not Use This Book .....	3
<b>Chapter 1 – What’s Your Problem?</b> .....	<b>5</b>
Learning Objectives .....	5
Introduction .....	5
Performance or Productivity Problems .....	5
New Employees .....	6
New Problems .....	7
Interpersonal Problems .....	7
Employees with Contextual Problems .....	7
Employees with Personal Problems .....	8
Discrimination .....	9
Insubordination .....	9
Unjustifiable Insubordination .....	10
Concerns about Safety .....	10
Concerns about Illegality .....	11
Excessive Absenteeism .....	11
Family Absences .....	12
Employees Who Have Disabilities .....	12
Using Sick Leave as a Pretense .....	12
Employees Who Really Are Sick—A Lot .....	13
Drugs and Alcohol .....	13
Alcohol Use at Work .....	13
Alcohol Use Off Hours, Off Site .....	13
Drug Use and Possession .....	14
Investigating Substance Use .....	16
Theft and Dishonesty .....	16
Violence .....	17
When Technology Is the Problem .....	17
Review Questions .....	23
Review Answers .....	24
<b>Chapter 2 – Employment Law Basics</b> .....	<b>27</b>
Learning Objectives .....	27
Introduction .....	27
Employment at Will .....	27
Legal Limitations on Employment at Will .....	28
Practical Limitations on Employment at Will .....	28
The Real Value of Employment at Will .....	29
Employment Contracts .....	29
Written Contracts .....	30
Oral Contracts .....	33
Implied Contracts .....	34
Breaches of Good Faith and Fair Dealing .....	35
Violations of Public Policy and Retaliation .....	36
Wage and Hour Claims .....	36

## Table of Contents

Workers' Compensation Claims .....	38
Family and Medical Leave .....	38
Health and Safety Complaints.....	39
Other Public Policy Claims.....	39
Discrimination.....	39
Title VII.....	39
Harassment.....	42
Disability Discrimination.....	43
Pregnancy Discrimination.....	46
Age Discrimination.....	47
Genetic Discrimination.....	48
Retaliation for Complaints.....	49
Unfair Labor Practices.....	50
Review Questions.....	59
Review Answers.....	61
<b>Chapter 3 – Performance Evaluations .....</b>	<b>65</b>
Learning Objectives.....	65
Introduction.....	65
The Benefits of an Evaluation System.....	65
Step 1: Create Performance Objectives.....	66
Job Requirements.....	67
Developmental Goals.....	68
Choosing Goals.....	68
Step 2: Observe and Document Employee Performance.....	70
Maintaining a Performance Log.....	70
Documenting Ongoing Feedback.....	71
Let Employees Know When They Do Well.....	71
Coach Employees When They Veer Off Track.....	72
Step 3: Conduct Interim Meetings to Discuss Progress and Problems.....	73
Preparing for the Interim Meeting.....	73
Holding the Meeting.....	73
After the Meeting.....	73
Step 4: Conduct the Year-End Evaluation.....	73
Writing the Evaluation.....	74
Planning the Appraisal Meeting.....	78
Conducting the Appraisal Meeting.....	79
Reassessing Job Requirements and Setting Goals.....	81
Review Questions.....	82
Review Answers.....	83
<b>Chapter 4 – Progressive Discipline .....</b>	<b>85</b>
Learning Objectives.....	85
Introduction.....	85
The Benefits of Progressive Discipline.....	85
The Steps of Progressive Discipline.....	86
Coaching.....	87
Verbal Warning.....	88
Written Warning.....	88
When Is a Written Warning Appropriate?.....	91
Termination.....	91
How Progressive Discipline Works.....	91
Gather Information.....	92
Assess the Severity.....	92
Decide How to Respond.....	93
Prepare to Talk to the Employee.....	93
Meet With the Employee.....	94

## Table of Contents

Document.....	96
Follow Up .....	96
Guidelines for Avoiding Legal Trouble.....	96
Don't Compromise At-Will Employment.....	96
Be Consistent .....	97
Be Objective .....	97
Don't Retaliate .....	97
Consider Reasonable Accommodations.....	98
Be Careful When Disciplining for Absences.....	98
Deal With Dangerous Situations Right Away .....	99
Keep It Confidential .....	99
Sample Progressive Discipline Policy.....	99
Review Questions.....	101
Review Answers .....	102
<b>Chapter 5 – Complaints and Investigations .....</b>	<b>103</b>
Learning Objectives .....	103
Introduction.....	103
When Investigation Is Necessary .....	104
Minor Problems .....	104
Incidents That Require More Attention .....	104
Allegations of Harassment .....	104
Complaint Policies and Procedures.....	106
What Your Complaint Policy Should Include.....	106
Sample Complaint Policy .....	107
Preparing to Investigate .....	108
Choose the Investigator .....	108
Starting the Investigation.....	111
Take Immediate Action If Necessary .....	111
Get Started Right Away.....	112
Conducting Interviews.....	112
Tips on Conducting Effective Interviews .....	112
Interviewing the Complaining Employee.....	117
Interviewing the Accused Employee.....	119
Interviewing Witnesses .....	120
Written and Physical Evidence.....	120
Employees' Rights to Privacy.....	121
The Right to Privacy in the Workplace.....	121
Lie Detector Tests.....	122
Drug Tests.....	122
Making the Decision.....	123
Interview the Main Players Again .....	124
Evaluate the Evidence .....	124
Decide What to Do.....	125
Document Your Decision .....	126
Review Questions.....	129
Review Answers .....	130
<b>Chapter 6 – Dispute Resolution Programs .....</b>	<b>133</b>
Learning Objectives .....	133
Introduction.....	133
Types of Alternative Dispute Resolution .....	134
Open-Door Policies.....	134
Ombudsperson .....	134
Peer Review Programs .....	135
Step Grievance Procedures .....	136
Mediation.....	136

## Table of Contents

Arbitration.....	137
Which Procedures Are Right for Your Company?.....	138
What Is Your Company's Style and Culture?.....	138
What Resources Can You Devote to the Program?.....	140
What Are Your Goals?.....	140
How Large Is Your Company?.....	140
Do You Have Established Policies and Procedures?.....	140
Tips for Creating an Effective Program.....	141
Get With the Program.....	141
Train Managers.....	141
Generate Employee Support.....	141
Prohibit Retaliation.....	142
Offer Some Confidentiality.....	142
Make Employee Assistance Available.....	142
Communicate the Program's Goals and Procedures.....	142
Take Action to Address Valid Complaints.....	143
Give Employees a Forum.....	143
Don't Be Greedy.....	143
Review Questions.....	144
Review Answers.....	145
<b>Chapter 7 – Making the Decision to Fire.....</b>	<b>147</b>
Learning Objectives.....	147
Introduction.....	147
Is It Time to Consider Firing?.....	147
Dangerous, Illegal, or Deceptive Conduct.....	147
Persistent Issues.....	149
Making the Decision to Fire: An Employer's Checklist.....	150
Step 1: Investigate the Conduct or Incident.....	150
Step 2: Check the Worker's Personnel File.....	151
Step 3: Examine Your Written Policies.....	152
Step 4: Review Statements Made to the Employee.....	153
Step 5: Examine Your Treatment of Other Workers.....	154
Step 6: Consider the Possibility of a Lawsuit.....	154
Step 7: Consider the Alternatives.....	156
Step 8: Get a Second Opinion.....	156
Step 9: Consult a Lawyer, If Necessary.....	157
Step 10: Document the Reasons for Firing.....	157
Review Questions.....	159
Review Answers.....	160
<b>Chapter 8 – Planning for the Aftermath.....</b>	<b>163</b>
Learning Objectives.....	163
Introduction.....	163
Legal Constraints on What You Say.....	163
Defamation Laws.....	163
Blacklisting Laws.....	164
What to Tell Coworkers.....	164
What to Tell Reference Seekers.....	165
Decide How Much Information to Give.....	165
Follow Safe Reference Procedures.....	166
Continuing Health Insurance.....	169
Federal Law.....	170
State Laws.....	170
Unemployment Compensation.....	170
Will the Employee Be Eligible?.....	170
Should You Contest the Claim?.....	171

## Table of Contents

Written Explanations of the Termination .....	172
Review Questions .....	193
Review Answers .....	194
<b>Chapter 9 – Severance and Releases .....</b>	<b>197</b>
Learning Objectives .....	197
Introduction.....	197
Are You Obligated to Pay Severance? .....	197
When Severance Is Required .....	197
Assessing Your Current Severance Practices .....	199
Should You Pay Severance? .....	200
Reasons to Offer Severance .....	200
Risks of Offering Severance.....	201
Should You Ask for a Release?.....	201
Getting a Release When You Have a Severance Policy .....	201
Getting a Release When You Do Not Have a Severance Policy .....	202
The Pros and Cons of Asking for a Release .....	202
What Should You Offer? .....	203
Money .....	203
Insurance Benefits .....	203
Uncontested Unemployment Compensation.....	204
Outplacement Services.....	204
Other Benefits.....	204
Designing a Severance Package .....	205
Writing a Release .....	205
Release Basics.....	205
Tips on Making Your Release Stronger.....	208
Additional Release Terms .....	209
Agreements to Protect Your Business.....	209
Noncompete Agreements .....	209
Nondisclosure Agreements.....	210
Nonsolicitation Agreements.....	210
Review Questions.....	211
Review Answers .....	212
<b>Chapter 10 – How to Fire.....</b>	<b>215</b>
Learning Objectives .....	215
Introduction.....	215
The Termination Meeting .....	216
Who Should Break the Bad News? .....	216
Who Should Attend the Meeting?.....	217
When Should the Meeting Take Place?.....	217
Where Should the Meeting Take Place? .....	218
What to Say and How to Say It.....	219
Give the Employee a Contact.....	223
Document the Meeting.....	224
Collect Company Property and Cancel Passwords .....	225
Keep It Confidential .....	225
The Exit Interview .....	225
When and Where Should the Interview Take Place? .....	225
Preparing for the Interview.....	226
Who Should Conduct the Interview? .....	226
What Should You Cover During the Interview?.....	226
Review Questions.....	236
Review Answers .....	237
<b>Chapter 11 – Looking Forward.....</b>	<b>239</b>
Learning Objectives .....	239
Introduction.....	239

## Table of Contents

Improve Your Hiring Process .....	240
Understand the Position.....	240
Decide Whether the Job Is Necessary.....	241
Screen Out Poor Candidates .....	241
Conduct an Initial Interview on the Phone .....	244
Interview Effectively .....	244
Investigate the Candidates.....	248
Pick the Best Candidate.....	252
Workplace Policies .....	253
Using an Employee Handbook.....	253
Policy Topics .....	255
Review Questions.....	268
Review Answers .....	269
<b>Chapter 12 – Researching the Law and Hiring a Lawyer .....</b>	<b>271</b>
Learning Objectives .....	271
Introduction.....	271
When to Hire a Lawyer .....	271
Reviewing Documents .....	272
Advice on Employment Decisions .....	272
Representation in Legal or Administrative Proceedings.....	273
How to Find a Good Lawyer.....	274
Getting Leads .....	274
Comparison Shopping .....	275
Preparing to Meet the Lawyer .....	275
Speaking With the Lawyer .....	275
Legal Fees.....	276
How Lawyers Charge for Their Time .....	276
Paying for Costs .....	276
Getting It in Writing .....	277
Working With Your Lawyer.....	277
Firing a Lawyer .....	278
When to Make the Change .....	278
How to Fire Your Lawyer.....	278
Doing Your Own Legal Research .....	279
Finding Background Sources .....	279
Finding Primary Sources.....	279
Review Questions.....	281
Review Answers .....	282
<b>Appendix A .....</b>	<b>283</b>
Using the Downloadable Forms .....	283
Editing RTFs.....	283
List of Forms.....	283
<b>Appendix B .....</b>	<b>285</b>
Federal Agencies That Enforce Workplace Laws.....	285
Federal Fair Employment Laws.....	286
State Laws Prohibiting Discrimination in Employment.....	288
State OSHA Laws and Offices .....	301
<b>Glossary.....</b>	<b>303</b>
<b>Index .....</b>	<b>307</b>