

Employee Relations ESSENTIALS




J. J. Keller
& Associates, Inc.[®]
Since 1953

**This publication updates in
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Employee Relations Essentials

Introduction

This manual is divided into three broad areas: recruiting and hiring, management and development, and the eventual departure of employees. Through each phase, employers have opportunities to improve employee relations – or cause damage to the relationship.

Positive employee relations begins with first impressions made during the advertising, interviewing, and onboarding process, which are covered in the first section of this manual. By the time a job offer has been extended, the company already has a considerable investment in the new hire. Making a good impression can encourage that person to stay, and it's the first step in developing a positive relationship. The impressions an employee develops during the first phase of employment will affect that employee's attitude toward the company.

The second section covers the employment relationship, from maximizing performance and minimizing conflict to developing employees for future success. Of course, employee relations will suffer if employees do not feel appreciated, so rewards and recognition are covered as well. Finally, if conflict develops, the employer may have to manage the problems and possibly impose discipline or take corrective action.

The final section recognizes that, sooner or later, everyone who works for an employer will leave. The employee might quit, get fired, or retire after years of service. Whatever the reason, employee departures are inevitable. The manner in which a departure is handled is likely to become known by other employees, potentially impacting their attitude toward the company.

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Subject Index

Employee Relations Essentials

Reserved

Introduction

Positive employee relations begin with first impressions made during the advertising, interviewing, and training process. Of course, finding the right employees is also a critical part of this process, but employers will want to give the impression that the individual is joining a company that offers more than just a paycheck. A business is only as good as the people who staff it, so an employer must take time to find and hire the right employees.

Staffing is critically important to a business, regardless of its size. All firms take the same risk in hiring a new employee; however, the smaller the firm, the greater the consequences in lost time and money of hiring (and then firing) the wrong employee. To lessen this risk, it is key that employers apply good recruiting and hiring techniques.

The first section of this manual covers the recruiting and hiring process, which extends through employee training and onboarding. The impressions that an employee develops during the first few days, weeks, and months of employment will affect that employee's attitude toward the company. Overcoming a negative impression presents a much greater challenge than starting the relationship off on the right foot.

The tab on Planning and Advertising covers the process of determining what type of position is needed. Even when hiring a replacement, this process may be necessary if the nature of the job has changed over time. Employers may even find that a replacement isn't necessary, or that some tasks can be transferred to other employees, while others can be handled by a part time or temporary worker. The compensation and benefits will need to be determined, and the position can then be advertised. A well-written advertisement that explains the requirements and expectations of the position can help attract the best candidates.

The second tab, on Interviewing and Selection, covers the interview process. Interviewing involves not only obtaining the information that employers want to know about the applicant, but also making a good impression on the potential applicants. Individuals who are not selected might be desirable candidates for other positions, and employers will want them to apply again in the future. Eventually, an employment offer will be extended (and rejected applicants will be notified), at which point the final selection process can begin. This may include testing job knowledge, performing background checks, or other evaluations.

The third tab, on Onboarding and Training, covers the process of getting a new employee "up to speed" on the job, but also integrating the individual into the company's culture. This typically occurs during a probationary or introductory period, although employers and employees must both understand that the "at will" nature of the employment relationship does not end after that period. This tab also covers unfair competition agreements, also called non-compete agreements or restrictive covenants. The intent is to prevent employees from acting against the interest of the company by releasing or improperly using information that might harm the company. Nearly every company has information that it would like to protect, from customer lists to procedures for product design and development.

While not every new hire works out, a company can influence the chances of a successful hire through proper planning, selection, and onboarding. Studies have shown that employees make a decision of whether to stay with a company during the first few months of employment. By the time a job offer has been extended and training has begun, the company already has a considerable investment in the new hire, so making a good impression can encourage that person to stay — and it's the first step in developing a positive employment relationship.

Reserved



Introduction

Planning for new hires, whether hiring replacements for departing employees or creating a new position, begins with defining the position. In the case of replacement employees, employers might assume that the position is already well defined — and it might be, but if the job description has not been updated for several years, or if the replacement employee will have different duties than the former employee, then the responsibilities and expectations of the position will still need to be defined.

The job description is typically a good starting point, and can be used to help create postings or advertisements for the position. But before a company begins to consider hiring, it must determine if hiring is the best option.

For some positions, using contract employees or independent contractors may be preferable, especially if the job duties are peripheral to the company's core business, or if the job requires specialized knowledge. For other positions, hiring through a temporary staffing agency might be preferable, especially if the job duties do not require specialized skills or the position only needs to be filled for a limited duration.

If the company determines the directly hiring an employee is the best option, it will need to describe the position to potential applicants. This requires identifying the various terms and conditions of employment. Will the position be part time, full time, seasonal, temporary, or some other category? Will the position be exempt, non-exempt, hourly, salary, commission, or some other manner of compensation?

Once the basic structure has been determined, the actual compensation (or potential earnings, in the case of commissions) will have to be competitive to attract qualified candidates.

Finally, the company can create an advertisement that will hopefully “sell” the position to potential applicants. In many cases, employers might start by posting a job opening internally or providing an opportunity for current employees to recommend candidates. If these searches are not successful, the company may start posting on websites, newspapers, or other media (which might even include billboards along a highway).

Even the selection of advertising media may depend on the nature of the position, since some media outlets are more likely to reach the desired audience. For example, advertising online might be more effective in finding candidates for a computer programmer, as compared to advertising in a newspaper.

Selection of media must also consider the geographic area from which candidates are sought. A company looking to hire a new CEO may search a much larger area than a company looking to hire a janitor.

For these reasons, the job planning, job description, compensation structure, and advertisements are all intertwined. These are the issues covered in this chapter.

Job descriptions and classification

The employees brought in today directly impact the company's operations tomorrow. Furthermore, the way employers handle the hiring process can mean the difference between happy employees and disgruntled employees, productive employees and unproductive employees, compliance with government regulations versus non-compliance, and being the victim of a civil suit versus staying out of the courtroom.

Creating job descriptions (and keeping them updated) can be a time-consuming process. However, the value they provide throughout the employment relationship, from creating advertisements to handling discipline for failing to meet expectations, makes them well worth the effort.

The job description can also help to classify an employee as exempt or non-exempt, and help compare the compensation offered to ensure that it is competitive.



Best practice

How job descriptions help

A properly written job description can help an employer:

- In recruiting, as the job duties and responsibilities in the job description can serve as a basis for writing targeted job advertisements.
 - Hiring the right applicant, since interviewers using the job description will be able to obtain more useful, specific information from applicants.
 - Clarify the position, providing a clear idea of the responsibilities of the position and who the position reports to.
 - During performance appraisals, so that employees know what is expected of people in that position.
 - Comply with Americans with Disabilities Act (ADA) requirements, in that the job description can be evidence.
-

Creating the job description

One of the first steps in creating a new position is writing a job description. If the position already exists, review the description to ensure that it's accurate. Job descriptions provide a framework of a position's duties, responsibilities, working conditions, and physical requirements for both applicants and employees.

The job description is a position summary including a list of specific job duties or essential functions, position qualifications, required education and experience, necessary skills and abilities, responsibilities, reporting requirements, working conditions, physical requirements, and supervisory responsibilities (if applicable).

One of the most important aspects of developing and using a job description is that it brings a level of consistency to positions. Employees know what to expect of the job and what the job expects of them.

A properly written job description also brings consistency to candidate screening, recruiting, and hiring. Well-written job descriptions help applicants understand the scope of the position, which results in a better fit between the employee and the job. Conveying job expectations and requirements in a written job description can help attract qualified and interested candidates.

Poorly written descriptions — those that don't accurately reflect the requirements of the position — can attract the wrong candidates and end up costing valuable interview time. Even worse, a candidate who doesn't fit the job is more likely to leave and find another job, meaning the company must start over with the advertising process to hire a replacement.

Established job descriptions can also help quickly replace or hire workers in the case of turnover, or when there's an increase in business demands. The job description can be used as a basis for writing targeted job advertisements, and can be used again during interviews to obtain information relevant to the responsibilities of the position. Staffing and career planning are simplified by using standard format job descriptions. For example, employees who wish to transfer or advance can be evaluated based on the duties of the current position, compared to the duties of the desired position.

Job descriptions provide a framework of a position's:

- Job title,
- Exempt/non-exempt status,
- Position summary,
- Qualifications,
- Duties,
- Essential tasks,
- Responsibilities,
- Reporting requirements,
- Working conditions,
- Physical requirements, and
- Supervisory responsibilities.

Though their format varies, most job descriptions should contain certain elements. They should provide a summary of what duties and responsibilities the position requires, including the required hours of work. They should also spell out other requirements for the position, such as the knowledge, skills, experience, and education required.

Job descriptions can also spell out expected quantity or production standards so applicants know what to expect, and help screen out applicants who could not meet those standards. Job descriptions should also contain a statement that when duties and responsibilities change, the job description will be reviewed and subject to change. Make sure they actually get updated if something changes.

HR can also use job descriptions in reviewing an employee's job performance during the appraisal process. Staffing and career planning are also simplified by using standard format job descriptions.

Larger employers benefit from having job descriptions when they need to standardize job functions across multiple locations and throughout the organization.

Also, some employers will have unique job titles that are specific to their industries, while others will have many job titles that are extremely similar, such as organizations with numerous clerical and administrative positions.

What should be in a job description?

Even though the format of job descriptions varies from company to company, there are common elements that should be part of most job descriptions. The job description should contain a complete summary of what the job-holder is expected to do. It should also spell out the qualifications for the position. The job description should contain:

- Job title, name, or code number as applicable;
- Department or area in which the job is located;
- The hours and/or shifts that the employee is expected to work;
- The supervisor the position will report to;
- Relationships to other jobs and the purpose of contact with outside agencies and personnel;
- Principle duties (i.e., essential functions of the job — the reason the job exists);
- Nonessential functions of the job;
- The quality and quantity of work expected from an individual holding the position;
- Special working conditions such as overtime, or as-needed work;
- Knowledge, skills, and experience;
- Educational requirements, if any;
- Certification or licensing required, and whether the certification or licensing can be earned while employed;
- Physical requirements and how often they are performed (for example, must lift 35 pound boxes for two to three hours per day, three days a week);
- Equipment familiarity required (e.g., computer, server maintenance, PDA); and
- A statement that when duties and responsibilities change and develop the job description will be reviewed and subject to changes of business necessity.

Employee Relations Essentials

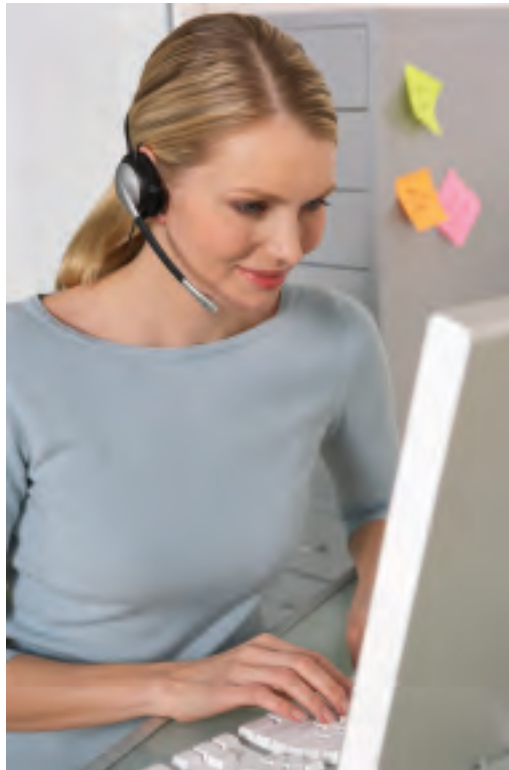
The list of job tasks is the heart of the job description, identifying all of the tasks the employee is required to perform. It should be thorough in scope, but broken down by activity such as setting up machinery, moving materials, placing parts on a line, and so on. For each task, the employer also should identify the following four characteristics:

1. Equipment/Weights/Measures (physical set-up of the job),
2. Physical Demands (standing, sitting, lifting, bending, and so on),
3. Frequency (how often a specific task is to be performed), and
4. Essential Functions (identify whether the job task is an essential function).

The job description may also spell out established quantity or production standards for the position. If there are expected production goals, these are legitimate for inclusion in the description, and the employer can screen out applicants who could not meet those standards.

Also describe the environmental conditions of the position. For example, a sales job for a company located in an office park might identify environmental conditions as “indoors, temperature controlled, sealed window office.”

List all necessary personal protective equipment required for the position, as some individuals may not be able to wear it.



Accurate job descriptions

Having accurate job descriptions for all employees can benefit the company in a number of ways. Here is a list of some of them:

1. Workers' compensation. An accurate job description can help determine whether an employee with a work-related injury can perform his job, at what level, and what restrictions may be necessary.

Employee Relations Essentials

Suppose an employee hurt his back (or other body part) at work. He goes to the doctor and returns with a slip that says he can only perform light duty work, with no definition of what that means. That doesn't do much good, particularly if the company doesn't have any light duty work available.

However, having the employee go to the doctor with a copy of his job description which details the frequency and type of physical labor that is required is invaluable for helping the doctor determine which of those job duties the employee can and can not do.

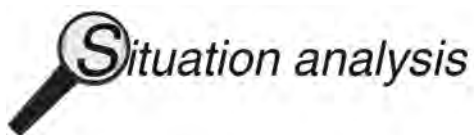
2. ADA accommodation. A qualified individual is one who can perform the essential functions of a job with or without reasonable accommodation. A good job description should outline which are the essential functions of a position. That way, if an employee has medical work restrictions that prevent him or her from performing the essential functions of the job, the employee is no longer a qualified individual with a disability under the meaning of the Americans with Disabilities Act (ADA), assuming no accommodation can be provided.

The ADA does not require that an employer have written job descriptions. However, if discrimination claims arise, the Equal Employment Opportunity Commission will look at the job description and will consider the list of essential functions as part of the evidence in the claim.

3. Determining status under the Fair Labor Standards Act. Many lawsuits have been filed claiming that certain employees were treated as exempt employees (they didn't receive overtime) when in actuality their jobs should have been classified as non-exempt, and they should have received overtime. The majority of these cases hinge on the job duties test, particularly on what constitutes an employee's primary duty.

For example, sometimes administrative employees are classified as exempt when they should not be. Just because an employee performs some duties that would qualify the job as exempt does not make him or her exempt if the majority of the employee's duties are, in fact, of the non-exempt variety. Job titles alone won't determine this — but an accurate job description can help employers make the determination. A good job description will give the percentage of time the employee will likely spend performing certain functions, and this can be helpful in defending a wage claim for overtime based on misclassification.

4. Employee performance. An employee who has an accurate job description knows what is expected of her. The employee can't come back later and say she didn't know what was expected in terms of job responsibilities, or was not aware of expectations. The job description can also be used in performance reviews or discipline. Employers can point to specific job duties where the employee needs work or specific functions that she is not performing.



When job descriptions aren't accurate

In some cases, job descriptions do not accurately reflect the duties performed on the job, but employers still rely on them for various reasons.

Court cases often involve employees who were classified as exempt from overtime based on the duties outlined in the job description. However, when the employees sued for back overtime pay, the court (or the jury) may accept their description of the

actual daily work. If the work those employees claim to perform on a daily basis does not support the exempt status, the company can be liable for back pay.

Similarly, employers have found themselves in court for claims of disability discrimination. The Americans with Disabilities Act (ADA) requires employers to make reasonable accommodations that would allow an employee to perform the essential functions of the job. This may include excusing the employee from performing non-essential functions. If an employee's request to be excused from certain duties is denied (because the company claims they are essential) but those duties are not even included in the job description, the company will have a greater burden in showing justification to deny the requested accommodation.

Applying competencies

It's extremely important that employers identify what is expected from employees in particular positions, and one method of doing this is a competency-based performance management system. While it may seem like an intimidating term, competencies can be understood as the knowledge, skills, abilities, and characteristics required to be successful in a particular job or organization.

When used as a part of performance management, relevant competencies are identified for the organization as a whole as well as for each position. These competencies consistently reappear within an organization and throughout an employee's career, which helps to translate an organization's overall vision into its daily operations.

Workforce planning is necessary to ensure the staffing levels are strategically aligned with the company's business priorities. Effective workforce planning exposes talent deficiencies and needs, identifies recruiting issues, and clarifies organizational and employee development priorities. Workforce planning is the highest level at which employers can identify the critical workforce skills and competencies that the organization expects all employees to personify. For example, in a service business, active listening and good communication skills (both oral and written) are probably among the essential competencies.

Once a workforce plan has identified the competencies that are most valued by the organization, seek to create job descriptions that both include and expand upon them. Job descriptions should not only carefully describe each position and the competencies required to successfully perform them, they should also take into account how each job works to accomplish the organization's overall mission. Assigning competencies to each position helps develop a framework on which employees can depend to accurately illustrate the expectations of a position.

Once job descriptions are developed based on relevant competencies, design the interview process to identify applicants who most embody those competencies defined as being integral for each job. For example, if a job requires the ability to work well under pressure, ask applicants how they have managed stress or dealt with deadlines in their previous experiences.

The same competencies that drive the interview can also direct much of the feedback an employee receives regarding his or her performance. When it comes time for a formal performance review, employees should be evaluated on how well they have demonstrated the identified competencies in their day-to-day work.

Employers who utilize competency-based performance management can also create a 360 degree feedback program (a tool which surveys multiple individuals to gather feedback on an employee's performance) based on the competencies most desired for the job each individual holds.

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When used consistently, competencies can permeate almost every facet of an organization. They make it simple for everyone in an organization to understand what the expectations are for each employee, and for the business as a whole. Giving careful consideration to the competencies assigned to individual positions is the best way to ensure that the company has the right people for the right jobs.



For more information, see the section on **Performance reviews** in the **Communications** tab.

Sample job description

The following sample job description may not be relevant for the position described, but is provided to offer an example of the type of information that should be included in a job description.

Aircraft Mechanics and Service Technicians

Department: Operations

Job Status: Part Time

FLSA Status: Non-Exempt

Reports To: Daniel Lucas

Grade/Level: QN1

Amount of Travel Required: No travel required

Work Schedule: This position runs on a 12 hour shift basis with 4 days on, 3 off, and then 3 days on, 4 off.

Positions Supervised: None

POSITION SUMMARY

Diagnose, adjust, repair, or overhaul aircraft engines and assemblies, such as hydraulic and pneumatic systems. Perform production installations, maintenance, preventative maintenance and alterations on aircraft structure, systems and sub-systems, including electrical and avionics on standard or experimental aircraft.

ESSENTIAL FUNCTIONS

Reasonable Accommodations Statement

To perform this job successfully, an individual must be able to perform each essential duty satisfactorily. Reasonable accommodations may be made to enable qualified individuals with disabilities to perform the essential functions.

Employee Relations Essentials

Essential Functions Statement(s)

Read and interpret maintenance manuals, service bulletins, and other specifications to determine the feasibility and method of repairing or replacing malfunctioning or damaged components.

Inspect completed work to certify that maintenance meets standards and that aircraft are ready for operation.

Conduct routine and special inspections as required by regulations.

Examine and inspect aircraft components, including landing gear, hydraulic systems, and deicers to locate cracks, breaks, leaks, or other problems.

Inspect airframes for wear or other defects.

Maintain, repair, and rebuild aircraft structures, functional components, and parts such as wings and fuselage, rigging, hydraulic units, oxygen systems, fuel systems, electrical systems, gaskets, and seals.

Assemble and install electrical, plumbing, mechanical, hydraulic, and structural components and accessories, using hand or power tools.

Test operation of engines and other systems, using test equipment such as ignition analyzers, compression checkers, distributor timers, and ammeters.

Modify aircraft structures, space vehicles, systems, or components, following drawings, schematics, charts, engineering orders, and technical publications.

Locate and mark dimensions and reference lines on defective or replacement parts, using templates, scribes, compasses, and steel rules.

Examine engines through specially designed openings while working from ladders or scaffolds, or use hoists or lifts to remove the entire engine from an aircraft.

Remove or install aircraft engines, using hoists or forklift trucks.

Inventory and requisition or order supplies, parts, materials, and equipment.

Communicate with other workers to coordinate fitting and alignment of heavy parts, or to facilitate processing of repair parts.

POSITION QUALIFICATIONS

Competency Statement(s)

Accuracy — Ability to perform work accurately and thoroughly.

Communication, Oral — Ability to communicate effectively with others using the spoken word.

Problem Solving — Ability to find a solution for or to deal proactively with work-related problems.

Technical Aptitude — Ability to comprehend complex technical topics and specialized information.

Working Under Pressure — Ability to complete assigned tasks under stressful situations.

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SKILLS & ABILITIES

Education : High School Graduate or General Education Degree (GED)

Experience : Three to seven years related experience

Computer Skills

Previous avionic or electrical experience is required. Previous work experience in Quality Control preferred. Prefer a minimum of five years of aircraft maintenance experience on complex jet-powered aircraft with military, airline, or certified repair station background. They must be able to comprehend complex technical manuals, schematics, other technical materials, and mathematical equations.

Certificates & Licenses

A valid FAA Airframe and Powerplant Certificate is required. No security clearance required.

Other Requirements

None

PHYSICAL DEMANDS

Physical Demands	Lift/Carry
Stand (Frequently)	10 lbs or less (Constantly)
Walk (Constantly)	11-20 lbs (Constantly)
Sit (Occasionally)	21-50 lbs (Frequently)
Handling / Fingering (Constantly)	51-100 lbs (Occasionally)
Reach Outward (Constantly)	Over 100 lbs (Not Applicable)
Reach Above Shoulder (Constantly)	Push/Pull
Climb (Frequently)	12 lbs or less (Constantly)
Crawl (Frequently)	13-25 lbs (Constantly)
Squat or Kneel (Frequently)	26-40 lbs (Frequently)
Bend (Frequently)	41-100 lbs (Occasionally)

(Not Applicable) Activity is not applicable to this occupation.

(Occasionally) Occupation requires this activity up to 33% of the time (0 to 2.5+ hrs/day).

(Frequently) Occupation requires this activity from 33% to 66% of the time (2.5 to 5.5+ hrs/day).

(Constantly) Occupation requires this activity more than 66% of the time (5.5+ hrs/day).

Other Physical Requirements

Ability to wear personal protective equipment (PPE) (high visibility clothing, ear protection, safety glasses).

WORK ENVIRONMENT

We run a 4-bay heated hanger environment, where we do all the heavy MRO (maintenance, repair, and overhaul) on CRJ 200 and 700, Lear jets and Q 400 aircraft.

Prepared by: _____ Date: _____

Approval signature: _____ Date: _____

Approval: _____

Approval: _____

Employee signature: _____ Date: _____

The Company has reviewed this job description to ensure that essential functions and basic duties have been included. It is intended to provide guidelines for job expectations and the employee's ability to perform the position described. It is not intended to be construed as an exhaustive list of all functions, responsibilities, skills, and abilities. Additional functions and requirements may be assigned by supervisors as deemed appropriate. This document does not represent a contract of employment, and the Company reserves the right to change this job description and/or assign tasks for the employee to perform, as the Company may deem appropriate.

Job analysis

In order to fill an open position, employers must first determine the characteristics of the position. So, the best place to begin the hiring process is with a job analysis. This allows the company to identify the knowledge, skills, and abilities (KSAs) needed to perform a given job in order to match a worker to the job.

The job analysis also helps illustrate how the job relates to other jobs in the company and determine the conditions under which the work is performed.

In order to properly analyze a job, determine:

- The duties of the job;
- The physical and mental demands (essential functions) of the job;
- The behaviors needed to perform the job well;
- Whether there are specific licenses, certifications, or degrees for the job;
- Whether there is a need for a background check;
- How soon the job must be filled; and
- Other critical components of the job.

In most cases, a job analysis will be conducted primarily for newly created jobs, though occasionally when positions are vacated and there are significant changes in duties, an analysis will need to be conducted.

Job analysis is usually performed by the HR department, an appropriate supervisor, or by an outside consultant. Consultants are often used because they are unbiased and can concentrate all their efforts on the job analysis task.



Job analysis methods

Information needed for the job analysis can be collected in a variety of ways. Some of the most common job analysis methods include:

- **Observation** — In this method, HR or an appropriate supervisor or manager actually observes a job being performed. This method usually works best when the job consists of observable physical activities (i.e., assembly-line worker, teacher). The method doesn't work when the job consists of mostly mental activity (i.e., computer engineer, writer). Also, workers may alter their behavior because they are being watched. When possible, observe multiple workers performing the same job.
- **Interviewing** (the employee currently performing the job and that employee's supervisor) — This method can gather a lot of information, but can be time consuming. It works well for jobs that do not have observable physical activities. The interviewer must be skilled in performing the interview or important information might not be obtained.
- **Questionnaire** — This is an inexpensive way to have employees describe their job-related duties. The questionnaire can be either structured or unstructured. The most important aspect of using this method is that employees understand the purpose. The questions should be tested on a small group of employees before being given to the majority of the workers.

It is important to note that analyzing a job is not always necessary. If the company is very familiar with a particular job, it may already know the characteristics of that job without a formal analysis.

Essential functions of the job

When analyzing a job, it is critical, both from a good practice standpoint and from a legal standpoint, to clearly and thoroughly determine the essential functions of the job (basic job duties an employee must be able to perform, with or without accommodation).

A job function can be considered essential for many reasons. These include, but are not limited to:

- The reason the position exists is to perform the function,
- The number of other employees available to perform the function or among whom the performance of the function can be distributed is limited, and
- There is a high degree of expertise or skill required to perform the function.

Other factors to consider in determining essential functions of a job include:

- The actual work experience of present or past employees in the job,
- The time spent performing a function,
- The consequences of not requiring that an employee perform the function, and
- The terms of a collective bargaining agreement.

Salary and other issues

While the skills and essential functions of the job are perhaps the most critical parts of the job analysis, there are other issues that need to be considered. These include:

- Whether the position can be eliminated — When a position becomes vacant, the opportunity may exist to rearrange the organization to eliminate the position, rather than refilling it.
- Salary range — Determining salary range is crucial for the recruiting process. Evaluate the proper salary for the position to be filled, independent of the person who vacated the position. Also, note geographical wage trends.

There is no clear-cut way of putting a dollar value to a specific job; HR's judgment is usually the determining factor.

Creating new job titles

While the prospect of creating a job description from scratch might be exhilarating to some HR practitioners, it can seem quite daunting to others. Even if you know what duties and tasks you expect a person in the new role to perform, something as seemingly simple as assigning a job title can present challenges.

You can give a new position any title you desire (there are no specific rules), and in some corporate cultures they get downright creative about it (AOL has a Digital Prophet, Apple has Geniuses). But if you want to stick to more traditional job titles, some questions to consider when choosing them include:

- How does the proposed job title align with the job description (essential duties, tasks)?
- Does the proposed job title exist elsewhere in the marketplace with duties that are fundamentally different from your job description?
- Where does the position fit within your company hierarchy? What is the reporting structure? And, what impact does this have on salary expectations?

When you are contemplating these questions, you may find it useful to do a bit of market research on positions that are similar to the one you are creating. One resource to explore is job boards. It can be helpful to see how other companies with similar positions have described them in job posts.

Furthermore, it can be especially valuable to think like a job seeker. Make sure your job titles and descriptions accurately reflect the actual job duties. This helps you avoid unintentionally misleading applicants about what the job entails, which makes your hiring and recruiting process far more efficient.

Another way to minimize confusion is to avoid using or combining terms in the job title that customarily belong to another profession or that might suggest a markedly different skill set than you require. For example, the title Program Developer is customarily used in computer technology and requires a specific skill set. If you are hiring someone to develop and oversee community outreach programs, you would instead want to choose a title like Director of Programs.

In addition, understanding where the new position fits within your company hierarchy can help you choose a title. If the new role is an entry-level position, it will likely include terms like associate, assistant, aide, or coordinator. A mid-level role might use terms such as specialist or representative.

Avoiding title inflation at the onset is important when delineating status or reporting structure, but it also helps establish salary (along with comparable market data) and a path for potential career growth. It can help to think about what you would title and pay the next position above the new job.

Your options for creating job titles are virtually limitless, and you can certainly choose to get creative. However, considering the aforementioned questions will help ensure that you choose a title that best represents the duties involved in your new position, how it is likely compensated, and what growth opportunities might exist. Job seekers will thank you.



Best practice

More market research for unfamiliar jobs

For newly created positions, employers may find it helpful to look at the Bureau of Labor Statistics (BLS) Occupational Outlook Handbook. This publication describes, for a wide range of occupations, the nature of the work, working conditions, the training and education needed, earnings, and expected job prospects.

The Occupational Information Network (O*NET™ Online) is another tool that may help with job analysis. O*NET contains a database of worker attributes and job characteristics. To access O*NET, visit www.onetonline.org.

Classification — exempt or nonexempt

Properly classifying a position as exempt or nonexempt with regard to minimum wage and overtime can be challenging. Misclassification is a common — and potentially costly — problem area under the Fair Labor Standards Act (FLSA).

When an employee is properly classified as exempt, he or she is exempt from the FLSA's minimum wage and overtime pay requirements.

The FLSA outlines the following exemptions:

- Executive
- Administrative
- Professional (learned and creative)
- Outside sales
- Computer employee

The FLSA sets a fairly high standard for employees to meet a specific exemption. As stated before, the classification must be based on the actual duties performed by the employee (and in the case of the Learned Professional exemption, also on the educational requirements for the position).

An exemption determination cannot be based solely on the job title or job description. Although a job description can serve as a guide for employers, if outdated, it might not accurately reflect the actual duties and responsibilities of the position.

In addition to meeting a specific duties test, employees must also be paid on a salary basis at not less than \$455 per week in order to qualify as exempt. The minimum required salary may be higher under some state laws.

Because exemptions are generally narrowly defined under the FLSA, an employer should carefully check the exact terms and conditions for each. Related information is available from the Wage and Hour Division website at www.dol.gov/whd.

Motor carriers may classify certain employees as exempt from the FLSA's overtime requirements. Additionally, employers may make exceptions to the FLSA's minimum wage requirements for certain disabled employees, student learners, young workers, and full-time students. These exceptions also have specific requirements.

Part time, seasonal, temporary, etc.

Should a position be classified as full time, part time, seasonal, temporary, or some other classification? For the most part, state and federal laws only define an employee as a person "employed by an employer." The number of hours worked by an employee is generally at the employer's discretion, and the company can determine whether to classify someone as full time

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or part time. These distinctions are usually applied by employers to determine eligibility for discretionary benefits, and there is no maximum or minimum number of hours that employers are required to apply.

Additionally, there is no legal distinction between full time, part time, temporary, seasonal, or other classifications of workers. As with the distinction between full time and part time employees, employers commonly use these terms in handbooks to define who is eligible for certain benefits. For example, seasonal workers might not be eligible for vacation, or part time employees may have to pay a greater share of health insurance premiums. Since these are optional benefits, employers generally may define employee eligibility terms however they choose, or address them to any extent they choose.

For example, a company might define “temporary employees” as those hired for a specified project or other defined period of time (and need not even specify a limit, although if it will be longer than one year, consider a classification other than “temporary”). This assumes the person is hired directly by the organization.



If hiring a temp from a staffing agency, the individual is legally an employee of the agency and simply leased by another company. In this case, the temp probably isn’t subject to most handbook provisions (vacation, sick leave, etc.), although temporary employees could still be mentioned in certain places. For example, if a temporary employee is subjected to discrimination or harassment by another employee, the company would certainly want the temporary employee to report that conduct.

Otherwise, as noted, there aren’t any legal definitions for these terms. Employers may include them in the handbook, but the extent to which employee classifications should be mentioned really depends on how the company defines those categories, and whether they are (or are not) eligible for certain benefits.

Basically, the number of hours an employee will be expected to work is simply a matter to be worked out by the company. A full time employee might be expected to work five eight-hour days a week, and anyone who is regularly scheduled for fewer hours could be deemed part time.

In some cases, a part time employee will end up working longer hours (even overtime) for several weeks, or even for several months. However, there is no obligation to consider them full time during that period. If the expected working hours (over the course of a year) still supports the part time status, the employee can remain classified as part time, even while working

overtime. However, if the company expects the extended schedule to continue for a considerable amount of time, it should consider reclassifying the employee as full time.

Contract employees vs. contractors

Some employers think a contract employee and an independent contractor are essentially the same, but there's a significant difference between the two classifications. A company might hire contract employees to work for a defined period of time ranging from a few weeks to several years. And it might also "hire" independent contractors who may work for a few days, or even a few months.

At the most basic level, the law only recognizes two types of workers: employees and independent contractors. An employee can be full time, part time, seasonal, or a contract employee; however, they are all employees. Their time is usually directed by the company in that they are given specified hours of work, and are given direction and supervision on how to perform the work. They can also be subject to the Family and Medical Leave Act, FLSA, and similar laws. For example, if a company hires a worker under a contract, it will most likely control when and how to perform the expected work, and the individual will usually be paid in the form of hourly wages or weekly salary.

An independent contractor usually operates his or her own business, advertises for work, and retains control over the methods and procedures by which the work is performed. An independent contractor normally gets a pre-determined amount based on a contract, and only has to provide the desired outcome of a project. The company does not control the means or processes to achieve that outcome. A typical example would be a painting contractor hired to paint the building. The contractor will quote a rate, then perform the job using the processes he or she deems best.

While an employee can work under a contract which outlines the terms and conditions of employment (such as benefit eligibility), such an agreement does not make the worker an independent contractor. To be a non-employee like an independent contractor, the relationship must meet a number of criteria.

Having a contract is one consideration, but the existence of a contract does not make the worker an independent contractor. Normally, a contractor is in business for himself or herself (self-employed) and solicits business through advertisements, maintains a business location or phone number, and has bank accounts in the name of the business.

A "red flag" is when the worker establishes a business for the sole purpose of taking on a contract with a specific employer, but does not work for any other businesses. This often suggests that the company and/or the employee was attempting to evade certain taxes (such as Social Security and FICA) by "creating" a business that exists to avoid those requirements (which may result in an IRS audit) or that the employer was attempting to evade overtime by classifying the individual as a contractor (which may result in a wage and hour audit).

If the individual will be performing tasks under the direction or control of someone at the company, will be paid wages with no opportunity for making a profit or suffering a loss, and the "contract company" will cease to exist when the host no longer requires the services of this person, this indicates an "employment" relationship rather than a "contractor" relationship.

Finally, an employee must be paid through payroll, with income reported on a W-2. Payments to independent contractors are reported on IRS Form 1099. The Form 1099 is only used to report income to non-employees except in rare cases (e.g., payments made to a deceased employee in subsequent calendar years). If the relationship does not satisfy the contractor criteria, employers cannot use a 1099 since this would be evidence of attempted tax evasion.

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Note that there is no such thing as a “1099 employee” since a worker is either an employee (W-2) or an independent contractor (1099).

Misclassifying employees can be costly. A few years back, a class action lawsuit was filed against a major software corporation on behalf of thousands of employees who were classified as independent contractors. They sued for benefits as employees, and because the IRS determined that they were employees for tax purposes, the court held they should have been included in the benefit plans. The corporation settled for \$97 million.

Generally, the amount of control exercised over the individual determines the individual’s employment status. In the case noted above, the independent contractors worked on the same teams as the employees, shared the same supervisors, performed identical functions, worked the same hours, possessed admittance card keys, and worked only onsite. However, instead of being paid through payroll, they were paid through accounts payable after submitting an invoice. The company did not withhold income or FICA taxes from their pay. Employers must be very careful not to classify a worker as an independent contractor if the worker is, in fact, treated more like an employee.



Best practice

Changing from employee to contractor

Be wary of changing the status of a worker from employee to independent contractor. This raises a red flag, because an individual should only fit into one classification. If the individual has been working as an employee for some time (and has been paid through payroll), this is usually fairly strong evidence of an employment relationship.

An independent contractor normally performs work on a temporary basis, or for a specific project, where the nature of the work is not integral to the business. Other factors to consider are whether the contractor supplies his or her own equipment, whether the individual has the opportunity for profit or loss, and whether the individual makes himself or herself available for other jobs.

While it is possible for an independent contractor to work for only one employer for several years, these situations are unusual. An individual is most likely an employee if he or she is expected to have a long-term relationship, performs work that is integral to the services provided by the organization, uses equipment and facilities provided by the organization, and is under the company’s control for working hours and expected schedules.

To help determine how a worker should be classified, both the IRS and the Department of Labor offer multi-factor tests to determine whether a worker is an employee or not.

Five employment contracts myths

Employment contracts are sometimes used to set forth the terms and conditions of employment. Often addressed are things like the individual’s responsibilities, the duration of the job, the benefits offered, and the extent to which the employee can compete with the business upon

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leaving the organization. But many companies don't use employment contracts frequently, and for some, this limited use can lead to misconceptions.

***Myth #1:** Signing an employment contract makes the worker an independent contractor.* What differentiates an employee from an independent contractor is the type of relationship an employer has with the individual (including the amount of behavioral and financial control), not the presence or absence of a contract. For example, a company could have an employment contract indicating that a special type of employee will have restricted (or exclusive) benefits and that the company will need the individual's services for one calendar year. If the employer still controls the daily efforts of the individual, he or she is an employee, not an independent contractor. The fact that the terms of employment are laid out in writing doesn't change that relationship.

***Myth #2:** It is always better to have an employment contract to ensure that expectations are clear.* While employment contracts can help solidify expectations, there are times when employers won't benefit from the control an employment contract can offer. For example, business conditions can change, and the terms originally set forth in a contract may not fit a company's situation after a time. Where this is the case, an employer will either be held to the terms of the original contract or will need to revise it.

***Myth #3:** Employment contracts should be created for all employees or for none of them.* It's a rare case that an organization could ask all employees to sign the same employment contract. It's likely that one contract won't apply to all workers, and even more likely that a contract won't be appropriate for some workers. Employers are most likely to create employment contracts for only a select few employees who work in special or unusual positions within the organization.

***Myth #4:** Employment contracts must be written.* Typically, employment contracts will be on paper, but that doesn't mean unwritten contracts can't be created. Unfortunately, employers can unintentionally create verbal contracts. For example, an employer who tells an employee that she will have a job as long as her sales numbers remain at a certain level may be creating a contract of employment.

***Myth #5:** Even with an employment contract, the at-will relationship still exists between an employer and an employee.* For employers, one of the benefits of employment contracts is that they can require an employee to stay with an organization for a set amount of time. Of course, an employee always has free will to leave an organization if he/she so chooses, but a penalty written into the contract can discourage an employee's untimely exit. This option is especially valuable for positions that involve costly training or are difficult to fill. But remember, a contract that removes the at-will relationship for the employee also does so for the employer.



Cross reference

For more information on the at-will employment concept, see the section on **Probationary or introductory periods** in the **Onboarding and Training** tab.

Temporary employees

Temporary employees help support or supplement an employer's workforce during special circumstances. Many temporary employees are hired, either directly or through a staffing firm, to replace an absent worker who might be ill or on vacation. An employer also might hire a "temp" when:

- A position is not expected to last more than one year (or a comparable shorter amount of time);
- An additional worker is needed to assist in completing a specific, temporary project or workload;
- Certain positions involve intermittent (irregular) or seasonal (recurring annually) work schedules; or
- The organization needs additional help to assist during short-term skill shortages, such as those relating to new technology or temporary business contracts.

When bringing in temporary workers, it's possible to create morale issues with "regular" employees, particularly if it means they will get less overtime. To help alleviate some of the negative perceptions, give regular employees prior notice that temps will be coming in to help with the workload. Explain the reasons for it, and ask for their support and cooperation. On the other hand, it could be a relief to workers who have been working a great deal of overtime, as it may provide a much-needed break from an overly hectic work schedule.



When hired, a temporary employee is aware that the position is likely to be non-permanent. By defining the temporary nature of a job at the outset, organizations avoid the angst involved in terminating an employee who might have expected more job security. However, temporary employees hired directly by the employer will typically be eligible for unemployment benefits when their work for the company is finished. On the other hand, in jobs where turnover is high, using temps hired through a staffing firm may lead to fewer unemployment claims.

Temps require less recruiting and training than regular employees. They are typically available shortly after the employer contacts a temporary staffing agency, and temps are generally already trained in the work for which they were acquired.

Another benefit for employers in hiring temporary employees is the ability to see whether a temp will succeed as a regular employee. If a temporary worker exhibits sought-after qualities in the position they're filling, the employer may not have to put in the time to search for external candidates. In fact, turnover within help supply firms usually is very high because few individuals choose to work as temporaries for long; many accept offers to work full time for clients for whom they worked as temporary employees.

Some companies use temporary workers full time on an ongoing basis rather than employ permanent staff. They do this because the billed hourly rate for a temporary employee hired through a staffing firm is often lower than the hourly wage and benefit cost of regular workers in similar positions. Most employers that directly hire temporary employees do not extend paid vacation and holidays, paid sick leave, pension benefits, and health insurance benefits to them.

Temporary employees who are directly hired by an employer may be entitled to certain benefits, however. Under the Employee Retirement Income Security Act (ERISA), if an individual who is at least 21 years old works at least 1,000 hours in 12 consecutive months (about 20 hours a week) for an organization, he or she must be given the opportunity to participate in the organization's ERISA-covered pension or retirement plan. Employers might circumvent this requirement by hiring temps through a staffing agency, or making it a policy that direct-hire temporary workers may be hired only for assignments lasting less than a year.

Temporary assignments may last just a day or two, or up to several weeks, a year, or longer. There is no limit on the maximum duration that a person can work as a temp.



For more information on the duration of employment for temps, see the **Time limits** section in the following pages.

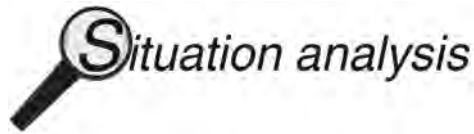
Using temps from a staffing agency

Usually temps are acquired through a staffing agency, and are legally employees of that agency. Temporary workers usually have an ongoing relationship with the agency as they move from job to job. The agency should be aware of the type of work that the temp worker is performing and should have an idea of the type of hazards encountered in each workplace where the worker will be assigned.

Generally, the temp agency will handle most of the HR-type administrative matters. As the employer of record, the staffing agency would be responsible for making tax deductions and handling other aspects of payroll for an individual, completing a Form I-9 for new hires, and scheduling vacation time. However, there will be times when a host company (the one leasing the temp) needs to get involved. For example, if the temporary worker is violating a safety procedure, the host employer should step in and take control of the situation.

Employers typically provide the day-to-day job assignments and supervision. There is a shared responsibility, however, to make sure the temporary worker receives adequate training, including on safety procedures and general employment matters (harassment or discrimination training, for example).

If a temp is violating company policy, such as engaging in harassing behavior, the host has an obligation to protect other employees from this type of workplace environment. However, it's important to let the temp agency handle any discipline that is needed. If there are performance problems with a temp worker, an employer should notify the temp agency.



Contingent workforce

The contingent workforce, made up of provisional, temporary employees, is a workforce to be reckoned with. This growing segment of the U.S. population enjoys independence and flexibility while offering employers the same. There are some drawbacks, however, to using contingent workers. Tax and labor liabilities are major risks employers take on when they employ contingent workers.

For employers, using contingent workers offers employers flexibility, “just-in-time” labor, and skilled, specialized workers matched to specific projects. It often saves the employer time in filling positions and saves money in wages, benefits, and taxes.

However, it can be hard for employers to assign oversight responsibility for temporary workers. Who is ultimately in charge: HR, the staffing agency, individual managers? Securing talent can be inefficient and costly. Of course, compliance issues can cause confusion. Using a well-designed Contingent Worker Management (CWM) system can greatly improve a company's bottom line. CWMs create a centralized process for hiring, managing vendor relationships, and pricing.

Temporary workers and the co-employment relationship

Many employers have unfounded fears of “creating” a co-employment relationship by hiring a temporary worker through a staffing agency, even though it cannot be avoided in many cases (and it doesn't necessarily impose additional obligations on the employer). There is no single source for information on co-employment, in part because the concept applies differently depending on the relevant law. Also, the term often is used interchangeably with the concept of joint employment.

In most cases where a host company uses temporary workers from a staffing agency, certain co-employment obligations will automatically exist. For example:

- A temp is protected by discrimination laws, which includes protection from actions of the host company, even if the staffing agency is the employer of record.
- A temporary worker is a joint employee under the Family and Medical Leave Act.

Employers cannot take any action to avoid creating a co-employment relationship, nor avoid liability, under these laws because the co-employment relationship is assumed to exist.

The Fair Labor Standards Act (FLSA) also recognizes joint employment where an individual works at multiple jobs for the same organization, or works to benefit more than one employer. Typically, the FLSA is concerned with overtime in instances where an individual performs duties at multiple locations of the same employer. For example, if an employee works at two grocery stores that are owned by the same company, all hours worked at both locations must be combined for overtime.

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However, the FLSA regulation is somewhat open to interpretation, stating, “Where the employee performs work which simultaneously benefits two or more employers ... a joint employment relationship generally will be considered to exist” (29 CFR §791.2, *Joint employment*).

As an example, a host employer could be liable for recordkeeping violations or back pay if it asks a temp to work without recording the hours, or denies a lunch break while still deducting 30 minutes for a meal period. The temp should report the problem to the staffing agency; but if a lawsuit arises, the host company could still face liability.

Some organizations believe that a finding of co-employment can be avoided by limiting the duration of the employment contract, refusing to include temps in social events, or issuing different ID badges. However, these factors are generally not relevant.



Time limits

Contrary to what is commonly believed, employers are not obligated to hire a temp after a certain period of time. Even so, some employers adopt term limits and stipulate that temps may only remain for a defined period of time (six months, for example) before the relationship will be terminated.

When evaluating co-employment obligations, term limits are not normally a factor compared to the behavioral control. The fact is that a host company exercises control over temps by assigning the day-to-day activities and telling them what hours to work. Therefore, it is probably a co-employer even if the person only stays a few days or weeks. There is no legal standard for term limits, and host employers are unlikely to face a situation where a co-employment relationship would not be found after five months, but would be established after six months, based solely on the duration of the relationship.

Of course, employers can still communicate expectations regarding the assignment (perhaps it only needs a temp for two weeks), and can explain the provisions for terminating the relationship. However, a host employer can otherwise keep a temp for years without ever hiring the individual.

Social events and ID badges

Some sources suggest that refusing to invite temps to holiday parties or social events may help defer a finding of co-employment. Like limited terms, this is unlikely to be a factor. Once again, the host company exercises control over the day-to-day tasks and work schedules. Giving an invitation to a social event is unlikely to be the one thing that pushes the company into a co-employment situation.

The same concept applies to identification badges. Employers can certainly issue different badges for temps, or provide different access privileges. However, a company does this for legitimate reasons, not merely to prevent a finding of co-employment.

On the other hand, refusing to extend social invitations and issuing different ID badges can be factors for independent contractors. This is because the type of relationship is one factor used by the IRS to classify independent contractor relationships. Employers should avoid treating independent contractors the same as other employees, and avoid blurring the line between employees and independent contractors.

Onboarding and engagement

Excluding temps from social events has a downside; the company might reduce the temp's feeling of connection and engagement. Don't discount the fact that temps have a lot to contribute, especially in a temp-to-hire situation. There's no reason to treat them like outsiders, especially if some temps stay with the company for months or even years. Giving them a tour of the facilities and introducing them to everyone might even increase productivity.

Since a host company is going to be exercising control anyway, it might find that temps are more willing to make suggestions and contributions if they feel like they are part of the team, not an adjunct to it. Fostering this feeling does not make a host the sole employer, and the host employer would have a number of legal responsibilities as a co-employer in any case. Given that this liability cannot be avoided, consider making temps feel at home and encouraging them to contribute their ideas, just like any employee.

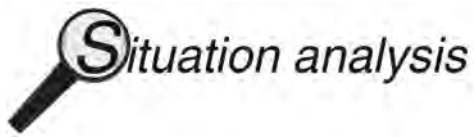
Interns

For some people, the word "intern" denotes a young, coffee-fetching, abuse-taking college student or recent graduate — but internships are evolving. Savvy employers view internships as a necessary element of recruiting and staffing. These organizations look for capable, driven interns with long-term interest in the company.

Businesses have long appreciated the minimal costs associated with hiring interns, since most do not receive benefits and are paid less than regular employees (or are not paid at all). But companies often don't realize that while the hourly cost of interns can be small, their contributions to the company don't have to be.

Instead of assigning menial tasks to interns and keeping them separate from the "real" employees, employers should give them actual work, complete with challenges and opportunities for problem solving. When interns aren't gaining practical experience or an understanding of a company's inner-workings, they aren't likely to remain interested in a long-term career. The cost of extra time spent with an intern often will be recouped if he or she makes a long-term commitment to the company.

Regular employees crave a sense of belonging and appreciation in addition to opportunities to grow and be challenged on a daily basis, and interns are no different. Treating them as an organization would its regular employees gives them a true taste of a career with the company. Working with promising interns could translate into an investment in the company's future.



Intern or volunteer?

Public (government) employers, as well as non-profit employers, sometimes question whether they can use interns, and whether the same criteria apply. For these employers, the status of an intern as paid or unpaid may not be as relevant. The reason is simple: these employers can accept unpaid volunteers who actually perform work that benefits the organization.

Generally, an unpaid volunteer should be performing work that is typically associated with volunteer duties (such as helping answer phones during a fund-raising event), as opposed to performing tasks that would normally be done by employees of the organization.

In that sense, a public or non-profit organization may still have an intern who is learning about the organization, but is not actually a volunteer. If so, the same criteria should apply as to whether the individual should be paid.

Paid or unpaid?

It's a noble thing to want to help out a student. Employers may want to help coach and train the student by having him or her work for the company. But since the student is learning, does he or she deserve wages?

It depends. An intern isn't free labor, even if the intern is learning while he or she is working. A six-factor Department of Labor test can be used to determine if an intern must be paid. For an intern to be unpaid, all of the following factors must be present:

1. The training is similar to training the student would find in a vocational school;
2. The training is for the benefit of the student/intern;
3. The training doesn't replace the work of regular employees;
4. The intern is not entitled to a job at the end of the internship;
5. The intern understands he or she is not entitled to wages for the training; and
6. The employer that provides the training not only doesn't benefit from it, but in fact, the training may hamper normal business functions.

As an example of this last factor, if the company has an intern who is answering calls, filling out forms, and providing actual work, the company benefits from the intern's work, even though the intern may be learning the business at the same time. In this situation, the intern must be paid.

If, on the other hand, regular employees take time out of regular operations to sit and train the student on various aspects of the business (not providing job training, but educating the intern for his or her own benefit), then the presence of the intern is actually keeping someone from doing the job, and does not benefit the company. In this second example, the intern may be unpaid.



Job sharing

Although employers don't hear too much about companies offering job sharing opportunities, it does occur in some types of businesses. As defined by the Department of Labor, job sharing is simply two or more employees doing the work of one full time worker. In other situations, it may include two or more employees that have unrelated part time positions that share in the same budget line — still equaling only one full time worker. They also must share the salary, vacation, and benefit plans for one position, as divided upon the amount of time each one works.

Both individuals must be able to handle the job as efficiently as one single person. The match-up of the two individuals is critical to the success of job sharing. Carefully evaluate the two (or more) potential candidates to see if they would make a good team. If the candidates are already internal employees it may be easier to evaluate them. Outside applicants will have to be carefully screened to ensure they are a good fit for the job. A detailed job description is a must to avoid any misunderstandings about each individual's responsibilities.

Advantages

Aside from the obvious — two employees that are able to work part time hours and still enjoy a portion of the benefits of full time employees — job sharing can be a recruitment and retention tool. If the employees are satisfied and feel valued, it can increase morale and productivity. What better way for a parent, student, or retiree to stay involved and active in the workforce while being able to manage personal responsibilities on their own time? By providing a more flexible schedule, the company can retain skilled and experienced workers while avoiding absenteeism.

The cost advantages to the company should also be mentioned. A single individual working more than 40 hours per week must be paid overtime. Yet, when two part time workers put in extra time (e.g., 30 hours each), there is no obligation to pay overtime wages.

Disadvantages

Not all companies or departments are able to function using job sharing. Those that can might find it a bit cumbersome when scheduling tasks or hours for each individual. If the hours are split evenly (e.g., one works mornings and the other works afternoons; one works the first 2.5

days and the other works the second 2.5 days in the week) the administration is quite simple. The two must agree to work out any needed time off among themselves.

Additionally, duties must be clearly spelled out so that there is no mistake about who does what. This may be the biggest obstacle to job sharing: a lack of communication allowing continuity of work. The transition must be seamless between the individuals, so a short overlap of time may be necessary to catch each other up on their daily progress.



For more information on job sharing as an alternative to layoffs, see the **Layoffs** area of the **Involuntary (employer initiated)** tab.

Determining compensation

Compensation involves much more than simply ensuring nonexempt employees receive over-time pay and at least minimum wage.

Employers need to determine their compensation structure and policies. These, of course, should be developed in line with the organization's goals and company culture, and should be designed to keep the organization competitive.

Some industries have customary pay practices and levels. These may make some pay or salary evaluations easier. However, organizations still benefit from evaluating their pay structures based on information gathered from external sources (how much employees in local equivalent positions are compensated, for example) and internal sources (such as how competitive the organization wishes to be with their pay or salary levels).

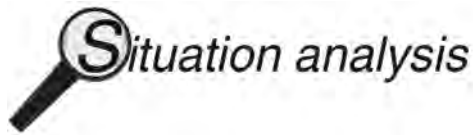
Other criteria may come into play as well. The type of position typically dictates the type of compensation. For example, sales positions usually involve commission payments and other incentives. A production job, on the other hand, might be paid on a flat hourly or piece-rate basis.

Whatever form an organization's compensation plan takes, the employer should be sure each employee understands how their job fits into the system.

Compensation's role in competition

An employer's first step should be to define its corporate strategy in regard to compensating employees. In terms of worker pay, is the company's intent to lead, lag, or match the market?

The particular strategy an organization uses often depends on its overall health, where it currently stands in the marketplace, and its plans for the future. Generally, a market leader attempts to recruit the best people available by leading the competition in pay and/or benefits.



The side effects of overly compensating employees

There may be a downside to paying employees more than the market dictates. Consider the hypothetical story of Leading Company, Inc. (LCI).

In an effort to recruit the best and brightest employees, LCI offers a substantial pay and benefits package — one that puts its local competitors to shame. LCI's compensation offering is well known in the community, and jobs there are highly sought after. In fact, the company's benefits and salary package was one of the main reasons that Stu took a job with LCI.

When he started with the company, Stu was engaged and motivated — a model employee. Two years into his career with LCI, however, Stu began to realize that his job was no longer the right fit for him.

If he worked for a company that provided average compensation, Stu thinks he could justify finding other employment. But he feels compelled to stay with LCI, knowing that competitors won't match the company's generous pay package.

Unfortunately, LCI's attempts retain to employees were, in the end, a little bit *too* convincing. Stu, now uninvested in his role with LCI, continues to slog to work, Monday through Friday, putting in just enough effort to keep his job, but never going above and beyond his employer's expectations.

There are many reasons employers pay above what the market requires, and securing the best talent is often a leading motivator. But while money is a motivator, it isn't the only one, and it may not even be the best one. Studies have shown that employees value rewards like being “kept in the loop” and being given the opportunity to work on important project more than they value money.

If a company hinges its retention efforts entirely on compensation, there will probably come a time for some employees when that's simply not enough to keep them motivated and dedicated to the employer. This is the point at which money could become precisely the kind of motivator that employers don't want.

Employers might pay more than competitors because they expect more from employees. Perhaps workers need to be more qualified, or the organization expects a higher level of dedication and engagement from them.

Whatever an employer expects when it offers high salaries and generous benefits packages, it must be communicated. Perhaps even more importantly, these expectations must be regularly measured and enforced.

On the opposite end of the spectrum, a market lagger might not be in an economic position to offer employees premium compensation. However, a company might also lag the market because it is able to recruit acceptable new hires with the pay and benefit package that it offers, even if that package is less than those offered by competitors. Or, it might be that there are no competitors in that geographic market, such as in the case of a large manufacturing facility located in a remote area.

Most companies fall into the “match” category, where they simply want to keep up with their competitors. That requires keeping in touch with what other employers are offering in terms of pay and benefits.

Pay basis

Some employees are paid on an hourly basis, others on a salary basis, and still others may be paid on a productivity basis. Organizations need to determine which of their employees will be paid on which basis.

Hourly employees

Often, production and service workers are paid on an hourly basis. This method is very simple to understand, as employees are provided a rate per hour, say \$10.50. For every hour they work, they earn that rate. Of course, if overtime is worked, the employee is paid one and one-half times the hourly rate.

An hourly employee need not be paid for hours not worked. For example, if a production worker works an average of 40 hours a week, but is sick one day and works only 32 hours that week, he or she need only be paid for the 32 hours actually worked.

Salaried employees

Employees such as professionals, supervisors, or managers are commonly classified as exempt and paid on a salary basis. This means that instead of an hourly rate, the employee is provided a set amount for a specified time frame. For example, an employee may be paid a salary of \$800 per week.

Paying employees on a salary basis means that the pay is generally not subject to reduction because of variations in the quality or quantity of the work performed.

Just because employees are compensated on a salary basis does not mean they are automatically exempt from overtime pay. To properly determine whether or not a position is exempt from overtime provisions, an analysis of the job salary **and** duties must be performed.

Piece-rate basis

Some jobs are compensated at piece rates. This means that employees are paid based upon the quantity of output generated. For example, an employee works on a one-person assembly line putting electronic parts into a printed circuit board. The employee receives \$3 for every board completed. The employee assembles 150 boards per week, and works 40 hours per week. This employee would receive \$450 per week. Obviously, the compensation may differ from week to week based on output.

Employees compensated by this method still need to receive at least the federal minimum wage. If recalculated for an approximate hourly basis, the employee would be paid \$11.25 per hour ($\$450/40 = \$11.25$). For hours in excess of 40, the employee would be paid at 1.5 times this rate. Rather than calculating the rate each week, some employers will pay 1.5 times the piece rate during overtime (such as \$4.50 for every board completed during overtime hours).

There are variations on these pay bases, of course. Sales employees are often compensated on a commission basis, at least partially. Their compensation might also include a quota bonus plan.

Managers and executives might be compensated with such things as bonuses, long-term income plans, and other incentives.

Again, like so many other elements of HR, the determination of pay basis depends upon such things as the organization's goals, principles, and culture. Whatever basis is chosen should be in line with, and feed into, the company's strategic plan.



Pay administration

Pay administration is a management tool that enables organizations to control personnel costs, increase employee morale, and reduce workforce turnover. A formal pay system provides a means of rewarding individuals for their contributions to the success of the firm, while making sure the organization receives a fair return on its investment in employee pay.

Formal pay plans have their benefits. In business — particularly small business — good people make the difference between organizational success and risk of failure. A good plan may make the difference between retaining good people and losing them.

A formal pay plan, one that lets employees know where they currently stand with respect to take-home dollars and their compensation potential, won't solve all employee relations problems. It will, however, eliminate an area of doubt and rumor that may keep the workforce anxious, unhappy, and less loyal and more willing to seek other employment.

Pay plans allow employees to know and understand that compensation is equitable (fair) and equable (uniform), and isn't set by impulse. They know what to expect and what they can strive for. Such a plan can help organizations recruit, retain, and motivate employees — ultimately building a solid foundation for a successful business.

Developing the plan

A foremost concern in creating a formal pay administration plan is to get the acceptance, understanding, and support of management and supervisory employees. A well-defined, thoroughly discussed, and properly understood plan is a prerequisite for success.

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A formal pay plan doesn't have to be costly in time and money. Formal doesn't mean complex. In fact, the more elaborate the plan, the more difficult it is to practice, communicate, and carry out.

To establish a pay plan, employers should:

- Define the jobs in the organization,
- Evaluate the jobs,
- Price the jobs,
- Install the plan,
- Communicate the plan to employees, and
- Update the plan when necessary.

Define the jobs

Unless an employer knows each job's specifications and requirements, it can't compare jobs for pay purposes. Therefore, the initial step in installing a formal pay administration plan is preparing a job description for each position.

After the jobs have been defined, they need to be evaluated and put into perspective with other jobs.



See the previous section on **Job descriptions and classification** for more information on how to create a job description.

Job evaluation

Through job evaluations, employers determine the relative worth of jobs in an organization. An effective job evaluation system is an important step in attracting and retaining employees. That's because job evaluation is used to establish fair methods for setting wage levels.

Nobody knows a scientific, precise way of deciding the exact worth of a particular job. Human judgment is the only way to put a dollar value on work. Many job evaluation programs are available; however, off-the-shelf solutions seldom fit into the individual needs of a single organization. Each company needs to identify which program(s) are most effective for its purposes. What works for some companies may not necessarily work for others.

There are five types of general job evaluation systems. They are:

1. Job ranking/rating
 2. Position/job classification
 3. Point-factor
-

4. Factor-comparison

5. Market-based

The first four evaluation systems are concerned with internal equity. Internal equity is the concept of paying employees in proportion to the relative value of their job. Internal equity seeks to place the same value on jobs that are similar in type, difficulty, responsibility, and qualifications. Jobs that require higher skills or responsibility are considered more valuable to an organization than lower-skilled jobs.

Job evaluation systems are based on quantitative or nonquantitative methods. The first two previously discussed are nonquantitative systems; their goals are to establish a relative order of jobs. However, there isn't a numeric value assigned to a job, so there isn't a way to determine how much more important one job is compared to another. For example, say an administrative assistant position is ranked as being more valuable than an assembly line position. Is the administrative assistant position twice as valuable or just 20 percent more valuable?

A simple ranking system comparing one job to another may be all that's needed in a small organization where there are few job titles and the hierarchy is obvious. However, in larger organizations where there is less "spread" between types of jobs, a more exact method is required. A quantitative method for job evaluation involves evaluating specific factors and using a scale to determine the relative worth of each position.

Point-factor and factor-comparison are quantitative systems that attempt to establish the relative worth of one job compared to another. Specific factors are evaluated; a value is assigned to the factor; and the values are totaled to provide a score that shows how valuable one job is in relation to another.

Market-based evaluation is not really an evaluation at all. It's an external survey of a job's prevailing wage that is used to set the relative "worth" of a job.

Job ranking/rating

A good job evaluation method for firms with 100 or fewer employees is simple ranking. It's a guess, but a well-controlled guess.

This evaluation system looks at a job and ranks it against other jobs in the organization. The end result is a list of jobs ranked from the lowest to highest, based on how valuable each job is to the organization.

It is a simple, subjective, nonquantitative process which can be easily misused unless there is a consistent, structured way of performing the ranking. Again, suppose an administrative assistant position is considered more important than an assembly line position. Why is it more important? Is there a valid reason or was it merely a subjective choice?

The problem is amplified when there are many jobs to be ranked, since there often isn't that much difference between jobs.



Simple ranking

Under the simple-ranking system, job descriptions might be compared against each other by ranking them according to difficulty and responsibility. Judgment is used to generate a document showing an array of jobs and the relative value of each to the company.

After ranking the job descriptions by value to the firm, jobs similar in scope and responsibility are grouped into the same pay grade. Then the groups are arranged in a series of pay levels from highest to lowest. The number of levels depends on the total number of jobs and types of work in the organization, but for a company with 100 or fewer jobs, 10 or 12 pay levels is usually acceptable.

Position/job classification

This evaluation system involves the grouping of positions or jobs into classifications that have been determined in advance. Like the job ranking system, job classification uses a nonquantitative approach. The end result is to develop classes among the jobs being reviewed. A class would be composed of jobs that share specific qualities or characteristics. Classes are then broken down into grades to which specific pay levels are assigned. For example, a senior accountant would be in the same class as a mid-level accountant, but at a different grade level.

A good example of the job classification system would be the General Schedule system that the federal government uses. These are available on the Office of Personnel Management website at www.opm.gov.

Point-factor

The point-factor evaluation system involves the grouping of positions into classes, which are sufficiently similar because of:

- The type or subject-matter of work,
- Degree of difficulty,
- Level of responsibility, and
- The qualifications needed to perform the work.

The point-factor system is a quantitative method of evaluation that uses a numerical or point-factor evaluation method as opposed to looking at the whole job and using a subjective method of job analysis. The points (or score) indicate how valuable one job is compared to another.

Specific compensable factors are used to evaluate relative job worth. Examples of compensable factors include, but are not limited to, the following:

- Experience,
- Education,
- Problem-solving ability,
- Leadership responsibility, and
- Physical demands.

The point-factor system takes time and resources to develop and is complex to implement.

Factor-comparison

Like the point-factor evaluation system, the factor-comparison system uses compensable factors (which are then weighted and assigned dollar values) to rank a job. The factor comparison system uses the pay rates from a small number of key jobs and extrapolates that information to build job scales that are applied to all other jobs being evaluated.

Market-based

The premise that an organization's pay range for a job should be equivalent to other similar jobs in the marketplace, by itself, is not really a proper basis for an evaluation system. However, taking the market's temperature regarding similar jobs is a good way to develop a job-worth hierarchy. The secret to an effective market-based evaluation system lies in pricing jobs in the labor market in which the organization wants to be competitive.

Once again, employers should be sure to compare job descriptions, not just job titles. Great differences may exist between what one organization and another call their jobs — one firm's janitor may be another's environmental control engineer.

Unlike the four evaluation systems mentioned earlier, the market-based evaluation is used by organizations concerned with external equity in their pay practices. However, larger organizations with unique jobs often cannot rely on a market-based approach to price their jobs.

Pricing the jobs

Once jobs have been ranked and grouped into pay levels, an employer may begin pricing them. Several options are available, including market pricing, pay ranges, and broadbanding. Each option has various advantages and disadvantages, and the method chosen may depend on the complexity of the workplace, the number of positions available, and what the employer hopes to achieve through pricing.

An employer might even use one method for some employees (such as office personnel) but another method for a different group of employees (such as manufacturing plant workers). For example, if the company has a union, the collective bargaining agreement may dictate what method is used for union members, but employers could still choose another method for non-union employees.



Market pricing

Although there are many methods that a company can use to determine the monetary value to place on a job, market pricing is one of the most popular.

As mentioned before, in addition to looking to information from within the organization in establishing a pay system, employers also should look outside at the going rates for similar work in the area. Only those jobs on each level that are easiest to describe and are most common in local industry need be surveyed. It is good practice to survey jobs with more than one level; for example, junior and senior typists.

Resources such as time and money may not be available for an employer to make its own survey, and competitors are likely to be unwilling to share salary information. However, data may be available from sources such as a local chamber of commerce, major survey firms in the area, or from such national sources as the U.S. Bureau of Labor Statistics, the Administrative Management Society, or the American Management Association. Trade associations also may be enlisted to help determine the going rate for one or more jobs at each pay level; however, membership may be required.

When an employer decides to price a job and determine the going pay rate in the external marketplace, its main focus should be on the job responsibilities rather than the job title. The same job title may be used across companies, but the responsibilities can differ at each one depending upon factors such as location, size of company, and so on. Comparing job duties is a much more accurate measurement than comparing job titles. In market pricing, the match on job duties should be as close to 70 percent or higher as possible.

There are some unique jobs that are extremely difficult or impossible to benchmark since they may have no direct match externally. These are positions which often combine the duties of several jobs into one title. In cases such as this, a weighted approach should be taken to

determine a suitable mix. For example, a position that spends 70 percent of the time on payroll processing and 30 percent of the time on administrative assistant duties should be calculated accordingly using data from the two benchmarked jobs. The weighting will more clearly indicate the true value of the hybrid position.

To obtain market pricing information, most organizations either contract with a third party, such as a consultant, which surveys other organizations' pay practices, or rely on published survey data. There are several types of salary surveys available to locate pertinent data on market pricing. Several common sources are:

- Telephone surveys conducted among local companies;
- Consulting firms offering compensation and/or human resources assistance;
- The Economics Research Institute (ERI);
- The Bureau of Labor Statistics (BLS);
- Customized surveys an employer designs and implements;
- Local or regional associations; and
- National online salary surveys.

Once an employer determines which type of survey contains the best data for its needs, the organization can undergo an analysis process using the available information.

One area not to be overlooked when market pricing a job is the effective date of the salary survey being used. If the data is several months old or more, an organization needs to “age” or advance the salary data and bring it to the current date using the pay increase factors which have occurred since the effective date. An employer can also “age” data for a job it may be intending to fill in the near future by using the projected salary increase rate it believes will occur.

A report can often be generated showing the various salary quartiles (e.g., 25 percent, median, 75 percent) for the position. It can be further narrowed down by level, which can include experience, education/training, skills, competencies, or knowledge. Another way to look at each job (when applicable) is senior, mid, junior, or entry level. Each category used will give a more accurate view of that job title in a particular marketplace.

Another area that is often a focus in market pricing is the total compensation for the job. This means an employer will need the base salary, as well as what the targets are in the external marketplace for short-term and long-term incentives. This is usually shown as a percentage of salary, often based upon performance. Many executive positions focus on the total compensation package rather than base salary only.

Market pricing is not an exact science, but rather somewhat of an art. Employers must do all the research and analyze the data — and then do their best to arrive at a fair conclusion in order to remain competitive in the workplace.

Employee Relations Essentials

Establishing pay ranges

Employers also commonly use pay ranges in establishing job pricing. When finished with a comparison of jobs, the employer computes an average rate (the averages in this publication are purely arbitrary — insert the organization's information) for each job and enter it on a worksheet, as in the following:

Pay Level	Position	Average Weekly Rate
1	Clerk-typist	\$574
2	Word processor	\$635
3	Payroll clerk	\$687
4	Secretary	\$723
5	Accounting clerk	\$741
6	Computer operator	\$815
(and so on)		

The average rates may need to be adjusted somewhat to maintain a distinction between pay levels. The going rates for each pay level can then become the midpoints of pay level ranges. (Midpoints may be set above or below the survey average, based on the company's ability to pay, the length of the workweek, and the type and value of available benefit programs.)

Typically, the minimum rate in a level is 85 percent and the maximum rate 115 percent of the midpoint. With this arrangement, an employee can increase his or her earnings by 35 percent without a job change; thus, there can be performance incentives without promotions.

A pay range for each position may resemble the following example:

Pay range—sales clerk

Pay Level	Minimum	Midpoint	Maximum
1	\$490	\$575	\$660
2	\$530	\$625	\$720
3	\$580	\$685	\$785
4	\$615	\$725	\$835
5	\$690	\$815	\$935
(and so on)			

A pay range will indicate where employees' pay and pay potential stand in relation to the market rates for their kinds of work. It should reveal at a glance where changes are needed to achieve rates that are fair within the organization and pay that is competitive with similar businesses in the community.

Broadbanding

Although not the most common method of salary administration today, broadbanding has been slowly gaining ground since its appearance in the late 1980s when General Electric implemented a broadbanding system.

Most companies use a traditional salary grading system which may have as many as 30 job grades. A broadbanding system, on the other hand, reduces that to a fewer number of "bands." It combines several salary grades with narrow pay ranges into one band with a wider spread. Each position or job code must be slotted into one of the bands — usually based upon market pricing.

There are two types of broadband structure:

1. Broad grades — a structure with several moderately wide pay ranges, and
2. Career bands — a structure with one or few very wide pay ranges.

Generally, organizations move to broadbanding by consolidating existing grades and pay ranges.

Traditional salary ranges have a minimum/midpoint/maximum for each grade level. Broadband ranges may have these also, although some omit the midpoint altogether. Some structures are further divided into zones (i.e., zone A, B, C in each band). However, this seems to negate the main purpose of reducing the number of pay levels.

Broadbanding provides less structure than traditional pay grade systems. This relative lack of structure encourages employee flexibility and development by way of horizontal job moves. It also can improve organizational ability to:

- **Enhance and reward performance.** Broadbanding's wide pay ranges allow organizations to reward high performance (and employees to earn pay increases) without position change or promotion.
- **Compete with the external market.** Broadbanding's wide pay ranges can help organizations recruit and retain critical talent by giving greater weight to the candidate's abilities, market rates, and competitors' offers — and less weight to the grade and pay structure — in individual pay decisions.
- **Simplify job evaluation.** Broadbanding reduces the number of levels of work (i.e., grades). This supports streamlining, automation, and delegation of job evaluation.
- **Make job evaluation and pay reflect the organization's mission and work.** For example, an employer might use six project-related factors to describe band levels and value an employee's contributions.
- **Establish and manage a flexible workforce.** Broadbanding reduces the number of distinctions between levels and (often) lines of work. This can reduce the amount of paperwork needed to adjust assignments in response to mission and workload changes, and refocus management and employee attention from job evaluation and position-based distinctions to mission accomplishment.

There are, however, disadvantages and challenges to this method of pay administration. Potential issues include:

- **Managing cost.** Broadband systems lack the structure and cost containment provided by traditional pay structures. Organizations that adopt broadbanding must select appropriate means of managing cost, which may include:
 - Position management,
 - Salary and pay-increase budgets,
 - Changes to performance management systems,
 - New methods of pay progression (ways for employees to move through a pay range),
 - Guidelines on starting salaries, and
 - New approaches to organizational budgeting and performance measurement.

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- **Communication.** Broadband systems make fewer job evaluation distinctions than traditional systems. Consequently, broadband systems send fewer “messages” about employee roles, hierarchy, and what the organization values. (Consider that many organizations and employees unconsciously use job title and pay grade as indicators of role and status.) Organizations that adopt broadbanding must continually communicate the purpose of broadbanding and focus employee attention on performance.
- **Performance management.** Under broadbanding, job evaluation carries less weight in pay decisions. The weight is generally transferred to performance measures, such as organizational results, individual performance ratings, or competency assessments. For broadbanding to succeed, organizations must ensure that these measures support strategic goals and are credible.
- **Linking pay to labor markets.** Broadband structures do not, by themselves, establish a clear linkage between individual pay and market rates. Organizations must determine how they wish to relate individual pay to the labor market and take steps to establish and maintain that relationship. Necessary measures usually include collecting market data, communicating market rates, establishing pay increase budgets, and monitoring pay levels.

It will also be necessary to train managers more thoroughly on the use of this method since the reliance on market data increases as does their accountability. Employees will also need to be made aware of the change and may find difficulty in understanding it.

Despite its disadvantages, broadbanding may be the answer for an organization that wants to promote career development and learning among its employees, as well as allowing for internal transfers and pay increases without requiring a promotion or move to the next salary grade.

Whichever job-pricing method an organization chooses, the planned pay structure should assist in tying individual rates of pay to job performance and contribution to company goals. It should also provide enough flexibility to handle special situations.



Installing the plan

Despite having a general pay plan, each employee must be paid on an individual basis. The next thing to consider is how to administer the plan for individual pay increases.

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Beyond the requirement to pay employees minimum wage and overtime when necessary, there are no laws that cover wage adjustments (outside of government contracts and discriminatory practices, perhaps). However, employees not only expect to be compensated for their services, they expect the compensation to increase.

There are several approaches to pay increases:

- Merit increases to recognize performance and contribution;
- Promotion increases for employees assigned to different jobs at higher pay levels;
- Probationary increases for newer employees who have attained the necessary skills and experience to function effectively;
- Tenure increases for time with the company; and
- General cost-of-living increases to help employees stay current with inflation and to keep pay competitive.

These approaches are the most common, but there are many variations. Most annual increases are for cost of living, tenure, or employment market reasons. Several, all, or combinations of the increase methods can be used.

Whichever pay increase system the organization uses, it should, like other HR systems, be in line with the goals of the organization. It would be generous to provide for 50 percent increases every year to all employees, but such generosity would severely cut into the profits of the organization. In contrast, providing only a modest increase may put the company at risk of losing its most valuable employees, who likely expect something in return for their hard work and dedication.

Some increases in wages are expected. If the minimum wage increases, employees who are compensated at that rate would automatically see an increase. Other reasons for general, across-the-board increases include those that accommodate cost-of-living increases, market equity, or the need to remain competitive.

In many instances, a number of employees may be performing the same job and maintaining the same level of productivity. This would be true for jobs that involve assembly lines, for example, since the output is not controlled by any one, single employee, but is at the mercy of the speed of the assembly line. In these situations, all employees of the assembly line may be considered for wage increases simultaneously, and perhaps automatically.

Organizations may have policies that indicate that tenure is a basis for wage increases, and as time passes, employees' wages increase automatically. This can also be combined with productivity-based increases.

Wage adjustments should be made with pay grades in mind. If a job has a salary range between \$8.50 and \$14, a high-performer or a long-time employee may be reaching the top of the salary range or pay grade for that job.

In some situations, employees may have a direct impact on their own level of productivity, and should be considered for wage increases based upon their own output. For example, a press operator may produce more product than other press operators in an organization. The first press operator may be a candidate for a wage increase while the others may not, because the first operator's productivity was greater. In this situation, the first press operator may receive a greater increase than the other press operators because of the output level.

Organizations may have a formal method of determining wage adjustments based on employee performance. These may include methods for evaluating and ranking the actual performance.

Promotions and demotions also have an effect on wage adjustments. These actions may place employees into different pay grades or salary ranges. In some cases, a demotion or job restructuring will result in a decrease in wages. Typically, the employee must be given advanced notice of any decrease before working any hours at the reduced rate.

HR professionals are not the only people that may be involved with wage adjustments. Supervisors and managers are often more aware of not only the requirements of jobs they oversee, but also of the employees' performance of those jobs. Given that, supervisors and managers may be the ones indicating the need for an adjustment and the level of the adjustment.

Another issue to consider is if a union is involved in the organization; the collective bargaining agreement may have requirements for wage adjustments. These must be taken into account when providing any wage adjustment.

It is helpful to have a form to document salary increases and record the reasons. Over the years, such records are good references for pay administration purposes.

Communicating the plan

Once the pay administration plan is in place, employees must be told about it. If setting up a good program is foremost in importance, a close second is explaining the plan to employees.

Some employers write a personal letter to each employee, others hold meetings to explain the plan and answer questions, and still others do both.

However employees are informed, the messenger needs to be clear, honest, and open in explaining how the plan works. This is a prime opportunity to build goodwill and good relations with employees. Organizations should be sure supervisors understand and can explain the plan to their people. Explaining the plan to new hires is essential, and it is a good idea to review the plan periodically with all employees.

Updating the plan

An employer should review the pay administration plan at least annually and adjust where necessary. If the plan is adjusted, supervisory personnel must be retrained to the adjustment. During the annual review of the pay plan, the employer should ask several important questions: Is this working? Is the organization attracting and getting the kind of employees it wants or is it just making do? What is the turnover rate? Do employees care about the business?

In the end, it is not the elegance of the plan nor the beauty of the forms and administration that matters; it is how the pay administration plan helps achieve the objectives of the business.

Benefits

Employee benefits play an increasingly important role in the lives of employees and their families and have a significant financial and administrative impact on a business. Most companies operate in an environment in which an educated workforce has come to expect a comprehensive benefits program. Indeed, the absence of a program or an inadequate program can seriously hinder a company's ability to attract and keep good personnel.

Employers must be aware of these issues and be ready to make informed decisions when they select employee benefits. Designing the right benefit plan is a complex task. There are many issues to consider, including tax and legal aspects, funding, and finding the right vendors or administrators.

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For many employers, a benefit plan is an integral part of total compensation because employers either pay the entire cost of a benefit plan or have employees contribute a small portion of premium costs for their coverage.

There are several ways to describe an employee benefit plan. It protects employees and their families from economic hardship brought about by sickness, disability, death, or unemployment. It also provides retirement income to employees and their families, and provides a system of leave or time off from work.



The employer must provide, or pay in whole or in part for, certain legally mandated benefits and insurance coverage. These include:

- Social security,
- Unemployment insurance,
- Workers' compensation,
- Leave under the Family and Medical Leave Act (FMLA), and
- Leave due to military service obligations under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

However, it is optional benefits that affect an employer's competitiveness in recruiting and retention.

Health benefit plans

One of the most common benefits organizations offer to their employees are health plans.

A serious illness or injury can be devastating to an employee and his or her family. It can threaten their emotional and economic well-being. Thus, adequate health insurance is important to employees and is part of a solid group plan.

In addition to helping attract and keep high-quality employees, group health plans:

- Relieve employees of some of the anxiety of health care costs by providing the care they need before illness becomes disabling. In theory, this helps employers avoid costly employee sick days.
- Usually cost less than purchasing several individual policies with comparable coverage. Moreover, there are tax advantages to offering health care benefits. Employer contributions may be deductible for the company, and the insurance is not generally considered taxable income for employees.

There are different types of health plans to consider. Employers may choose either an insured plan (also known as an indemnity or fee-for-service plan) or a pre-paid plan (sometimes known as a health maintenance organization).

Traditional indemnity plans

An indemnity plan allows the employee to choose his or her own physician. The employee typically pays for the medical care and then files a claim form with the insurance company for reimbursement.

These plans use deductibles and coinsurance as well. A deductible is a fixed amount of medical expenses an employee pays before the insurance plan reimburses any more expenses. The deductible can range from \$100 to \$1,000 a year. Coinsurance is a percentage of medical expenses the employee pays, with the plan paying the remaining portion. A typical coinsurance amount is 20 percent, with the plan paying 80 percent of approved medical expenses.

Listed below are the most common types of insurance arrangements (indemnity plans) providing health care to groups of employees:

1. A basic health insurance plan, covering hospitalization, surgery, and physicians' care in the hospital.
2. A major medical insurance plan, usually supplementing a basic plan by reimbursing charges not paid by that plan.
3. A comprehensive plan, covering both hospital and medical care with one common deductible and coinsurance feature.

Health maintenance organizations

Health maintenance organizations (HMOs) provide health care for their members through a network of hospitals and physicians. Comprehensive benefits typically include preventive care, such as physical examinations, well baby care and immunizations, and stop-smoking and weight control programs.

The main characteristics of HMOs are as follows:

- The choice of primary care providers is limited to one physician within a network; however, there is frequently a wide choice for the primary care physician.
- There is no coverage outside the HMO network of hospitals and physicians.
- Costs are lower, due to limited choice. Physicians are encouraged to keep patients healthy; accordingly, they often are paid on a per capita basis, regardless of how much care the patient needs.

The employer prepays HMO premiums on a fixed, per-employee basis. Employees do not have to apply for reimbursement of charges, but they may have small copayments for medical services.

PPOs

Preferred provider organizations (PPOs) fall between the conventional insurance and health maintenance organizations, and are offered by conventional insurance underwriters. A PPO is a network of physicians and/or hospitals that contracts with a health insurer or employer to provide health care to employees at predetermined discounted rates.

PPOs offer a broad choice of health care providers. However, because of this broader choice, they are more expensive than HMOs.

A few additional items to keep in mind about PPOs:

- Although there is no requirement for employees to use the PPO providers, there are strong financial reasons to do so.
- PPOs may have less comprehensive benefits than HMOs, but the benefits usually can meet almost any need.
- PPO providers usually collect payments directly from insurers.

Self-insurance

Rising health care costs are prompting small business owners to take a look at a form of health care coverage previously considered an option only for big business: self-insurance.

With self-insurance, the business predetermines and then pays a portion or all of the medical expenses of employees in a manner similar to that of traditional health care providers. Funding comes through establishment of a trust or a simple reserve account. As with other health care plans, the employee may pay a portion of the cost in premiums. Catastrophic coverage is usually provided through a stop-loss policy, a type of coinsurance purchased by the company.

The plan may be administered directly by the company or through an administrative services contract.

The advantages of self-insurance are:

- Programs can be flexible. They are designed to reflect employee needs, including medical and dental care, prescriptions, and so on.
- Mandated benefit laws and state insurance premium taxes do not affect these plans.
- The employer retains control over the timing and amount of funds paid into the plan and can manage costs more directly.
- Administration of these plans can be more efficient.
- Over time, these plans can save money.

The drawbacks to self-insurance are:

- Health care is costly and heavy claims years may prove extraordinarily expensive.
- Long-term commitment is necessary to achieve savings.

Self-insurance can be a viable option for small businesses, but it should be undertaken only after careful study.

Prior to making a decision on a plan, employers should consider what the company and workers want in a health plan, and all costs that will be associated with the plan. Next, the employer should investigate the quality of potential insurance carriers and each plan, including the benefits and restrictions.



Best practice

How to find good health insurance plans

Finding a benefit plan that meets budget constraints and fills the needs of employees is crucial. To reduce risk, select insurance underwriters with top industry ratings. Check with other trade or business associations and state regulators on the history of the particular plan under consideration. Among the sources to check are:

- A local chamber of commerce,
 - Independent insurance agents,
 - Trade associations,
 - State departments (or commissions) of insurance,
 - Benefit consultants or actuaries, and
 - Community business leaders.
-

Dental plans

Many companies include a dental plan in their benefits lineup because typically it is not an expensive benefit to maintain.

There are several types of dental plans available. The most common include indemnity (any provider is allowed), DHMO (only certain dentists are included in the network), or a PPO network (discounts are given for using dentists in the provider network, although outside providers can also be used for higher fees).

A common phrase used to identify the fee paid for dental services is called “usual, customary, and reasonable” (UCR). Insurance companies determine the UCR cost based on typical fees charged by other dental providers for each service. Any amount charged by the dentist above the UCR amount, then, is borne by the patient.

In addition, direct reimbursement plans (self-funded by the employer) and discount dental plans may be offered as well, although neither is considered an insurance plan.

A typical dental plan may cover four basic areas of dental care:

1. Preventive: regular check-ups, routine cleanings, and topical fluoride treatments
 2. Basic restorative: X-rays, simple extractions, fillings, space maintainers, and root canals
 3. Major restorative: crowns, bridges, oral surgery, endodontics, periodontics, surgical extractions, dental implants, and dentures
-

4. Orthodontia: usually restricted to separate lifetime maximum (e.g., \$1,500) and age limit (e.g., to age 19)

An annual maximum of benefits (e.g., \$1,000 per individual) is usually established for the plan. Additionally, a deductible (e.g., \$50 for an individual; \$100 for a family) often applies to most services, except preventive care. A reimbursement rate is determined by the category of care (e.g., preventive might be at 100 percent, basic at 80 percent, and major restorative at 50 percent).



Disability benefits

A disability plan provides income replacement for an employee who cannot work due to a non-work-related illness or accident. These plans are either short term or long term and are distinct from workers' compensation.

Disability insurance policies can cover an individual's own occupation or any occupation. "Own occupation" policies protect individuals who are unable to perform the substantial and major duties of their specific job. In contrast, an "any occupation" policy provides disability payments only if an individual is incapable of performing work of any kind.

Short-term disability

Short-term disability provides an income for the early part of a disability. A policy may pay benefits for two weeks up to two years.

Benefits may begin on the first or the eighth day of disability and are usually paid for a maximum of 26 weeks. The employee's salary determines the benefit level, ranging from 60 to 80 percent of pay.

The employer may choose to specify a number of days of sick leave paid at 100 percent of salary. The employee can use these before short-term disability begins.

Long-term disability

Long-term disability (LTD) helps replace income for an extended period of time and usually begin after short-term benefits conclude.

LTD benefits continue for the length of the disability or until normal retirement. Again, benefit levels are a percentage of the employee's pay, usually between 60 and 80 percent. Social security disability frequently offsets employer-provided LTD benefits. Thus, if an employee qualifies for social security disability benefits, these are deducted from benefits paid by the employer.



Best practice

Shopping for disability policies

When researching disability insurance benefits, it is best to talk to several insurance companies. Here are some good questions to ask about disability policies:

- What is the definition of disability in the company's policy?
 - How long will the benefits continue?
 - How much is the benefit amount?
 - Will the benefit amount adjust for inflation?
 - Is there a waiting period for benefits?
 - Is the amount affected by social security, workers' compensation, or other benefits?
 - Are partial benefits available if an employee is released for light duty or part time work?
 - What are the exclusions in the policy?
 - Is the issuing company strong financially?
 - Does the plan include rehabilitation and return-to-work incentives?
-

Life insurance

Traditionally, life insurance pays death benefits to beneficiaries of employees who die during their working years. There are two main types of life insurance:

1. Survivor income plans, which make regular payments to survivors, and
2. Group life insurance plans, which normally make lump-sum payments to specified beneficiaries.

Protection provided by one-year, renewable, group term life insurance, with no cash surrender value or paid-up insurance benefit, is very popular. Frequently, health insurance programs offer this coverage.

An employer should use the same principles for selecting a life insurance program as it does for selecting health insurance.

While life insurance is a fairly popular offering, employers should be aware that it usually isn't a benefit likely to attract employees. Obviously, the benefits are only payable upon the employee's death, so it isn't something that employees can utilize during employment (e.g., it is not as desirable as health or dental insurance). Studies have indicated that life insurance is among the least important factors that applicants consider when looking for an employer.

Retirement benefits

A financially secure retirement is a goal of all Americans. Since many individuals will spend one-fourth to one-fifth of their lives in retirement, it is more essential than ever to begin preparations at an early age. Most financial planners report that an individual requires about 75 percent of his or her pre-retirement income to maintain the same standard of living enjoyed during one's working years.

A qualified retirement plan (one meeting Internal Revenue Service specifications) can attract and reward employees. A number of retirement plans are available, including the 401(k) plan and the traditional pension plan, known as a defined benefit plan. Accountants, banks, insurance and investment professionals, as well as other financial institutions, can provide information on specific retirement plan products.

Defined benefit plans

A defined benefit plan promises a specified monthly benefit at retirement. The plan may state this promised benefit as an exact dollar amount, such as \$100 per month at retirement. More commonly, it may calculate a benefit through a plan formula that considers such factors as salary and service; for example, one percent of average salary for the last five years of employment for every year of service with an employer. The benefits in most traditional defined benefit plans are protected, within certain limitations, by federal insurance provided through the Pension Benefit Guaranty Corporation (PBGC).

With this plan, the benefits an employee will receive are predetermined by a specific formula — typically calculated by an actuary annually. The promised benefit is tied to the employee's earnings, length of service, or both. The employer is responsible for making sure that the funds are available when needed (the employer bears funding and investment risks of the plan).

Defined benefit plans are typically better for older employees (usually age 45 and older). For example, these plans can provide the ability to fund for years of employment before the inception of the plan. While some contribution flexibility is available, factors determining the cost of promised benefits (e.g., number and ages of employees, rates of return on investments) will mandate the level of required deposits to the plan.

The price of providing a higher degree of tax savings and being able to rapidly shelter larger sums of retirement capital is having to meet additional reporting requirements. Defined benefit plans typically cost more to administer, requiring certifications by enrolled actuaries, and approval of terminations by both the IRS and the PBGC.

One study showed that a majority of Fortune 500 companies now extend benefits to domestic partners. Presumably, this shift away from a more traditional benefit plan has been made because it is what employees want, and therefore, it can be used as an incentive to attract and retain employees who might otherwise seek employment somewhere else in order to obtain the desired benefits.

At the same time, another study has shown that there has been a decrease in the number of traditional pension plans that are being offered by Fortune 1000 companies. A traditional, or "defined benefit" pension plan, is one in which the company guarantees a certain benefit

amount to an employee upon retirement. However, if the company fails to properly fund the plan, the money may not be there when the employee retires (Enron employees fell victim to this).

More companies are switching to defined contribution plans such as 401(k)s, which are subject to market fluctuations, and do not guarantee retirement savings. Though based partly on economic factors, the switch to these types of plans also reflects the changing expectations of the workforce. Just as it is no longer expected that an employee will work at one company for the duration of his or her career, it is also no longer expected that a company will take care of its employees for life. Employees are expected to invest wisely and be responsible for their own retirement nest egg.



Defined contribution plans

Also known as individual account plans, defined contribution plans specify the amount of funds placed in a participant's account (for example, 10 percent of salary). The amount of funds accumulated and the investment gains or losses solely determine the benefit received at retirement. The employer bears no responsibility for investment returns, although the employer does bear a fiduciary responsibility to select or offer a choice of sound investment options.

There are several basic types of defined contribution plans, including simplified employee pension plans, profit sharing plans, money purchase plans, and 401(k) plans.

Simplified employee pensions

A simplified employee pension (SEP) plan is ideal for the self-employed or for small corporations as it requires minimum paperwork and offers a maximum of flexibility. It is the only employer plan requiring no IRS approval, no initial filings, and no annual reporting to the government.

Although SEPs are designed as pensions, they are actually IRAs. Unlike regular IRAs, however, contributions are not limited to \$2,000. The total deferral can be up to \$30,000 or 15 percent of annual earnings (about 13 percent for self-employment income), whichever is less.

Contributions must be made on a nondiscriminatory basis to all employees who are at least age 21 and who have worked for any part of three of the past five years earning a minimal amount, which is adjusted annually for inflation. Contributions can vary from year to year — employers may even skip entire years — and must be paid no later than the due date of an employer's income tax return, including extensions. Once made, the entire contribution is owned by the employee.

Complete specifications for the plan can be found in IRS Form 5305. The form itself serves as the plan document, requiring only the insertion of business name, the checking of three boxes and a signature. The form is not filed with the IRS, but rather copied for all employees and then placed in the firm's files.

Under another type of SEP, called a Salary Reduction SEP (SAR-SEP), employees can defer, or set aside, a portion of pay as a pre-tax contribution. Deferred contributions, like other SEP contributions, are excludable from the employee's gross income for calculating federal income tax. However, SAR-SEPs are allowed only if fewer than 25 employees were employed during the preceding year. In addition, periodic testing is required.

Individual retirement accounts

The simplest of all retirement plans is the individual retirement account (IRA), authorized by Congress in 1974. An IRA is a tax-favored savings plan that allows eligible participants to make contributions with pre-tax dollars and defer taxation on earnings until retirement.

There are several limitations to IRAs:

- Contributions cannot exceed the lesser of \$2,000 per year or 100 percent of compensation (\$2,250 for a spousal IRA).
- Contributions may be made only up to age 70 and deposits must be made before filing individual taxes (April 15).
- The account holder may not use funds to purchase life insurance or collectibles (except gold or silver coins issued by the U.S. government).
- If a person (or his or her spouse) is an active participant in an employer-maintained retirement plan with income exceeding certain levels (\$25,000 for single persons or \$40,000 for married couples), the IRA contribution may be partially or totally nondeductible.

Businesses may sponsor IRA savings programs for employees. Through payroll deduction, employees set aside small amounts for deposit into an IRA contract. An employer can make IRA contributions for all or select employees. In such instances, the recipient's reported annual taxable salary will include the IRA contribution, although this amount would then be deducted (conditions permitting) by the employee on his or her year-end tax filing.

Profit sharing plans

Similar to a SEP, a profit sharing plan offers the flexibility of making contributions — up to 15 percent of compensation paid to all employees, but no more than \$30,000 for any one individual. Alternatively, rather than selecting a percentage, a flat amount (for example, \$100,000) could be allocated among eligible employees. Contributions are keyed to the existence of profits, although they may be possible even if the company suffers a loss in the taxable year.

Profit sharing plans differ from SEPs in several distinct ways. An employer can apply a vesting schedule to the company's contributions, based on an employee's length of service with the company. If an employee is terminated before becoming fully vested, his or her funds will revert

to the plan or be reallocated among the remaining participants. In addition, profit sharing plans permit the exclusion of part time employees and can be used for loan purposes.

Profit sharing plans, as all other qualified retirement plans, require the preparation of formal trust documents as well as annual tax filings. A standardized trust or prototype plan will often satisfy requirements and will typically be less expensive and simpler to operate than an individually designed plan.

Money purchase plans

With a money purchase plan, the employer is usually committed to making annual contributions equal to a designated percentage of each employee's compensation. This percentage may not exceed 25 percent of earned income, with a maximum contribution of \$30,000 per individual. The contribution percentage must be the same for all employees participating in the plan and contributions must be made even in years in which there are no net profits.

Unlike profit sharing plans, money purchase plans do not allow for integration with Social Security. Integration is the ability to set aside a larger proportion of the contribution for those earning over the Social Security maximum wage base. A combination of both profit sharing and money purchase plans provides optimal flexibility and higher contribution limits.



401(k)/Profit sharing plans

The Revenue Act of 1978 added Section 401(k) to the Internal Revenue Code and, since then, the growth of these tax-deferred savings plans has been dramatic.

The basic idea of a 401(k) is simple: it is a profit sharing plan adopted by an employer that permits employees to set aside a portion of their compensation through payroll deduction for retirement savings. The amounts set aside are not taxed to the employee and are a tax deductible business expense for the employer.

An employer's discretionary matching contribution can provide incentive for employee participation as well as serve as an employee benefit. The employer can match any percentage of the employees' contributions. Employer contributions can be capped, to limit costs, and a vesting schedule can be applied to employer deposits (employees are always 100 percent vested in their own contributions).

For employees, the opportunity to reduce federal — and often state and local — taxes through participation in a 401(k) plan offers significant benefits. While savings are intended for retirement, certain types of loans can provide employees with access to their funds — employees repay borrowed principal plus interest to their own account. From an employer's standpoint, the 401(k) can be the least expensive and most flexible of all retirement plans.

Special nondiscrimination tests apply to 401(k) plans, which may limit the amount of deferrals that highly compensated employees are allowed to make. As a result, a minimal employer contribution may be required.

Employee stock ownership plans

A special breed of qualified plan, an employee stock ownership plan (ESOP), provides retirement benefits for employees. In addition, an ESOP can be used as a market for company stock, for financing the company's growth, to increase the company's cash flow or as an estate planning tool.

ESOP funds must be primarily invested in employer securities with provisions that are fairly similar to those of profit sharing plans. Tax deductible contributions to the plan are used to buy stock for eligible employees. On retirement, the employee may take the shares or redeem them for cash.

Complicated rules must be adhered to in the establishment and maintenance of an ESOP plan. Expert advice should be sought.

Designing the right retirement plan

Selecting the right pension plan for a corporation results from a process of identifying business needs and expectations, including:

- Need for flexibility,
- Current age of key employees,
- Current number of employees and plans for growth,
- Need for tax deductions (present/future), and
- Maximization of retirement benefits.



Best practice

Questions to ask before finalizing a pension plan

Does the plan require a given level of contribution each year?

Do the plan provisions (eligibility, hours of service, and vesting of employer contributions) meet current and future needs?

What are the costs of establishing and administering a plan and trust, including providing annual employee reports? For how long are these costs guaranteed?

What are the investment options offered? Which offer guarantees and which do not? What is the 10-year historical performance of the various investments?

Are there any loads (charges) associated with deposits (front-end charges) or surrenders (rear-end charges) from the plan?

Can employees make individual investment selections and what types of reports do participants receive?

Flexible compensation or cafeteria plans

To accommodate today's many variations in family relationships, lifestyles, and values, flexible compensation or cafeteria benefit plans have emerged. In addition to helping meet employee needs, cafeteria plans also help employers control overall benefit costs.

Cafeteria plans offer employees a minimum level or core of basic benefits. Employees are then able to choose from several levels of supplemental coverage or different benefit packages. All packages are of relatively equal value, but can be selected to help employees achieve personal goals or meet differing needs, such as health coverage (family, dental, vision), tax reduction (thrift plans, salary reduction), retirement income (pension plans), or specialized services (day care, financial planning, legal services).

Careful planning and communication are the keys to the success of flexible compensation. Employees must fully understand their options to make choices of greatest benefit to them and their families. Both employers and employees must fully understand the tax consequences of the various options.

Leave

The old concept of two weeks with pay per year has given way to a wide variety of paid and unpaid leave plans for all businesses. Among the typical options are:

- Annual leave
 - Holidays (national and state)
 - Sick leave
 - Personal leave (birthday, other reason of choice)
 - Emergency leave
-

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- Compassionate leave (funeral, family illness)
- Religious observance
- Community service (voting, jury duty, court witness, National Guard, Civil Air Patrol, volunteer fire department)
- Education/training
- Leave without pay
- Leave of absence (paid or unpaid)
- Parental (formerly maternity) leave

In a strict sense, paying people for not working is a costly, unprofitable concept. However, time off from the grind is a tradition of the American workplace, and rightly so. The benefits of leave can far outweigh costs. Among the many benefits for the employee are rest, relaxation, a new perspective, travel, pursuit of hobbies, and release from daily tensions. The employer also benefits — the employee returns refreshed from the break in daily routine, possibly with new ideas and renewed energy for doing a better job. Employers also can observe the performance of employees in new situations, as they fill in for their vacationing coworkers, potentially leading to better allocation of workforce talents.



Cross reference

For more information about work schedules, see the **Work/life balance & wellness** section in the **Rewards and Advancement** tab.

In determining employee eligibility for leave, an employer must find answers to many questions, including the following:

- How much paid leave time can the company afford per year?
- How many categories of leave should there be?
- Can employees carry over unused leave from one year to the next? If so, how much?
- Are there leave rights during probation?
- Who gets first choice of dates in scheduling annual leave? How are conflicts resolved? By seniority?
- Can employees borrow leave in advance?
- At what point does extended/borrowed paid leave become unpaid leave and extended/borrowed unpaid leave become unemployment?
- Are employees eligible for more leave after a certain number of years with the company?

Employers must determine when eligibility for leave begins: Immediately? After the first year? Many employers establish a paid annual leave schedule by declaring employees eligible for so many hours leave after they have worked a specified number of hours; for example, two hours leave for every 80 hours worked or one day for so many weeks worked.

However, employers should remember that they may be required to offer unpaid leave under various laws, including the Family and Medical Leave Act and equivalent state laws.

Although the vast majority of employees will not abuse time allowed for compassionate, emergency, or other leave categories, clear policies should be established on requesting such leave and on its duration.

Granting paid or unpaid leave can be a costly benefit. Depending on the nature of an employee's work, an employer may need to require overtime from other employees or hire temporary employees to cover the absence.



Best practice

Questions to ask before finalizing a leave plan

- Is the business open on all holidays? If not, on which ones?
 - If the business is open on holidays, does it work with full or limited staff, paying them time-and-a-half as may be required by law?
 - How many hours/days are allowed as leave for voting, jury duty, religious observance, funerals, etc?
 - How are insured benefits handled during unpaid leave?
 - Which state laws affect leave?
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Perks

While all employees are usually eligible for benefits such as health and other insurance, retirement plans, and leave, key employees have come to expect certain additional benefits or perks related to their increased levels of responsibility.

Like basic benefits, perks help attract and keep good employees. Employers can balance the far higher cost of providing some perks with expectations of increased production from the employees who benefit.

Key employees responsible for sales or generating contacts for new business might receive consideration for company automobiles, personal expense accounts, professional memberships and publications, club memberships, spouse travel on company business, credit cards, entertainment allowances, end-of-year bonuses, and sabbaticals.

All employees might receive consideration for employee assistance programs (EAPs), physical exercise facilities (if the company has them), parking, tuition programs, dependent day care, holiday gifts, service awards, credit unions, matched donations to universities, colleges and/or charities, physical examinations or health screenings when offered, and merchandise discounts.

Some employers offer legal services, loans, and mortgages on a case-by-case basis, while others provide employer-employee cost sharing of such perks as physical exercise facilities, dependent day care, parking, and perhaps, some health screening services.

Before beginning any program of perks, check current tax law for treatment of each item. Can the company deduct it as a business expense? Will it become taxable income for the employee?



Making benefits choices

Before they implement any benefit plan, employers should ask themselves some questions:

- How much is the company willing to pay for this coverage?
- What kinds of benefits interest employees? Does the company want employee input?
- What should the benefits plan accomplish? Is it more important to protect employees from economic hardship now (health insurance and disability benefits) or in the future (retirement benefits)? Is there a way to do both?
- Does the employer want to administer the benefits plan, or does it want the administration done by an insurance carrier?
- What is the composition of the employee group today? Can the organization project what it might look like in the future?

Adapting benefits to changing needs

Some changes in benefits packages are based on economic necessity. It is difficult to find a private sector employer these days who pays 100 percent of the premiums for health insurance because it has simply become too expensive to do so; and yet in the not-so-distant past, that was the norm.

Knowing what employees need in terms of benefits should also be a factor in determining what type of benefit package an employer offers. What worked in the past may not be addressing the needs of the workforce today.

Employers should periodically take stock of their benefit packages to determine whether they are still in line with the needs of their workforce. For example, if an organization's workforce in the last five years has become primarily one of families with young children, does the company's benefit package reflect that? Does the package offer flexible scheduling, day care subsidies, or elder care benefits for employees who may be taking care of children and/or aging parents?

If an employer's workforce contains many unmarried individuals who live with domestic partners, offering domestic partner benefits might help in retention efforts.

If an organization's workforce is largely made up of older individuals, day care subsidies likely won't be of much use to them. Instead, the employer might want to consider health care benefits that offer a wider array of routine health services (such as yearly mammograms or prostate cancer screenings). These may encourage older workers to remain healthy and promote early detection of health problems. The employer may also want to consider a program that allows employees to transition into retirement gradually by offering part time hours on a limited basis.

By responding to the needs of employees and potential applicants, an organization may become more competitive in the marketplace. Being adaptable is the key to being competitive.

Legal issues

The government has certain requirements for qualified pension or profit sharing plans, as well as for most health and welfare plans. It is essential for employers to stay current on developments that may affect their plans. Even small changes in tax laws can have a significant impact on a plan's ability to help the employer and its employees achieve their goals.

An adequate benefit program has become essential to today's successful business, large or small. With careful planning, a company and its employees can enjoy good health and retirement protection at a cost the business can afford.

If an employer is serious about offering employees a satisfactory benefit plan, the next step may be to contact an insurance broker or carrier, the local chamber of commerce, or trade associations. There may be off-the-shelf products that will suit the company's needs. A benefit consultant or actuary can help employers design specialized benefit programs.

Executive compensation

Many companies have separate or simply more extensive compensation packages for their executive officers. But these more generous compensation packages often come with additional legal requirements.

For public companies, special rules apply to executive compensation. Executives' earnings must be disclosed to the federal government, and shareholders must be given an advisory vote on the compensation of the most highly compensated executives. "Say-on-pay" votes must be held at least once every three years. These companies may also be required to conduct a shareholder advisory vote to approve "golden parachute" severance arrangements.



Advertising/posting positions

Employers aren't actually required to advertise a position. Rather, the organization could simply choose a current employee who seems a likely fit and make the offer. While this does happen on occasion, it cannot be used for every position. For one thing, hiring an internal candidate will simply create another opening that must be filled. Also, other employees who were not given an offer may have been interested in the position, and may be upset that they weren't given an opportunity to compete for it. Finally, the best candidate may be in another department, and allowing one supervisor to "poach" a valued employee from another team is likely to create conflict.

Many employers begin by advertising internally, allowing current employees the opportunity for potential advancement or transfer. If no internal candidates can be found, the company may expand the search to external sources. While this creates another opening, the position vacated may have been at a lower level, and finding a likely replacement (as well as training that replacement) may be less challenging.

Employers may also allow current employees to suggest candidates or otherwise make referrals. This can reduce advertising costs and help identify likely candidates without sorting through a large number of applications. These individuals may even be considered with other applicants, since referrals may not be provided until the opening has already been posted externally.

When it comes to staffing, the best defense is a good offense, and this requires planning. Organizations benefit from knowing when positions or employees will need to be added, how many will be needed, which departments or locations will require staff, and what might be good sources for candidates — all before a position opens.

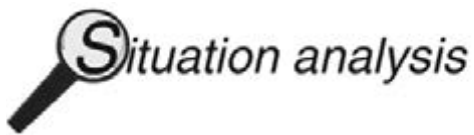
Through careful analysis to identify the staffing needs, an organization stays on track with its goals. It's able to direct its recruiting efforts toward the most talent-filled and efficient sources, and do so in a cost-effective manner. After all, before an organization can advertise a job, it needs to know what type of applicants it's looking for.

Limiting internal transfers

Allowing employees to apply for internal job openings is a great way to provide upward mobility, but employers may have to place restrictions on which employees are eligible for a transfer.

Many employers restrict internal transfers until the employee has been with the company for a specified amount of time, such as six months or one year. Similarly, employees who accept a transfer might be ineligible to move again for at least one year. However, exceptions might be included for openings within the same department, shift, or job category. For example, a night shift forklift operator might be allowed to apply for the same position on the day shift, even if he or she hasn't been with the company for the specified amount of time.

The actual time frames are up to the company, but should consider factors such as the "learning curve" for a new job. Some jobs may require a full year (or more) before the employee is a full contributor, and allowing someone to switch jobs within that time may be inefficient (not to mention frustrating for the manager or team that is losing someone just as that person was starting to contribute).



Should managers be allowed to prohibit a transfer?

If an employee is eligible to apply for another position according to your policy, it is generally not appropriate to allow that employee's manager to deny the transfer. Managers may feel frustrated when the team is understaffed, or when the transferring employee was a valuable contributor. However, allowing a manager to "block" a transfer is likely to create even more frustration for the affected employee.

A common reason for employees to change jobs is a perceived lack of upward mobility. If the employee is not permitted to advance within the company, the individual is likely to seek opportunities with another employer. In that sense, blocking the transfer may not prevent the employee from leaving the department — and the company could lose a valuable employee altogether.

For suggested ways to incentivize managers to encourage employee mobility, see the **Rewards and Advancement** tab in the **Management and Development** area.

Employers may also require that an employee have a performance rating of “meets expectations” (or higher) to be eligible for a transfer. If someone is below expectations or is under a performance improvement plan, the individual should be deemed ineligible for a transfer. This helps ensure that only the best candidates are accepted for open positions, and also prevents managers from passing along a problem employee for another manager to address.

Even if an employee is not meeting expectations, however, exceptions could be available. For example, an employee might have done well in one position, then applied for a transfer, but can’t seem to get the hang of the new job. That individual could be allowed to return to the former position if a suitable opening is available (or might be demoted), even if the employee would not yet be eligible to transfer.

Similarly, an employee might be allowed to transfer under special circumstances as approved by the company. For instance, if an employee has a family emergency and requests to work part time in order to care for a parent, a transfer to a suitable position may be permitted, even if the employee would otherwise be deemed ineligible for the transfer.

Staffing

Sometimes staffing needs will be obvious. If an employee announces plans to retire from or leave an integral position, the organization likely knows the type of replacement needed. Other times, however, staffing needs require planning and creativity.

In an attempt to see what staffing needs will exist in the future, it is often beneficial to look into the past. This is known as a needs analysis. Some general questions may be asked to help determine some of this information:

- Where does the organization want to be? (If the organization is to grow, will there be the need for additional positions?)
- Where is the organization now? (How many employees does the organization have now, and are there enough?)
- What costs are involved? (Will any new positions be justified, and is the organization prepared to incur the cost of the positions?)
- How will the organization get where it wants to be? (What will new positions be, and what recruiting methods will be used?)

Included in these questions is the application of the supply vs. demand concept. By answering “Where does the organization want to be,” an employer gets a sense of its demand for labor. If the organization is in a growth mode, there may be a demand for additional staff. A sense of the organization’s “supply” comes from answering the question, “Where is the organization now?” This is where an organization looks at such things as where it looks for potential candidates, and whether existing staff members can meet current and future goals.

Forecasting

One way to help determine what may happen in the future is to look at how the organization has been doing. Have sales continued to increase? Can a correlation be made as to the quantifiable organizational activity and staff levels? For example, for the past 10 years, for every \$100,000 worth of sales increases, two more positions have been required. If the company is expected to grow by \$500,000 in the next year, there may be the need for ten more positions in that time frame.

Another means of determining future needs is to look at turnover analysis. If the organization has a consistent turnover rate and nothing indicates the pattern will change, the pattern should continue. This can help employers project the number of positions that will likely need to be filled over a particular time period.

Costs

As with anything else that requires resources, staffing involves costs. The organization needs to be aware of how much it may cost to add positions or train existing employees, if that is what needs to be done to meet the goals. The labor costs need to be identified and managed.

Finally, the organization will have to determine what methods will be used to recruit candidates for new or open positions. Will they look internally? Will they look locally? Will they need to expand their search?

Sources for candidates

Where organizations look for potential candidates can require a bit of forethought. If the position requires an uncommon talent, the search may have to go beyond local boundaries, and perhaps beyond the continental boundaries. If the position is one which has many interested and viable candidates, the customary sources may be tapped.

Some sources may fluctuate based on the market and economy, which affects unemployment and other factors that influence how effective customary sources may be.

Not only are the sources important to identify, but also the method used for attracting candidates. Local sources may benefit from an ad in the newspaper or at a local college. National sources may require ads in industry publications or the efforts of a third party.

Many organizations will look internally for candidates, as well as externally. This is an effective cost-conscious method. Organizations that do not have a sufficiently diverse workforce may not wish to rely exclusively on internal sources, since it will hinder their diversity efforts.

If a collective bargaining agreement is involved, it may also need to be considered.



Best practice

Hiring for high-turnover positions

Employers that find themselves in the unenviable position of continually hiring for high-turnover positions tend to wonder: “Is there is a better way to attract and retain employees who will stay?” Of course, companies may be restrained somewhat by the compensation or benefit package they have to work with, and there may be nothing they can do about that. However, there may be steps an organization can take to try to retain employees in those high-turnover positions.

Use referrals. Studies show that there is a relatively higher retention rate among employees who are hired based on referrals by other employees. An employer can use its internal network to generate employment leads. The organization might ask employees if they know anyone who might be interested, and create incentives for them to refer a friend or acquaintance for a position with the company. Employees may have a personal stake in the outcome of their referral, so they want that person to be a good fit. There may also be some incentive on the part of the referred person to stay on, so as not to let the referring employee down.

Be sure the position is well-defined. Employers should be sure candidates know what they are getting into. An organization will be doing them (and itself) a favor by

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giving applicants an accurate picture of the job. Remember, being a “good fit” applies not only to the position itself, but also to the corporate culture. If an individual is used to working in a free-form, liberal type of environment, it may be difficult for that individual to work in a more structured, conservative type of environment. On the flip side, if a candidate is used to a very structured, hierarchical environment, he or she may not adapt well to a position that requires the employee to take more initiative to get the job done with less oversight.

Pre-screen. Employers waste less time by pre-screening applicants before putting them through a full interview process. Pre-screening might involve conducting an interview over the phone to gather basic information to get a preliminary feel for whether that candidate should move forward in the process or not. If an employer finds a candidate is not the right fit for a job over the phone, the employer can quickly move on to another candidate without having expended a great deal of time and resources.

Make the application process easy. When an employer has a hard time filling certain positions, it might take a look at its application form and application process. If applicants are bogged down with too much paperwork at the very beginning, it may discourage some from applying at all. Employers should try to simplify and/or streamline the process. An employer that accepts only online applications, for example, might be adding an extra layer of difficulty to the process for some people and may discourage them from applying.

Offer incentives. An organization may need to offer some type of incentive for employees to stay in high-turnover positions. This could take the form of a bonus after working a certain number of months, for example.

Recruiting

Once an organization has identified its staffing needs, it should consider reviewing its recruiting process.

The goal of recruitment is to attract a qualified pool of candidates from which to choose a new employee or employees. Employers not only want to find and hire the right people, they also want to get the most “bang for their buck,” or the best qualified candidates without spending a great deal of money to find them.

A recruitment strategy will depend on a number of variables:

- The type of position being filled (laborer, technical, professional, executive);
 - The location of the business;
 - The difficulty in finding someone with the right skills for the position;
 - The pay and benefits the employer can offer for the position (taking into consideration external and internal pay equity issues);
 - The conditions of the labor market, either locally, regionally, or nationally;
 - Available time and budget;
 - Affirmative action goals;
 - Relocation issues, if any; and
 - Available recruiting sources.
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Organizations may need to be creative and think outside the box when looking for an edge in the search for talent. Still, there are certain tried-and-true ways to improve recruiting efforts.

Know the job. Make sure everyone involved in hiring for the position is on the same page in terms of what the job requires, and what skills and attributes are desired.

Know attitudes. Know if the hiring manager is just looking for a warm body, and discern if a candidate is just looking for a paycheck. In either case, it's not a recipe for success.

Form a recruitment team. Get star employees involved in recruiting. Have them speak at job fairs, college campuses, and give them time off to network in various associations. The investment may well be worth it.

Know the market. If an employer down the road regularly lays off employees seasonally, tap into that market for workers, or even set up an informal arrangement.

Make applying for a job easy. Be sure there are multiple means of applying for a job. Don't over-complicate the application process, either online or in paper form. Candidates may get so bogged down in the process that they give up, or form a negative impression that the company must be inefficient to present such an overly complicated application process.

Spread the responsibility. Make supervisors responsible for retaining employees. They'll work harder to hire good ones and keep the ones they have. Consider tying their department's turnover rate to their raise.

Write catchy ads. Think outside the box when it comes to advertising for positions. It will capture job seekers' attention. The advertisement isn't just for a job — it's also an opportunity to sell the company and tell them why they should want to join the company.

Tap into untapped labor markets. Some businesses are exploring the "fringes" of society's working networks to find labor. This might include hiring people with learning disabilities, or criminal offenders who are out on probation.

Find out why employees leave and fix the problem. Employers can eliminate some hiring woes by reducing turnover. Perform exit interviews and find out why employees are leaving. If it's because of pay, the financial situation may not allow for change. But if they're leaving because of conflict with a supervisor, the company can and should get involved. If it appears that exiting employees are unwilling to be candid about problems at work, consider conducting a survey to ask current employees what they think about working there — what they like about it and what they don't. If the company can find ways to improve the working environment, it might just improve retention as well.



Cross reference

For more information on exit interviews, see the **Related Matters** tab in the Separations section of the manual.

Recruiting sources

Employers are relying less and less on newspaper advertisements to fill positions, and are relying more on the Internet to do the job. It costs less, is more efficient, and takes less time to post an ad and receive responses. One downside, however, is that not everyone has access to a computer or to the Internet. Depending on the applicant pool targeted, employers may need to offer a number of avenues for potential candidates to respond to the ad by advertising in the newspaper as well.

Other sources to find candidates include:

- **Internal referrals.** Studies show that employees hired through internal referrals have a higher retention rate than those hired from other sources. The downside to internal referrals is that it may inhibit diversity.
- **Former employees.** Retirees can be brought back as consultants or on a part time basis, or former employees who were good workers can possibly be wooed back.
- **Job sharing.** A woman who intends to quit work altogether after the birth of a child might be persuaded to work on a part time basis, or on a job-sharing basis with another part time worker to create one full time position. These positions don't often include full benefits such as health insurance, so employers get the benefit of a full time worker with less cost.
- **Telecommuting.** Employees who are moving out of the area might be able to work from home if their job is conducive to it. Telecommuting on a part time basis may also serve as a recruiting incentive for someone who needs to work on a flexible schedule.
- **Previous applications.** Employers might look through past applications even before the company advertises a position to see if there are any qualified candidates.
- **Trade and professional associations.** Networking is a good place to start when an organization is hiring for specialized technical or professional positions.
- **Labor unions.** This is particularly used for building trades and in the construction industry.
- **Job fairs.** Job fairs are a good way to make a lot of contacts in a short period of time.
- **Company website.** A company's website can serve as a recruitment vehicle to attract applicants by providing a listing of current job openings and information about the company.
- **Online job boards.** Examples are Monster, CareerBuilder, and others.
- **Social media sites.** Examples include professional sites like LinkedIn, though many employers maintain a Facebook page as well.
- **College campuses.**
- **Technical colleges.**
- **Headhunters.** Also known as executive search firms, this recruitment is particularly effective for regional and national searches for executive and professional positions.
- **Temporary agencies.**
- **State or public employment agencies.**
- **Contract workers.**

- **Interns.**
 - **Nontraditional labor pools.** Churches, disabled individuals, inmates, welfare-to-work programs, and senior citizens can all be sources from which to recruit labor.
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Best practice

Get creative

Effective recruiting may require getting creative, especially for hard-to-fill or hard-to-keep positions. For over-the-road drivers, the turnover rate can be as high as 150 percent each year. Employers have had to get very creative and proactive to try and keep new drivers. Their efforts include ride-alongs with a mentor or coach, meeting and talking to the family about life on the road, and proactively counseling and working with drivers to solve problems they encounter in the job. It's cheaper to keep current employees than to replace them, even if retention efforts cost time and money.

Organizations may need to offer signing bonuses or extra incentives to recruit qualified candidates, either because of location or the difficulty in finding an individual with the skill sets required, or because the demand for a particular position is high and the market is competitive. Some years back, computer positions were highly sought after, and the market was extremely competitive, leading employers to offer very high salaries and incentives to attract workers.

Recruiting with employee referrals

When looking for qualified job candidates, companies should view every employee as a potential recruiter. Employee referral programs can be a cost-effective way to bring in high-quality applicants since they allow a company to avoid some recruiting costs and give workers the opportunity to tap into their contact networks. Employers may even discover passive candidates (those who are not actively seeking work) via this avenue. With a properly implemented employee referral program, employee participation helps to build a productive, engaged workforce.

Referred candidates are often more qualified than individuals who have no connection to the organization. Employees who are familiar with the requirements of the open position, as well as organizational culture, can recommend jobs to applicants who would be a good fit for the position and the company. In essence, referred applicants are pre-screened by current employees, most of whom wouldn't vouch for someone they aren't sure could do the job well. Referring qualified applicants can also give workers a sense of pride.

New hires referred by employees tend to acclimate quickly to their position. They may come into the workplace with a better understanding of what is expected of them than an individual with no previous company connections, and may also be more likely to get a rundown of the pros and cons of the company in general. More than non-referral candidates, these individuals should have a realistic idea of what they're getting into, and turnover because of unpleasant surprises or misrepresented job duties is less likely.

Referred employees also tend to stay with a company longer because they come in with personal ties to the organization, and the referring employee has a vested interest in making sure the individual stays on. As a result, employers usually experience higher retention rates with referred employees.



Best practice

Program components

A number of factors should be considered when an employee referral program is established, and program specifics will vary from company to company. Corporate culture, the state of the job market, the type of employees needed, and industry norms will all make an impact on what a program looks like at any given time.

In general, however, a successful employee referral program will include rewards for referring employees, effective communication, and some limits or ground rules for referrals. The program's effectiveness should be monitored, and it should be changed as needed in order to ensure that it is having the desired impact on a company's workforce.

Rewards

Perhaps the most visible features of an employee referral program, at least for current employees, are the rewards available. Incentives can include cash, trips, car leases, televisions, gift cards, and other prizes. Offering an appealing reward can help generate employee interest in the program, and a survey of employees may reveal incentives they would value.

The value of the reward typically depends on the job level of the open position. For example, a reward for successfully referring a candidate for a non-exempt position could range from \$100 to \$400, while the range for an exempt position could be \$600 to \$900. A higher reward, upward of \$1,000, may be offered for management and other select positions.

The job market and difficulty of filling a specific position will also affect the reward. When setting the value, consider what the cost would be to fill the position with the help of an external consultant. Surveying what other companies in the industry are paying for internal referrals can also help.

Rewards do not have to be stagnant; they should be reviewed from time to time to make sure they are in line with what the market is paying. Varying the amount can also keep employee interest in the program high. To encourage referrals for an immediate need or hard-to-fill position, a bonus reward could be offered to the person who refers the first qualified applicant.

While cash is a common reward, offering prizes or the opportunity to be in a prize drawing can also attract employees to the program. To keep the program fresh, a different type of prize could be offered every time a drawing is held. A summertime prize might be a mountain bike, while a mini-vacation could be given to the winter winner. If the budget for rewards is low, consider offering a prime parking spot, movie tickets, or other small prizes.

Another consideration is to offer a smaller reward to employees who refer qualified individuals even when those candidates are not hired. To discourage employees from referring everyone they know, the organization will want to avoid paying a reward for every referral. However, a reward given for referring a qualified candidate who receives an interview can reinforce the message that the organization appreciates the referring employee's effort.

Recognition can be a powerful motivator and should be part of an employee recruiting program even when cash or other prizes are offered. Employees are often moved to participate in a referral program because it helps their team and company succeed, and recognizing their dedication is important. A handwritten thank-you note from the company president can let the employee know that his or her efforts are noticed. An employee may also be publicly thanked at a team meeting, or the thank-you note and reward could be hand-delivered to the employee during the workday.

Rules and limits

Just as important as rewards are the program's parameters. The rules should state who qualifies for a reward and what must happen for the reward to be given. Clear limits can help employees make appropriate referrals and keep them from feeling as if they were cheated because they did not get the prize they expected after making a referral.

The exact structure of a program will vary, but a company should consider:

- Whether awards will be given for all referrals, only for referrals resulting in an in-person interview, or only those resulting in a hire. A policy may state that the referring employee needs to be working at the company when the reward is given to be eligible.
- Whether referrals will be accepted for all positions, only high-impact positions, or only those that are hard to fill. Some companies do not allow referrals for positions at or above the level of vice president. Similarly, lower positions which are relatively easy to fill might be excluded from the referral program.
- Managers and those working in a recruiting or hiring function may be ineligible for rewards, although some companies offer to make a donation to a charity of that person's choice. Some companies do not allow temporary and seasonal employees to make referrals, or a new hire may need at least one year of service with the company to be eligible for a referral award.
- Under some programs, employees who refer a spouse, sibling, or child (or the spouse or child of a coworker) are not eligible for a reward.
- How to handle referrals of individuals who previously worked at the company. One option is to not allow referrals of people who have been employed by the company in the previous year.
- What to do if more than one person refers the same candidate. Typically, the first person to submit that name is the only one eligible for payment.

Another important consideration is when to give the reward. If a reward is conditioned on a referred candidate being hired, a company may want to pay the reward within 30 to 90 days of the referred employee's first day of work. Another option is to release a portion of the reward when the employee is hired, and the remainder after the employee has worked for a certain period of time. Waiting too long to give the reward can hamper interest in the program.

The policy may also note that candidates will be evaluated in a manner consistent with the company's hiring practices, policies, and procedures. Questions about the program can be handled by human resources.

Administering the program

A simple and efficient process should be developed for submitting and processing the referrals. A company may develop a form that employees may submit on paper or electronically, or applicants may indicate the name of the referring employee on a job application. Whatever referral method is selected, employers should keep in mind that the more complicated the process, the less likely employees will make referrals. For example, employees might simply send an email containing a name, email address, and phone number for the person they're suggesting, or provide LinkedIn and Facebook contact information to the human resources department.

Once a referral is submitted, human resources should respond quickly. Within a few days of receiving the application, the referring employee and applicant should be contacted. If the company does not reach out, the applicant may become discouraged and disinterested in the position, and question the responsiveness of the company. In addition, the referring employee may lose interest in the program and fail to submit future referrals. Ideally, the applicant's information should be screened within five days, and both the applicant and referrer should kept up to date on the various steps of the hiring process.

Communication

Effective communication can help make the employee referral program both popular and efficient. Employees should be aware of the benefits of making referrals, should know the limits of the program, and should understand how to make a referral. Posters, emails, social media postings, and the company intranet can all be used to get the word out.

Posters should emphasize the rewards available and let employees know where they can find more details. The company intranet can contain information about why an employee recruiting program is being offered, its benefits and rules, and how employees can submit a candidate's name. If workers do not have access to email or computers, submission forms and program details can be available at information kiosks.

Also, develop ongoing communication channels. Email updated job openings to employees or post them on the company intranet at regular intervals. Social media can be an effective way of sending job opening notifications that workers can quickly pass on to friends. When a specialized position needs to be filled, send a targeted message to employees with similar skills.

Diversity considerations

While an employee referral program has many advantages, there can be a downside to using employees as recruiters. Such programs may hamper efforts to diversify the workforce because employees are likely to refer others like themselves.

Employers may find themselves in a situation where the best candidates from a recruiting standpoint may not necessarily be the best candidates to further the company's diversity goals. This doesn't mean employers must scrap the referral program, but might decide to limit the number of candidates hired by referral. The company may also wish to let employees know that diversity is a priority to encourage more diversity among referrals. The organization should regularly analyze the program to assess the impact on the diversity of the applicant pool, final candidate selections, and hires to determine if changes need to be made in the methods being used to attract new workers.

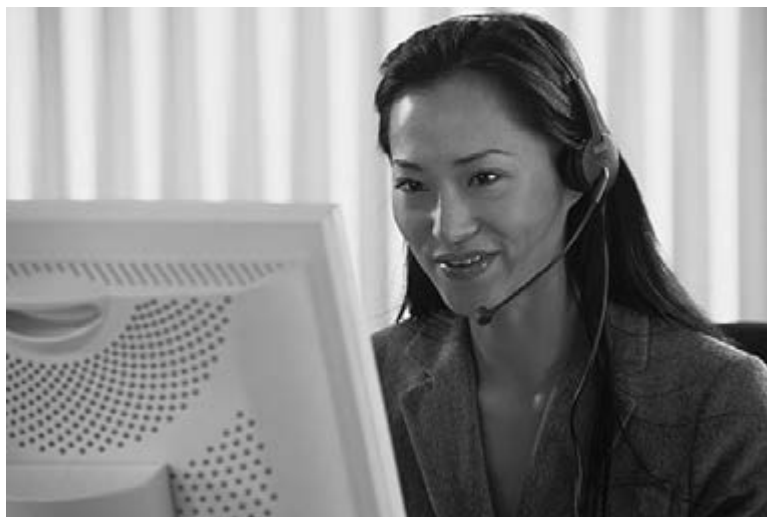
While an employee referral program does need to be monitored to ensure that it is not having a limiting impact on the applicant pool, a properly run program can be an efficient way of bringing in quality hires. Soliciting internal referrals alongside traditional recruiting methods can create a solid candidate pool for most positions.

Keeping it relevant

To make sure a company is getting the most out of its referral program, assess the program at regular intervals. Make sure it is not adversely impacting diversity, of course, but also review it to ensure that it is continuing to enhance the company's workforce.

Metrics can include the percentage of new hires referred by employees, the cost per hire, new-hire performance, retention, and job satisfaction of the referred employees. In addition, evaluate how many employees are making referrals to examine the impact of various rewards and communication efforts.

If the program is not having the desired impact, changes may need to be made to its parameters or communication plan. When properly designed and implemented, an employee referral program can deliver a high return on investment and play a valuable role in a company's recruiting efforts.



Using headhunters

Headhunters seek out professional people, even when they're not necessarily looking for new employment. Sometimes, with the right incentives, professional employees can be successfully lured away from their current employer.

There are two types of executive search firms: contingency firms, which charge a fee once the position is filled, and retainer firms, which charge a set fee regardless if they successfully fill the position or not. The retainer can be as much as 35 percent of the annual compensation for the position plus expenses, so this option isn't cheap, but may be effective in finding the best when other recruitment sources have come up empty.

Recruiting international workers

When qualified workers can't be found locally, many employers turn to international workers.

There are various categories of work visas, but a commonly used visa to obtain professional workers is the H-1B. This category allows employers to employ foreign professional workers in a specialty occupation for up to six years. Examples of specialty occupations include accountants, computer programmers, engineers, financial analysts, and scientists. An employer must sponsor the employee's H-1B visa, file certain forms, and pay a fee. The process may take

months before the foreign worker is on board. In addition, Congress puts a cap on the number of visas it will issue in any given year, so employers must get their applications in as soon as possible to even have them considered.

With all the recruiting resources that are out there, there's no guarantee that an employer will find the right people every time it searches for job candidates. However, the more willing an organization is to expand into additional sources of recruiting and look for new labor pools, the more success it may have in attracting talent.

Where to look for potential employees

Generally, the higher the level of a position for which an employer is hiring, the wider the area it should target for its recruitment search. For positions such as a laborer, administrative assistant, hourly positions, and some exempt positions, it may be sufficient to recruit locally. For a mid-level professional position such as a supervisor, manager, or technical position, an employer may have to look regionally. For an executive-level position, an employer may need to conduct a national search.

If an organization is looking for someone for a hard-to-fill position — one that requires a certain set of particular technical skills, for example — it might have to look farther and wider than it normally would. It might also have to offer incentives to attract the right person.

Location, location, location

A target recruitment area needs to take into account an employer's business location or the location of the open position, if that differs from the business location.

If a business is in a relatively remote location, it may be difficult even to get local workers to make the drive out there, and recruiting strategies will have to reflect that. A mid-size or large business located miles from a population center, for example, might arrange to shuttle employees to work from nearby cities after the employees gather at park-and-ride lots. Remotely located business also might have to provide more incentives to attract the right people.

Employers might find success in targeting certain markets in their recruiting efforts. For example, a business located in a remote location of a state that offers fishing, hunting, and outdoors opportunities may want to recruit by targeting ads to people interested in that lifestyle. This type of business could run ads in outdoors-oriented magazines, or during outdoors-related shows or events.



Best practice

Go to the workers

During the recession, several county economic development councils and companies in Wyoming, which was job-rich but labor-poor, began advertising job opportunities to laid-off workers in Michigan and holding job fairs there. The response was overwhelming, and the campaign worked: Michigan workers began moving their families to Wyoming, then telling their friends back home about the opportunities

there. Before long, a whole community of Michigan natives was settling in Wyoming, making money, earning a living, and learning to appreciate a different way of life.

While an employer doesn't have to do anything as drastic as Wyoming did, on a lesser scale, a business can target recruiting efforts in the same way — by finding out who is laying off employees, perhaps regionally, and targeting those workers in recruitment efforts.

Relocation

Employers will likely have an easier time recruiting applicants from a distance if they offer some type of relocation package. These can vary from one extreme to another. Some larger companies offer a guarantee to buy the new employee's current home if the employee isn't able to sell it within a certain period of time. That way, the new employee isn't stuck trying to sell a home and obtain a new home, which is often contingent on the sale of the current home.

Other relocation packages simply give an allowance of a certain amount of money (say, \$2,000), and the new employee can spend it however he or she sees fit. This could cover the moving company, airline tickets, temporary housing, and other expenses involved with the move. Other packages agree to pay for the moving company and certain incidental expenses involved with the move, such as a few nights' hotel stay while house hunting, and a set limit for mileage, meals, and other relocation expenses.

Some employers may offer to pay for temporary housing for a set period of time before the new employee is responsible to pay for his or her own housing. This could be a matter of weeks, or a month, whatever seems appropriate for the situation and budget.

There are some tax implications involved in relocation packages, and employers should be aware of those when they offer relocation packages.

Relocation benefits when budgets are tight

Competition for talent is tough, even in the face of high unemployment rates. Employers are increasingly looking to applicants who live in far-off places to fill key roles. An important component in attracting applicants is a valuable relocation package.

Unfortunately, HR departments have been operating with diminished coffers, and many employers simply do not have the relocation budgets they once did. But financial constraints provide the opportunity to go beyond the basics in relocation benefits. Creative and outside-the-box benefits can be both cost-effective and attractive to potential job candidates.

First, employers should take stock of their current relocation package(s) and consider management input. Do executives balk at the idea of eliminating specific offerings? Will the owner put his or her foot down and insist that the company never offer certain benefits? The answers to these questions and a hard look at the budget will give employers a framework for development.

Next, employers should survey their most recent hires. What did they like best about their relocation package? What would they have liked to have seen? How was their relocation experience as a whole? These responses will reveal what the organization is doing right and where it might improve. Some improvements might be outside the current budget, but there may be smaller steps the employer can take to improve new-hire satisfaction.

Some relocation benefits might be more well-received than others, depending on an employer's culture. Additionally, linking relocation assistance to culture can have a positive effect on an organization's employment branding efforts. What follows are a few examples of less traditional relocation and employment benefits tied to specific culture-fostering goals.

If **work-life balance** is a priority, the following benefits might be advantageous:

- Resources for researching local schools and daycare providers;
- Recreation opportunities and resources, such as fliers to local campgrounds, free passes to a local attraction, and directions to nearby dog parks;
- Financial resources, including the opportunity to discuss 401(k) rollovers with a financial adviser; or
- Lists of regional health care providers.

If an employer believes **health and wellness** to be its primary focus, it might consider offering:

- Certificates for free healthy cooking classes;
- Directions to local organic and specialty grocers, farmers' markets, and food co-ops;
- Fitness center or personal trainer discounts;
- Participation opportunities on company-sponsored sporting teams; or
- Lunch on the company at a healthy restaurant.

If a company believes **innovation and creativity** are keys to its success, these benefits might be a good fit:

- Technology discounts, purchase plans, or certificates;
- An education reimbursement program; or
- Information on local clubs and volunteering opportunities.

Finally, if **adaptability and originality** are important, a company might offer a cafeteria plan of relocation benefits from which individuals can select their top choices.

A successful relocation package doesn't have to mean spending thousands on moving expense reimbursements. Simply providing robust information can help bolster an organization's retention of newly relocated employees. With this sort of thoughtful reception, new employees are likely to feel welcomed and build ties to the area quicker than what would be achieved through simple lump-sum payments.

Internet recruiting

While recruiting efforts of the past may have been limited geographically, today's technology allows an organization to advertise its job openings on a global scale. Internet-based recruiting can be much more cost- and time-effective than traditional methods, such as advertising positions in newspaper classified ads. But employers should proceed with care when posting job openings on the web: online recruiting has its own set of drawbacks and legal concerns.



Best practice

Internet recruiting tips

Online job posting is the primary recruiting method for many employers and the job-search tool of choice for most applicants. So how does an organization compete with the multitude of other employers vying for quality candidates? It all comes down to effort.

Internet-based recruiting is not an entirely automated process. For online efforts to be successful, an employer will still need to research and experiment with new recruiting methods and take steps to improve its recruiting process.

First, make Internet recruiting the primary responsibility for a select recruiter, if staffing levels permit. Candidates seeking information and employment opportunities over the Internet desire timely response. If an organization doesn't give these potential employees fast, accurate, and courteous turnaround, it may lose them. Checking and reviewing Internet inquiries and applications should be part of the recruiter's daily morning routine. Waiting even a few days to respond to an employment inquiry may send a message to applicants that the organization is inefficient, uncaring about potential employees, or even technologically inept.

Keep in mind that the Internet is simply a means to generate potential applicants. An employer's goal is to turn these leads into quality hires. In order to achieve this, the organization needs to contact qualified applicants as soon as possible.

For the sake of efficiency, the Internet recruiter's computer should immediately retrieve all Internet applications. Whenever a candidate applies online, the employer should send them an email response. If there is a limited number of applications, the recruiter should start the email with a personal opening paragraph, then copy and paste the organization's recruiting information for the applicant to review. Then, the recruiter can end with a personal closing paragraph inviting them to contact the recruiter.

On the other hand, if an organization typically receives a large number of Internet applications, it might consider setting up an automatic email response that acknowledges the receipt of an application or résumé. Once the employer has reviewed all the applications or résumés for a position, it can then personalize a follow-up response to qualified candidates.

Employers should be cautious not to create an Internet-based recruiting system that is overly automated, however. This may dehumanize the application process to a degree that is uncomfortable for some applicants. If time and personnel resources allow, employers should personalize responses so that applicants feel that they are getting individual attention, rather than a canned response.

Broadening efforts

If an employer typically relies on just one Internet-based recruiting tool, it might think about branching out. In addition to online job boards, the employer should use the organization's website in recruiting efforts. Creating a webpage detailing careers at the company allows the employer to describe not only open positions, but also the organization's culture and values.

Employee Relations Essentials

Additionally, candidates who visit a company's website are typically interested in that company, and may be more serious about working for the organization than a candidate who stumbled across an open position posted on a third-party service.

Some organizations have even made the switch to the .jobs domain for their recruiting efforts. The .jobs domain is meant to give employers a more direct, consistent, and efficient means of recruiting new employees.

The .jobs domain is aimed at making recruiting and job searching more uniform and simpler for both employers and job seekers. Any employer is able to post open positions on its .jobs page, rather than fighting for space on the company's standard homepage.

Whether an employer uses the .jobs domain or not, it should make sure its site is applicant-friendly. There should be a clearly labeled link on either the organization's homepage or site menu directing applicants to information about careers with the organization. Sites should be accessible to individuals with vision-related disabilities.

The Internet moves much faster than the real world of employment applications. If an employer makes users click through page after page to find available positions or information about the company's values, potential applicants will lose interest and move on to other employers' sites, including those belonging to competitors.

Customizing the website

An employer's website, in addition to clearly listing job openings, should contain information about the company. Consider including information about the organization's mission and vision, and employee-specific information. What can selected applicants expect out of their new positions? Show that the organization not only values customers, but also its employees.

An organization might also include information about the surrounding community. This is especially important for high-priority positions and other jobs for which an employer is casting a wide recruiting net. If a candidate is considering applying for a job that will take him or her far from home, the candidate will likely want to know what to expect in the new location.



Using social media

One job advertising avenue steadily gaining momentum in the recruiting world is social media. Organizations have begun using social networking platforms and other media outlets in recruiting. Some companies post recruiting or corporate culture videos on sites like YouTube; others might add a chat feature to their recruiting webpage, allowing interested candidates to discuss positions with a recruiter in real time. Some organizations use blogs to share information about the organization.

Perhaps the most widely used social media tool in recruiting, though, is social networking. Using social networking sites to advertise open positions is an attractive prospect for many organizations. Social networks allow users to share information they find relevant with other users to which they are connected, and those users in turn share that information with their connections. In a short time, an attractive job opening or well-made recruiting video could go “viral.”

Before advertising job openings through social media, consider whether such recruiting methods will fit with company culture. Keep in mind the type of candidates who will respond to these ads and also understand that certain positions might not be best advertised via social media methods. For example, posting a job ad on a technology blog or forum might be a good way to recruit quality IT or marketing candidates who are typically early adopters of new technology. Conversely, posting a job ad for a nurse practitioner or welder on Facebook might not bring the best “bang for the buck,” as most Facebook users log on to the site to connect with family and friends, rather than find a job. In this case, a social networking platform aimed at professional networking, like LinkedIn, might be a better fit.

Social media use has another advantage. Linking back to an organization’s website or careers page can improve the company website’s ranking in search engines, meaning even more people may find the recruiting information. But employers should again use caution: improper social media use can backfire and damage recruiting efforts or even an organization’s reputation. If an employer is unfamiliar with social media, it should consider seeking training or asking the organization’s marketing team or a third party for assistance.

Measuring efforts

As with real-world recruiting, employers will need to measure online recruiting efforts. In some ways, the Internet can make this easier. Online advertisement services will often record how many “clicks” certain ads get, which can allow tracking which ads are the most successful. Employers can also monitor how many individuals view the careers webpage.

Consider conducting a review of the organization’s site to make sure it is optimized. Evaluating the company’s own site objectively can be difficult, even overwhelming. It might help to have an unbiased, outside party evaluate the site. Consider asking new hires to rate their application experience and the ease of applying through the website.

The Internet also gives the opportunity to monitor competitors’ recruiting efforts. Doing so can not only provide incentives to improve recruiting endeavors, but also reveal areas in which the company might not have considered expanding efforts.

Remember, technology changes on a daily basis. It’s important to review recruiting efforts and keep up to date on new recruiting methods and resources. By staying current or even ahead of the pack, the company sends a message to potential applicants that the organization is a leader in its field and cares about job candidates.

Online recruiting risks

Online recruiting has many advantages, but the Internet does not eliminate legal and regulatory issues involved in the hiring process.

With Internet postings, it's easier for candidates to fire off résumés or reply to job advertisements. That means an organization is likely receive a wealth of applications and résumés in response to a job posting. Not all of these responses will come from qualified applicants. But while the number of applications an employer receives from unqualified applicants may be overwhelming, an organization can't simply delete these applications. Employers must follow federal and state recordkeeping regulations.

Additionally, while Internet communication may seem more informal, legal obligations still apply. Discriminatory email communication can land an organization in hot water. As a general rule, employers should not ask questions over email that they wouldn't be able to ask in person, over the phone, or through mail correspondence.

If an organization uses software or sample job postings to create job ads, it should make sure the software or sample follows not only federal law, but also state and local laws.

Security issues

While electronic forms of communication are generally faster than standard methods, they pose dangers a mailed envelope or phone call wouldn't create. Viruses and other malware (short for malicious software) can spread through email and instant messaging programs, crippling an organization's computer network. Typical employers receive hundreds of emails each day; during a recruiting drive, this number might skyrocket. Without a high-functioning security software and protection measures, just one of those emails could spell disaster for an organization's information systems.

Malware isn't limited to just ruining the functionality of a computer or network, though. Certain programs can harness the power of a company network for illegal activities. Other programs known as spyware might record and transmit passwords and other confidential information entered or viewed on a computer or network.

To safeguard their organization, employers should make sure their antivirus and antispyware software are updated regularly. They should also have a network firewall in place. These defenses will not completely rule out the possibility of an organization becoming a victim of malware, but it will make the employer a more difficult target to hit.

Be sure that the antivirus program is set to automatically scan any email attachments before they are opened. Additionally, use caution before clicking on a link in an email or webpage. Instead of immediately clicking on a link, let the mouse pointer hover over it. In most Internet browsers, the actual URL address will display. In some cases, this can provide a hint as to whether the link is going to the actual webpage that is described in the hyperlink text. Certain top-level domains (TLDs) are riskier than others. For example, a .edu domain is less likely to host a malicious site than a .cm (the TLD for Cameroon) domain. Internet security companies and organizations will often provide detailed information on which domains and websites should be avoided.

Employers should use common sense when they receive attachments or links in an applicant email. If there are suspicions about an applicant's legitimacy, consider contacting the applicant by phone to verify that the attachment or link is trustworthy before opening it.

Employers shouldn't let security dangers or legal issues prevent them from using the Internet as a recruitment method. With proper preparation and protection, the advantages of online recruiting far outweigh its risks. The quality of effort put into recruiting will be reflected in the quality of the candidates who reply to those efforts.

Passive recruiting

Passive recruiting is the practice of recruiting individuals who are not actively searching for employment. It allows organizations to be proactive in their hunt for talent. Rather than waiting until an employee leaves to fill an open position, companies that use passive recruiting identify high potentials or talented individuals at other organizations and entice them to join their own. The practice plays an especially important role in filling high-priority positions or jobs that require specific skill sets.

Passive recruitment is often a long-term strategy. While some candidates may be tempted by an attractive salary and benefits package, companies may need to bide their time with other potential employees. The downturn in the economy in recent years and damage to retirement accounts has made many candidates leery of the unknown. Recruits might want to know why they should leave the security of their current careers behind. In order to truly appeal to these prospects, an organization must view them less like traditional applicants and more like customers.



Former employees

One great source of passive candidates is employees who used to work for an organization. Former employees are a known quantity; the company has seen their work ethic, has knowledge of their skills, and knows that they are familiar with company culture. Because of their experience with the organization, rehired employees are able to start their new jobs with less

training. They return to the organization with not only new skills, but a new perspective. Seeing for themselves that the grass may not in fact be greener on the other side of the fence may make many of these employees grateful for the chance to work with the organization again. This can result in more motivation to succeed and increased loyalty.

Not all former employees are ideal candidates, however. Employers should focus passive recruiting efforts on only employees who had positive reputations with the organization. The best candidates include individuals into whom the organization invested time and effort.

Organizations sometimes struggle with overcoming negative feelings when considering rehiring former employees. Bitterness toward employees who chose to leave the company might cause some employers to discount this source of potential candidates. However, a willingness to switch to different positions and careers can be a sign of self-respect. This might signify that an employee is willing to grow into new roles within the organization.

Employers might consider keeping in regular contact with quality former employees and reminding them why the organization is a quality employer. Adding these employees to the company newsletter mailing list or inviting them to certain company celebrations might help with passive recruitment efforts.

Previous applicants

Employers often have a policy to retain employment applications for a period of time, even if the candidate is not hired. In fact, federal law requires applications to be kept for at least one year. These past applicants can be potential candidates. Just because an applicant wasn't selected in the past doesn't mean he or she isn't a good fit for a current position. Many times an employer will have already screened these applicants, so reconsidering their applications can cut down on time, effort, and expense. Employers should make sure they thoroughly review these applications, though, and understand why the applicants weren't hired in the first place.

Networking

Perhaps the most extensively used method of passive recruiting is networking. An HR professional's or recruiter's personal professional network, and an organization's network of business contacts can prove invaluable when searching for employment candidates. Additionally, professional and trade associations can be good resources for finding specialized, quality candidates.

Professional social networking sites allow employers to make the same connections with industry peers and trade organization members as real-world networking efforts, but in a fraction of the time. There is a trade-off, though. While social networking offers a wider scope of potential connections, interacting face-to-face often leaves a longer-lasting impression.

Top talent at other organizations

One valuable source of qualified, experienced employees is an organization's competitors. Recruiting the top talent at the competition has a two-fold effect. Not only is an organization made stronger through the addition of a qualified performer, but the competing company may be weakened by the loss of one of their rising stars. But employers should use care when recruiting from the competition, as they may also attempt to recruit employees away from the organization or retaliate in other ways.

In passive recruiting, employers will want to keep track of people and teams that win industry awards and recognition. These are likely people the employer will want for its team, even though they may work for the competition. So while an employer might not start out directly searching for individuals to recruit away from its competition, this may be an outcome of top-talent sourcing.

Employers should remember that passive recruitment can often become an endurance test. The key is to keep in contact with high-quality potential candidates so that when they are ready to leave their current jobs, the organization is the first to come to mind as an opportunity.

Personnel/executive recruiting firms

If an employer has neither the time nor the resources to devote to intensive passive recruiting, it might try using the services of an executive search firm or personnel recruiting service. These sources can be costly up-front, but may save money in the long run. Most recruiting services have experience in both passive and active recruiting, and allow organizations to keep open positions confidential until a number of qualified candidates are identified. Additionally, while an employer's own recruiters might need to split their time between searching for candidates and other HR-related duties, recruiting services are able to devote all of their time to the recruitment task.



Best practice

Tips for using a recruiting firm

There are numerous recruiting firms in the market. The best fit for an organization will depend on the type of job the employer needs to fill. First, employers should consider whether they will need a specialized type of recruiting firm. If a position is a highly technical one, an employer will want to research recruiting services that are experienced in recruiting in that industry. These companies often maintain databases regarding qualified individuals in a particular industry and have several valuable networking connections.

On the other hand, if an organization needs to fill a high-priority executive position, an executive search firm might be a better fit. Executive recruiters, also called headhunters, search for top talent throughout the globe. These firms will sometimes incorporate behavioral assessments and research into their efforts in order to find quality candidates whose personalities best match an organization's culture and strategic plan.

Problems with passive recruiting

Passive recruiting is not for the impatient. Wooing a potential candidate is rarely a short-term process, and in some cases, it can take years. If the need to fill a position is immediate, it's best to use traditional active recruiting techniques in addition to passive methods.

Passive recruiting can be expensive. Candidates currently employed in stable jobs will rarely consider swapping employers unless the salary increase is quite hefty (often double-digit percentages) or they are unsatisfied with their work environment or culture. An employer must be prepared to offer highly competitive salary and benefits packages if it wants to be successful in passive recruiting.

Finally, by relying solely on recruiting employed individuals, an organization may deprive its applicant pool of talented workers who may have been laid off or left employment for a period of time for family reasons. The practice of recruiting and hiring only employed individuals may also be discriminatory.

Employers considering diving into the world of passive recruiting would do well to remember that it is best to balance passive efforts with traditional active recruiting. By using both methods, an organization is able to cast a wider recruiting net and identify quality candidates not just locally, but throughout the world.

Employer branding

One of the best ways to increase sales is through clearly communicating what sets the product apart from others in the marketplace. This same concept can be applied to recruiting efforts. An organization must promote itself in order to attract top-quality talent. One of the best ways to do so is to create a distinctive employment brand.

The key to employer branding is clearly and consistently advertising the organization's strengths and unique attributes. The fact that an organization is a great place to work will do an employer no good if potential applicants don't know about the company's attractive benefits program, work-life balance, comfortable company culture, or other advantages.



Increasing awareness of the brand

An organization's individual branding strategy will depend on the type of image it is attempting to portray, the organization's culture, and the type of applicants it is trying to attract. Formulating a distinct brand image may necessitate gaining input from the organization's marketing department and executive team. It may also require a review of the organization's strategic plan.

When focusing on branding efforts, consider how likely it is that potential candidates know of the company. This can be crucial when it comes to small and mid-sized employers' attempts to fill high-priority positions. While potential applicants close to the organization's headquarters and branch offices might be aware of the company, what about qualified applicants located elsewhere? The answer to this question may help an organization further direct its efforts.

Sponsoring trade and industry organizations, engaging in philanthropic and community projects, and maintaining a social media presence are all methods to grow an organization's brand recognition among potential job candidates. The methods chosen should match the company culture and the image the employer is trying to send.

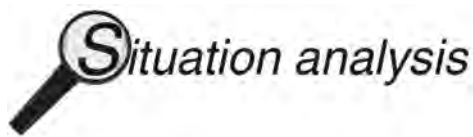
Once an organization selects a specific branding plan, it will be important to consistently publicize the chosen image. Repeated exposure to a well-defined brand creates positive recognition. This means branding efforts will need to be largely uniform in their style, tone, logo use — even fonts.

Considerations in employer branding

The message sent through branding efforts must be rooted in reality. It does an organization no good to advertise its office as a relaxed, informal workplace if employees are expected to be highly professional and dressed in business formal attire. If branding efforts are anything less than truthful, they will backfire and employees may leave the organization soon after being hired. Trust in the organization will decline, as will the number of quality job applicants.

Maintaining an employer brand is also important. An employer should not treat only new hires and potential applicants with “employer customer service.” The organization should make sure all employees feel like they matter and fit in with the organization’s culture. After all, there are few things more powerful in attracting potential applicants than a glowing recommendation from a satisfied current or former employee.

The better an employer’s branding efforts, the more likely the organization is to become an employer of choice in its industry and locality. By focusing on what qualities set the organization apart from the pack, the employer will send a message to potential job applicants that the organization understands its mission and knows the type of quality human capital it needs to succeed.



Social media is changing the workplace

Social media affects business in several ways. It affects a company’s brand, its transparency, its customer service, and how the world perceives the organization.

Not long ago, businesses defined and strengthened their brand and made sure it was perceived as they wanted it to be. Branding was a top-down phenomenon. Enter social media, which is in a position to affect a business’s brand globally — and not necessarily in a positive way. Employers should know what is being said about the company online.

In 2009, a global Nielsen study reported that recommendations from friends and acquaintances as well as opinions posted by consumers online were the most trusted forms of advertising, not a company’s PR department, and not its website. This being the case, if consumers are reading on social media about the poor customer service someone received from the company, they may tend to believe the individual who posted the comment.

Anyone who is researching a company to make a decision whether to buy its products or services (or apply for a job) and who finds several reports of negative consumer experiences (or negative employee experiences) is likely to look elsewhere.

Making diversity a priority

Certain federal contractors are obligated to have an affirmative action plan and take certain actions to promote diversity in hiring. They may target their recruitment efforts at women or minorities. They may also need to give preference to veterans or disabled candidates.

But an organization needn't be an affirmative action employer to promote diversity. Employers can target minorities in their recruitment efforts to try to diversify their labor pool.

A diverse workforce can be extremely beneficial for an organization. Diversity initiatives may reduce costs associated with turnover, absenteeism, and low productivity. Additionally, diversity efforts may also improve a company's bottom line by decreasing complaints and litigation and improving the organization's public image.

Not only that, but diverse organizations may be able to use knowledge of minority employees to relate to different groups in the marketplace. If the diversity of an employer's workforce happens to mirror the diversity of the organization's customer base, it can also help the company to better anticipate and address the needs of its clients. These employees may also be able to serve and keep an international customer when their own workforce departments such as sales, marketing, and customer service understand the needs of other cultural and ethnic groups.

Diversity in the workplace isn't something that just happens on its own; organizations must identify diversity as a priority and take steps to encourage and manage it in the workplace. A good first step is developing a diversity policy.



Best practice

Drafting a diversity policy

The workplace is more diverse today than ever before. If the company doesn't yet have a formal diversity policy, now is the time to draft one. The following steps can help an organization get started:

Define diversity. If an organization doesn't define diversity, how will it determine what the organization is seeking?

Get senior management support. Not only will this provide resources, it will send the message to the rest of the organization that diversity is good for the company.

Audit the organization. Employers need to know what they are dealing with in terms of workforce composition. The organization might also examine related policies to make sure they support diversity issues.

Develop a communication program. Employers should broadcast their diversity efforts, both internally and externally. An organization should emphasize that it wants to hire women, veterans, people with disabilities, older workers, and those from different ethnic and racial backgrounds.

Plan. Organizations should set goals and objectives to measure their diversity efforts and make sure they are aligned throughout the organization. The best goals are SMART: specific, measurable, achievable, results-driven, and time-specific. As

these goals are expanded throughout the organization, hold managers and supervisors accountable for hiring, retaining, and developing a diverse workforce.

Train. Train supervisors on how to manage diversity, starting by helping them identify their own cultural values as well as the cultural patterns of their employees. Managing diversity is more than just acknowledging the differences among people, but celebrating them. It also involves making note of the similarities between people, even in situations where there may seem to be few. Make training ongoing to keep diversity a priority.

Determining recruiting's effectiveness

An employer that never analyzes the effectiveness of its recruitment efforts from various sources might never realize what works best for the organization and what doesn't. There are a number of considerations when faced with recruiting options: how soon the company needs to fill the position, the quantity and quality of applicants, the average time it will take to fill the position, the training required for the new person, and eventually, the work performance of the person hired.

Some recruitment sources are cheap and effective. For instance, internal referrals are inexpensive, but these new hires have a high retention rate.

When evaluating recruitment sources, employers should look at:

- Total cost,
- Cost per hire,
- Number of applicants generated,
- Yield ratios (explained below),
- Employee tenure in that position,
- Job performance, and
- Time to fill data.

Yield ratios

Yield ratios can give provide a concrete measure of recruitment effectiveness. Employers can look at a number of variables:

Number of qualified applicants divided by the number of total applicants

Example: 60 qualified applicants ÷ 200 total applicants = a yield ratio of 30%

Number of minority applicants divided by total applicants

Number of female applicants divided by total applicants

Comparing the yield ratios of different recruiting sources can help evaluate whether a source is effective in its intended purpose.

When determining the effectiveness of each recruiting source, an employer also may want to take into account:

- The number of résumés or applications generated from that source,
- The number of interviews resulting from that particular source, and
- The number of job offers accepted.

Determining cost

When calculating the costs of recruiting sources, it is important to take into account both direct and indirect costs, since both have an impact. Direct costs include advertising expenses, agency fees, and training costs. Indirect costs include the value of the time spent by supervisors or managers in interviewing applicants or training new employees.

Dividing the cost of the recruiting source by the number of employees hired from that source provides the cost per hire. For example, say an employer hired five people from responses to newspaper ads, and the cumulative cost of the ads is \$900. The cost per hire from that source would be $900 \div 5$, or \$180 per employee. On the other hand, if the employer hires eight people through employee referrals and the cost of the referral program is \$160, the cost per employee would be $160 \div 8$, or \$20.

Recruiting's relationship to the hiring process

An important but sometimes forgotten part of recruiting is public relations. For the one person an employer hires, there may be 50 more who weren't hired. Those 50 rejected applicants will be carrying around an impression of the company. If they had a bad experience, they will tell others, and that negative impression of the company could quickly spread throughout the community and beyond.

Therefore, it's very important from a public relations standpoint to keep candidates informed as they move through the application process (or not). This means acknowledging receipt of their application or résumé, their status if they will be interviewing, when they might hear something after an interview, and a prompt rejection letter if they are no longer being considered.

Recruiting isn't just a process by which an organization finds employees, it also has public relations ramifications. Getting an organization's brand out there, name recognition, and positive public relations are all a part of the process.

Job notices

When a company has an open position to fill, recruiters can look at a variety of methods to notify potential applicants of that position. They may look at sources both from outside their company and from within their company for viable candidates. These external and internal resources are often approached with different recruiting methods. For example, to approach external talent sources, a recruiter may place ads in local newspapers, industry publications, or on an Internet site, or they may go through local colleges or job fairs.

To attract candidates from inside a company, a recruiter may post an opening on a company bulletin board.

The decision of whether to use an internal or external source may depend upon a number of factors, including the company policies, the position in question, the cost of recruiting efforts, and perhaps the demographics of the area. Often, companies will begin their recruiting efforts within the company, and if no viable candidates emerge, they will turn their attention to external sources.

Employee Relations Essentials

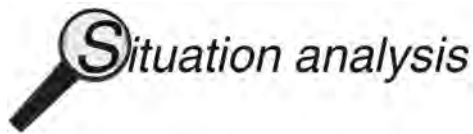
When recruiters post jobs within a company, they should consider some positive and negative factors.

Positive factors include the following:

- Low cost: Internal posting costs virtually nothing compared to external advertising costs.
- Employee morale: Employees are rewarded for their good work and may see the opportunity as a chance at promotion.
- Known performance of candidate: Information on an internal candidate's professional performance is already at hand.
- Less time in orientation: The candidate does not need to get to know the company.

Negative factors include the following:

- Potential lack of fresh ideas: Internal candidates may not bring new ideas to the mix.
 - Increased need for training: Internal candidates may require more extensive training to fulfill the job requirements.
 - May impinge upon equal employment opportunity goals: If the employee population consists of non-minorities or men, the diversity of the population may not expand if the recruiting efforts focus on internal candidates.
 - May create another opening: An internal transfer may simply create a requirement to fill the vacated position.
-



Job bidding

As opposed to job posting, which is a notification of an open position, job bidding is a system of giving the job to one of the bidding applicants on the basis of fixed criteria such as seniority. Not all employers like the idea of job bidding or have applicable formal procedures. Job bidding is often found in companies that operate with a union environment.

Crafting a job notice

Whether a recruiter uses internal or external sources, some guidelines must be followed when creating a job notice. The notice should be designed to attract the most qualified candidates for the position, but the notice should not be discriminatory in nature. It should not favor younger workers over older workers, or one gender, ethnic group, or racial group to the exclusion of others.

Recruiters should be careful about the language they use; it could subject their company to liability if it is discriminatory.

Employee Relations Essentials

The following are examples of the types of phrases that should not be placed in job notices:

- “Recent college graduate” — potential Age Discrimination in Employment Act (ADEA) violation;
- “Young, energetic” — potential ADEA violation;
- “Hostess” or “waitress” — potential Title VII of the Civil Rights Act violation;
- “Christian carpenter wanted” — potential Title VII violation.

This list provides only a few examples, and is not intended to be comprehensive.



Introduction

Finding the best person for the job is a challenging process and could result in the “wrong” hire even when the process is correctly followed. However, employers can minimize the chances of having to withdraw an offer (or having to terminate an employee who didn’t fit the job) by using a thorough interviewing and selection process.

Whether a job advertisement garners a few dozen applicants or a few hundred, the company must sort through the potential employees to find the most likely candidates for interviews and other screening. When a large number of applications are received, the employer might only spend a few seconds on each, checking for basic qualifications and filing the rest. However, this can still yield a substantial number of potential applicants that must be compared and possibly interviewed.

Since the interview represents the first contact with someone who will eventually be hired, it provides the first opportunity to make a good impression on the candidate. The manner in which applicants are treated during and after the interview (for follow up contacts, whether a rejection or second interview) may influence their decision of whether or not to accept a job, or in the case of rejected applicants, apply in the future.

Beyond the interview, additional screening might involve skills tests, agility tests, background checks, reference checks, and other evaluations to help identify the most qualified applicant. Some types of testing and checking can be done before making an offer of employment, but certain checks (especially medical inquiries) must wait until after an offer has been extended.

Employers can extend conditional offers and retain the right to withdraw the offer if the background checks or other screenings indicate a cause for concern. Any job offer, whether conditional or not, will have to provide enough information for the candidate to decide if he or she wants the job.

If the candidate received offers from more than one potential employer, the information provided (as well as the experience during interviewing and selection) will influence which offer is accepted.

Reviewing applications and selecting candidates

Once recruiting efforts are under way, various types of applicant information will begin to surface. The two most common types of information are the employment application and résumé.

A major aspect of sifting through applicants is the employment application. Employers may get information in other formats, such as résumés, but the job application is usually the meat and potatoes of the selection process. Even if other forms are involved, the employment application should be the major source of information.

The résumé, unlike the employment application, is drafted by the applicant and, thus, contains the information the applicant wants the employer to know. Most employers find it beneficial to use the résumé as a general screening tool, but not as a replacement for a thorough employment application for serious applicants. By having both types of documents, employers can compare the two and look for any discrepancies.

An employer's main objective is to identify anything that might cause it to discontinue the screening process. In other words, an employer is looking for possible disqualifiers, or red flags, that indicate the applicant may not be a good fit for the organization.

When reviewing an employment application or résumé, there are certain things an employer should look for. Naturally, this will vary depending on the type of application and the type of position. But, there are some general factors to consider:

- Does the applicant have the key qualifications?
- Does the applicant have experience in a similar job or environment?
- Is there an indication that the person has skills and knowledge associated with the essential functions of the job?
- Are there any meaningful accomplishments?

In short, an employer is looking to determine what the applicant could do for the employer — how he or she could handle the position, and how he or she might fit in with the organization. The best way to find these answers is to determine how the applicant has done those things in other organizations or experiences. So, past experiences are one of the most important things to watch for when reviewing information.

It's also very important to look at the KSAs (knowledge, skills, and abilities) right away. If these are not adequate, an employer may save some time in reviewing the rest of the information. When looking at KSAs, make sure they are relevant to the position sought.

Information is only good if it can be verified. So, look for verifiable things, such as salary, positions held, education, etc.

Application review tips

When reviewing an employment application, look for:

- **Legibility:** The application must be legible if the information it contains is to be verified. An unreadable application may be an attempt on the part of an applicant to confuse or mislead.
- **Accuracy:** Names, phone numbers, and addresses of each past employer should be accurately listed and in a logical (chronological) order. Previous employers should be

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easy to follow up on. Although not an automatic disqualifier, a cause for concern is when information on an applicant's application does not match other verifiable records.

- **Completeness:** The application should be completely filled out. Make sure the application includes all required personal information such as complete name and address, addresses of current and past residences, etc.

Look out for:

- **Gaps in employment:** Perhaps the biggest red flag to look for when reviewing an application is unexplained gaps in employment. It's an employer's job to fill in the blanks of all employment gaps with verifiable information before making any hiring decision. An employer will do this during the interview process, assuming the applicant makes it that far.
- **Frequent job shifts:** Why can't the worker seem to find the right employer? An unstable work history is a big red flag, and might be an indicator of larger problems with the applicant. Also, look for evidence of any pseudo employers listed, such as self-employment or family businesses.
- **Names of supervisor(s) not listed:** A prospective employee who fails to name specific previous managers or supervisors on an application may be attempting to hide a poor or unsafe work history. As a matter of company policy, an employer should require applicants to not only list the names of previous employers, but the names of their direct supervisors as well.

Other potential causes for concern include:

- More emphasis on earlier experiences or education than recent,
- Missing information (i.e., why isn't the salary history given?),
- Reasons given for changing jobs, and
- Job history showing decreasing responsibilities.

Screening résumés and applications

Careful applicant screening is an essential skill for finding quality new hires. If the company receives notifications of interest in a position by means of résumés, assume that they only provide the information the applicants want to convey, and are intended to put the applicants in the best light. While a résumé can be used as a general screening tool, it should not be used as a replacement for a thorough employment application.

One advantage of having both a résumé and an application form is that employers can compare the two and look for any discrepancies in the information provided. Another advantage, especially if it matters for the position, is to look at writing style, grammar, and punctuation. A résumé is an important document in an applicant's job search. If not enough care has been taken to produce an error-free document, that may reveal something about the employee's attention to detail.

For these reasons, be sure to have all applicants complete an application form. Other good reasons for mandating applications include:

- All applicant information will be in a consistent format for comparison purposes.
- The application will provide information that may be missing from résumés.

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- Employers get a feel for the applicant's qualities in terms of attention to detail and ability to thoroughly complete paperwork.
- Employers may get a sense of how serious the applicant is about the position. For instance, if the application is missing information or is completed sloppily, the applicant may not be all that serious about the job.
- An application should request the applicant's signature that all information provided is true. If it turns out the applicant falsified any of the information, it may be grounds for termination.

Above all, it is important to be consistent in the review process. Employers may not receive résumés on all applicants, but can get applications from them all. Relying on a résumé alone for some, but not for others, may cause inconsistencies in comparisons.



Best practice

Best practice checklist

Always get an application form from all applicants. Don't rely on résumés alone.

Use résumés to look for discrepancies between the résumé and application.

Look to see if the applicant has the basic qualifications for the position.

Look for red flags, or any kind of disqualifier.

Remember that careful screening is the first line of defense against a bad hire.

Résumés that reveal too much

When unemployment rates are high, it can be easy to see how a job seeker might feel like a little fish in a big pond. In response to this feeling, job seekers are constantly looking for ways to make their résumés stand out, and individuals struggling to add a personal touch may format their résumés in unique ways or print them on brightly colored paper. Whether or not these techniques have the desired effect, they are mostly harmless for the employer. However, what if applicant's attempt at personalization divulges too much information?

From time to time, employers may receive a résumé with the applicant's photo attached. Simply looking at the photo may provide information that employers shouldn't consider, such as race, sex, age, or even disability status. Since it's illegal to make employment decisions based on these factors, just having this information can be a problem.

In an effort to avoid this issue, some employers immediately dispose of any applications that arrive with a photo attached. However, this may not be the best solution. While providing a photo is not a common practice in the U.S., it's a more conventional practice in other countries. If résumés with photos typically correlate with applicants who are not native to the U.S., a process of destroying them may have a disparate impact on these individuals.

A better solution would be to simply consider the applicants' qualifications without regard to characteristics divulged by their photos. Some HR professionals find it helpful to remove photos from résumés to make sure applicants get fair consideration. In many cases, this can be done before other parties (including hiring managers) ever see the photographs.

By impartially comparing the application to job requirements and documenting the reasons for any decisions, employers will reduce the risk of being charged with discrimination based on any protected characteristic garnered from an individual's photo.

Remember, while employers can't discriminate against individuals because of protected characteristics, they don't have to give an applicant **more** consideration than their qualifications would otherwise merit just because they belong to a protected class. While discarding photo-bearing résumés may not be a solution, the company can disregard the photos themselves.



Applications

One of the first contacts an employer has with a prospective employee is a job application. This form communicates information about the employer to the applicant and, in turn, provides information about the applicant to the employer. The information gathered should help the employer select the best candidate for a particular position.

Employers use applications for a number of reasons, but primary reasons are to ensure that all applicants provide the same information to allow for a fair evaluation and comparison of candidates, and to obtain a signature showing that the information provided is accurate.

Some application forms are very general, and can be short. These are usually used as a preliminary screening tool. Longer forms can be used to gather more detailed information. Some forms are targeted for specific positions.

Employee Relations Essentials

Application forms can have a variety of designs and layouts, but most include common information, such as the following:

- Contact information,
 - Training or education background,
 - Special skills,
 - Work experience,
 - References,
 - Authorization to verify information,
 - Waivers,
 - Certification or acknowledgment of truthfulness of the applicant's information, and
 - Signature.
-



Best practice

Acknowledgment of truth and accuracy

Although most applicants will be honest, the sheer number of applications received means that at least some applications are likely to have false information. In fact, a study by CareerBuilder found that almost half of employers discovered false information on an application or résumé. These misrepresentations included exaggerating job responsibilities, claiming a false educational background, and claiming false employment history.

An application form should have a statement whereby the applicant acknowledges the truth and accuracy of the information provided on the form. The form should state that falsification is grounds for failure to hire or for termination. If the company discovers the applicant lied (say, about a conviction found during a background check), it has grounds for refusal to hire — not based on the conviction itself, but for being untruthful on the application form.

Employers might also consider including an application disclaimer. In an attempt to goad employers into a quick settlement, some applicants will provide too much information (age, race, disability status, union affiliation) and then claim they were discriminated against in the refusal to hire because of the information they provided. The application should have a disclaimer that states that the company will only accept applications that are complete, and that if an applicant submits additional information not asked for on the application, it may be cause for rejection.

What not to include on an application

Employers try to gather as much information from applications as possible; however, employers should avoid requesting certain information, as they may violate privacy or equal employment opportunity laws or statutes.

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The application forms of old were a legal nightmare. They asked for date of birth, social security number, height and weight, asked if the applicant had a car, was disabled, and so on. It is essential not only that application forms are legal, but that they include clauses to protect the organization.

Age. There should be no questions asking a person's age, including "What year did you graduate high school?" That question tends to indicate a person's age, since most people graduate when they are 18. Applications can ask if the applicant is age 18 or older (because child labor laws apply to those under 18), and if under 18, the employer can ask how old the applicant is (because child labor laws may vary depending on the age of the worker).

Instead of asking what year the applicant graduated high school or college, simply ask the number of years completed, whether the applicant graduated or not, and what degree the applicant attained.

Other protected classes. In addition to age, individuals are protected from discrimination (under federal law) based on race, color, national origin, religion, gender, disability, pregnancy, and genetic information (state laws may have additional protected classes). There should be no questions on an application form relating to any of these.

Citizenship. Employers should not ask if an applicant is a citizen of the United States, but instead ask if he/she is authorized to work in the United States. Exceptions may apply for employers who work on certain government contracts, such as military contracts.

However, employers may ask if an applicant will require sponsorship of a visa. Sponsoring an individual can be an expensive and time-consuming process, and refusing to sponsor a visa can be a legitimate reason for rejecting an applicant.

Transportation arrangements. Don't ask if an applicant has a car or, unless driving is part of the job, if they have a valid driver's license. The EEOC's position is that such questions may tend to discriminate against minorities, who are less likely to own a car. Simply ask if the applicant has transportation to and from work.

Convictions. Employers can usually ask about criminal convictions, but should have a disclaimer that says a conviction is not an absolute bar to employment. Check state and local laws as well, because some states may prohibit these questions.

Social security number. A social security number should never be asked for on an application form; in fact, some states have passed laws to prohibit this, in the interest of preventing identity theft.

Almost all states have restrictions on what is asked in an application, and employers should be familiar with and comply with the laws of each state in which the application will be used. Inquiries which are normally precluded include age, sex, race, disability, and religion.

The information requested in an application should be focused on that which is job-related and consistent with business necessity. It should help the employer find a match between a position's requirements and a candidate's qualifications to perform in that position successfully.

Requesting applicants' previous W-2s

Many employers take job candidates' salary expectations into consideration during the hiring process. Some organizations have gone further in this respect by requesting applicants' most recent Forms W-2. Employers sometimes use W-2s to verify a stated previous salary range, but might use the information in other ways. If a previous employer has gone out of business, for example, obtaining an employment reference might be impossible. A W-2 can prove that the individual actually worked at the organization.

Requiring a job applicant's W-2s isn't prohibited by federal law, but does involve some risks. Employers should be mindful of these dangers. Forms W-2 can contain certain information that might increase the risk for a discrimination claim. Examples include information about dependent care benefits, military differential pay, and sick pay usage, which may suggest that the individual belongs to a protected class.

Employers are generally advised to avoid asking for this information. If an employer has knowledge that an applicant belongs to a protected class, it might need to prove that this information was not used in the hiring process, if the employer faces a discrimination claim.

Employers should also be mindful of their state laws. Some states restrict employers from requesting a job applicant's social security number before certain stages in the hiring process, or require that employers keep social security numbers secure and confidential. Most W-2s contain social security numbers.

Certain states prohibit discrimination against the unemployed. If an individual does not have a W-2 because he or she is unemployed, failing to consider the applicant for employment could increase an organization's risk for a claim. Another risk in using W-2s in the screening process is disparate impact. Employers should monitor the effects of this practice to determine whether it might cause adverse impact on certain minorities or women.

Employers should also realize that applicants are not likely to appreciate this practice. Some may see a demand for their W-2s as an invasion of privacy. This could result in fewer qualified candidates, as word of the employer's hiring practices spreads. It also might result in only desperate individuals applying for a position with the organization.

Tips for W-2 requests

As with all employment screening mechanisms, employers should make sure that requesting applicants' W-2s is related to the specific job for which an applicant is applying and that the practice is consistent with business necessity. If the employer is requesting a Form W-2 simply because it doesn't trust an applicant's reporting of his or her past salary, the lack of trust might suggest other concerns about that applicant.

If requesting an applicant's previous W-2s is necessary, employers might consider waiting to request them until after extending a conditional offer of employment. Of course, employers should be sure that they understand and comply with their state laws before making a request.

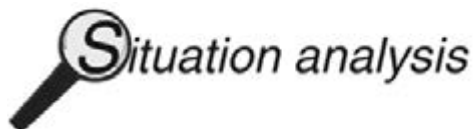


Interviewing candidates

Interviewing is critical not only because it provides an opportunity for the company to make a positive first impression, but because it provides an opportunity to learn about the candidate. In many cases, initial screening may be performed by Human Resources, with likely candidates getting subsequent interviews with a hiring manager. This may require providing training to managers or supervisors regarding proper interviewing techniques.

Two main goals of an interview are to learn as much as possible about an applicant's work background, habits, and skills and to encourage the best applicants to join the company. Preparing a list of questions to ask in the interview can help achieve these goals. Using a script maintains consistency and helps steer the interview away from illegal questions. It also helps the interviewer stay organized and make a better impression.

When conducting interviews, employers can get into trouble for saying the wrong thing. For instance, the conversation might stray into political, religious, or family areas that have nothing to do with the candidate's ability to perform the job, and should have no bearing on the decision of whether or not to hire the person.



Ask not what your company can do for you...

Some HR professionals have found that, when interviewing younger applicants, the interviewees seem more interested in what the company can provide for them and less focused on what they can contribute to the organization. While this won't always be a reason to automatically dismiss the potential candidate, it may indicate the individual's attitude toward the employment relationship. If such an attitude appears to surface, direct questions such as, "What can you bring to our organization?" might further reveal the interviewee's expectations.

If one applicant appears to have excellent qualifications but seems more interested in what the company can do for him or her, while another applicant has lower qualifications but focuses on what he or she can do for the company, the organization might prefer the more motivated candidate over the more “selfish” candidate.

Interviewing do's and don'ts

While it's important to learn about a prospective employee, the company could face liability if the wrong questions are asked in an interview. Not only that, but some employers have been known to make verbal “promises” they can't keep; in court, such promises have been determined to be oral contracts binding to the employer.

Federal laws prohibit discrimination in employment, which includes asking questions that may be used to make a hiring decision based on race, national origin, sex, age, disability, religion, and so on. Before conducting interviews, have a script of questions known to be safe. Asking the same questions of each candidate not only helps to compare them equally, it also minimizes the possibility of slipping up and saying something improper.

Behavioral questions work best. An example would be, “Tell me about a time when you handled an angry customer.” This forces the candidate to relate a story about a difficult situation he or she handled. The interviewer can expand on that and ask additional questions such as “What

was the problem, what did you do, and what was the outcome?” Asking follow-up questions such as, “Why did you do that?” or “What did you learn from that experience?” also may elicit good information.

It is said that the best predictor of future performance is past performance. Finding out how an individual handled various situations in the past may be a good gauge of how they will perform in the future.

What to ask

It’s sometimes confusing to know just what can or cannot be asked, and what to do with information a candidate offers that employers are not supposed to know, like their daycare arrangements, their recent divorce, or their back injury.

There are some questions it’s never okay to ask before making a job offer (and in some cases, even after). These include questions on marital status, religion, nationality, union membership, political affiliations, if the candidate has ever filed a workers’ compensation claim or a lawsuit, whether the candidate has children, and so on. These questions have nothing to do with the candidate’s ability to perform the job.

If the candidate offers information the interview is not supposed to ask about or use in the hiring decision, simply tell the person the information isn’t relative to the job and won’t be used in the hiring decision, and get the interview back on track.

Finally, be wary of offering promises. It is not unheard of for a supervisor to tell a candidate, “If you work out, within a year or two, you’ll be promoted.” If the candidate takes the job based on that promise of advancement and it doesn’t happen, he could sue for breach of an oral contract, and could very well win.



Best practice

Using job descriptions in interviews

Although an interview certainly can involve an exchange of pleasantries, keeping the job description handy can serve as a reminder to keep the conversation from getting derailed into areas that aren’t relevant to the hiring decision. Employers can’t ask candidates about physical or mental disabilities, for example, but can ask if the applicant can meet the essential functions of the job. Having a written job description can eliminate any confusion about the specific requirements.

Using this information can help keep an interview on track, and stay focused on whether the candidate possesses the necessary qualifications or can otherwise meet the demands of the job.

Questions to avoid

While certain interview questions will garner good information, others may be illegal. There are certain questions to avoid because they could elicit information, such as gender, age, and race, that cannot be used in a hiring decision. Unless there is a legitimate business necessity, avoid the following questions:

- Are you married? What is your maiden name? Do you wish to be addressed as Mrs., Ms., or Miss? (However, employers may ask if the applicant has ever worked under a different name for purposes of reference checking.)
- Do you have children? Plan to have children? Are you pregnant?
- How old are you? What year did you graduate? (However, employers may ask if applicants have diplomas or degrees and if they are 18 years or older.)
- What is your nationality, race, or religion?
- Have your wages ever been garnished or have you ever declared bankruptcy?
- Do you own your own home? This could be viewed as discriminating against minorities who may be less likely to own their own home. Even questions like, “How long have you lived at this address?” have been cited as discriminatory.
- What type of discharge did you receive from the military?
- Do you have a disability? (Employers can ask whether the individual can perform the essential job functions of the job and meet attendance requirements with or without reasonable accommodation.)
- How often do you drink alcoholic beverages or take illegal drugs?
- Have you ever filed a workers’ compensation claim or a lawsuit against your employer?
- Have you ever been a member of a union?
- What clubs, societies, and lodges do you belong to? Ask only about organizations that the applicant considers relevant to his or her ability to perform the job.

This is a rather lengthy list, and it doesn’t include all of the potential questions to avoid. In fact, most of these questions are not specifically prohibited by law. However, they are generally avoided because they do not reveal information that employers require to evaluate job qualifications, and the information could be used for discriminatory purposes.

As an example, many states have laws against discrimination based on marital status, and asking if an applicant is married should not bear on the hiring decision. Similarly, questions about children might lead to gender discrimination claims if the applicant alleges that she was denied employment based on a presumption that she would require more leave to care for her children.

As another example, the regulations on age discrimination explicitly state that asking for age is not, by itself, a violation. However, such questions may indicate an intent to discriminate based on age (since age shouldn’t be a job requirement) and may even deter older individuals from applying. Therefore, such questions are usually avoided.

The other questions may similarly reveal protected information, or suggest an intent to discriminate. For example, employers cannot retaliate against an individual for engaging in activity that they have a legal right to do, such as filing a workers’ compensation claim, joining a union, or joining other organizations that the company might disapprove of (such as religious societies).

In short, asking these questions is not unlawful by itself, but may lead to a presumption that the company would not have requested information that it didn't intend to use. If there isn't a legitimate need for the information, the applicant (or an enforcement agency) might assume that the company had a discriminatory reason for requesting that information.



Cross reference

For more information, see the **Protected Rights and Actions** tab in the **Management and Development** area.

Successful interviewing strategies

Here are some guidelines to keep the interview process not only legal, but successful:

For each interview, use a pre-scripted list of questions designed to help judge the applicant's qualifications, skill levels, and overall competence.

To avoid discrimination issues, ask the same questions of each candidate, but prepare specific questions for individuals that will explore their work history and education.

During the interview, verify the information that was provided on the application or résumé. Make sure applicants explain any gaps in their employment history. Ask the applicant to explain instances of excessive job hopping.

Thoroughly describe the company and the position. Stress the good points about the job, but don't mislead. Also, explain any aspects of the position that may have presented problems in the past. Some people welcome a challenge or may have dealt successfully with such issues in the past, and are not intimidated by the prospect. For others, it won't be a good fit, but it's best to know that at the outset before making a bad hire.

Let the applicant do most of the talking. Follow the 80/20 rule. The candidate should do 80 percent of the talking and the interviewer should do 20 percent. Don't feel the need to ask a question every time the candidate pauses. Silence will often encourage the candidate to offer more explanation.

It's okay to take notes after each interview to remember who said what, but be careful that what is written down won't create liability for discrimination. For example, don't write down a physical description based on an inherent physical trait such as race, national origin, or age to remember a candidate.



Best practice

Interviewing pitfalls

Interviewing comes with some potential pitfalls, so try to avoid the following:

- Viewing a candidate strongly because he/she followed a weak candidate, and vice versa.
 - Picking a candidate because he or she is similar to the interviewer.
 - Allowing nonverbal factors to influence a decision (hair color, dress, mannerisms).
 - Asking drastically different questions to different candidates.
 - Stereotyping.
 - Not digging deeply enough or settling for politically correct answers (some candidates are very good interviewees, but not necessarily right for the job).
-

Avoid hiring low performers

You may have extended a job offer (and later hired) a candidate who seemed to be a perfect fit for the position, only to later discover that the individual did not measure up on the job. This has likely caused you to wonder if you missed something during the interview that could have foretold these problems.

Initial impressions aren't always correct, and you've probably tried to avoid forming a falsely positive impression based on the candidate's experience and education. Still, the fact that the employee didn't work out suggests that you may have missed some important clues, or perhaps your interview questions need adjustment to highlight these characteristics.

Negativity

Employees who fail to meet expectations are not always pessimistic, but individuals with a negative or pessimistic outlook are often more likely to be low performers. They are more likely to resist changes and tend to focus on the "down side" of a situation. This may not only create self-fulfilling prophecies of failure, but their attitude can drag down an entire team.

In broad terms, a negative person is more likely to view a change in procedure or a difficult situation as a problem to endure, rather than a challenge or opportunity to overcome. While you shouldn't expect the majority of candidates to view a difficult situation as an exciting adventure opportunity, you should be looking for an expression of willingness to face a challenge and deal with a situation realistically. In particular, be wary of candidates who merely complain about a situation.

This characteristic might be identified by asking the candidate questions about how he or she handled a difficult situation, and asking for examples of how the candidate reacted to changes or challenges. Ideally, a candidate will indicate that he or she focused on adapting to the

situation and, even if the candidate disagreed with the change, at least accepted the reality of the situation and moved on. In contrast, a negative person may have responded to a difficult situation with exasperation and resistance rather than acceptance. Negative individuals may remain focused on things they cannot control, rather than focusing on things they can control.

As an example, you might ask a candidate to describe a situation in which a new procedure was adopted that required the individual to learn a new process. An ideal candidate might indicate that he or she accepted the change and worked to learn the new process quickly, perhaps even assisting others. Conversely, a negative person might respond with comments such as “I never understood why that change was made.” A candidate may even express his or her feelings by referencing others, perhaps by saying that coworkers at that company disagreed with the change. This could indicate a negative attitude, unless offered as examples of contrast (e.g., “although my coworkers disagreed, I thought the new procedure was better and I tried to help them learn it”).



Cross reference

For information on addressing a negative employee, see the section titled “Negative attitudes” in the **Managing Problems** chapter.

Refusing accountability

Employees who refuse to take responsibility for their actions can become a nightmare for supervisors. A supervisor’s efforts to address performance or conduct problems may be met with self-justifying statements or attempts to place blame on others, rather than an honest willingness to work toward improving the situation.

Relatively few people are willing to step forward and voluntarily admit their errors, but employees who are confronted with a problem should at least be willing to acknowledge their role and take responsibility for helping to resolve the situation. On the other hand, employees who insist that “it wasn’t my fault” or who place the blame on circumstances (while refusing to acknowledge their ability to influence those circumstances) are less likely to become better employees.

Interviewers may be able to identify this characteristic by asking candidates to describe a previous conflict with a coworker or supervisor and to describe how it was resolved or how the candidate reacted. An ideal candidate might acknowledge that a failure in communication caused a problem and explain his or her efforts to resolve the situation.

Conversely, a candidate who refuses to accept responsibility may describe a situation in which another person was the cause of a problem and might even blame the other person for any failures in the resolution process. Related clues might even involve the candidate’s choice of pronouns, such as using “I” or “me” rather than “us” or “we” (as in, “I don’t know why she hated me” rather than “we had several meetings to discuss our project and assign responsibilities”).

Melodrama

A melodramatic person is one who blows things out of proportion and may become upset by even minor challenges. Often, this person is easily upset or will react negatively to perceived slights even when no offense was intended. No matter how technically competent the candidate might be, you don't want melodrama in your company.

This tendency might be identified during candidate interviews through the questions asked to identify the other two characteristics discussed previously. For example, if the candidate is asked to identify a conflict and how it was resolved, the nature of the conflict selected by the candidate for illustration may provide clues about what he or she considers problematic. For instance, if the example involves seemingly petty disputes or if the candidate seems to have experienced a lot of conflicts, these may indicate that the person is easily overwhelmed.

Virtual interviews

Recruiting and hiring has been impacted by new capabilities of online communications, and employers are increasingly choosing to conduct interviews virtually. The Aberdeen Group, a market research firm, recently found that 42 percent of companies were using video interviews as part of their recruiting process in 2011, up from only 10 percent in 2010.

Any company can conduct an interview online using services like Skype or FaceTime. In some cases, these services are replacing preliminary phone interviews, allowing recruiters to get a better overall feel for an applicant's demeanor. However, these free services can involve problems, such as a faulty internet connection, which can make for a frustrating or even incomplete interview.

Free services aren't the only way to conduct virtual interviews. Some employers use vendors to administer their online interactions. Though the fees for services deter some employers, the costs may be justifiable for organizations that would otherwise pay for applicants' travel costs.

Vendors of online interviewing offer some significant advantages over free services, including increased accessibility for applicants (such services typically require less bandwidth than video chat), the opportunity for an unlimited number of participants, the ability to record and save conversations securely, and round-the-clock access to technical support.

Instead of virtual interviews, some employers ask applicants to submit a one-way interview by addressing a list of scripted questions in a video profile. In place of a first-round interview, some companies find these profiles to be quite convenient. They ensure that the same questions are asked of all applicants, and they typically eliminate issues that might otherwise arise with scheduling.

Though one-way interviews give employers the convenience of multiple reviews by decision makers, not all employers find that convenience to be convincing. The profile gives the employer some familiarity with the applicant, but doesn't give applicants the opportunity to get to know the organization, which can be an important part of the hiring process.

Virtual interviewing won't always make sense, but in many situations, companies can find savings in both time and money. Taking the time to evaluate the potential benefits, even if limited to specific positions, might result in a considerable return.

When supervisors conduct interviews

Interviewers have the potential to violate a myriad of discrimination laws. If a manager responsible for hiring doesn't have proper training, he or she could easily invite a lawsuit for the company.

Employee Relations Essentials

Any individual who has hiring responsibility should know to avoid discriminating against individuals on the basis of race, sex, color, religion, national origin, disability, pregnancy, genetic information, and union affiliation. In some state and local jurisdictions, individuals also can't be discriminated against on the basis of marital status, sexual orientation, political beliefs, military discharge status, arrest and conviction records, and the use of lawful products such as cigarettes. And this isn't an all-inclusive list.

Once a candidate is at the interview, managers should be aware of the potential for blunders during small talk that often occurs before and after the interview. Just because the interview hasn't officially begun doesn't mean the laws against asking discriminatory questions don't apply. For example, a female candidate mentioned she had to find a sitter so she could attend her interview, and when she calls to find out why she didn't get the job, an untrained supervisor might say, "We just thought that with all your responsibilities at home, it might be difficult for you to travel as much as this job requires." That statement alone could be grounds for a lawsuit.

In addition to knowing what not to say, a supervisor or manager should know how to get the best results from interviews. Employers can only get a limited amount of information from a résumé or application, but an interview can reveal a candidate's attributes and find out what he or she can bring to the table.

Interviewers should realize that strong candidates who are interviewed after weak ones may appear even stronger, while the reverse is also true.

Hiring managers should realize that the process of avoiding discrimination does not extend only to the interview itself. It starts when the interviewee is selected and extends, essentially, for at least a year after the interviewee leaves (that's the typical statute of limitations for filing a discrimination claim based on failure to hire). This could be an issue if a candidate who was interviewed but not chosen calls to find out why, questions the hiring process, and so on. Should a need arise to defend a hiring decision, what is said to the applicant is critical.

Reserved

Situation analysis

When the words are out

In an effort to put the candidate at ease, an interviewer might engage in a little small talk before the interview begins. Suppose it goes something like this:

Interviewer: “So, you found the place okay?”

Candidate: “Yes, I didn’t have any problem.”

“Where did you drive from?” (Red flag)

“I live on the other side of town, on Plank Road, near the union hall.”

“Oh, I know the place. Have you ever been inside?” (Red flag)

“Yes, a few times.”

“Now, you’re not working currently, is that correct?”

“That’s correct. I’m home taking care of my kids.”

“How old are they?” (Red flag)

“They’re two and four.”

“Oh, so they’re pretty young yet. You do know this job involves travel, don’t you?” (Red flag)

“Yes, I’m aware of it.”

“Now, I noticed your last name is Ping, but you don’t look Chinese. I take it that’s your married name?” (Red flag)

“Yes, it was, but now I’m divorced.”

“Divorced with two young kids? And you still think a job involving travel is doable for you?” (Red flag)

“Yes, I have child care arrangements.”

If this were a real interview, the interviewer would have violated the law in several ways. The first mistake was asking the candidate where she drove from: If she came from home, this question could solicit information about race, income, and other factors — some cities are so segregated that employers can assume a lot about a candidate from the person’s zip code or neighborhood.

Second, asking if she was ever inside the union hall could be a veiled way of asking if she is or has been a union member. Employers can’t discriminate based on union membership, including prior membership.

Asking about the ages of her children and expressing doubt about her ability to fulfill the travel obligations could be viewed as family responsibility discrimination, which is a type of gender discrimination.

Finally, mentioning that her last name wasn’t congruent with her appearance could be race, color, or national origin discrimination.

Once an interviewer says something improper, the damage has been done, and those statements could be a lawsuit waiting to happen.

Interview notes can be trouble

It is perfectly acceptable to take notes during an interview. In fact, it's a good idea. However, be careful about the type of notes taken.

It is best not to write down anything that could be construed as discriminatory. Making a notation as to someone's race may be used as evidence of discrimination if that person isn't chosen for the job. In fact, steer clear of making notes about any personal characteristics ("tall black man," "short Asian female," "stutterer," "older female"). These can easily be construed as evidence of discrimination if that individual is not hired or considered for the position.

It is also a good idea to steer clear of any notes that may be construed as some sort of bias for or against someone ("housewife," "student," "knows the owner"). The intent in writing these notes may be completely innocent, but employers don't want to have to defend the notes taken, and describe what the thought process was, months or even years down the road if the company is sued.

Instead, concentrate on other descriptions such as clothing (green dress, red and blue paisley tie). Since these are an individual's temporary features rather than personal characteristics, these types of memory-jogging notes are not likely to get a company into trouble, and they may serve as good reminders.

Finishing the interview

After the interview, thank the candidate and explain when a decision might be reached or, if there are further steps, what the next step will be. Indicate when the applicant can expect to hear from the company — and be sure to follow up as promised. Otherwise, the organization will lose credibility.

Finally, be sure to "close" each interview. Don't just have them leave, but walk them out and ask how they felt about the process. Feedback is helpful for refining the interview process, and in turn they'll feel like they are valued.

Interviewing persons with disabilities

The Americans with Disabilities Act (ADA) became law in 1990. One of its purposes was to remove barriers to employment for people with disabilities. The ADA Amendments Act became law on January 1, 2009, and fundamentally broadened the definition of "disability" to encompass more individuals.

The law requires employers to accommodate qualified individuals with a disability. To do that, employers must engage in an interactive process, which is a give-and-take discussion with a disabled individual to determine if the individual can perform the essential functions of a job with or without accommodation. If accommodation is necessary, the parties involved should work together to find an acceptable solution. Employers must accommodate not only employees, but job applicants during the hiring process.

Discrimination may occur because interviewers make decisions based on stereotypes, misconceptions, or unfounded fears. Remember that "disability" does not mean "inability." Concentrate on what the person can do, not on he or she they can't. In preparing to interview a disabled candidate, use a structured interview guide that is the same for every applicant.



Here are some tips for conducting the interview:

- If the individual has an obvious disability or reveals it during the interview, concentrate on the individual, not the disability.
- Treat the individual with the same respect given to any candidate.
- Hold individuals with disabilities to the same standards as all applicants.
- Ask only job-related questions regarding the job for which they are applying.
- Concentrate on the applicant's technical and professional knowledge, skills, abilities, experiences, and interests.

If the applicant has a known disability, either because it is obvious or otherwise revealed by the applicant, an employer may ask him to describe how he would perform the job.

Often one of the biggest fears in interviewing a disabled person is not knowing how to act during the interview. The best advice is to let the disabled person describe any assistance he or she may need. The following is a list of common courtesies and considerations to follow:

- Look directly at him or her even if there is an interpreter.
- Don't automatically assume the person needs assistance; be sure to ask first.
- Don't express sympathy. The applicant doesn't want pity; he or she wants to highlight relevant abilities.
- Don't avoid questions that were asked of others out of fear that the applicant may be sensitive to the question.
- Ask all questions in a direct manner, such as "Can you lift 25 pounds?"

In most respects, interviewing people with disabilities is the same as interviewing people who are not disabled. In general, interviewers should ask job-related questions that focus on qualifications, experiences, and skills for doing the job. Individuals with disabilities say they want to be treated as any other employee.

Online (virtual) education

Years ago, the chance that an employer would have an employee walk in the door with a résumé boasting an online degree was slim. Now, employers are likely to meet more than a few applicants who obtained their education without ever setting foot in a classroom. The question is this: could these individuals possibly have obtained the skills necessary to do a job well at the organization without a traditional education at a brick and mortar institution?

The short answer is yes, it's definitely possible. Today, students can earn a myriad of different types of degrees online, in some cases from a prestigious institution (Duke and Indiana University both offer online degrees) and following the same curriculum as on-campus students. While there are "diploma mills" out there, the fact is that online education has the potential to supply a student with as valuable an education as could be obtained in the traditional classroom.

Consider giving applicants with online degrees the opportunity to prove the worth of their education by asking for examples of experiences and samples of their work.

Social skills and diversity

One argument against online learning is that individuals who get their education online aren't forced to develop their social skills and interact with other individuals in the same way they would in an actual classroom. While that may be true for some students, people may cultivate those skills in other ways, and the interview is a prime forum in which to find that out. For example, someone who pursued a degree online while working may be able to relay even more compelling professional examples of communication skills than an individual who is fresh out of a four-year conventional institution.

Additionally, depending on the nature and the caliber of the individual's online degree, their virtual interaction with other students could include discussing business-related issues with people all over the world. In this way, online students may even have an advantage by having interacted with a more diverse group of individuals than they might have in a traditional classroom.

Consider the reasons behind the degree

When assessing the value of an individual's online degree, consider why that person chose to pursue a degree online. Many individuals do so not to avoid the traditional classroom, but to balance education with other responsibilities, which may include a busy career or a family. By considering why the individual sought a degree online, a company might become aware of characteristics the person possesses that could make him or her a good fit for the organization.

For example, a mother with full-time childcare responsibilities who pursued an online degree likely needed considerable skills in organization, focus, self-motivation, time management, and multi-tasking, all of which can translate to valuable characteristics in the workplace. As another example, an employer may see confidence and determination behind a working professional who obtained a degree online.



Evaluating online education

A 2009 study by the Society of Human Resource Management indicated that about half of employers still prefer applicants with traditional university degrees over those with online degrees. Even if this is the case, don't turn away applicants just because of the way they obtained their education. The goal should always be to hire the best and the brightest talent available, and while this might be an individual with a traditional education, it may not be. The trick is to be open-minded enough to find out.

While many employers remain skeptical of degrees obtained online, there are many reputable institutions. If considering an applicant with an online degree, there's one essential truth to keep in mind: all online universities are **not** created equal. This means that it may take some legwork to determine whether particular online degrees and universities are both legitimate and valuable to the organization.

Fortunately, employers may already have practice assigning value to different institutions. For example, Ivy League schools come with a certain prestige that may not be equaled by small community colleges. Employers may also assess an individual's educational background by the difficulty involved in being accepted into a particular degree program. Depending on what is required from employees, assessments of individual institutions will vary.

Accreditation status

For traditional brick and mortar institutions, most employers are familiar enough with the individual schools that they don't need to turn to official ratings. However, since online schools may not be as recognizable, turning to a school's accreditation status can help. Accreditation is a process that evaluates a school's mission, goals, resources, admission requirements, and quality of faculty and educational offerings.

Unfortunately, just as there are less than reputable online colleges and universities, there are also phony accrediting agencies. Sometimes these are even created by counterfeit institutions to sanction themselves. However, both the U.S. Department of Education and the Council for Higher Education Accreditation maintain lists of recognized accrediting agencies in the United States. Both sources also allow employers to determine whether particular institutions have been accredited by approved agencies.

Researching accreditation can help to identify institutions that are little more than “diploma mills.” These are schools that grant degrees without requiring that students complete an adequate course of study, and they won’t receive reputable accreditations. When an institution meets accreditation standards, documentation will expressly identify the school as being “accredited.” Other phrases such as chartered, licensed, or authorized may be used, but they do not mean that the institution is accredited.

A diploma mill might also issue fake degrees from real institutions, so be sure to double check applicants’ credentials.

While many employers are still skeptical of online degrees, the Society for Human Resource Management’s 2009 “Credibility of Online Degrees Survey” indicates that online degrees are viewed more favorably now than they were five years ago. The popularity of online education is likely to continue to grow, so instead of missing out on talented employees who choose a virtual path to education, take some time to evaluate online institutions. Checking schools’ accreditation and applicants’ credentials can help ensure that an individual’s degree comes with a reasonable expectation of quality.

Testing and evaluations

Employers may utilize a number of tests to evaluate potential candidates. Some tests may be administered as part of the evaluation process, while others may have to wait until after an employment offer has been extended.

As an example, an applicant for a newspaper job might be asked to write a short article so the employer can evaluate the candidate’s writing skills. Similarly, an individual applying for a mechanic’s job might be asked to demonstrate how to disassemble and reassemble a piece of equipment.

Demonstrations of an applicant’s skill or knowledge are common during the application process, but the employer should not profit from this testing. For example, any articles written by potential journalists should not be published, and a mechanic who is asked to demonstrate his skill should not actually perform repairs on a customer’s equipment.

In some cases, the specialized nature of the job may require an extensive evaluation, to the point that the individual is actually engaged in job training. For instance, a truck driver may have to ride along with a more experienced driver for several days to learn procedures. This would be job training that must be paid, not merely an evaluation of the candidate’s knowledge, so it could only be conducted after hiring the individual.

Types of tests

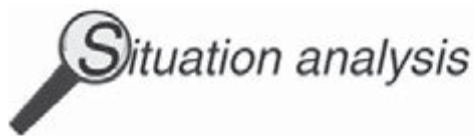
The type of testing performed will obviously depend on the nature of the position. These can include physical agility tests, demonstrations of knowledge or skill, or even medical evaluations. Certain types of test may tend to exclude individuals on the basis of a protected class, such as disabilities. Therefore, the Equal Employment Opportunity Commission (EEOC) categorizes and defines pre-employment tests as follows:

- Cognitive tests assess reasoning, memory, perceptual speed and accuracy, and skills in arithmetic and reading comprehension, as well as knowledge of a particular function or job;
- Physical ability tests measure the physical ability to perform a particular task or the strength of specific muscle groups, as well as strength and stamina in general;

- Sample job tasks (e.g., performance tests, simulations, work samples, and realistic job previews) assess performance and aptitude on particular tasks;
- Medical inquiries and physical examinations, including psychological tests, assess physical or mental health;
- Personality tests and integrity tests assess the degree to which a person has certain traits or dispositions (e.g., dependability, cooperativeness, safety) or aim to predict the likelihood that a person will engage in certain conduct (e.g., theft, absenteeism).

Whatever tests are used, all applicants for the same category of positions must be subjected to the same tests. Also, if the test will be used to screen out applicants (and may tend to exclude applicants on the basis of a protected class, such as having a disability), then the employer should be prepared to show how the test is job related and consistent with business necessity.

The testing should also reflect the actual job duties as closely as possible, or should provide a reasonable indicator of success on the job. For example, if a strength test is more challenging than the actual job duties, it may tend to screen out females and individuals with physical limitations.



Can you require English proficiency?

Most employers know that English-only policies can be problematic, but a certain level of English language skills can be required. However, fears of inadvertent discrimination causes many employers to feel uneasy about determining the level to which they can require English proficiency.

The rules on national origin discrimination prohibit employers from taking adverse action based on national origin characteristics, including accents or limited English skills. However, if an applicant is unable to perform the job functions because of limited language skills (or the accent prevents customers from understanding the employee), the individual might be deemed “not qualified” for a position.

Employers may determine what level of English proficiency (spoken and/or written) is necessary for a particular position, but should be able to prove that the level expected is reasonably necessary to perform the job safely and efficiently.

If an ability to read or speak English is essential to job performance, employers can measure an applicant’s qualifications by testing that job skill to the same extent they evaluate other job-related skills. Language tests should evaluate the minimum level of comprehension needed to safely and effectively perform the job. For instance, the employer might ask an applicant to read a set of instructions and demonstrate the procedures described.

Remember, though, that if the test is more difficult than the job demands, it may exclude qualified applicants based on national origin. This adverse impact can be unlawful discrimination, even if the exclusion was not intentional.

When to test

Some tests can be administered prior to extending an offer of employment, and others must wait until an offer has been extended. Tests that aren't designed to obtain medical information are acceptable prior to an offer; tests that do obtain medical information can only be administered post-offer.

For example, a physical ability test for a firefighter might require a candidate to pick up a 150-pound mannequin and carry it on his or her back for 100 feet to simulate rescuing someone from a fire. This type of test is acceptable at the pre-offer stage. If, however, the test also monitors the candidate's pulse and heart rate before and after the test, it would then be considered a medical test that can only be conducted post-offer.

The more complex the testing procedure, the more likely that the company will conduct the test later in the hiring process. To use a previous example, an employer is unlikely to have all applicants for a newspaper columnist position write a sample article. Instead, applicants may be asked to submit previously published articles. Once a few likely candidates are selected, they would be asked to create an original article to allow for comparisons of skills.

Where extensive evaluation is needed, the company may have to make a conditional offer of employment and actually hire the person for a training period. Keep in mind that employees could be paid less than the usual rate for the position during this time, as long as they are earning at least minimum wage. For instance, an employee might be hired at \$10 per hour for a two-day training period, with the understanding that successful completion of training will begin the usual introductory period for new hires, at the usual rate for the position.

Physical examinations

Remember that physical examinations may be required only after an employment offer has been made (if they are medical tests and not merely agility or strength tests). A candidate can be rejected based on the results if the physical reveals a health problem or disability that precludes the candidate from performing the essential elements of the job, even with reasonable accommodation.



Physical examinations may be necessary for safety reasons. For example, as part of a hearing conservation program, OSHA requires new employees covered by the program to undergo audiometric testing to establish a baseline audiogram within six months of their first exposure to noise at or above the action level. Other OSHA standards concerning employee exposure to toxic and hazardous substances require that employees have medical examinations prior to or at the time of assignment to a job where exposures meet or exceed certain levels.

When physical exams are necessary for a new employee, employers should set up the appointments during work time, and provide directions or anything else needed to ensure employees receive the appropriate tests.

Physical ability tests

Physical ability tests are just one type of test the EEOC has found that can be discriminatory in nature. The EEOC issued an extensive fact sheet on the application of federal anti-discrimination laws to employer tests and other selection procedures to screen applicants for hire and employees for promotion. It is titled “Employment Tests and Selection Procedures” and can be found on the agency website at www.eeoc.gov.

The fact sheet describes common types of employer-administered tests and selection procedures currently being used, including cognitive tests, personality tests, medical examinations, credit checks, and criminal background checks. The document also focuses on best practices for employers to follow when using tests and other screening devices.

If employers conduct pre-hire physical ability tests as part of the hiring process, the tests must be reasonably related to the job and be a good predictor of job performance. If employers conduct such tests, they should seek to measure not only the impact of tests on various groups, but also the validity of the tests to determine whether they truly are a predictor of job performance.

Drug and alcohol testing

If the new employee will need to undergo drug testing at the time of hire or in the future, the company needs to arrange the test and/or explain the drug testing program. Most states allow employers to test candidates for drug use, and some require that the applicant be informed beforehand. An employer can reject an applicant who tests positive for current drug use.

Drug testing is not required by the Drug-Free Workplace Act; however, there are some situations in which drug testing might be appropriate or necessary.

When a personality test measures mental health

Personality tests might be designed to measure honesty, adaptability, conflict resolution skills, communication styles, introversion, extroversion, and other traits. However, when they border on asking questions that might elicit medical information as to the state of a person's mental health, problems can arise. The Seventh Circuit Court of Appeals (which includes Illinois, Indiana, and Wisconsin) held that an older version of the Minnesota Multiphasic Personality Inventory (MMPI) is a medical exam under the Americans with Disabilities Act, and that employers who require applicants to take this exam and base employment decisions on the results are in violation of the ADA (*Karraker v. Rent-A-Center*, 2005).

The court found that this particular test could be used to diagnose certain psychiatric disorders such as depression, hypochondria, hysteria, mania, and paranoia. For example, questions such as the following were asked, and applicants had to answer either true or false:

I see things or animals or people around me that others do not see.

I commonly hear voices without knowing where they are coming from.

At times I have fits of laughing and crying that I cannot control.

My soul sometimes leaves my body.

At one or more times in my life I felt that someone was making me do things by hypnotizing me.

I have a habit of counting things that are not important such as bulbs on electric signs, and so forth.

It's easy to see how answering these questions affirmatively would call into question an applicant's mental health. To be valid, a medical exam must be job-related and consistent with business necessity. It's hard to see how this information has any bearing on a management position, which is what the test was conducted for.

The EEOC defines a medical examination as "a procedure or test that seeks information about an individual's physical or mental impairments or health." According to the EEOC, factors to consider in determining whether a particular test is a medical examination include:

- Whether the test is administered by a health care professional;
- Whether the test is interpreted by a health care professional;
- Whether the test is designed to reveal an impairment of physical or mental health;
- Whether the test is invasive;
- Whether the test measures an employee's performance of a task or measures physiological responses to performing the task;

- Whether the test normally is given in a medical setting; and
- Whether medical equipment is used.

In this particular case, the test at issue was an older version of the MMPI, not the version that is currently available, and most people would know not to ask these types of questions. Still, employers who use personality tests should review them to be sure the questions don't appear to elicit medical information.



Should you tell rejected applicants what you really think?

Employers may occasionally hear from rejected applicants who request (or even demand) an explanation for their rejection. Employers have no obligation to explain the reasons, but may choose to do so. The organization should evaluate whether the risks of sharing information outweigh the benefits.

If an applicant was an excellent candidate but lacked specific experience or skills, you might want to explain what was missing so the individual could reapply at a later date. Even if the person doesn't obtain the necessary skills and reapply, your honest feedback may foster goodwill, possibly in the community if the individual tells others about your positive feedback.

In other situations, sharing the reasons for an applicant's rejection doesn't benefit your company. Applicants who weren't close to meeting requirements might benefit from feedback, but you may risk getting into an argument with those who claim they were perfect for the job. By sharing information, you also risk making a statement that the applicant might perceive as discriminatory.

Employers may decide whether to respond to requests for feedback, but should understand the benefits and drawbacks to either approach. If you provide feedback, be sure to deliver only objective, factual information that won't create the appearance of discrimination.

Rejecting overqualified candidates

Employers sometimes don't want to hire an individual who is overqualified for the position. This may seem counterintuitive, but employers may have legitimate concerns about hiring an overly qualified individual. Perhaps the company is worried that the person will get bored, won't be happy with the pay, will be unhappy working for a supervisor who may be less qualified, or only sees this job as transitional until something better comes along.

These concerns boil down to worries that the highly qualified person won't stay with the company for long, or might cause disruption by trying to "take over" and tell others how to do the job, even while the new hire is still learning the job.

However, should an employer try to explain to the candidate that this is the reason for the rejection? Employers aren't actually required to provide a reason. Even if a rejected applicant requests an explanation, the employer can choose whether to provide one, or how much information to share. The organization should evaluate whether the risks of sharing the reason outweigh the benefits.

If an applicant was an excellent candidate but lacked specific experience or skills, the employer could certainly explain what was missing so the individual could reapply at a later date. Even if the person doesn't obtain the necessary skills and reapply, the honest feedback may foster goodwill.

For qualified applicants, sharing the previously mentioned concerns may not benefit the company. In particular, explaining that the applicant was overqualified (which he or she may hear as "too qualified") may cause the person to argue about why he or she is perfect for the job. In addition, the applicant might perceive the rejection as discriminatory.

Although it's technically okay to tell an applicant that he or she is overqualified, the individual may not understand why that is grounds for rejection. In particular, if the applicant is a member of a protected class (based on age, race, gender, national origin, religion, or some other category) but the person selected is a member of a different class, the rejected individual might suspect a discriminatory motive, perhaps thinking along the lines of, "If I'm more qualified than the person who got hired, why was I rejected?"

If the company rejects an overqualified candidate and responds to a request about the reason, the company should deliver only objective, factual information that won't create the appearance of discrimination. Also, be prepared to respond to possible arguments about why the high qualifications actually make the individual perfect for the job. This doesn't mean directly refuting them, but it does mean effectively deflecting them.

Consider the likely reaction (and possible arguments) and how to handle them in a manner that avoids getting into an argument or defending the decision. Giving a reason such as "overqualified" doesn't require explaining your concerns, but the person may ask, and will likely expect an answer.

Instead of using the term "overqualified" when giving a reason for a rejection, consider stating only that despite the individual's impressive credentials, the company selected someone else who was deemed to be a better fit for the position, and invite the candidate to apply for future openings.

Making an offer and notification

When the most qualified and desirable candidate has been identified, the company will need to extend an offer of employment. Most commonly, the offer is put in writing and mailed to the individual. This helps to document the date of the offer, as well as the details of the offer. However, many employers also choose to call the candidate and let them know an offer is coming. If the individual has been interviewing at more than one company, the phone call can more quickly notify the individual that an offer is on the way, and perhaps delay the individual from accepting other employment until learning what else is on the table.

The offer letter does not have to be extensive, nor does it have to provide too many details. In the most simple form, the letter can ask the individual to come in and discuss the offer in person. However, most offer letters will contain enough information to get the candidate interested. This may include the offered salary or hourly wage, whether any bonuses or commissions are available, and a brief listing of benefits such as 401(k) plans, health insurance, profit sharing, and vacation.

The letter does not need to offer specifics on these benefits, but merely mention that they are available. The company might be willing to negotiate some of the benefits, such as the number of vacation days to be provided. Also, the letter does not need to list the date of hire, and might simply include a statement that employment will begin on the first day of work, or when the employee first reports for orientation or training.

The offer letter will normally ask the individual to sign an acknowledgment either accepting or declining the offer, although if the candidate intends to negotiate some of the listed terms, he or she may want to discuss the matter first. The company can decide how flexible it wants to be in these situations.

The offer might also state that it is conditional upon successfully passing a background check. This might include a drug screen, verification that the individual possesses a required license or certification, or other conditions. If the candidate fails the background check for some reason, the offer can be withdrawn.

Sample offer letters

The following offers an example of the language that might be used in an offer letter.

Date

Applicant

Street address

City, State Zip code

Dear Mr./Ms. [Applicant],

Please accept this letter as a formal offer of employment with [company name] as a [job title], contingent upon your passing applicable exams. This [exempt/non-exempt] position is under the supervision of [supervisor's name and title]. The starting pay for this position is [starting pay]. The hours for this position are [hours and days].

There is a [number of days/weeks/months] orientation period for this position, during which time your overall performance will be reviewed and evaluated. You will receive a formal performance evaluation after your first [number of days/weeks/months] of employment and [annually/biannually/etc.] thereafter.

You are eligible for [benefits] on the [time of eligibility]. Eligibility for other benefits will become effective as stipulated in established corporate policy.

Hours of work, rates of pay, employee benefit programs, and/or company policies in general may be subject to change from time to time, and any such changes will be communicated to employees in a timely manner. In addition, you will be subject to all employee work rules and company policies.

Your starting date will be [starting date], and continued employment will be dependent upon acceptance after the orientation period.

We are looking forward to having you begin work and anticipate a positive business relationship. If all the provisions of the employment offer are acceptable, please sign below and return to me at your earliest convenience. Retain a copy for your records.

Regards,

Company representative's name

I understand and accept all the provisions of the job as outlined above. I understand that this offer is not a contract for employment for any guaranteed period of time. It is my understanding that the privilege of employment is the right of the employer and is subject to the employer's discretion.

Employee Relations Essentials

Signature _____ Date _____

The letter of the job offer need not even be that extensive. Some employers prefer a shorter letter, as follows:

Date and heading

Dear Mr./Ms. [Applicant],

This letter is to offer you the position of [job title] with [company name] effective [starting date] with an hourly rate of [rate]/annual salary of [salary]. Paychecks are issued [issue frequency].

Your employment begins with an introductory period during which you and your supervisor, [supervisor name], can assess if your performance in this position is progressing satisfactorily. No later than [number of months] from your date of hire, your performance will be evaluated.

This offer is contingent upon your ability to present proof of valid work authorization.

Please let us know of your decision to accept this offer in writing by [date].

Regards,

Company representative's name

Sample offer letter for internal applicant

Date and heading

Dear Mr./Ms. [Applicant],

To confirm our recent discussions, we are pleased to offer you the position of [job title], with an effective date of [date]. This is a[n] [exempt/non-exempt] position.

The starting salary for you in this position would be [\$\$\$ per week/\$\$\$ per pay period]. The applicable benefits will be adjusted for your new salary. The job description is attached.

Please let us know your decision to accept or decline this offer by [date] by signing below and returning this letter to the HR department so that we may proceed with moving you into this new position and filling your current one. If you have any questions, please call or stop by.

We look forward to your continued contributions and providing you with professional opportunities.

Regards,

Company representative's name

I accept/decline (circle one) the position of [job title] as described above and in the attached job description.

Compensation does matter in recruiting

A desire for higher wages may not prompt employees to start looking for new jobs if they enjoy their current jobs. Similarly, offering higher wages may not be enough to retain employees if the work environment is intolerable. But compensation does matter, at least to job applicants, because it provides a simple means of comparing positions.

Job seekers who have been unemployed for some time may be less concerned about pay and more concerned about reentering the workforce. However, job seekers who are able to choose among several offers may accept a position with higher compensation.

Keep in mind that the individual you identify as a top candidate has likely been identified as a top candidate by another company as well. If the salary you've offered is the highest among the candidate's job offers, your company's job offer is probably at the top of the person's list. If not, and the individual asks about compensation by pointing out that he or she has an offer with higher pay, you should be prepared to explain why the candidate should choose your company.

You may have to state that the compensation offered is the best you can do, but be prepared to explain the other virtues of working at your company. These may include your benefit offerings, your commitment to ensuring work/life balance, or your company's culture of focusing on employee development.

Avoid making unintentional employment contracts

Most employers have either done it or heard someone else do it: create an unintentional contract of employment. This is usually done verbally and unwittingly as an informal guarantee to an applicant or employee, in statements such as "If your performance is good, you'll have a job here as long as you want." Such statements create implied contracts of employment that, if challenged, could be binding on the organization.

An implied contract is one that is inferred through words or actions, as opposed to an express contract, which is in writing. An implied contract can nullify the at will status of an employee, making termination more difficult (or unlawful, in terms of a breach of contract action).

Although such statements to applicants or employees are meant in good faith (and not necessarily as guarantees of future employment), employers obviously don't have a crystal ball and can't predict the future. Another recession could hit, requiring layoffs. If the employee who was guaranteed a job as long as his performance was good received a layoff slip, he might sue for breach of contract, alleging he had an implied contract guaranteeing that he can only be terminated for poor performance. And he might win.



Other unforeseen circumstances could include changes in production, the loss of a large customer, or a decision by the company to go in a new direction, all of which could force a change in personnel. The company could restructure to eliminate middle management, leaving a promised promotion unfulfilled. While things may seem stable with the business now, there is no guarantee that conditions will remain static.

The future may not only see conditions change with the business, but conditions could change with the employee, as well. The employee may lack the skills that he or she claimed to have, or it might be increasingly evident that the employee doesn't have the necessary social skills to develop interpersonal relationships and is, in fact, having conflicts with just about everyone he or she deals with. Or the company might suspect the employee is using the job as a jumping-off point to set up his own competitive business.

The employee may develop personal problems that lead to substance abuse, which subsequently affect work performance. If the employee is missing a lot of work due to illness or unexcused absences, it would be difficult to justify a promotion. Obviously, there are numerous scenarios involving things that could change over time, and these are just a few.

If an employee should make such a claim and sue for breach of an implied contract, whether the employee wins or loses, the organization still has to defend the claim. This will require resources in terms of time, personnel, and legal expenses, and it won't be cheap. When making a job offer, do not offer guarantees relating to continued future employment.



Cross reference

For more information on unintentional contracts, see the **At-will employment concept** section in the **Onboarding and Training** tab.

Background checks

A background check can have far-reaching consequences if not done sufficiently, or not done at all. Résumés are not necessarily storehouses of factual information, and job candidates can lie about their education, experience, criminal record, employment history, and more on applications. Employers should always verify the information given by an applicant. Failing to do so can be costly in a number of ways.

The type of background check performed may vary depending on the position. Note that the check may vary by position, but not by person. If an employer is performing a check on candidates for a certain position, it must do so for all candidates for that position, not just some. This does not mean employers must perform a check for every applicant, but if the company ordinarily performs a check on the top three finalists, then it must follow that practice consistently.

Likewise, employers cannot limit background checks to certain individuals based on their race, age, religion, gender, national origin, or other such characteristics. Any background checks performed should be done objectively, without regard for the individual.

For example, a gap in employment may be more than simply a period of unemployment indicating an employee was laid off, terminated, or quit his job without having another one lined up. It could also be the result of jail or prison time. An employer is obligated to avoid hiring someone who poses a threat to other employees or to members of the public. Performing a thorough background check and finding those employment gaps is the first step in that process.

Hiring managers should check references well, especially dates of employment, since many candidates lie to cover up gaps in employment on their applications.

Performing an adequate background check does not necessarily mean doing an all-out check for every single position. An “adequate” check not only refers to the extent of the check, but also to what is appropriate for the position. For instance, if an employee will have no access to money and will not deal with any of the company’s financial matters, a credit history check may not be reasonable and, depending on state law, it might not even be legal.

For people who deal with the public, particularly in unsupervised situations where employees are required to go into peoples’ homes, a criminal record check is likely justified. Employers have a duty to protect the public from violence or other harm that an employee may cause, and should perform an adequate check to determine if there is anything to suggest that a candidate for that particular job would pose a risk to others.

As a general rule, the greater the responsibility of the position, the more extensive the background check.



Best practice

Background checks on temps

When leasing employees from a temporary staffing agency, be sure to ask what type of background checks were performed. A staffing agency might only perform a cursory check, and the information searched may not be relevant for the position given to the temp.

If the temp will be hired on as a regular employee, another background check might be needed. Aside from the fact that the host company probably doesn't have the original background check documents (and they might not be complete), the individual may have been with a staffing agency for several years, and there could be more recent convictions or other concerns that would affect a hiring decision.

When to check

When background checks are conducted on job applicants, the checks should be performed at the same point in the hiring process, usually after extending a conditional offer of employment. Some employers will include questions on the job application asking the applicant to indicate whether he or she has any convictions. Employers should be aware that a number of states (and quite a few cities) have adopted so-called "ban the box" laws to prohibit such questions on the job application. Typically, these laws prohibit inquiries about criminal history until the first interview, or until after a conditional job offer has been extended.

Background checks are most commonly conducted for incoming candidates, but they need not be limited to the beginning of an employment relationship. Many employers perform checks on internal candidates when they are promoted or, if appropriate, upon transfer to another position that harbors different responsibilities.

Don't assume that a candidate's background was adequately and thoroughly checked at the time he or she was hired. Even if it was, just as employees' job duties and responsibilities change over time, so do their personal lives. Any number of things may be discovered that weren't there when he or she was hired, or weren't relevant to the position at the time, but are relevant now.

For example, an employee who was hired for an entry-level position that did not involve handling cash or company funds might have undergone a fairly basic background check at the time of hire. If this individual receives an offer of promotion to a higher position that does involve such responsibilities, you may want to conduct a more thorough background check.

Keep in mind that the amount of time passed since a conviction (or financial problem such as bankruptcy) should be a consideration when deciding whether the background check results should justify withdrawing the job offer. In particular, if an employee has been with the company for more than 10 years and has a strong performance record, older convictions may not be relevant. On the other hand, the employee might have recent issues (other than criminal convictions) that could have a bearing on your decision of whether to withdraw the offer.

What to check

A background check might incorporate any of the following:

- Criminal records
- Court records
- Credit history
- Motor vehicle records
- Employment history
- Educational background
- Professional licenses
- Military records
- State sex offender registry
- References
- A drug test

In most situations, the above items can be checked before a job offer is made, and this is by no means an exhaustive list. After a conditional job offer is made, the company may be able to make job-related inquiries into a person's physical fitness for the position by making medical inquiries or checking into the individual's workers' compensation records. However, all entering employees in a particular job category must undergo the same physical evaluations. Also, if a job offer is withdrawn on the basis of medical information, the company must be aware of the legalities of doing so.

Contacting current or previous employers

You'll want to verify the employment history provided by a candidate, since applicants are not always entirely honest about prior employment. Even if the individual did not specifically authorize these reference checks, you may contact previous employers without the individual's permission.

Of course, if a third party will conduct those reference checks on your behalf, the Fair Credit Reporting Act (FCRA) may require certain disclosures to the employee. However, the FCRA does not apply to employers that conduct their own checks, such as calling previous employers or educational institutions.

Contacting previous employers should not raise concerns for a candidate, but he or she may have concerns about reference checks made to the current employer. In particular, the candidate may not want the employer to know that he or she is looking for a new job.

Many employers will ask if it's okay to contact a current employer, which is primarily a courtesy. Contacting a current employer after being asked not to do so may be seen as unprofessional, which could affect the candidate's willingness to accept a job offer. Delaying contact with the current employer until after extending a conditional job offer should be a reasonable compromise.

However, if an individual asks you not to contact a previous employer, you might see this as a red flag, and you could still make the contact. The candidate should not have concerns about a former employer learning of the job search, simply because the candidate no longer works there.

If an applicant is still reluctant to agree to your contacting a previous employer, you might discuss the situation with the individual. Perhaps the individual had a bad relationship with someone at the company and is expecting an unfairly negative reference, but you may still want to obtain both sides of the story and make your own evaluation of credibility.

If you get a negative reference (which might even come from an employer that the applicant listed as an “approved” reference), you can drop the candidate from further consideration or withdraw any job offer already made. Whether you choose to share the specific reason for rejection is at your discretion, but keep in mind that the individual will almost certainly ask why a job offer was withdrawn, and be prepared to answer such questions.



Considering medical records

Gathering medical information on a candidate is a tricky and sensitive undertaking. For instance, if heavy lifting is a requirement of a position, it may be a legitimate concern as to whether an applicant has had three hernia operations. On the other hand, if a company discovers that the candidate in question has recently been in substance abuse rehab, but that has no real bearing on the position, it can't necessarily take that into account.

The Americans with Disabilities Act (ADA) requires that employers ask the same questions or require the same medical exams of all entering employees in the same job category. This means that if an employer has three finalists for a position, it can't pick and choose which of the candidates will receive an exam or be the subject of a medical inquiry.

If a job offer is withdrawn based on medical information obtained, the company must show that:

1. The individual poses or would pose a direct threat of harm to himself or others due to the medical condition; and/or
2. There are no reasonable accommodations available that would allow the individual to perform the essential functions of the job without posing an undue hardship.

Employers may check workers' compensation records after a conditional offer of employment is made. These types of checks may uncover a medical condition that causes the applicant to pose a direct threat to herself or others. In this situation, the company could rescind the job offer if

it determines that the organization cannot make a reasonable accommodation. A job offer can also be rescinded if the company has reason to believe that a candidate has submitted a fraudulent workers' compensation claim in the past. Such a decision would not be based on a candidate's medical condition.



Best practice

Past vs. present drug or alcohol use

The issue of substance abuse is also a tricky one for employers, and again the ADA must be taken into consideration. Drug tests are not, under the ADA, considered medical exams, and they can be administered before a job offer is made. However, many employers save this step for the post-offer stage to avoid incurring excessive costs of testing all candidates.

In the pre-offer stage, employers may ask some questions about drug use, such as asking whether an applicant is currently using drugs illegally, or if the applicant drinks alcohol. (Note: Some state laws prohibit discrimination against individuals for the use of lawful products such as alcohol. In these states, it might be best to avoid requiring such information.)

Employers cannot ask if the applicant is a drug addict or alcoholic, nor ask whether he or she has ever been in a drug or alcohol rehabilitation program. These questions may reveal the presence of a disability such as alcoholism.

An individual who is no longer using drugs illegally is protected under the ADA. An individual who is currently using drugs illegally, however, is not. Past and current alcoholism, on the other hand, is protected.

Once an individual is hired, the ADA does not protect those who are impaired by alcohol or drugs while on duty.

Considering criminal records

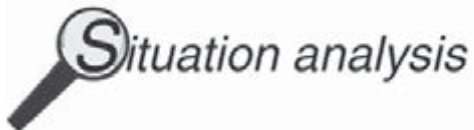
A criminal records check may not be a bad idea for all incoming candidates. However, to affect a hiring decision, a conviction should be reasonably related to the position.

The Equal Employment Opportunity Commission (EEOC), which enforces federal laws prohibiting discrimination and harassment in the workplace, is of the position that barring employment based on any conviction can be discriminatory toward certain protected classes. The agency states that employers must consider the following factors when basing an employment decision on a conviction:

1. The nature and gravity of the offense or offenses,
2. The time that has passed since the conviction and/or completion of the sentence, and
3. The nature of the job held or sought.

EEOC Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq. (1982).

If an applicant is rejected, the company needs to be able to show that it considered these three factors to determine whether the decision was justified by business necessity. This means that decisions based on criminal records need to be individualized. An across-the-board ban on employment for individuals who were convicted of certain crimes would likely not fit with the EEOC's outlined policy.



Using a criminal record

In looking to hire several new employees, one applicant, Luke, is qualified, but he has a criminal record and was convicted of drug possession six years ago. Since the company is worried that Luke may not be trustworthy, and has other qualified applicants, can it reject him based on this information?

Refusing to hire an individual because of his criminal history could be problematic. Treating individuals differently because of criminal history may disproportionately affect members of certain racial or ethnic groups. Where this is the case, an employer may maintain such a policy only if it can prove a business need. If Luke's offenses are minor or don't relate closely to the job (and, as in this case, were committed many years ago), it's not a good idea to refuse to hire him solely because of his conviction record.

As another example, employers might find certain offenses to be distasteful (such as convictions for domestic violence) but the nature of the offense occurred in circumstances that are unlikely to arise in the workplace (e.g., if the person is applying for a forklift operator position). If the background check was conducted after making a conditional offer of employment, this conviction probably wouldn't be grounds to withdraw the offer.

Guidance released by the EEOC in April 2012 indicated that employers should consider conviction records of applicants only if they are job related and consistent with business necessity. When a conviction does not meet this standard, employers risk creating a disparate impact on certain minorities who are more likely to have been convicted of a crime. The EEOC expects employers to allow the applicant to explain the circumstances surrounding the conviction.

According to the EEOC guidance, an employer may demonstrate that a decision to exclude a candidate was job related and consistent with business necessity by showing that it:

1. Considered at least the nature of the crime, the time elapsed since the criminal conduct occurred, and the nature of the specific job in question, and
2. Gave an applicant the opportunity to show why he or she should not be excluded.

The employer does not have to accept the applicant's explanation, but the discussion may help evaluate whether the conviction should be grounds for rejection.

For example, if an applicant has a conviction that might otherwise relate to the job, but it occurred 15 years ago (when the person was 20 years old) and the individual has a clean record since with strong employment references, then using the conviction to deny employment may be challenging to justify.

Arrest vs. conviction

While it is possible to use information regarding an arrest in an employment decision, employers should remember that an arrest does not establish criminal conduct. The EEOC holds that barring employment based on an arrest is not job related and consistent with business necessity, whereas a conviction will usually serve as sufficient evidence that a person engaged in particular conduct. The EEOC clarifies that an employer may make an employment decision based on the conduct underlying an arrest if the conduct makes the individual unfit for the position in question.

For example, assume the principal of an elementary school was arrested and charged with several counts of sexual abuse during his tenure. The school suspends him based on their policy that requires suspension or termination of any employee it believes engaged in conduct that impacts the health or safety of the students. Although the principal denies the allegations, the school terminates him after it conducts a thorough investigation and doesn't find his explanation credible.

Regardless of the principal's race or national origin, the EEOC would not likely view this situation as discriminatory because the school's policy was linked to conduct relevant to the job, and the discipline was based on the underlying conduct rather than the fact that the arrest occurred.

State laws

Review state laws regarding background checks and determine if they apply. States may require employers to complete background checks for certain positions, or may prohibit certain types of background checks. Other state laws will place restrictions on how employers use the information received through a background check.

Many states require that background checks be conducted for certain sensitive positions such as day care workers, school bus drivers, teachers, home healthcare workers, those who work with the mentally ill, and so on. States recognize the need to protect vulnerable populations such as children, the elderly, and the mentally ill.

Commercial motor vehicle operators are also required by law to have their background checked.

Even where the law may not require a check, an employer would show due diligence by carefully scrutinizing the backgrounds of individuals who will:

- Work with vulnerable populations (e.g., children, the elderly, patients);
- Work in or deliver products to customers' homes, particularly if unsupervised;
- Be trusted with money, valuable company property, or confidential information.

Remember, it is the employer's burden of proof to show that an adequate background check was performed, if it is ever called into question.

How to protect the company

There are a number of ways to protect the company from the consequences of a bad hire:

1. Don't rely on résumés alone. Require all candidates to complete an application form. On the form, be sure there is a statement for applicants to sign to verify the truth and accuracy of the information they've provided. The application form also should state that any falsifications,

omissions, or misrepresentations of any information are grounds for rejection of the applicant for employment, or for termination of employment.

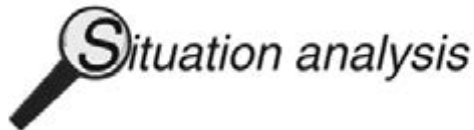
2. Investigate all the information and references given in the application and résumé. Don't take anything at face value.
3. Question the applicant about any gaps in employment. Ask for verification of time spent in self-employment or other explanations for such gaps to be sure the candidate was not actually incarcerated during that time.
4. Check appropriate records in all the places the applicant lived.
5. Confirm all educational and professional licensing credentials, grade point average, major course of study, and whether a diploma was issued.
6. Document all background check results, including conversations with references and past employers. Include the name and title of the person contacted, what questions were asked, and what answers were given.
7. Be sure applicants sign an authorization and waiver form allowing previous employers to freely discuss the applicant's personnel and performance record.
8. If driving is part of the job, be sure to check the applicant's driving record in all the states where the applicant lived, and also check the current license status of the candidate.
9. When contacting previous employers, be sure to fax them the applicant's authorization and waiver form. If they are still reluctant to talk, and a state reference immunity law is in force in that state, remind them of the law and that any information that is given in good faith is protected under the law.

Vetting out counterfeit candidates

Unfortunately, applicants do lie about their qualifications, and there are even businesses whose sole purpose is to provide fake references for applicants who don't have authentic or adequate references to call upon. In some cases, these services pretend to be the business of the individual's choosing; in others, companies are made up specifically for the purpose of providing fake references. So how does an employer vet out these dishonest applicants when even their references are lying for them?

- Check the phone numbers provided against company websites or phone book listings. If they don't match up, consider calling the employer's publicly listed number and inquiring about the applicant that way.
- Do some research about the company. If searching doesn't uncover a website or phone book listing, the organization may not be real.
- If calling a suspected false reference, ask that reference for the name of another individual who might be able to vouch for the applicant.
- Don't rely only on the résumé to tell provide the applicant's qualifications. Ask specific questions about the individual's previous experience and listen carefully for any inconsistencies.
- If the company receives a reference letter instead of an individual's contact information, don't take it at face value. Follow up by making a quick call to the author of the letter (and again, check the phone number).

Unfortunately, applicants won't always be who they say they are, so interview every candidate thoroughly and do the legwork to follow up with their references. Even though this requires a further investment of time, the alternative could be training an individual who doesn't have real qualifications, terminating him or her for being unable to perform the job, and spending time and money to find, hire, and train a replacement.



Using Facebook to vet candidates

Imagine being a packed courtroom, about to give testimony. The company has been sued by a candidate who was rejected for a job. Her argument: The company denied employment in violation of the Americans with Disabilities Act. Why does she think this? Because an interviewer mentioned that the company checks social networking sites when considering candidates. The questioning might go like this:

Attorney: "During the hiring process, did you look at her Facebook site?"

Interviewer: "Yes."

Attorney: "Did you read it thoroughly?"

Interviewer: "Yes."

Attorney: "Did you know, prior to rejecting her application, that she had recently undergone cancer treatments?"

The interviewer has to admit this, because it was on her Facebook account.

Attorney: "Can you prove that you didn't use that information in your hiring decision?"

The interviewer can deny using it, but might not be able to prove that it didn't factor into the hiring decision. One defense is to provide evidence showing that the selected candidate was more qualified. However, if the evidence is questionable or the jury is sympathetic, there may be just enough doubt in their minds to wonder if the knowledge of her condition didn't contribute to the decision not to hire her. "After all," they're thinking, "if it were me and I knew about it, I wouldn't want to hire her, either."

Social networking sites can provide information employers shouldn't have, and once obtained, it can be an uphill battle to prove such information wasn't considered in the hiring decision. If the company chooses to use social networking sites to vet candidates, do so with extreme caution.

Background checks and the Fair Credit Reporting Act

The Fair Credit Reporting Act (FCRA) seeks to prevent the circumstance in which inaccurate or incomplete consumer reports causes an adverse employment action. Under this law, a consumer report contains information about a person's personal and credit characteristics, character, general reputation, and lifestyle. To qualify as a consumer report under the FCRA,

a report must be prepared by a consumer reporting agency (CRA), a business that assembles such reports for other businesses.

The FCRA doesn't prevent employers from performing certain background checks, but does outline procedures that must be followed for employers that choose to utilize them. When an employer intends to use a consumer report regarding an applicant or employee, the FCRA requires that the employer notify the individual in writing that such a report may be used. The document containing this notice should contain *only* this notice. The employer must also obtain written authorization from the individual for this report (special procedures apply to the trucking industry and for employee misconduct investigations).

If an employer intends to take adverse action against an individual (which may include refusal to hire, termination, denial of a promotion, etc.), it must provide a pre-adverse action disclosure, including a copy of the individual's consumer report and a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act" (a document from the Federal Trade Commission which should be provided by the consumer reporting agency). These documents must be provided *before* an adverse action is taken based on the information on a consumer report.

Once the applicant has been given the pre-adverse action notice, summary of rights, and a copy of the report, the individual must be given a reasonable time to dispute the contents of the report with the consumer reporting agency. The term "reasonable" is not defined, but the Federal Trade Commission has issued an opinion that five days should be reasonable in most cases. Some lawyers have suggested that this should be five business days, not calendar days.

In some cases, the applicant may contact the employer to dispute the contents of the report. However, the individual needs to contact the consumer reporting agency to correct any errors. An employer may choose whether to accept any explanations of the alleged errors, or may choose to proceed with the chosen action, such as withdrawing the job offer.

After an adverse action is taken based on a consumer report, the employer must give the individual notice that the action has been taken. Such a notice must include:

- The name, address, and phone number of the CRA that supplied the report;
- A statement that the CRA that supplied the report did not make the decision to take the adverse action and cannot give specific reasons for it; and
- A notice of the individual's right to dispute the accuracy or completeness of any information the agency furnished, and his or her right to an additional free consumer report from the agency upon request within 60 days.

There are legal consequences for employers who fail to get an applicant's permission before requesting a consumer report or who fail to provide pre-adverse action disclosures and adverse action notices to unsuccessful job applicants. The FCRA allows individuals to sue employers for damages in federal court. A person who successfully sues is entitled to recover court costs and reasonable legal fees, and the law also allows individuals to seek punitive damages for deliberate violations. In addition, the Federal Trade Commission, other federal agencies, and the states may sue employers for noncompliance and obtain civil penalties.

Employers must carefully follow the requirements of the Fair Credit Reporting Act both before and during the hiring process. Despite the term "credit," this law covers a variety of third-party reports, including criminal background checks.



Introduction

Employers only have one chance to make a great first impression. For new hires, that chance is new employee orientation. Do it wrong, and employees will regret accepting a job offer, leave for the first opportunity that looks better, and put the word out to others to stay away from the organization.

Every new employee must complete paperwork to get on the payroll and be aware of critical policies and procedures. But unfortunately, much of what new employees are given in traditional orientation programs is perceived as boring, irrelevant, and/or overwhelming.

The following strategies can help make new employees feel welcome, integrate them into the organization, and help them to become productive more quickly:

Send a “welcome aboard” letter. Include a job description, an agenda for the first day, and provide contact information so the new hire can have a point person for answering questions.

Prepare the supervisor. Copy the supervisor on all correspondence with the new hire. Make sure the supervisor will be available that first day and has an intradepartmental orientation set up.

Make the new hire feel welcome. When meeting the new employee the first day, offer a T-shirt, coffee mug, or some other memento with the company logo to help him or her feel part of the team. Consider providing a map that shows nearby restaurants. And even better, offer a map of the facility (especially if it has several buildings). Seemingly minor issues like not knowing where to park can cause the new hire to arrive frustrated on the first day.

Give a brief company overview. Every new employee needs to know about the company — but don’t overwhelm individuals with minutiae.

Train on need-to-know topics. To find out what new employees need to know, check with “old” new hires (those who have been with the company one month, six months, and a year). Ask, “What do you wish you had known your first week on the job?” Ask managers and supervisors, “What policies and procedures does a new employee need to know to avoid making mistakes?” and “What issues do you see newly hired employees struggling with?”

Employee Relations Essentials

Work with the supervisor for continued onboarding. HR is typically responsible for orienting new employees to the overall company, providing policy information, and explaining benefits. But the real onboarding process belongs to the supervisor, who is responsible for the employee's day-to-day work life. The supervisor should make sure the new employee has a fully equipped workstation, should create a schedule for the employee's training, and should make sure the new employee knows who to go to with questions.

Make orientation a continuous improvement project. Survey and meet with new employees (and supervisors) periodically to get feedback about how to improve the onboarding process, including how to make a better first impression.

Don't try to do it all in one day. Remember that the failure of most orientation programs is that they are overwhelming to a newcomer. Spread training sessions out over a period of time. The new hires will learn more and retain more, and they will think more highly of their welcome aboard.



Best practice

When a new employee arrives

The first six months are when most new employees decide whether or not they want to stay. Employers can influence their decision and help create a positive experience by following a few simple guidelines:

Give them what they need. This refers to training, supplies, and support. They need to have adequate training to minimize their mistakes and help them feel competent in their jobs; they obviously need the proper supplies to do their jobs efficiently; and they need support from a mentor so they have someone they can go to when they have questions.

Treat them like they have value. New employees know that they won't be fully productive for awhile, but don't treat them as if they are of no consequence or don't belong. Treat new hires as if they are already productive members of the team, based on the belief that they will be. Make every effort to make them feel welcome.

Prepare the team. Current employees should know something about the new hire and his or her background. There should be a plan at least for the individual's first day and week, which should include orientation and training, departmental/team procedures, and so on. The entire team should know what projects the new employee will be working on, and who will be responsible for assisting/training/mentoring him or her, so that everyone can prepare ahead of time.

Develop a schedule. The new employee, as well as the team members, should know what to expect during the first week or so on the job. This depends on the complexity of the position, but should provide guidance beyond a general expectation to learn the job.

For instance, the schedule might have items like, "Tuesday morning: Working with Robert to learn about [blank]" and "Tuesday afternoon: Meeting with HR regarding benefits." If even the first few days are planned out, the new hire won't be wondering what to do, especially when the supervisor is in a meeting or otherwise unavailable.

Onboarding (introductions) and training

Once a company has chosen an employee for a position, the employee must be provided with information on things such as wages and benefits, to whom he or she reports, and the employee's work location. Some companies have a formal orientation structure, while others are all but non-existent.

The first year, and in particular the first six months of a new employee's tenure, are the make-or-break months. During this time, the new employee will decide if he or she wants to stay in the job or look for employment elsewhere. Assuming the employee is doing well, there are steps employers can take to enhance retention.

These steps include planning for the new employee's orientation, establishing a mentor, creating a training schedule, and of course, providing feedback on the new employee's progress.

Orientation

It all starts with orientation. This is the new person's introduction to the company, the department, and to the new job. The first impression should be favorable. While much of the general orientation is handled by Human Resources, supervisors are in charge of orienting the employee to his or her job.

Be sure to give a warm welcome and introduce the employee around. Realize the new employee may be overwhelmed with information on benefits, policies, and other company information. Try not to overwhelm the employee too much the first day so he or she has time to process the information and doesn't reel from information overload.

For a department where everyone has worked together for many years and knows each other well, it may be especially difficult for a new person to "break into the group." It may take a while for a close-knit group to truly see a new person as a peer. Before the new employee starts, tell the others how important it is to make the new person feel welcome and that it's important to include the person on a social level as well as on a professional level.



Best practice

Orientation overload

Perhaps a necessary evil, orientation is a fundamental step in onboarding. To keep employees excited about their jobs from day one, avoid the following orientation pitfalls:

Inundating employees with information. Giving employees too much information increases the likelihood that they'll forget the important material. If the company's 100-year history is truly vital to a new employees' success, consider delivering it at a later date.

Ignoring the fun stuff. Employees do need to know about company expectations and benefits, but don't forget to mention things like extracurricular activities and social events that might keep employees excited about working for the organization.

Employee Relations Essentials

Rushing through. Long orientations can get dull, but be sure to allow time for questions to ensure that employees have a firm grasp of the material presented.

Focusing only on the big picture. Some of the most pressing questions on new employees' minds involve where to park, what's appropriate to wear, and what the expected work hours are. Covering these details in orientation can set employees' minds at ease.

Expecting them to remember everything. Employees won't retain everything presented at orientation, so give them contact information for key people who can answer their questions down the line.

To find out whether orientation is leaving employees bored, overwhelmed, or under-informed, ask for their feedback. Using this feedback, review the orientation process periodically, and don't be afraid to adjust it as needed.

Before the employee arrives

While the true orientation period doesn't begin until the new employee actually reports for work, there is a lot of "leg work" that should be done before the employee's first day. Planning ahead for the new employee will make the orientation process go much more smoothly on the worker's first day and prove beneficial in the long run as the employee adjusts to the new position.

Before the employee's first day, it's a good idea to:

- Notify coworkers in the new employee's department or area that a new worker will be starting. Ask the coworkers to welcome the worker and offer their support.
- Prepare tasks for the employee to accomplish during the first couple of days. These should be interesting tasks that help the employee learn something of value (a work process, networking, etc.).
- Schedule the employee in any training or classes that are needed.
- Ensure the employee's work area is available, clean, and has the necessary tools, supplies, and equipment.
- Set up email accounts, computer logins, etc.
- Obtain any door keys, passes, parking permits, etc., the employee will need.
- Gather information that the employee will be given (handbook, policies, benefits, etc.).
- If possible, assign the employee a mentor.
- Arrange for the worker to meet key people in the organization.

Starting on the first day

Orientation is usually associated with the training and information that is given to the worker on the first day of work. However, orientation can last for a much longer period of time and can include an evaluation of the worker's performance, feedback, etc. Orientation can also be tied to employer-provided benefits, in that certain benefits may not take effect until the employee has completed the orientation period.



Best practice

How long should new employee orientation last?

The short answer is that orientation should last as long as it takes for the worker to achieve the goals of the orientation program. There is usually an “orientation session” that may be as short as three hours and then a longer “orientation period” that could be anywhere from a week to a year. It really depends on the specific workplace and the employee’s specific job.



Introduce the employee

New employees have a lot on their minds. They are concerned about everything from where to park or catch the bus, to who their coworkers are, where their workstation is, what the employee benefits are, where they can eat lunch, and many more things. It is easy to see how they can be distracted during orientation.

During their first weeks on the job, new employees are bombarded with information about company rules, regulations, procedures, and benefits; however, employers need to make every effort to address new employees’ concerns in order to help them become productive in their new jobs.

Employee Relations Essentials

Begin by describing the purpose, scope, and mission of the company — where it has been and where it is going. This will help create a sense of identity for the employee and a sense of pride in being a part of the organization.

Review the job description

Review the job description with the new employee to dispel any confusion about the job's requirements. If the state is an at-will state (most states are), and the employment is at-will, also explain that “at-will” employment means the employer, or employee, can terminate the employment at any time — there is no contract for a set term of employment.

Provide a copy of the handbook

The employee handbook explains many of the company's policies and procedures. During employee orientation, refer to the handbook as the company's rule book. Provide contact information in case the new employee has questions about the various policies in the future.

There are several ways to get employees to read the company handbook. One of the ways is to make the handbook easy to read and interesting. Another way is to give a quiz or test that incorporates various parts of the handbook, so workers will have to read the handbook. Also, having employees sign and return a statement that they have received the handbook could be beneficial.

If employees will sign a statement upon receipt of the handbook, consider the wording of the statement. It may not be appropriate to have employees sign that they “have read” the handbook if they have not, in fact, read the book. Instead, the statement could say that employees “agree to read” the handbook. If there is a later dispute, the statement will more accurately reflect the situation and places responsibility on the employee to read the book.

Discuss work hours and related items

New employees need to know when they are expected to be at work. Explain the company's policies on:

- Tardiness
- Excused/unexcused absence
- Flex time
- Rotating shifts
- Recording work hours (time cards, time sheets)
- Breaks
- Meal breaks
- Lunchroom/food service
- Eating at workstations
- Personal telephone and email

This is also the time to discuss where to park, carpooling, and the availability of public transportation and shuttle services. To help new employees get settled, show them where to put their personal belongings, the availability of lockers, coat rooms, and pay phones.

Review the company dress code and, if the employees are to wear uniforms, go over the details of the company's uniform program.

Confirm pay rates

During orientation, HR should review the agreed-upon rate of pay and the pay schedule, when employees will receive their first check, how paychecks are delivered, the availability of direct deposit, and additional procedures regarding pay. Other items to go over at this time with the new employees include payroll deductions for taxes, insurance, and similar programs.

Orientation is also a good time to discuss the company's policies for performance reviews, pay increases, and reimbursement for business-related expenses.

Explain orientation period

Many employers require new employees to satisfactorily complete an orientation period before being eligible for certain benefits. Typically, frequent performance reviews are part of the orientation period.



Best practice

Tips for orientation

A well-rounded, professional orientation process for newly hired employees is very important to a company's overall retention effort.

The new employee orientation process can vary greatly from one company to the next. But, at a minimum, orientation should generally include the following:

- **A welcome** — The first order of orientation business is to welcome new employees to the company. Take the time to personally welcome and thank them for selecting the organization.
- **Documentation** — During orientation, make sure employees complete any necessary documentation that hasn't been completed (e.g., W-4 forms).
- **Money matters** — Make sure to thoroughly review pay and benefits packages. Few things will cause more job dissatisfaction than confusion about pay or benefits.
- **New training** — This is one of the most important parts of any orientation process. Make sure new employees are given or scheduled for any necessary training.
- **Safety policies and procedures** — Clearly communicate safety values and goals during orientation. Communicate safety before the worker settles in to an unsafe routine or mind-set!
- **Operations and work rules** — Clearly explain the operational procedures, processes, and work rules. Communicate the important role employees play in the success of the organization. New employees need to understand how their efforts impact the organization.

Employee Relations Essentials

- **Expectations exchange** — Make sure questions are answered and expectations are aligned before any new employee begins work.
 - **Tour** — Give new employees a tour of their work areas, and if possible, the entire company.
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Do managers realize the importance of onboarding?

Onboarding goes beyond the typical orientation that is handled by Human Resources. It is also the responsibility of the department where the employee will be working. Department supervisors must do their part by having an adequate plan for the employee's first day.

How a new employee is treated sends a message not only to the new person, but to all employees about how much they are valued by the organization. If a new employee is treated as just another item in a manager's day that he or she doesn't have time for, that will be evident. On the other hand, if the new arrival is truly welcomed and the manager makes time to orient the new employee to the job and to the department, that will send a signal that the company recognizes and appreciates the value of its people.

The department where the employee will be working should have the new employee's workstation ready on day one, complete with supplies. The new employee's coworkers should know when the new employee will start, know something about his or her background, and be advised as to what projects he or she will be working on so that they can prepare.

Be sure the department manager will introduce the new person around, give a tour of the facility, explain interdepartmental processes and relationships, assign a mentor to answer questions, and go over specific departmental procedures. On the first day, it's a good practice for the manager to make plans for the department to have lunch together so that the new employee can get to know his or her coworkers.

Onboarding is a process of integrating a new employee into the business environment and culture, and this takes time. Be sure that department managers are handling the onboarding process well, because what happens after orientation is complete and the new employee actually starts the job is critical to that employee's success.

Company policies

During orientation, it's important that new employees be informed of the company's policies and procedures.

A few policies that may particularly need clarification and explanation are as follows:

Discrimination: Make it clear to new employees that discrimination is not tolerated. Discrimination is any situation in which a group or individual is treated differently based on their membership in a protected category or protected characteristic such as sex, religion, age, or disability.

As part of new-employee orientation, explain the company's procedures for employees to report discrimination and the company's policy for keeping the reports confidential.

Sexual harassment policy: Employers need to clearly communicate to all employees that sexual or other harassment will not be tolerated. Explain the company's policies and procedures for employees to report any cases of sexual harassment.



Benefits package: New employees need to learn about the company's benefits. Frequently, these employees are under a deadline to sign up for insurance benefits. Explain the benefits and what the employee needs to do to take advantage of them.

Employee benefits are those perks that are offered as an incentive to work for the employer. The types of benefits vary, but generally include:

- Health insurance
- Dental insurance
- Medical and optical prescription reimbursement
- Life insurance
- Short- and long-term disability insurance
- Retirement plan
- 401k (403b) plan
- Profit sharing
- Bonus/incentive programs
- Personal leaves of absence
- Personal time off/sick days
- Vacation
- Severance pay

Employee benefits may also include child care, educational reimbursement, training, smoking cessation, and health and fitness programs.

Work-related injuries and illnesses: New employees must receive clear instruction on how they are to report work-related injuries and illnesses. This is also a good time to review the benefits of workers' compensation insurance.

Mentoring programs

Assigning a mentor for each new employee is a good way to ensure that the new employee has someone they can go to with questions and problems.

If the company operates a mentoring program for new employees, explain the program's goals, procedures, and benefits during orientation. Introduce the new employee to his or her mentor as soon as the orientation process allows.

Establishing a mentor pool

In order to have a mentoring program, a company must first have mentors. It's a good idea to have several to choose from, both for scheduling purposes and to keep burnout from being an issue. To begin establishing a mentor pool, look for the right types of people. First and foremost, look for employees who are able to fulfill the role required because of time, willingness, etc. After that, it becomes a matter of selecting based on characteristics. Some characteristics of good mentors are:

- Good temperament and personality,
- Thorough understanding of company policies and goals,
- Positive on-the-job attitude,
- Peer and subordinate respect, and
- High quality of job performance.

Note also that it may work best if each mentor is assigned to only one new employee, as it can be a time-consuming process.

Train the mentor

While a mentor may understand how the company functions, and the procedures and culture, he or she may not know how to approach the mentoring task. A large part of this is organization. But, other things such as what to do first, what not to do, how much is too much, how to make the new employee feel comfortable, etc., may not be apparent. It's a good idea to develop a formal training program for mentors, showing them how to serve in the mentoring capacity. This could include such things as:

- Describing goals and objectives of the mentorship,
- Explaining written materials the new worker may need or ask for,
- Clarifying jargon or technical language (company or industry-specific) the new worker may not understand,
- Describing the workplace to new workers,
- Helping new workers feel comfortable,
- Recognizing problems the new worker may have, and
- Discussing practical ways to perform the job.



Mentor checklist

As part of the mentor training, give the mentor a checklist containing the critical items he or she should cover with the new employee. The checklist might include:

- Introductions
- Describe the workplace
- Tour the new worker's department
- Give employee a "who works on what" list
- Show break rooms, cafeterias, etc.
- Discuss time-off procedures
- Discuss safety procedures (where to get personal protective equipment, etc.)

Assigning mentors

It's best to have a volunteer to do the mentoring, but it's okay to designate someone if nobody volunteers. Choose an employee who not only knows the ropes, but will guide the employee well. Look for someone who follows the rules, doesn't cut corners, and will teach the new person to do things the right way (the first time).

Mentoring is a win-win situation: The new person gets the benefit of having someone to turn to whose job it is to answer questions, and the mentor gets the benefit of developing his or her leadership skills.

Successful mentoring programs are a win-win-win proposition:

- The company wins because mentoring strengthens workforce competencies, thereby helping the company achieve its objectives;
 - Mentees win because they receive advice and counsel that help put them on a fast track or help them overcome obstacles in their career development; and
 - Mentors have the opportunity to share their knowledge and leave a legacy.
-



Best practice

Those who can't, teach?

Remember that an employee who is the best performer may not be the best choice as a mentor. The ability to perform a task well does not necessarily include the ability to explain that task to others. Factors to evaluate when considering if a particular employee would be a good coach might include:

- Whether other employees seek out that individual for guidance;
 - How the individual is perceived by others (someone who is a known “gossip” could still be a high performer, but not necessarily the best coach);
 - Whether the individual embodies the culture and values of the organization;; and
 - Whether the individual demonstrates good work habits (new employees might learn bad habits rather than good habits).
-

Key components of a mentoring program

Although mentoring can be done informally, formal programs provide inclusive opportunities to everyone who meets the eligibility requirements of the program. Establishing this type of program requires taking several critical steps:

1. Convene a mentoring team. A mentoring team helps assess organizational readiness for a mentoring program, identifies the initiative's goals and objectives, develops the parameters of the program, and champions its cause.

2. Set goals. The team sets goals that support the mission and needs of the organization, such as improving retention, increasing the number of women and minorities in leadership positions, or developing high-potential individuals for future leadership roles.

3. Establish desired outcomes. In addition to setting goals, the team establishes the desired outcomes for the program to show the program's effectiveness, measured in terms of program satisfaction, knowledge and skills acquired, career progress and performance of mentees, or employee retention.

4. Identify needed resources. Money, time, access to facilities, or the ability to conduct virtual meetings are the types of resources mentoring may require, in addition to administrative support and program coordination.

5. Identify mentor eligibility requirements. Organizations often use length of service, level in the organization, educational attainment, or performance as eligibility criteria for mentors, depending upon the goals of the program.

6. Select mentors. Mentors should be respected leaders who have knowledge and experience in the organization, a willingness to develop employees, and good communication skills.

7. Develop the matching process. Will mentees match themselves to available mentors or will the program coordinator pair them together? What criteria will be used to make the match?

8. Provide training. Potential mentors and mentees should understand how the program works, including its goals, their respective roles, their communication processes and the frequency of communication, desired outcomes, and program evaluation.

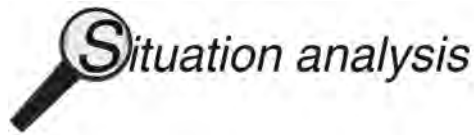
9. Announce the program and recruit participants. Working in conjunction with supervisors, announce the program to the workforce.

10. Monitor the initiative. The program coordinator needs to monitor the program to make sure mentor-mentee meetings are taking place and that parties are working toward desired outcomes.

11. Evaluate the program. At the end of a specified period, the program is evaluated to ascertain its goal achievement.

Properly planned and executed, a formal mentoring program can strengthen the skills and competencies of the workforce and positively affect recruitment, retention, employee relations, diversity, and corporate branding.

Reserved



Informal mentoring

Informal mentoring occurs when a mentor and mentee select each other without relying on a formal structure. This type of mentoring can result in strong bonds and long-lasting friendships between mentors and mentees. However, informal mentoring has its limitations:

Lack of opportunities. Mentees are traditionally drawn to mentors of the same gender and race. If the organization has more white males than women and minorities in senior roles, then women and minorities may not have the same opportunities to mentor informally.

Perceived favoritism. The relationship between mentor and mentee may be viewed as inappropriate.

Misunderstanding of roles. Mentors who are not trained in their responsibilities may not provide appropriate guidance. Mentees, for the same reason, may misunderstand the parameters of the relationship.

Mentoring 101 for supervisors

Whether the company has a formal mentoring program or not, here are some tips for a successful mentoring relationship:

- **Teach.** Share knowledge and be a role model. Explain how things work in the organization, including organizational politics.
- **Provide feedback and information.** Guide the mentee to help him or her avoid trouble areas and find opportunities for growth. Coach and help him or her through tough situations, describing the benefits and drawbacks of various courses of action.
- **Provide career guidance.** Help the mentee understand and acquire the kinds of knowledge, skills, and experience needed to get ahead.
- **Offer options.** Offer advice and suggestions, but don't direct. Let the mentee make up his or her own mind as part of the learning process.
- **Maintain confidentiality.** A mentee needs to know he or she can trust the mentor and report any problems.

Training

When the time comes, how will supervisors get their employees up to speed quickly? A solution to consider is structured on-the-job training (SOJT), not to be confused with traditional informal on-the-job training (OJT).

Informal OJT — pairing a new hire with an experienced worker who does show-and-tell — is the most common type of training. Unfortunately, this informal approach is often not very effective.

Employee Relations Essentials

Untrained trainers, often selected because of their seniority rather than their willingness, ability, or desire to train, may pass on poor work habits and sometimes bad attitudes. Inconsistent procedures then result in poor quality, an increase in mistakes, and lost productivity — all contributing to high overhead expenses.



Structured OJT puts aside those shortcomings. In SOJT, an already experienced and successful employee uses a company-standardized checklist of tasks and performance criteria to train new employees. SOJT ensures consistency, effectiveness, and efficiency.

To be effective, SOJT requires up-front preparation time and commitment to allow subject matter experts to share their expertise and develop (or review for accuracy) task-oriented job descriptions, training manuals for both trainers and trainees, job aids, checklists, and performance standards. Also, the company must prepare trainers and allow time to do the training, then evaluate each trainee's performance.

The rewards, though, of SOJT are real. SOJT:

- Shortens training time,
- Standardizes safety and quality procedures, and
- Provides a way to give just-in-time training.

Effective SOJT depends upon several things: selection of subject matter experts, development of training materials, preparation of trainers, and evaluation of training.

- **Subject matter experts (SMEs).** These should be seasoned employees with expertise, a willingness and desire to train, good communication skills, and patience.
- **Training materials.** Standardized materials, including checklists and job aids, are essential for both the trainer and trainee. Each task-oriented training module should

include a task statement, a performance standard, safety procedures, and conditions under which the task is performed.

- **Preparation of trainers.** Trainers, who may be the SMEs, need to master the five-step OJT training method: Tell, show, try (with coaching), do, and evaluate.
- **Evaluation.** Each trainee should go through an evaluation with a sign-off indicating that he or she has mastered the task.

On-the-job training (OJT) needs to be thoughtful and thorough to assure knowledge transfer and skill development to new employees or team members who are being cross-trained within each department. To achieve highly effective OJT requires understanding the job and choosing the right trainer.

If there is no written job description, prepare one. For accurate training, a thorough understanding of the job is necessary, including its job tasks, responsibilities, equipment, safety protocols, as well as skills, education, and training required to do the job effectively.

Break the job's functions or processes down into logical tasks (steps). Then, assess each task with a critical eye and identify those that could benefit from the use of a job aid — a short list of steps or a visual aid — to assure safety, quality, and adherence to procedure. Then, document the minimum performance standards for each function.

Pick the right trainer. If the most senior team member is doing OJT, he or she may be passing on bad habits or shortcuts. Instead of looking at seniority, look for someone who has good work habits, excellent technical knowledge, great communication skills, patience, and a desire to be a trainer. After choosing a trainer, take the time to train him or her in how to conduct OJT.



Best practice

Bringing new hires up to speed

A new employee does not have to talk with everyone on the first day, or even during the first week, since this can be overwhelming. The talks can be scheduled over a period of three or four weeks. Just don't shortchange the new employee this opportunity to learn how important his or her job is to the company's mission.

- Provide meaningful work. As the newcomer settles in, give him or her real work rather than busying the person with menial tasks.
 - Follow up at the end of the first day. Ask, "What did you learn today? What went well? What didn't go so well?" Follow up in the same way at the end of the first week.
 - Improve the orientation process. After the new hire has been around for a month, go back and ask what else could have been done to make the new employee feel welcome and productive. Consider the suggestions and improve the process for the next new hire.
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The five-step OJT process

OJT is a five-step process — not merely a two-step show and tell. It starts with telling, not showing.

- 1. Tell.** Explain the task or function thoroughly — including why the task is done (its role in the end product) and its desired outcome. Provide a job aid and describe how to use it.
- 2. Show.** Demonstrate how to perform the task, explaining each step. Encourage questions, and answer them so the trainee understands. Repeat this step as necessary until the trainee is comfortable with the work.
- 3. Try, with coaching.** Once the trainee is comfortable and understands what needs to be done, allow him or her to try it, under supervision. Coach the person, but don't take over the task unless safety is compromised. Ask the trainee to explain what he or she is doing and why it is being done. Have the trainee repeat the task with coaching until he or she feels confident.
- 4. Do.** Still watching the trainee, allow him or her to do the task alone. Don't coach. When the task is finished, give feedback. Once he or she can perform the job without supervision, let the trainee go to work.
- 5. Evaluate.** Periodically return to the trainee and evaluate the work. Provide constructive criticism as necessary.

By using a more effective five-step process, employees are in a much better position to be successful in their jobs, and the time spent to accomplish on-the-job training is well worth the outcome.

How adults learn best

Those responsible for training should understand some of the characteristics of adult learners:

Adults want to know why they need to know something — what they will gain from it and how it is relevant to their job — not just be told that they need to know it.

They want to use the information they learn shortly after they learn it.

Adults learn better when they are active participants in training rather than passive learners.

If they can, they like to relate the material to their own past experiences. In fact, having trainees share their past experiences can be educational for all.

Adults prefer to solve problems rather than just learn facts, so plan interactive activities that use the information in a problem-solving way.

Finally, allow for feedback. Ask for employees' opinions on the value and delivery of the training. This will help improve the training program for next time. Better yet, during the next training session, tell them what changes were made in response to their feedback.

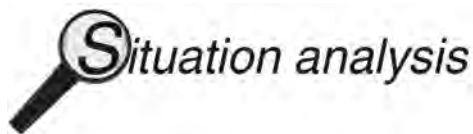
Feedback and coaching

By providing continual feedback (not just once a year during an annual performance review), the employee can be encouraged to learn new things, correct any deficiencies before they become serious problems, or engage in training to pursue positions up the hierarchy. Employees tend to stay with companies that are willing to invest in professional development. It shows a commitment to the employee, which in turn enhances the employee's loyalty to the company.

Feedback is particularly important to new employees. While there may be a temptation to offer encouragement for the new hire (which is always a good idea), legitimate concerns also need to be addressed. The encouragement offered should not overshadow a discussion of improvement areas, especially if the employee is not meeting expectations.

All too often, a supervisor will give encouragement and positive feedback (sometimes with only minimal oversight of the employee's actual work) and after a few weeks, decide that the employee is not working out. If the documented feedback has been positive, but does not accurately reflect the new hire's performance, then termination may be harder to justify.

Supervisors often don't have formal training on the need for documentation, but many have still heard of the at-will employment concept. As a result, the supervisor may not understand why HR is resisting the termination of an employee who isn't meeting expectations. They must understand that even though they should focus on what the employee is doing well, they must also focus on what the employee is not doing well.



Failing to take action

In some cases, a supervisor who delays taking action can create greater potential for liability. For example, if a new employee is not meeting expectations and could be fired, but the supervisor delays notifying HR of this need, the employee might "see the future" and understand that a termination is soon to come.

If the new employee takes some protected action, such as filing a discrimination complaint (even if unjustified), the company should become wary of terminating shortly after that complaint, especially if the supervisor only documented positive reviews.

In that case, even taking action such as extending the introductory period (to continue the evaluation) might be difficult to justify. After all, if the documentation shows that the employee is performing acceptably, why would full status be denied shortly after the claim was filed? An employee or enforcement agency may assume that the extension was retaliation for filing the claim.

While most employees won't file questionable claims against the company, and employer must always be prepared for the possibility.

In addition to the potential liability, failing to remove an under-performing employee does no favors for the other team members, and can harm employee relations. The other team members may be justifiably upset about having to spend time training someone who "doesn't get it" and who isn't contributing by taking on a share of the workload. Supervisors owe it the company and their teams to avoid sugar-coating an evaluation.

If the new hire has been assigned a coach (typically a senior and proven employee), that person may also be asked for feedback. Even if the company doesn't officially assign a coach, a new employee might commonly be trained by only one or two people. These informal relationships may develop as the team recognizes that it makes sense for one team member to keep track of what has been taught (or simply because one of the senior employees is the expert in a particular area).

Whether formally assigned or informally developed, a coach won't actually participate in the new employee's reviews. However, obtaining feedback from these coaches can be valuable because a supervisor cannot watch over the new employee at all times. Asking the coach for his or her evaluation of how quickly the new hire is learning, or whether the attention to detail is lacking, can help the supervisor provide focused training on improvement opportunities.

Engagement

Finding ways to keep employees engaged in the company may include involving them on teams, putting them in charge of a project, or having them work on a special project. This lets them know their contribution is appreciated and valued, and strengthens their tie to the organization. If possible, demonstrate how their contribution impacts the company's bottom line. Employees often feel a "disconnect" when they can't see how their contribution makes a difference. Showing them how it all ties in makes their job meaningful in the grand scheme of things.

In some cases, a job requires a minimal training and the new hire might be "up and running" on the first day. For example, an equipment operator might only require a demonstration of how to perform the job, and may be running the machine alone by the end of the first day. In other cases, the position requires a certain amount of experience that can only be gained over time.

While there is some value to having a new hire work on "practice" assignments, the individual should be given the opportunity to fully contribute as soon as possible. There is no better way to learn a job than by actually doing the job. This may result in some mistakes, and possibly extra work for the team to offer suggestions or corrections. However, the new hire should quickly build confidence and hopefully see that his or her contributions are reducing the burden on other team members.



Cross reference

For more information on engagement, see the **Communication** tab in the **Management and Development** area.

Probationary or introductory periods

There is no state or federal law that either prohibits employers from establishing a probationary or introductory period. The primary reason for classifying new hires a "probationary" is to let them know that they will be subject to scrutiny and must meet expectations to become "regular" employees.

The status has no legal significance because all employees are at-will, and most employment laws simply define an employee as someone who works for an employer. Classifications such as probationary (or even full time and part time) are simply terms adopted by employers to define or clarify the relationship.

The problem with using a term such as probationary is that employees might mistakenly believe that once they have completed the probationary period, they can no longer be fired except for cause. However, the at-will nature of the employment relationship doesn't end with the probationary period, but some employees don't understand this.

For these reasons, many employment law attorneys advise against calling the initial period a probationary period, simply because it is so often misunderstood. Instead, employers may use terms such as initial or introductory period, not because those words have a specific legal meaning, but because they are less likely to cause confusion.

No matter what the initial period of is called, employers should be clear that completing the period does not change the employment at will relationship and that either party may terminate the employment relationship at any time, with or without notice. This notice should be provided in addition to the any disclaimer in the employee handbook.

The duration of an introductory period may differ depending on the nature of the job and even on company culture. Very short periods (such as 30 days) would be unusual. More commonly, the introductory period would be at least three months, though many employers use six months. For a more complex job, the introductory period might be a full year, but this would be unusual. Employers should be able to determine whether or not to keep an employee within six months, even if job training continues beyond that time.

In some cases, an employee's performance is marginal and the probationary period may be extended. In some cases, an introductory period may be extended because a supervisor failed to conduct evaluations at the expected time interval, or even because the supervisor gave an initial positive review, and then performance declined or other issues arose.

Employers can decide whether an extension should be granted, but should keep in mind that if an employee is not working out after several months, whatever problems are occurring are unlikely to be resolved in another month or two.

Observing a probationary period has elements of both benefit and risk. The risk lies in misunderstandings and false expectations that employees can develop. The benefits are that using such a period can make it psychologically easier to discharge an employee who is not a good fit for the job or the company. Either way, using probationary periods does not relieve an employer of its responsibility to properly manage new employees and their expectations.

Choose words carefully

Employers know the importance of choosing words carefully. Unfortunately, a slip of the tongue could be the very thing that turns an employment situation into a legal matter.

One area of concern is the possibility of challenging the at-will employment relationship with the words chosen. Employment is at will in all states except Montana, and that means employees can be fired at any time — for any reason or no reason at all (as long as it's not for an illegal reason). However, with no more than a casual conversation, employers can create a contract of employment and remove the option to fire an employee at will.

For example, employers may be tempted to reassure nervous employees that their jobs are safe. However, a simple statement such as “Don't worry, you'll have a job here as long as you want it” could create a contract of employment, negating the at-will relationship. If the employee is terminated down the road, even for cause, this seemingly harmless comment could be the basis of a wrongful termination lawsuit.

The same problem could result from choosing the wrong terminology. Calling employees “permanent” to differentiate them from temporary workers might make sense, but it can give them the impression that their employment is somehow guaranteed.

For similar reasons, using terms like “probationary” to describe the period of time when an employee first starts work can be problematic. These terms usually imply that the employee can be terminated for any reason at any time during that introductory period. However, after the

orientation or probationary period is up, they may come with the opposing implication that employment is more certain and, again, perhaps even guaranteed.

Remember that supervisors also have the authority to endanger the at-will relationship with the language they choose on a daily basis. Make sure they understand what at-will employment is and what they shouldn't say to employees to avoid jeopardizing it.



At-will employment concept

Every state except Montana recognizes at-will employment. In all other states, employers can choose to hire individuals as employees at will, which means they are employed at the will of the employer. Specifically, it means their employment can be terminated at any time for a good reason or for no reason, just not for an illegal reason. Conversely, it also means the employee can choose to end the employment relationship by quitting at any time for any reason. Being employed at will means there is no contract of employment that must be honored.

Montana law includes the Wrongful Discharge from Employment Act, which requires employers to have good cause for termination of employees after they have completed their probationary periods. If an employer does not have an established probationary period, the law designates a six-month period from the date of hire. Only during the probationary period is employment at will.

Avoiding implied contracts

Problems with at will employment surface when an implied contract of employment sneaks into the relationship. It may be an offhand comment that a supervisor or someone on the hiring team made that may have made it sound like a candidate was guaranteed employment for a certain amount of time.

Alternatively, it may be something in a letter formally offering employment to a candidate that created an implied contract. It could even be language in an employee handbook that creates a contract. Employers must be careful what they say and put in writing so that nothing is misconstrued as a contract of employment. Here are some examples:

Interviews

After interviewing a very promising candidate, the hiring manager is not only very excited about the candidate's prospects, but with his future in the company. He's fairly certain he'll extend a job offer, and without really thinking, says, "As long as you do a good job, you will have a place with our company."

The employee gets hired and his work is satisfactory, but the real problem is his attitude and the way he interacts with everyone else. He rubs everyone the wrong way, he is too aggressive and confrontational, and among the people who have to work with him, morale and productivity are negatively affected. He has become a liability rather than an asset. The company decides to terminate, but in that termination meeting, he mentions that he was promised a place with the company as long as he did a good job, which he is doing, according to performance reviews.

While there is more to an employee's performance than just the work completed, those ill-fated words may come back to haunt the company. The employee may have a case for wrongful discharge, or he may not, but the matter may have to be settled in court. It's better to avoid the problem altogether by avoiding making promises of any kind.

Offer letters

When sending a letter to a job candidate confirming his or her agreement to accept an offer, be very careful with the wording. Don't couch his or her salary in terms of an annual salary, because that could be misinterpreted as a guarantee of employment for a year.

Instead, put the salary in terms of monthly or biweekly wages, or hourly wage, if appropriate. This may include an annual equivalent, of course, such as \$1,000 per week, equivalent to \$52,000 per year. Also, include specific language that states that it does not create a contract of employment but that employment is at will.

Employee handbooks

The employee handbook should also have an at will statement in it, so employees can't argue they were never told that employment was at will. Be sure to avoid language in other areas, however, that can create the implication that employees will only be terminated for cause.

For instance, be sure a discipline policy doesn't state that employees will only be terminated for cause, and if it sets out a procedure for discipline (verbal warning, written warning, suspension, termination), be sure the language is clear that the company need not go through all the steps before imposing a termination.

Have language specifically stating that termination for certain offenses can be immediate, that the employer has latitude in determining the appropriate discipline, and that the steps are to be used as a guide.

Understanding the exceptions to at will employment

There are a number of exceptions to employment at will that should give employers pause before going through with a termination — just to be sure all the bases are covered and the company isn't open to a possible lawsuit down the road.

At will means employers can terminate an employee for a good reason or no reason, just not for a bad (illegal) reason. Such reasons would be discrimination (based on age, sex, race, disability, etc.), retaliation, and other exceptions that make termination illegal based on federal or state statutes.

Certain laws specifically state that it is illegal to terminate an employee for exercising his or her right under the law. For example, it's illegal to fire an employee for exercising his or her rights under the Family and Medical Leave Act or the Americans with Disabilities Act. It also goes against the National Labor Relations Act to terminate employees for engaging in unionizing activities or getting together to talk about pay and working conditions.

Contract of employment

Just because there is no written employment agreement, it doesn't mean there isn't a contract of employment. A contract can be verbal, implied, and even *unintentional* on the part of the employer and still be valid. For example, if an employee was told when he was hired that he would have a job as long as his performance was adequate, and he was let go, he might successfully sue under the theory that he had an implied contract. These types of verbal agreements, even when they're made without authorization from anyone in the company, have been upheld in court.

Implied contracts can also be unintentionally made in an employee handbook. For example, if there is any language implying that an employee can only be terminated for cause, or if the handbook outlines a series of progressive disciplinary steps (such as verbal warning, written warning, suspension and then discharge) and doesn't state that the employer has the right to impose whichever discipline is warranted for the infraction, an employee may have a case that no matter the infraction, he or she is subject to all the discipline steps before termination.

Public policy

An example of public policy would be terminating an employee specifically for filing a workers' compensation claim. Some states expressly prohibit this in their statutes, others imply it, and others refer to it in their state Constitution. Courts may expand public policy to encompass more than what is expressly stated by law. Terminating an employee for whistleblowing would be another example of public policy, as would terminating an employee for serving on a jury, or for refusing to engage in illegal behavior (such as misstating financials, overlooking safety hazards, or committing perjury in a legal or administrative proceeding).

Good faith and fair dealing

If a long-term employee is terminated just before retirement to avoid a large payout or to avoid having him collect retirement benefits, it might violate the "implied covenant of good faith and fair dealing." This legal theory rests its case on the belief that employers have some responsibility to treat employees decently, and that a blatant act to cheat the employee should not go unremedied.

To add to the confusion, not every state recognizes every exception to at will employment. For example, only 11 states recognize the "good faith" exception. Montana doesn't recognize at will employment at all, outside of an employee's initial probation period. However, when terminating employees, it's best to keep these exceptions in mind. Employers want to make a termination as clean as possible and avoid the murky waters of the at will exceptions.

Non-competes and restrictive covenants

A non-competition or non-compete agreement is a written contract between an employer and an employee that restricts certain activities of the employee when he or she leaves the organization to work elsewhere. A non-compete may be put into place to protect sensitive business information or trade secrets or to limit the employee from working in the same field within a given geographical area or time period.

Imagine this scenario: Last month, an employee left to join a competitor, and curiously, this competitor is now setting up a state-of-the-art sales system akin to the one the former employee had been working on.

Issues like these compel many companies to create non-compete agreements. These agreements might prohibit former employees from contacting customers with whom they had contact while employed, working for direct competitors (this may include self-employment), or sharing trade secrets after leaving the company. However, non-competes won't hold up just because an employee agreed to the terms and signed an agreement. The agreement must be reasonable.



The reasonableness factor

There is no federal law regarding non-compete agreements, so their legality will vary by state. Some states specifically prohibit non-competes, but most require that they be reasonable to be enforceable. This reasonableness standard applies to the extent of the restriction on the former employee as well as the duration of the restriction. The agreement must balance the organization's legitimate business interests while still allowing the employee to work in his or her chosen field.

For example, a beauty salon might have good reason to prohibit former stylists from working within 15 miles of the business for at least six months after their employment ends. Without such an agreement, a stylist's clients may follow him or her to a new place of employment, taking business away.

On the other hand, requiring stylists to sign an agreement promising not to work within 60 miles for at least two years would make it very difficult for individuals to earn a living in their chosen field. This type of non-compete probably wouldn't be enforceable in most states because it's not reasonable in scope and probably isn't necessary to protect the company's interests.

Even if employees sign the agreement, a court may not uphold it if the non-compete is not clear and reasonable. To be valid, a non-compete agreement must be narrowly tailored to meet state law and the needs of the employer while still balancing the needs of the employee.

Non-competes are not for all organizations

Before adopting a non-compete, consider the pitfalls of such an agreement. Even if the agreement legally restricts former employees, it may be a deterrent to potential employees who don't want to deal with such limitations if the job doesn't work out. Current employees may feel resentful of the control imposed by a non-compete, and those who aren't happy may feel bound by it. A non-compete could keep an unhappy, unproductive employee with the organization long term.

If the company decides that a non-compete is necessary, it's a good idea to work with an attorney to draft an agreement that will hold up in court. Non-competes can work to protect an organization's interests, but only if they're carefully set in a way that satisfies applicable state requirements.

Policies are not (quite) contracts

Many employers compile a set of policies into an employee handbook, and commonly include a disclaimer (or multiple disclaimers) that nothing in the handbook creates a contract for continued employment, nor undermines the at-will nature of the employment relationship. While these statements are valuable, employers need to understand the limitations of such disclaimers.

Although the policies may not create a contract for continued employment, those policies may create an enforceable agreement between the company and the employees. For example, most states do not require (by law) that employers pay out earned vacation hours to departing employees. However, if the vacation policy promises such payout upon separation, those terms can be enforced by a state labor agency (some state agencies even provide wage claim forms which ask employees to attach a copy of the relevant company policy).

In one case, an employer's policy defined how employees would be paid, and the employer's policies were more beneficial than the law required (for instance, employers may agree to pay overtime after eight hours per day, in addition to overtime after 40 hours per week). However, employees were not always paid according to the handbook provisions. When the employees sued for back wages, the company pointed to the disclaimers stating that the handbook was not a contract. Nevertheless, the court found that the handbook terms created an "agreement" that could be enforced.

Employers also need to take care when crafting policies because a common legal doctrine says that if the terms of a contract are ambiguous, they will be interpreted in a manner favorable to the signatory over the creator. In simple terms, this means that if employees could reasonably understand your policy language as a promise of certain benefits (even if you did not intend to provide such benefits), a court may interpret the terms favorably to the employees.

Unfortunately, handbook disclaimers have worked against employers in other ways. There have been cases in which employers sought to enforce handbook provisions (such as non-compete or confidentiality provisions) against employees or former employees but were unable to do so because the company included these provisions in a document that the company itself had clearly declared was not a contract.

If you intend to impose such restrictions and expect to enforce them, the terms should be expressed in a separate document that is clearly intended as a contract. Generally, the employee must be given some consideration in exchange for signing a contract. Often, contracts are signed at the time of hire, and the consideration is simply getting the job.

Training cost repayment

Replacing employees is expensive. Aside from the cost of the hiring process itself, training new employees can be particularly costly. In many cases, turnover is simply a cost of doing business and cannot be avoided. But while employers may not be able to recoup costs associated with the hiring process itself, they may be able to avoid footing the bill for training if employees don't stay with the organization for a particular period of time.

Where an employer wishes to implement an arrangement to recoup training costs, it should divulge the appropriate information to employees and have them sign an agreement before beginning work. Employees should be made aware of the particular costs that would need to be repaid (these could include travel costs, the cost of actual training courses, or fees to attend conferences, for example), and should be provided with a dollar amount where possible.

To be enforceable, an agreement to repay training costs must be reasonable, both in the amount of money an employee would be required to repay and in the length of time he or she would be required to stay with the organization to avoid repayment. This "reasonableness" standard will vary based upon both the type of training provided and the nature of the organization. While it might be realistic to ask an employee of a police department to stay for three years or repay \$5,000 in training costs, it isn't likely to be reasonable to ask the same of a restaurant server.

Employers want to protect the investment they make with training, but there may be pitfalls to requiring employees to either stay with an organization or repay training costs. For instance, an unhappy employee or one who simply isn't a good fit for an organization may stay on for the required length of time only to avoid the penalty. Having a disengaged or negative employee on staff may cost an employer more than footing the bill for the individual's training.

Employers should also consider the potential difficulty involved in collecting the money owed by an employee. In one case, an employer required certain employees to repay training costs on a sliding scale: \$8,000 if they left within the first year, pro-rated down to nothing if they worked for at least five years. When an employee quit within two years, she owed the employer \$6,400.

The employer made no deductions from the non-exempt employee's final paycheck, but withheld a payout for her unused vacation and demanded the balance due. The employee sued for violation of the Fair Labor Standards Act, alleging that the employer's deductions took her pay below minimum wage.

The court ruled that since the employee still received her full final paycheck, she was paid well above minimum wage for the hours worked in her final two weeks of employment. It also ruled that the employer could demand repayment. (*Gordon v. City of Oakland*, 9th Circuit, No. 09-16167, November 19, 2010)

While this case illustrates that an repayment agreement can stand up in court, it still ended with the employer needing to request an additional sum from the employee. Since ex-employees won't always pay voluntarily, an employer may need to take legal action (such as small claims court) to recover those payments.

Reserved

Introduction

When it comes to employee relations, employers can take one of two approaches: they can choose to control employees as much as possible because they believe they inherently can't be trusted; or they can choose to trust employees to act like responsible adults who will be held accountable for their actions, and deal with any "bad apples" as they are discovered. Moving from a culture of control to a culture of trust requires a shift in organizational thought patterns, but it can be done.

Each of the tabs in this section addresses a different area of the employment relationship, but they are all about maximizing employee performance, minimizing conflict or distractions, and ensuring that employees can contribute to the success of the company.

This area of the manual begins with a section on communication, which is the foundation of any employment relationship (or indeed, any relationship at all between people). Areas covered include communicating expectations, gaining acceptance for change, and providing both positive feedback and constructive criticism regarding employee performance.

The next section covers rewards and incentives, since employee relations will suffer if employees do not feel appreciated. Rewards need not be expensive, and despite a common belief that employees primarily desire more money, studies find that employees are more likely to be happy and productive if their contributions are recognized and rewarded, and more likely to leave a job (even one with higher pay) where this recognition is lacking. Part of recognition, of course, means recognizing which employees demonstrate the potential for advancement, or where additional development could benefit both the employee and the company.

The third section addresses discipline and corrective action. No matter how thorough the hiring and screening process, every organization will end up hiring a few bad apples. In some cases, however, good employees may "slip" for various reasons, whether due to stress, family problems, or simply a change in job duties. Whatever the cause, corrective action may be needed — and note that this term developed for a specific reason, since the intent is to give employees a chance to correct the problem. In addition, employees come from diverse backgrounds, and this makes conflict nearly inevitable. Employers should have strategies in place to handle such conflicts, whether they include simply an argument or the possibility for violence.

The fourth tab in this section explains how to manage other problems in the workplace. These can range from having a difficult conversation with an employee about a personal hygiene problem, to addressing an employee who may be using drugs on the job. Handling these problems is likely the responsibility of supervisors, since they are the primary contact person for employees, and need to handle most issues without involving Human Resources, but in some cases, such as suspected drug use, they must know when to ask for guidance.

The final tab in this section addresses employee protections. The relationship between a company and its employees is not always cordial, and even employees who are engaged may become frustrated on occasion. Employers must understand what activities are protected, especially when the employee is not on the job. Of course, employees must also understand *their* obligations to the company.

Reserved



Introduction

At the core of employee relations is communication. If employers are to relate well to employees, and vice versa, there must be a good line of communication. Both sides must know where the other side is coming from, and both must be willing to adjust, as needed and as is reasonable and good for the organization, to the others' feedback. Either side's failure to meet expectations is guaranteed to hamper employee relations.

Good communication begins with listening. Often, listeners will have a response, whether positive, negative, or neutral, but employers should provide time for feedback and allow listeners to express their concerns. Communication is a two-way street, and listening to employees is also critical.

When communicating, consider the objective of the communication. This is true whether the information is transmitted verbally, in writing, or in electronic format. Understanding the audience is also critical, and communication will differ depending on education, culture, and other factors. This will help forecast the response to the communication.

For any change that affects employees, communication is key. Employees, like all people, react to changes — some may view a particular change as positive, while others may view it as negative. A change in processes, procedures, environment, or roles can generate stress among the employees. Through communication, HR can help employees through a change, no matter how big or small, from new paycheck designs to mass layoffs. For example, it would generally be better to express a change in organizational processes with the background as to why the change is taking place than simply stating something to the effect of “this is what we’ve decided.”

Whether the audience is one person or the entire employee population, strong communication skills are necessary to convey important information. Effective communication is a valuable tool for HR professionals, as they interact with many people and they need to provide information clearly.

Employee Relations Essentials

The first section in this chapter on communication discusses communicating expectations. This includes not only expectations for performance and attendance, but explaining company policies and procedures. It also means giving feedback, and communicating success as well as opportunities for improvement.

Of course, supervisors are the primary day-to-day contact person for employees, so they have a major role to play in employee communications. It's been said that employees don't leave their companies, they leave their supervisors. If a supervisor favors some employees, or doesn't treat everyone fairly, the organization may pay for this in lost productivity, turnover, or even lawsuits. A supervisor's demeanor and even body language will communicate the leader's attitude toward each employee in the department. Supervisors require a number of skills and attributes to be successful leaders, ranging from giving positive feedback to assigning priorities.



Best practice

Supervisor attitude

It is widely recognized that the single most important factor affecting employee performance, morale, and loyalty, is the boss. Supervisors should never forget the influence they have over others. For employees, it's easier to choose a good attitude when the boss has a great attitude. Think of the best boss you ever worked for. How did you feel when working for this person? Now think of the worst boss you ever reported to, and consider how you felt at work. This exercise shows the impact a boss can have on a person's attitude, behavior, and performance.

Many studies have shown employees are more productive when around positive people. Positive attitudes make them happier, more productive, and more successful. The good news is that supervisors can choose which attitude to show. Remaining positive rather than falling victim to pessimistic comments is essential to reaching goals, maintaining a good outlook on life, and getting along with others. Being able to remain positive in the face of adversity requires developing a specific mindset. Developing a positive mindset can help maintain focus on goals and let go of the negative energy that can hamper creativity and productivity.

Inevitably, the work environment will undergo changes. Whether adopting a new policy, changing benefit providers, or modifying the job duties of employees, communicating changes should be made with an eye toward gaining acceptance for change. The second section of the communication chapter discusses these matters.

A key area of employee communication is the performance evaluation. Employees need to know when they are doing well, and when they are performing below expectations. Although an organization might want to build a culture of trust, every organization will have to deal with problem employees at some point.

Part of communication is documenting actions taken, whether praising an employee or giving constructive criticism. This information is typically stored in personnel files. However, some state laws grant employees the right to review their personnel files, or even make copies of the file, potentially for up to one year after employment. The section on access to personnel files covers these issues.

Communicating expectations

Communication must be more than management or HR telling employees what the organization's policies and procedures are. For positive employee relations, employers must let workers know the reasons for these rules. It is difficult for workers to be enthusiastic about following a policy or procedure if they do not know why they are being asked to do so. In the best-case scenario, employees will know about a policy or procedure before it is instituted. Giving employees an opportunity to provide input into the way things are done can provide an enormous sense of empowerment, which improves employee relations.

Communicating expectations and policies also helps protect the company. For example, if an employee is terminated for violating a policy or rule, and was aware of the rule (as well as the consequences) before being terminated, the individual might be denied unemployment benefits. Additionally, showing that the company took proactive steps to prevent harassment or other unlawful conduct by communicating related policies is also a factor when defending against discrimination claims.

Also, when an employee has a complaint about a policy, particularly if it is a longstanding complaint, take it seriously. This means thinking about the complaint and deciding on a course of action, whether it means accepting the suggestion (changing the policy) or explaining why the policy needs to be the way it is.



We've all heard that honesty is the best policy. This is especially true in employee relations. Hiding things from workers can only lead to suspicion and mistrust. In many ways it is better to share too much with employees than not enough. Also, the more information shared, the less likely employees will rely on potentially false information through the rumor mill.

Employee Relations Essentials

In an organization with good employee relations, all workers must have an equal opportunity to perform well. Also, workers should know what the employer's definition of "well" is. Employers, consequently, should base rewards and promotions on those spelled-out definitions of good performance.

For example, employers will have an easier time comparing employees based on the number of units produced or the volume of sales achieved over a specified time period. Employees who understand these expectations can strive to achieve them.

To identify the state of employee relations, it may be a good idea to conduct a survey or institute some other means of obtaining feedback. Ideally, employees will share any concerns they have as those concerns arise. However, some employees may not voice their concerns (or ideas for improving an already good situation) unless they are asked. When requesting employee feedback, make sure the company can follow through appropriately to address the feedback.

A survey should obtain information for developing an action plan, not just serve as an outlet for frustrations. If the company might not be able to fix a problem, don't create the expectation that it can, and be honest about this. Acknowledging a problem is fine, but if the company knows it can't change something, don't even ask about how to change it. Employees might get even more frustrated if their concerns are collected and then (seemingly) ignored.



Best practice

Conflict resolution

A major part of good employee relations is keeping people happy. This unfortunately sometimes means dealing with conflict. Effective organizations tackle conflict head-on, preventing it where feasible.

With conflict resolution, often the problem is not in the apparent "conflict" but in a larger or deeper issue. That's why many conflicts seem to be over trivial issues (office equipment, headphone volume, perfume/cologne, etc.) The reality is that the problem may not be headphone volume at all. Instead, it may be the "why does this person always get their way" thought or the "why does he think he can do anything he wants" feeling.

In organizations where employee relations are disregarded, many unwanted situations can occur: low productivity, high turnover, absenteeism, and even litigation.

Another way to help employee relations is to establish various lines of responsibility. Line supervisors, if trained and selected properly, can head off some potential problems before they get to the level of requiring HR involvement.

What do you expect?

Employers have many expectations of employees, ranging from the basic (such as showing up on time for work) to the exceptional (going above and beyond the expectations). In some cases, employers struggle just to ensure that employees are meeting basic expectations. The ideal situation, of course, is having self-motivated employees who perform their jobs well, with minimal oversight or guidance.

To achieve this ideal, employees must *want* to show up for work. Aside from some Type A personalities who are driven by achievement, many employees would likely prefer not to work. The idea of having employees who want to show up for work doesn't necessarily mean that they jump out of bed in the morning and look forward to arriving at work. However, it does mean that they want to continue working for the same employer, and may become more engaged by their employer.

Communication plays a major role in creating an environment where employees are engaged. This includes communicating the expectation that employees can be responsible for themselves. Most people will rise to the challenges presented, if given the opportunity. However, if the work environment is one of micromanagement or conflict, employees may simply perform at a minimum level necessary to retain the job. These employees are not engaged.



Cross reference

For more information on helping employees meet basic expectations such as performance or attendance, see the **Discipline and corrective action** tab.

However, engaged employees who misunderstand your expectations can potentially cost your company more than those who are just doing the bare minimum.

A common example occurs when a company announces its intent to reduce injuries and offers a bonus if employees work a specified number of days without injuries. This may encourage employees not to report their injuries. Unfortunately, even minor injuries may become infected or otherwise worsen, resulting in medical costs that could have been avoided by immediate reporting and treatment.

Another example in which your employees can create liability is if you announce that cutting costs and meeting deadlines are top priorities, and your employees start working "off the clock" (without recording their hours) to complete projects on time and within budget. Those employees could later file lawsuits for back pay, and may be successful if they can show that your company reasonably should have known about the off-the-clock hours.

When expressing your expectations to employees, be sure to explain which goals are primary, but also describe how to report problems, and point out that honesty and courage will be rewarded. For instance, an employee who reports a defective product may cause your company to delay shipping that product, but may also save the company costs or liability that could have arisen from the defect. The employee's willingness to point out the problem should be recognized and rewarded.

What do employees expect?

While employers need to communicate their expectations, this communication isn't always a two-way street. This doesn't mean employers must survey their workforce to understand the employees' expectations, but should at least understand what employees expect. In short, what do the employees want?

Many organizations assume that employees want things like money, benefits, and good working hours. While these are certainly considerations, the organization might have a limited ability to change these things. If the employee enjoys the work, those considerations may not matter as much.

Most employees aren't looking to quit solely to find a higher-paid job, and most understand that taking another job will include trade-offs. For instance, they understand that taking a part-time job might provide more free time, but would also involve lower pay. Similarly, a job that offers greater compensation may require longer hours or may be more stressful.

Unfortunately, employees may focus on things they don't like about their jobs, rather than focusing on things they do like. Some things cannot be changed, but employers should help employees focus on factors that can be changed. Most of these involve employee relations.

In many ways, employees desire the same things in their professional lives that they desire in their personal lives, including:

- **Appreciation.** Employees expect their hard work to be recognized and appreciated. In fact, studies have shown that employees who feel appreciated are less likely to seek other employment, even if another job would offer higher pay.
- **Respect.** Employees want to be respected by their employers and their managers, and to be treated like responsible adults. The other side of that coin is that employees also want to respect their managers. This respect must be earned.
- **Trust and honesty.** To earn respect, managers must be seen as trustworthy. If employees feel the employer is giving false reasons for taking action such as changing a policy, trust may falter, and respect may go with it. Keeping secrets, displaying dishonesty, and refusing to admit mistakes will also damage that trust.
- **Fairness.** Employees want to be treated fairly, where everyone is subject to the same standards. Managers who show favoritism to a few employees, or seem to hold personal grudges against others, will not be viewed favorably.

Understanding what employees want also requires understanding what they don't want, or at least understanding which factors are less important. For instance, most employees don't expect a manager to be their friend. The saying "it's lonely at the top" applies on all levels, including the head of a department.

This isn't to say that supervisors should be unfriendly. They can certainly offer casual conversation and even emotional support. However, the supervisor must be a leader, and certain obligations of that leadership role may prevent a friendship bond from forming. If the supervisor is a strong and effective leader who has earned the employees' trust and gives appreciation, then the supervisor should be respected as a leader. A respected leader can have a more positive effect on employee relations than one who is merely liked as a friend by a handful of employees.

The (employment) laws of physics

Applying laws of science to employee relations might seem unusual, but the laws of physics are remarkably similar to the laws of human nature. Consider one of the laws put forth by Sir Isaac Newton: Bodies in motion will continue moving unless something causes them to stop or change direction. This concept can apply to individuals as well as organizations. An employee (or an entire company) will often follow the same path, even when the need for change is apparent, until the situation reaches a crisis. A classic example was the Titanic hitting an iceberg, forcing a need for action. Unfortunately, the ship's crew denied the need for change and attempted to continue in the same direction until the situation reached crisis levels.

Human nature is to continue doing what we've always done. This might not be an earth-shattering revelation, but recognizing this tendency can help employers understand that resistance to change is natural, even if potentially unhealthy. At the very least, acknowledging this tendency may allow employers to anticipate a need for change and choose a different path before an external force causes them to slow down (or suffer damage from the impact).

Conversely, when employees are moving in a positive direction and working efficiently, they will normally continue to do so. The trick is developing and maintaining positive relations to reach this point and sustain the momentum. This isn't particularly complicated, since it primarily involves removing barriers to performance. Unfortunately, something as simple as a disrespectful supervisor can create such a barrier, causing employees to move in a less productive direction.

Another law is that when a body in motion encounters friction (resistance), it slows down. Are employees encountering resistance? Some friction between coworkers is normal, but when friction comes from the organization (in the form of overly restrictive rules, policies, or management decisions), the productivity of those employees will slow down. Identifying and eliminating friction can minimize resistance, resulting in more productive employees.

A related rule is that the energy required to start an object moving is higher than the energy needed to maintain movement. In short, it's easier to keep moving, and harder to get started after stopping. This doesn't mean employees should never take breaks, of course, but if they're rolling along and some external factor causes the work to stop, they may need more energy to get moving on that project again.

One of the lesser-known physical laws is perhaps most applicable to employee relations. It is this: The amount of energy in a closed system is constant, but may change forms. In scientific terms, this means that motion may change to heat. In business terms, it means that employees always have the same amount of energy — but it can change forms. Energy that had been directed toward production (self-motivation) may change to less desirable forms because of conflict (frustration). When employees gather to chat around the coffee maker, are they discussing how to solve a problem? Or are they complaining about their manager or working conditions? Either way, they are expending the same amount of energy. If the workplace creates frustration, that energy will not be directed toward production.

Perhaps the most well-known physical law ties in with all of the above: For every action, there is an equal and opposite reaction. Actions by managers can create a reaction of frustration, which can change how the employee's energy is directed. This reaction will typically be in proportion to the management decision; that is, the bigger the perceived unfairness, the longer employees may spend fretting about the problem. The outcome need not be negative, however, since a manager who is encouraging and supportive should elicit a reaction of greater productivity.

Happy employees are not necessarily engaged

Studies have shown that workers who enjoy their jobs are more productive, and finding happiness in work positively impacts retention. In a 2012 survey conducted by the American Psychological Association, 67 percent of workers said that they remain with their current employers because they enjoy the work they do.

It may be true that you cannot force employees to be happy, but you can provide the opportunity to achieve happiness by offering valued recognition, stress-relief, and perhaps most importantly, development opportunities.

The first step in helping employees find enjoyment is to make sure the pre-employment screening process is effective. New hires' strengths and skills should fit their current positions and provide an indicator of future success in the organization. Frustration from a poor job fit is not easy to overcome, so it's important to get the right person. Employees need to know that they can succeed in the organization, even if that success takes dedication and hard work.

To help employees achieve their need for esteem, be sure to offer recognition. The best type of recognition will depend on your organization, the situation, and the specific employee. Recognition can range from a formal rewards program, to pay-for-performance compensation systems, to a promotion, and even to a simple "thank you" from a supervisor. Some employees will prefer public recognition, while others will appreciate a more personal approach. Encourage managers to take the time to understand what inspires each of their direct reports.

Also, make sure that employees have the tools to meet their personal career development goals. Opportunities should fit the employee's personality and desired career path. The organization might consider implementing a structured career development plan for some or all employees. This can help identify what opportunities would be best suited to the employee's personal goals as well as the organization's needs. A less formal approach might simply involve identifying employees' strengths and interests, then planning work assignments to maximize exposure in those areas.

Everyone's idea of fun is different, and activities that some employees enjoy might cause frustration for others. Recognize that employees are individuals. Regular performance evaluations and even informal chats will provide valuable information to use in fostering employees' enjoyment in their jobs.

Studies show that employers who improve employee engagement reap benefits in the form of better financial performance. This makes a business case for efforts to increase employee engagement. Tools to use may include:

- Gain sharing — a way for employees to see how their work impacts the bottom line.
- Pay for performance — directly relating an employee's pay to an employee's effort.
- Involvement — keeping employees informed of company matters, and keeping the lines of communication open.
- Incorporating learning — encouraging employees to continually improve themselves in their knowledge, skills, and abilities.
- Autonomy, creativity — promoting an environment where employees can be creative in their jobs, and be relied on to be responsible for their own work.
- A sense of community — employees who have friends at work are more highly engaged than those who don't; recognize employees for their achievements.

- An atmosphere of respect — when things don't go well, focus on the cause, not on placing blame.

There is a link between job engagement and customer satisfaction, as well as corporate profitability. Employers would do well to pay attention to the level of engagement of their employees.

What is engagement?

Employee engagement has been defined in many different ways. In one organization, it might be described as an employee's increased emotional connection to the company, while in another, it might be the willingness and ability to contribute to the success of the organization's mission and values.

Engaged employees tend to have a heightened stake in the success of their organization because they feel connected to and invested in the company. They tend to go above and beyond without being asked, putting in what many people refer to as "discretionary effort." Engaged employees tend to be more productive, more creative, more customer-focused, safer, and less likely to leave their employers.

Supervisors and managers are in the best position to observe and encourage employee engagement, and can be held accountable for encouraging it. Perhaps a supervisor's efforts to get and keep employees engaged are included as part of his or her performance review. At the very least, be sure supervisors understand what engagement is and how to encourage it.

Measure more than job satisfaction

There are several components in job satisfaction, including satisfaction with coworkers, pay, working conditions, supervision, and career opportunities. Employees might be very satisfied with their working conditions, but the underlying reason may be that they don't have much work to do. They might be happy with their supervisors because the supervisor tends to look the other way when they do a mediocre job or fail to follow policies.

On the contrary, employees who aren't satisfied might still be some of the most productive employees: they might be stellar employees who aren't happy with their pay or advancement opportunities, but who take pride in their work.

Measuring job satisfaction is still valuable. In the case of unsatisfied but productive employees, working to understand the areas of discontent could help retain a top performer in the long run. The key is not only to measure job satisfaction, but to try to understand precisely *why* employees are either satisfied or dissatisfied, and consider this information alongside measurements of performance and productivity to paint a clear picture of employees.



Cross reference

For more information on increasing employee motivation, see the **Rewards and Advancement** tab.

10 ways to maximize engagement

Most employers can quickly point out which employees barely get their jobs done, and which of them regularly go above and beyond. So how do you foster employees who put forth extra effort?

1. Start with the hiring and onboarding process. Encouraging employee engagement begins as early as the application process. Something as simple as arriving at an interview unprepared can set the tone for the entire employment relationship.

2. Provide job clarity. Be clear about job duties and levels of performance that are expected. Employees also should be familiar with the goals of the organization and how individual success translates into success for the company.

3. Provide challenges and opportunities. If employees are overworked, it may not seem the best time to present them with new challenges. However, the opposite can be true. A study by Towers Perrin indicates that challenging work can actually mitigate some of the negative impact of a demanding workload.

4. Give employees as much authority as possible. Employees who feel empowered and have freedom to make decisions related to their jobs are more likely to be engaged. Individuals also may be willing to accept increased risk if they have control over decisions relating to that risk. On the other hand, requiring employees to constantly get approval for decisions slows efficiency and momentum and may hamper creativity.

5. Provide equipment and training. Employees who aren't given the resources needed to do their jobs may feel as though they have been set up to fail. If they don't feel as if the organization will do whatever it takes to help them succeed, they probably won't be motivated to help the organization prosper. Without the right equipment and training, they may not even be able to.

6. Go green. A 2010 Hewitt and Associates study indicates that there tend to be higher levels of employee engagement in organizations that are socially and environmentally responsible. Working sustainability programs into the organization may drive up levels of engagement.

7. Think of compensation beyond pay. Employees want to be paid fairly, but they also want to be rewarded with things like discretion and responsibility within the company. Identify what type of non-monetary compensation is valuable to each individual and note that this will likely differ from one employee to the next.

8. Offer advancement opportunities. To become and stay engaged, employees need to not only know but *see* that going above and beyond is rewarded. Whether this is in the way they are treated (perhaps they are given more discretion or responsibility) or in an actual promotion, an organization has to deliver when it says employees have opportunities for advancement.

9. Encourage bonds with coworkers. The way individuals feel about their coworkers and the extent to which they belong within a community of people has considerable bearing on their levels of engagement.

10. Show respect. A key driver of engagement is whether or not employees feel that they are cared about as people, not just as employees. While you don't have to make friends with everyone, treat all employees with fairness, honesty, and respect.



Stopping the rumor mill

Most employers suffer their share of workplace gossip, but if the rumor mill seems to be working overtime, a simple step might slow it down: start talking.

Of course, there are some individuals who simply like to gossip. They thrive on being the person who's "in the know" and will share information (whether true or not) with anyone who will listen. If these individuals become disruptive, address them individually, identifying the issue as specifically as possible. Explain the effects the employee's actions are having on the work-group and that the behavior must not continue. An outline of the possible repercussions for repeat offenses should also be communicated.

But when rumors are flying and participation doesn't seem to be limited to a select few, consider why this might be happening. Do employees feel as though they don't have enough information? Does the information they do have seem contradictory?

During difficult economic times, employees are most desperate for information. If employees are ill at ease and aren't getting information that makes sense, they'll likely try to fill in the blanks themselves.

For example, trying to shield employees from bad news about a contract might seem to prevent them from worrying, if the issue doesn't affect them. However, if employees catch wind that something is going on, the lack of candor might lead to rumors that the entire organization is going down in flames. Not only is this awful for productivity and employee morale, but it may tarnish the company's reputation in the community if word gets out. It may even lead to unnecessary turnover as employees who buy the hearsay look for other employment.

Next time rumors seem to be abundant, consider whether it might be appropriate to be candid with employees. While there will always be information that must be kept confidential, maintaining a certain level of transparency with employees may not only keep rumors to a minimum, but may also establish a level of trust with them.

Policies and procedures

Most organizations have many policies, but are they all enforced consistently? Perhaps more importantly, do those responsible for enforcement understand all of them completely? When the answer is no, trouble can ensue.

Beyond just understanding and communicating the organization's policies, managers are responsible for enforcing policies. In particular, a disciplinary policy should be followed each time the policy is violated, not intermittently. Failing to apply policies consistently can incur liability for the organization.



For more information on the importance of consistent policy enforcement, see the tabbed sections on **Discipline and corrective action** and **Managing problems**.

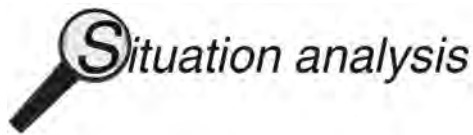
When employees see that policies aren't administered fairly, morale is likely to suffer, and employees' respect for management may also be compromised. If employees don't expect that policies will be enforced consistently, they're also more likely to disregard them, and they may even be caught off guard when policies are enforced, which could lead to charges of unfair treatment.

Failure to enforce policies consistently could also lead to legal liability for any organization. Consider the following example: A strict attendance policy indicates that an employee who is at least 10 minutes late for work three times in a six-month period will be terminated. Managers sometimes note when employees are late, but often look the other way. However, on a particularly trying day, a manager decides to enforce the policy. Following it to the letter, the manager terminates a particularly frustrating employee the third day that he is late to work.

The problem? The employee is a member of a minority group and files a claim of discrimination against the organization, alleging that he was fired because of his minority status. Up until this point, other supervisors haven't enforced this policy to termination, even though several non-minority individuals have been late three times (some even more often than that) in a six-month period.

While this alone does not prove that the individual was specifically discriminated against, the fact that the policy was not consistently enforced may give his claim more weight. If the employee also had other evidence of discrimination based on his race, the organization might just find itself on the wrong end of a lawsuit, even if the intent of enforcing the policy was not discriminatory in nature.

Policies should be dependable representations of what employees can expect, and regular implementation will make these standards clear. If there's a policy a manager doesn't feel comfortable enforcing, he or she should not disregard it, but should talk to HR. If the policy is outdated, inappropriate, or difficult to enforce, revise or remove the policy instead of ignoring it.



Failure to communicate policies

A U.S. Supreme Court case (*City of Ontario v. Quon*) illustrates the importance that supervisors thoroughly understand their employer's policies and enforce them consistently. In this case, the City of Ontario issued pagers to several police officers. While the city didn't have a formal policy specifically addressing the pagers, employees were informed that the pagers were to be used only for city business and not for personal use.

Whether he didn't understand the policy, didn't agree with it, or simply didn't enforce it, a manager told Jeff Quon (one of the officers) that pager messages would not be viewed as long as he paid any fees for going over the set number of texts. Based on this manager's advice, Quon reimbursed his employer for the overages each time he exceeded his monthly allotment of text messages, but continued to use the pager for personal reasons.

Despite the manager's statement, the contents of Quon's pager were eventually audited, and he was terminated for sending sexually explicit text messages during work hours. Quon sued for invasion of privacy, based in part on the contradictory information delivered by his supervisor. Though Quon didn't win, the city still incurred the trouble and the expense of a lengthy lawsuit based in part on the supervisor's contradictory statements.

Dismantling workplace silos

Silos in the workplace can occur from one department or workgroup to the next, one location to the next (this might even be adjacent buildings), one shift to another, or even one generation of workers to the next. Instead of being a functional part of the organization, different workgroups or classes of employees might become uncooperative with one another. Workplace silos are most apparent when a lack of cooperation and/or communication between groups of individuals begins to inhibit the organization's ability to excel.

Silos can occur even in very small businesses or within small workgroups. They are the result of barriers that form from one work group, business function, or location to the next, and their formation can prevent communication and knowledge transfer.

To determine whether or not the organization is suffering the effects of workplace silos, consider the following questions:

- Do employees have trouble understanding what other departments do and how their goals are accomplished?
 - Is it difficult to get answers from another workgroup, location, or department?
 - Does internal communication feel clumsy and uncomfortable?
 - Is it difficult to track down the appropriate individual(s) with responsibility for a particular task?
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- Do teams or work groups seem defensive or possessive of their work or work processes?
- Do different areas of the organization repeatedly blame one another for oversights or challenges rather than working together to find a solution?

Answering yes to any of these questions may indicate that employees are spending more time protecting their work and their way of doing things than figuring out ways to be competitive as an organization. These silo symptoms may cause the company to miss out on creative and innovative opportunities, potentially costing business in the long run.

Whatever barriers are creating silos in the workplace, it's best to dismantle them. Silos in the workplace can wreak havoc on employee morale, stifle creativity, and cause even the most cooperative of employees to feel disconnected.

As with any issue that needs correcting, the first step is to identify the problem and make employees aware that it is recognized as an issue. In many cases, employees won't even realize that silos exist, and won't realize when or how they contribute to such a separation. To keep silos at bay:



Communicate individual roles. Employees must respect and understand one another's processes and goals, while also being willing to be flexible with their own. They also need a firm understanding of how the work they do fits within the big picture of the organization — and that means understanding the roles of other employees, departments, and locations as well.

Dismantling silos starts with getting employees to simply *acknowledge* different areas of the organization. Connecting departments, teams, or locations might be accomplished by creating a “thank you” program that allows individuals to recognize one another across departments, or creating a clear chart of what each department is responsible for.

Encourage interaction. Managers must support interaction between different departments and teams, keeping in mind that social interaction can be beneficial if it keeps employees communicating. Creating cross-functional teams for particular projects or initiatives encourages relationships between employees who wouldn't normally interact. Giving them an opportunity to work closely together can help them understand one another's strengths and perspectives and establish relationships that can be extremely beneficial down the road.

Communicate upward. Managers must relay what is going on to senior management and company leaders so the problem can be addressed at a corporate level.

Share information. Transparency in communication is extremely important to prevent the development of silos. If information is guarded at the highest level, not only are employees likely to follow that lead, but they probably won't fully understand the company's overall challenges, objectives, or motivations.

Think big picture. It is important to be clear about everyone's responsibilities, but emphasize that the overall goal of the organization should always be first priority. Employees must understand that this may require them to step out of their comfort zones or share responsibilities with other groups or departments for a time.

Don't get so caught up in routine or company procedures that innovation is lost. While the current system may be efficient and effective, that doesn't mean it's the best possible way to get the job done. Be open to new ideas at all times, and commend employees for their creativity and suggestions — even those that are not implemented.

There are many reasons silos develop, and some are natural. For instance, it's natural for people to focus on themselves and their own tasks and goals first, so most individuals must be pushed to regularly see their place in the big picture.

It's also not unusual for people with different specialties to think and work differently. Often, different groups of employees have different work processes, different visions, or different motivations. Any of these variables can make the exchange of ideas difficult from one area of the organization to the next. For example, employees in manufacturing likely think very differently than employees working in marketing or finance. It can take work to develop a common language and understanding.

Silos can also develop when employees feel threatened in some way. For example, turf wars may be especially problematic in businesses that have experienced layoffs or reductions in work or hours for employees. When these events occur, employees may become even more possessive of their knowledge and of their work in an effort to ensure that they're not the next one to be let go in the event that another layoff should occur. They may even hoard work instead of accepting help to ensure that they maintain the appearance of being necessary.

The unfortunate reality is that silos are not uncommon and most organizations will experience some form of siloing. Silos are most detrimental when the organization can't accomplish a task due to lack of cooperation between departments, locations, or team members. When this is the case, it's a good idea to work with management to break silos down.

If silos are detrimental to the organization, be consistent in discouraging them. If a company preaches collaboration but only offers rewards for individual or individual team achievements, any silos will likely stay in place, and further separations may even develop.

Situation analysis

Why people hate meetings

If employees complain about meetings or consistently arrive late, the meetings may be wasting time more than they are contributing to the good of the organization. Here are some of the most common reasons employees hate meetings:

There are too many meetings. Employees spend so much time in meetings, they have little time left to do their jobs.

Participants are not involved. The meeting is one-sided (a leader does all the talking) or lopsided (a few strong personalities dominate).

Meetings drag on past their prime. If participants leave muttering, “That could have been accomplished in 15 minutes, not two hours,” meeting-time management is an issue.

Too much is on the table. The organizer may attempt to cover too much in one meeting, or discussions get off course and the leader doesn’t rein them in quickly enough.

Nothing happens. Meetings are considered a waste when nothing results from them, especially if there is an expectation of action.

Addressing environmental causes of workplace distractions

Looking at design photos, it’s not hard to understand the appeal of the open office. A workplace with high ceilings and sleek rows of modern, mostly cubicle-free desks certainly may look like a lovely, collaborative place to work. But there is one thing missing from these photos: the people.

How people feel directly influences how they behave — and an individual’s work environment has a profound impact on his or her well-being and performance.

While there are some very good reasons to work in the open, such as enhanced collaboration and shared urgency on projects, the prevailing public opinion is that open offices magnify workplace distractions. People complain that a lack of privacy, too much noise, and constant interruptions are making it extremely difficult to get work done.

If your company is suffering from some of the shortcomings that may come with an open office environment (or is considering transitioning to such a setup), you may want to consider ways to mitigate common workplace distractions amplified by open spaces.

A lack of privacy

When you think about a particular workspace, consider two types of privacy: architectural and psychological. Architectural privacy is literally walls and doors, while psychological privacy is control over how accessible you are to others. Architectural privacy influences psychological privacy; employees won’t feel like they have any control over others’ access to them when they are sitting in an open room.

For some jobs, this lack of privacy may significantly impede performance, particularly for those who need to be alone with their thoughts to innovate. For those who regularly work collaboratively, however, an open office space might make more sense. Understanding which job functions dictate more of a need for psychological privacy will help you choose who should work in spaces with more architectural privacy.

Even where an open, collaborative environment makes sense, every employee should have access to a private space to make an occasional personal call or gain a few minutes of respite on a break. Designating small rooms for employees to use for brief intervals may serve this purpose.

Excessive noise

Studies have been done on the effects of prolonged noise exposure on brain function, and some evidence indicates that excessive noise can actually impair executive brain functions such as planning, reasoning, and impulse control.

The acoustic environment of an open office — with high ceilings and hard surfaces (concrete floors, brick walls, metal desks) — provides ample opportunity for background noise (printers, conversations, ice machines, etc.) to reverberate. This not only makes everything louder, impeding concentration for many people, it also affects the signal-to-noise ratio. This essentially means that it's more difficult to hear the things you need to hear, like a person talking on the other end of the phone.

Acoustic panels and soft fabrics used in an open space can cut down on this reverberation. Curtains, carpeting, and plush seating help absorb background noise, and modern acoustic panels can hang from ceilings, or even resemble wall art. Depending on the needs of your office, certain machines might be located in one room versus throughout the space.

Communication as interruption

The constant access to coworkers and cacophony of background noise encouraged by an open office setup naturally lends itself to an endless stream of distractions that can reduce productivity. While you may be limited in your ability to provide physical privacy or background noise reduction, certain policies may help decrease the more intentional interruptions, such as meetings or socializing.

Talk to your supervisors about how they can help their teams limit the number of interruptions related to meetings, email, office chitchat, or personal technology. A group might be able to create its own guidelines for a more hospitable environment.

Every workplace has distractions that impact productivity which may be magnified by open spaces. Proactively addressing the environmental issues that commonly disrupt your employees will help create an atmosphere that inspires their best work.



Best practice

Supervisors should take a team approach to reducing distractions

While no one can remove all workplace distractions, the first step in mitigating them is to understand what can be controlled and what cannot. Suggest to your supervisors that they start by compiling a list of the things that are distracting their teams.

They should ask team members to think of the top distractions and interruptions to their daily activities, and rank them in order of highest impact on productivity. (Supervisors may want to have employees respond privately in case one team member's top distraction involves another team member.)

Once they've compiled everyone's distractions, they can determine what areas are shared pain points and what things are individual. For individual concerns, supervisors will likely want to work directly with that team member to come up with a solution. For shared concerns, they should consider brainstorming acceptable solutions together.

Here are some common examples of workplace distractions and possible solutions:

- **Too many meetings:** The exercise may reveal that the team has too many meetings, and the team might need to create guidelines to determine when a meeting is necessary. Or maybe the meetings are just held at inconvenient times. Perhaps employees would prefer to have certain days of the week or times of the day blocked out to create uninterrupted work time.
- **Too many emails:** How does the team want to use email? What is the expected level of urgency and time for response? For example, establishing a team policy to not use email for urgent matters allows team members to set times to check it periodically during the day, versus reading every message as it arrives in the inbox.
- **Loud talking, office chitchat:** Camaraderie with colleagues can have a very beneficial impact on how team members work together, but excessive chatting or boisterous behavior can be extremely distracting to those who need to concentrate. Could the team establish some quiet hours out of respect for those who are sensitive to noise? Might the team consider a policy that encourages employees to politely ask teammates to simmer down when needed? Of course, if the noise level coming from one individual seems to be disruptive, supervisors should be ready to address that on an individual level.
- **Use of headphones/earbuds.** Many employees wear headphones or earbuds to help them cope with the noise levels in an office. Some say it aids in concentration and enhances productivity, while others say wearing them is a distraction in itself. Whether or not your company allows employees to wear them will depend entirely upon your office setting and if your employees need to be able to hear what is happening around them at all times. Whatever is decided, make sure the policy is understood by all and universally enforced.

Encouraging positive relations through communication

A large part of communication involves simply ensuring that employees have the tools and resources needed to do their jobs. If there are barriers to their productive time, they will not be able to focus on productive work, and the resulting frustration may further hamper productivity.

As a typical example, some employers have taken such a strong stance against the theft of office supplies that employees must formally request even basic items, such as pens or paper. While these procedures may result in savings by reducing theft, they may create a greater cost through lost productivity (employees spend time making requests for resources, rather than doing the job) and through frustration, since employees are likely to complain among themselves about the situation.

Therefore, one side of the communication coin is simply identifying barriers and hopefully removing them. These barriers can include silos or rumors, as well as a lack of communication itself. For instance, employees may need help in managing priorities. When employees have multiple deadlines or multiple priorities, they may not know where to focus their efforts.

An expectation for all assigned work to be completed might seem reasonable, but it does happen that employees will receive more work than they can handle. If this happens, they need to know which areas should be handled first.

The other side of the communication coin is positive feedback and encouragement. Maintaining a positive outlook and treating employees as responsible adults can go a long way toward increasing engagement and maximizing productivity. However, there are limits to how much

Reserved

discretion employees can be given. To continue the previous example, employees who are overloaded might be trusted with the responsibility to complete their tasks, but may require guidance on which tasks should be handled first.

Your role in working with temps

Many employers use temporary workers (temps) from a staffing agency. The agency is the primary employer, but the host company may be a joint employer with some shared responsibilities. Many employers are concerned about the potential liability of being a joint employer, although joint employment status may be unavoidable under some laws. For example, temps are automatically considered joint employees under the Family and Medical Leave Act (FMLA).



Cross reference

For more information, see the section on **Temporary workers and the co-employment relationship** in the **Planning and advertising** tab.

Even so, employers should respect the role of the agency, which may mean allowing the agency to retain a certain amount of control. For example, as the primary employer, the staffing agency should establish the hours of work, approve requests for time off, and handle disciplinary issues.

Setting hours of work

When you directly hire employees, you establish the expected working hours, and you may change that schedule at any time. However, when using temps from a staffing agency, tell the agency how many hours you require of the worker. The agency will communicate those expectations to the employee as part of the placement.

If you want to change the working hours, you should contact the agency to revise your agreement, rather than directly asking the temp to work different hours.

Approving time off

If the temp wants time off, the individual may notify you as a courtesy, but actual approval should come from the agency. You may not mind if the temp takes a day off, arrives late, or leaves early, but you should not “approve” such requests. The staffing agency should retain control over things like approving and tracking requests for time off.

Handling discipline

Likewise, if a temp is having problems with attendance, conduct, or other disciplinary matters, notify the agency and let them handle the situation. You may have control over the day-to-day job duties, but the staffing agency should address any disciplinary problems. If the agency does not seem to be effectively addressing a situation, you may request the placement of a different temp or you may even work with a different agency.

As part of training a temp, a manager can certainly point out errors and make notes for future reference, especially since it may affect a decision of how long to continue using this temp, or even whether you will eventually make a job offer. However, managers should avoid giving formal discipline such as verbal or written warnings. There is a difference between conduct issues and performance issues.

For example, if a temp is rude to other employees, the matter should be reported to the staffing agency, although the manager might still inform the temp that the conduct was unacceptable and will be reported to the staffing agency.

On the other hand, a temp who makes errors may have a training problem, not a disciplinary problem. In that case, your company is in the best position to give feedback, which can include guidance on how to correct or avoid mistakes. The coaching might include statements along the lines of “it’s important to learn this” or even that “these mistakes are not acceptable.” However, a manager should not place the temp on a performance improvement plan.

Although writing up a disciplinary action for a temp is not appropriate, some feedback has to be provided. The distinction is largely in how that feedback is delivered when compared to regular employees. The feedback may indicate a need for improvement, but should not include consequences of failing to perform as required. The consequence would likely be releasing the temp back to the agency.

Misconceptions

There are a number of misconceptions surrounding temps. A common one is that employers are obligated to hire a temp after a certain period of time. If such a requirement existed, it would seriously hamper a staffing agency’s ability to conduct business by forcing the agency to “give up” a worker after a defined time period. In truth, you could retain a temp for years without ever hiring the individual, and continue paying the agency for leasing that worker.

Some sources suggest that refusing to invite temps to holiday parties or social events may help prevent a finding of joint employment. This may be true in some cases, but as noted, your company will automatically be a joint employer under laws like the FMLA. You might also be a joint employer under the Fair Labor Standards Act because you control the day-to-day job tasks. A temp’s voluntary participation in a social event should not normally impact the evaluation of which employer controls the individual’s hours and working conditions.

Excluding temps from social events may even have a downside — it might reduce the temp’s feeling of connection and engagement. In particular, if your company uses temps on a trial basis in a temp-to-hire situation, there’s no reason to treat them like outsiders. The impression you create may even impact the temp’s decision of whether to accept a job offer to become a “regular” employee.



Best practice

Ten tips for managing temps

Temporary employees come in all shapes and sizes, from day laborers to executives. Some people turn to temporary work because they like frequent assignment changes and the freedom to manage their work schedule. Others use the services of a temporary agency as a means to find regular full-time employment.

Regardless of why individuals seek temporary employment, the challenge is to bring these employees up to speed as quickly and as safely as possible. How does an organization do that? Here are some tips:

Talk to the team. Team cooperation helps integrate and train temporary employees. Communicating with the team about upcoming work loads and the need to bring on temps can help avoid employee relations problems.

Carefully consider the company's needs. It is generally most cost effective to use temporary employees in jobs having the shortest learning curve.

Develop a good job description. The staffing agency will need to know the kind of work that will be done, its physical demands, the skills and knowledge (including tools and equipment) it requires, and the environment in which the work takes place.

Interview candidates. Unless the company only needs a warm body for a short-term assignment, take the time to interview candidates. Assess their skills and knowledge, but also consider how well they may fit into the team.

Provide orientation. Give them an overview of the work done in the department. Review job duties to show them how their work fits into the big picture. Give a tour of the facility and point out where they should park, eat lunch, and take breaks. Introduce them to fellow teammates, and tell them who they should check in with each day.

Make introductions. Treat temporary employees with respect and dignity. Never introduce them or refer to them as temps. Address them by their name.

Train. Even if the workers have the skills, knowledge, and work experience requested, don't assume they know how to use all required tools and equipment. Train them and assign them to a regular team member who can be the "go-to" person and answer their questions.

Check on progress. Several hours after their initial training, check on them to see how they are doing and if they are having any problems.

Let the agency do its work. The agency's job is to deal with personnel issues, such as attendance, tardiness, and poor interpersonal relations. If any of these problems arise, contact the liaison for the staffing agency. A host company should not impose discipline, but should report concerns to the primary employer (the agency).

Supervisor communication

When employees have questions, they most likely ask a supervisor for guidance. For many issues, asking their coworkers may be acceptable as well, such as questions on technical issues. However, if employees are asking questions of each other that should be directed to a supervisor (such as policy enforcement or even how to fill out a timecard), this may indicate a communication barrier.

While it might be natural for employees to feel more comfortable asking questions of one another, the answer might describe “how things have always been done,” and it may not be the correct way. The effect of inaccurate coworker answers might range from a loss of efficiency (things could be done better) to a potential for liability (safety procedures aren’t followed).

There are many reasons that employees might avoid communicating with a supervisor, including:

- The supervisor doesn’t know the answer or doesn’t provide an answer.
- The supervisor doesn’t enforce a policy.
- The supervisor doesn’t respond appropriately.

The supervisor doesn’t know the answer or doesn’t provide an answer. In some cases, a supervisor won’t know the answer. This can be a challenge because nobody likes to admit that they don’t know something. If a supervisor promptly looks into the matter and provides a response in a reasonable time, the employees should feel more comfortable asking questions in the future.



However, if the supervisor simply says he doesn’t know, or tells the employee to figure it out, the employees are less likely to ask questions in the future. This creates a barrier to communication, and overcoming the barrier won’t be easy. The best way to avoid this situation is for

supervisors to admit they don't know something, promptly follow up with the employee who asked the question (or with all employees, if the issue could affect the workforce), and explain the reason behind the answer.

Part of treating employees like adults means giving them a reason for a decision. While a parent might get away with saying "because I said so" to a child, this answer isn't appropriate in the workplace. To accept an answer (especially if it changes how things are done), employees will want to know the underlying reason for the rule.

The supervisor doesn't enforce a policy. Most questions involving company policies should be addressed to a supervisor. Whether the matter relates to wearing personal protective equipment or filling out a timesheet, supervisors need to have the answers. In some cases, however, supervisors will give the wrong answers or will create a work environment that discourages questions.

For example, if a supervisor is not enforcing OSHA safety rules, employees are more likely to violate them. Moreover, if a safety rule hasn't been previously enforced, how likely are employees to even ask about the rule?

Consistently enforcing things like dress codes, safety rules, and other policies is an enormous part of communication. The silence from lack of enforcement (or lack of communication) speaks volumes about the supervisor's relationship with employees — and by extension the organization's relationship with employees, since supervisors are the face of the company to most employees.

Once again, the supervisor should explain why the rule has to be enforced. The supervisor will not be able to sound convincing if he or she hasn't been enforcing the rule. This can also have greater consequences if employees start to think that if "the boss" doesn't have to follow the company rules, why should they have to do so?

The supervisor doesn't respond appropriately. An inappropriate response could range from not giving an answer to something like, "Don't bother me with these questions." Essentially, any response other than a helpful answer may be inappropriate. Such responses are likely to cause a breakdown in communication by discouraging questions in the future. If something goes wrong in the future, the employee will likely receive the blame, and might even be told that he or she should have asked for guidance. But if the supervisor's responses have not been helpful, who should really be to blame?

Any of these responses put up barriers to communication between the company and its employees. This highlights the importance of choosing the right supervisors and training them on the importance of ensuring positive employee relations. They must understand that their role is to provide leadership and to maximize productivity while acting as a representative of the company's best interests (which should align with their own best interests). They should understand the consequences of failing to communicate; the negative effects on employees could affect turnover, morale, and productivity. None of this is in the company's best interests, and if supervisors are held accountable for positive employee relations, a failure to advance the company's interests should have an impact on the supervisor's career as well.

Dealing with a supervisor who refuses to get involved

A good supervisor needs training and experience, but also certain personality traits. Not everyone is cut out to be a supervisor, but individuals who possess the right personality traits can learn to be effective. Those traits include things like confidence, organization skills, and communication skills. A supervisor must be able to act as a mediator, build relationships, and work to ensure effective collaboration among team members.

When conflicts arise among team members, some supervisors may be reluctant to get involved, especially if the conflict is personal rather than professional. While a supervisor may ask Human Resources for guidance, he or she should not start by requesting that HR meet with the employees — and HR should be wary of accepting such requests because immediate HR involvement may undermine the supervisor's authority and credibility with the employees.

If a supervisor refuses to manage conflicts (or refuses to do so without direct involvement from HR), there may have to be consequences for the supervisor. Some supervisors may feel that personality conflicts are not worthy of their involvement. Although a supervisor should never tell employees to work things out on their own, HR can tell a supervisor to work things out between his or her team members. After all, one of the supervisor's primary duties is to provide leadership.

If team members are in conflict, the supervisor should outline the expectations and help guide the employees toward a solution. If these efforts are unsuccessful, the supervisor may have to impose discipline. This may be the point at which HR may become involved. HR may provide behind-the-scenes guidance, but should become directly involved only if the supervisor's resolution efforts were unsuccessful.

HR might learn of a conflict when a supervisor requests assistance in dealing with the problem or (much worse) when employees report the problem to HR after the supervisor failed to address the situation (or report that the supervisor is the source of the conflict). This can be a delicate situation and determining a proper response may require some investigation.

For example, if some employees are testing the boundaries of a new supervisor, the supervisor may have to be more assertive. Conversely, if several long-term employees with solid performance records have complained about a new supervisor, the problem might be the new supervisor's leadership style. If the leader cannot adjust his or her style to effectively manage a team of otherwise productive employees, the supervisor may not be cut out for a leadership role.

Do you know what your problem is? Me.

Breakdowns in communication may occur when the listener (the employee) did not understand the information given by the speaker (the supervisor). If the listener is confused or uncertain, then he or she ought to request clarification. Sometimes, however, the listener really believes that he or she understood the message, but actually walks away with an incomplete or inaccurate understanding. So, who is at fault for the misunderstanding?

In most cases, the speaker is likely at fault. The speaker is responsible for ensuring that the communication is effective and that the listener understands the message. When miscommunication occurs, the speaker may want to blame the listener, and may argue that a speaker is not responsible for the listener's comprehension. However, at the start of the conversation, the person conveying the information is the only one who understands the message. If the listener does not understand, the most likely cause is the speaker's failure to communicate effectively.

Individuals have different communication styles, and the speaker is responsible for adapting his or her style to that of the listener. Otherwise, the listener may assume that he or she understood the message and won't see a reason to request clarification. An assertion that the recipient isn't a "good listener" is an easy excuse for the speaker, who might otherwise have to admit that he or she is not a good communicator.

Signs that a speaker might not be a good communicator can be obvious, if the warnings are recognized. In particular, if a speaker (or supervisor) has regularly used any of the following phrases, this may suggest that he or she is not a good communicator:

“I’ve told you three times already.”

“You misunderstood me.”

“Can’t you follow directions?”

“Why doesn’t anyone around here listen?”

What’s worse, reactions that place the blame on the listeners can make them even more reluctant to ask for clarification. If the listener assumes or believes that he or she understood the information given, then even a direct question such as “do you understand?” won’t provide confirmation that the information was accurately conveyed. Instead, the speaker should ask the listener to repeat back the information to ensure that all points were understood.

While it’s easy to blame others for communication failures, the problem might not be the listener. If listeners are consistently unable to understand information or follow instructions given by a particular speaker, the problem might be the speaker.

Learning to communicate

While training can alter a person’s behavior, it cannot necessarily alter his or her personality. People have different personalities, and some are better at managing people than others — which is why we have articles such as the following:

A Florida State University professor and two of his doctoral students conducted a study that shines some light on the magnitude of the problem of the abusive boss, and documents its effects on employee health and job performance.

In order to test the theory that “people don’t leave their jobs, they leave their boss,” more than 700 people from a variety of jobs were surveyed about their opinions of supervisor treatment on the job. The survey generated the following results:

- Thirty-one percent of respondents reported that their supervisor gave them the “silent treatment” in the past year;
- Thirty-seven percent reported that their supervisor failed to give credit when credit was due;
- Thirty-nine percent noted that their supervisor failed to keep promises;
- Twenty-seven percent indicated that their supervisor made negative comments about them to other employees or managers;
- Twenty-four percent reported that their supervisor invaded their privacy; and
- Twenty-three percent indicated that their supervisor blames others to cover up mistakes or to minimize embarrassment.

According to the researchers, “Employees stuck in an abusive relationship experienced more exhaustion, job tension, nervousness, depressed mood, and mistrust. They also were less likely to take on additional tasks, such as working longer or on weekends, and were generally less satisfied with their job.”

So while employers can (and should) conduct supervisor training, it is also important to have a handle on how supervisors are doing their job on a day-to-day basis.



Best practice

Lonely at the top?

A manager can be friendly with direct reports, but there's also an advantage to maintaining a certain professional distance from employees. As a result, employees will form bonds and loyalties with one another that are very different than the ones they share with a leader. While supervisors should understand the necessity of this different type of relationship, being left out of the team bond can feel lonely, particularly if the leader was once peers with employees who are now the direct reports.

Managing people who were once peers doesn't preclude being friendly, but it does require prioritizing. It's more important to develop respect and cooperation than friendships. At the same time, supervisors shouldn't be so assertive and aggressive that they aren't approachable. To maintain professional balance:

Do remain friendly with employees, but **don't** give them inflated assessments of performance or refrain from discipline in an effort to remain friendly.

Do clearly communicate expectations, but **don't** avoid communication when it feels awkward.

Do focus on the tasks to accomplish each day, but **don't** let the focus land so heavily on tasks that the people are forgotten.

Do delegate responsibility, but **don't** simply pass on menial tasks.

Supervisor training topics

Whether newly promoted to a supervisory position from within the ranks or hired from another company with previous experience, the new team leader may require training on a variety of topics. All too often, supervisors are not given formal training on how to perform their expected job functions. Employers should not assume that supervisors know how to properly interview employees, provide guidance, document performance, or justify a termination. Even if the supervisor has handled these duties for years (perhaps at a previous employer), they may not be doing so correctly.

Conducting interviews

Interviewing employees requires knowledge of relevant laws, as well as skills in communication and speaking, but it also requires experience. Supervisors may benefit from sitting in on interviews conducted by HR professionals to learn the process. Even as they become more comfortable leading an interview, they may need an HR professional available to help with any sticky situations.

Each interview is unique, since any applicant may raise questions or topics that are outside the supervisor's experience (such as volunteering information about religious beliefs, medical history, or prior union membership). Supervisors should have some guidance and experience before they are ready to handle interviews on their own.

Providing guidance

A major part of any supervisor's job is developing employees. This may require providing training, guidance, feedback, encouragement, or correction. Employers might assume that an experienced supervisor already knows how to handle these things. Unfortunately, the supervisor may not be doing so as intended.

Most individuals learn the basics of positive and negative feedback while growing up, or from role models such as parents. While the lessons learned might be applicable to their own children, they may not translate to the workplace. Adult employees require a different approach, and each employee may require a unique approach. For example, high-performing employees might feel that constant praise (however deserved) is suffocating or disingenuous.

Whether the guidance provided is supportive or corrective, supervisors must know how to handle a variety of possible responses. When correcting an employee's error, the employee will hopefully accept the correction and move on. However, some employees may respond with anger ("We've always done it my way!") or may even break down in tears ("I can't do anything right!"). The supervisor must be able to effectively address any response.

Obviously, the employee's response will also depend on the manner in which the corrective advice is given. An approach that is too strong or demanding for the circumstances may generate resentment, even if the employee doesn't voice this feeling and becomes increasingly frustrated with the supervisor. Conversely, an overly gentle approach may come across as a mere suggestion that could be ignored.

Even giving positive feedback or encouragement may require training. High-performing employees require encouragement just as much as low-performing employees require correction. Every supervisor knows how to simply say, "Great job on that project." However, if valued employees have not received more encouragement than an occasional "good job" for several months, the lack of feedback may start to affect their morale. Training supervisors on ideas for giving feedback might include offering suggestions such as:

- Writing a positive letter, showing it to the employee, and placing it in his or her personnel file;
- Providing a small reward in recognition of an accomplishment, such as movie tickets or a gift card;
- Pointing out accomplishments and contributions during staff meetings; or
- Mentioning an employee's value to his or her coworkers, knowing that they will probably inform the employee about those remarks.

Even an experienced supervisor may benefit from new ideas on how to offer feedback, encouragement, and guidance to employees.



Cross reference

For more information, see the section on **Giving feedback** in this chapter.

Documenting performance

Documenting employee performance is one of the most important duties a supervisor performs. Doing so improperly can not only increase potential liability for the company, but can negatively affect employee morale, productivity, and turnover — all of which can cost the company. Training on how to document performance should involve more than showing the supervisor how to fill out an annual performance evaluation.

Many employers have experienced problems involving a supervisor's failure to properly document problems, and have even lost legal challenges for lack of documentation. Less easy to measure, however, is the adverse impact on employee morale and productivity from failing to give timely and positive feedback for employee accomplishments, or failing to correct problems in a timely manner. For instance, ignoring conflict between coworkers based on a belief that they'll work things out might allow the problem to grow until discipline is needed, while an earlier intervention might have avoided the need for discipline.

Whether positive or negative, performance evaluations should not be delayed until the employee's annual review. Just like giving feedback should be an ongoing process, documenting that feedback should also be an ongoing process. However, supervisors must be aware of the potential implications of failing to create good documentation.

If documentation of praise consists of a few notes scrawled on a scrap of paper, it won't make a very favorable impression on the employee. Conversely, if those same scribbles were used to document problems, they won't make a very good impression on a lawyer or enforcement agency representative who is asking the company to provide a non-discriminatory motive for the action taken against the employee.

Employers may want to reinforce the importance of creating proper documentation by evaluating those files during the supervisor's own performance evaluation.



Cross reference

For more information, see the section on **Performance appraisal guidelines** in this chapter.

Justifying a termination

If supervisors are diligent in providing feedback and documenting their efforts to inform employees about the need for improvements, then a termination should be easy to justify because all of the necessary documentation will already exist. Unfortunately, many supervisors are less than diligent about this, or may feel that there will be time to handle it later. These delays may actually increase the potential for liability.

Supervisors need to understand that even though the at will employment concept may not require meeting a specific level of justification, there will be an assumption that an employee must have been terminated for a reason (employers do not normally terminate for no reason at all). Unless the company can show a legitimate business reason, there may be an assumption that the employer had a discriminatory motive or other unlawful motive.



Cross reference

For more information, see the section on **Documentation and justification** in the **Involuntary (Employer Initiated)** tab.

Identifying a poorly performing supervisor

In many cases, supervisors are given complete discretion to run their departments. When they are trustworthy and effective at maintaining positive employee relations while maximizing productivity, this won't cause problems. However, when a company only reviews "the numbers"

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for a department, without evaluating how employee relations are handled, there could be problems brewing that are not indicated by the raw numbers.

Some organizations seem to have an institutional reluctance to question supervisors, and simply assume that if the job is getting done, all must be well. Numerous studies have shown, however, that there is often a disconnect between upper management's perception of employee relations and the perceptions held by the employees themselves.

Many organizations have adopted formal complaint procedures for employees to challenge a supervisor's decision or action. However, employees are unlikely to use these procedures unless or until the underlying problem becomes almost unbearable. Employees may fear (sometimes with good reason) that their concerns will not be taken seriously. All too often, their perception is that management will defend "one of their own" and won't listen to the employee. After all, the supervisor is known and trusted, having regular contact with upper management, while the employees are unknown and have little or no contact with upper management.

There is also a common perception among employees that a company is willing to replace an employee who is not meeting expectations (or even one who is), but the same company will be unwilling to replace a supervisor who is not meeting expectations. But how does an employer know whether a supervisor is meeting expectations?

In recent years, some employers have made a greater effort to increase contact between upper management and employees. Perhaps the ultimate culmination of this is embodied in the television show "Undercover Boss," where a CEO joins the ranks of workers to obtain first-hand knowledge of how the company operates on a daily basis. While such extreme steps need not be undertaken, the concept of increasing direct contact between employees and management is still valid.

Think of it this way: Supervisors are responsible for managing the day-to-day operations of their employees. They typically review the quality and quantity of work performed by each employee, along with other factors, to measure the contributions of those employees. While employees are usually given the opportunity to offer input, much of the review is based on the supervisor's observations of the employee's daily work.

Along the same lines, management is responsible for the day to day effectiveness of the supervisors. However, if management is only reviewing the output numbers and does not observe how the supervisors are handling employee relations, the review is based primarily on the supervisor's own evaluation of his or her performance. As noted above, this can create a considerable gap between management's perception of employee relations and the employee's own perceptions of their relationship to the company.

While a company does not have to "go around" a supervisor or place an undercover manager on the team, an organization should hold supervisors accountable for developing and maintaining positive employee relations. Relying solely on the supervisor's own reports of employee relations would be no different than relying on every other employee's own report on his or her effectiveness. Finding out if a supervisor is not performing well will likely require talking to employees.



Cross reference

For more information on evaluating supervisors, see the section on **360-degree feedback** in the **Rewards and Advancement** tab. This information applies to all employees, including supervisors.

Emotional intelligence in employee relations

HR professionals might sometimes feel like the “parent” in the relationship with a supervisor whose conduct has been less than stellar when dealing with employees, or worse, who has made an employee relations mistake that borders on, or is, unlawful. They might need to coach the supervisor or explain to the supervisor why those actions were inappropriate (or illegal, as the case may be).

Handling employee relations issues badly may in part be due to ignorance (simply not knowing what the laws are), lack of training (not knowing what a proper response should be), or because the supervisor is lacking in emotional intelligence.

What is EQ?

Emotional intelligence, also called EQ (as opposed to IQ, the measure of a person’s basic intelligence), describes a person’s ability to understand their own and others’ emotions and respond appropriately. Individuals with low emotional intelligence are more likely to be petty, vindictive, take action out of spite, and retaliate against employees, which obviously could lead to liability for the organization. Those with higher EQ are better able to keep their anger in check, see the folly in being vindictive, and look at the big picture when deciding what action to take.

People who have low EQ might bully others, talk over others, or be unable to discern social cues or read nonverbal language. They are less effective in dealing with people, and certainly in managing them. Supervisors with low EQ are more likely to take part in inappropriate behavior, ignore employee complaints, and lack empathy for the employees they supervise.

Low EQ leads to lawsuits

Court cases are rife with examples of this type of behavior. For example, in a California case, supervisors joined in calling two employees of Lebanese descent “terrorists” and “camel jockeys.” In this case, one of the managers was ordered to pay \$1 million out of his own pocket, since California law allows personal liability for discrimination. The company was ordered to pay \$61 million.

In another case, a supervisor told an employee who complained of sexual harassment that she should NOT go to HR, and that it was her fault she was being harassed because she was “hot.” After only five weeks on the job, the woman quit and sued her employer. She won a judgment of \$1.2 million.

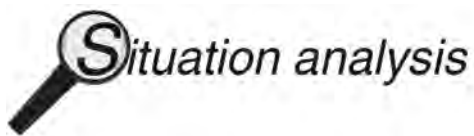
There was also the company that lost its retaliation lawsuit because a supervisor told an employee that she was being terminated, in part, as retribution for filing a harassment claim against him *five years earlier*. If not for that supervisor's comment, the employee might not have sued.

The manifestations of EQ

While it's human nature to sometimes feel vindictive and spiteful, a person with high EQ realizes the inappropriateness of giving in to those emotions in the employment context. A person with low EQ may not.

A person with high EQ will be more likely to look at the large-scale consequences of his or her actions down the road. A person with low EQ may only see as far as the immediate personal satisfaction of taking a retaliatory action, but not see the potential consequences of that action.

A person with high EQ will work toward the greater good of the organization as a whole. A person with low EQ will tend to elevate his or her personal interests above those of the company, even to the point where those interests are detrimental to the organization.



Be wary of microgestures

Most managers know that efforts to ensure fairness in the workplace are vital, particularly when it comes to avoiding illegal discrimination. Of course, treatment that is not specifically illegal can still be unfair, and even seemingly minor (or unintentional) actions can still damage employee morale.

A 2007 Corporate Leavers Survey indicated that unfairness in the workplace costs U.S. employers about \$64 billion per year, and more than two million professionals leave their jobs after being "pushed out by cumulative small comments, whispered jokes, and not-so-funny emails." These reasons may sound minor, but even seemingly insignificant things like rude gestures or body language can make an employee feel as if he or she is being treated unfairly.

Sometimes called microgestures or microinequities, these small but detrimental acts may include subtle forms of treating an employee differently, including, for example: (1) Failing to make eye contact or glancing at the clock when an employee is speaking, (2) Repeatedly ignoring the suggestions of a particular individual, or (3) Regularly mispronouncing (or even forgetting) an employee's name.

Unfortunately, many managers perform some of these types of acts without even realizing it, so it's important to be conscious of even the "micro" ways of treating employees differently.

It doesn't take a full-blown lawsuit to do damage to the organization; if an employee quits due to what he or she perceives as unfairness, no matter how big or small, the organization will suffer in terms of knowledge loss, training costs, and perhaps even reputation. It takes a conscious effort to treat employees fairly even at the most minor levels, but it's definitely an effort worth making.

Training vs. screening

While emotional intelligence is largely something a person is born with, it is believed that it can, to some extent, be learned. However, instead of trying to teach emotional intelligence, or to train supervisors to deny their emotional tendencies, HR professionals might give thought to screening supervisor candidates for EQ in pre-employment tests.

Perhaps the best defense against employment lawsuits is to have a good offense. By putting emotionally intelligent people in supervisory positions, many of the inappropriate reactions that supervisors with low EQ tend to respond with may not occur at all.



Cross reference

For more information on evaluating supervisors, see the **Testing and evaluations** section in the **Interviewing and Selection** tab.

Supervisors as coaches

In the world of sports, everyone wants to have their chance to show the team they can be relied on to do their part. It's not much different in the world of business. Employees want to prove they can do a good job and be a contributor to the team. In sports, if someone isn't producing as well as the team needs them to, that person is likely to get some extra coaching. In business, if an employee isn't producing as well as he or she should, the employee could benefit from some extra coaching as well.

Coaching is just what it sounds like in sports — a little extra help. It's not the same as discipline. Coaching is designed to avoid the need for discipline by nipping a problem in the bud before it gets to the point where discipline is needed. Coaching is about constructive feedback. Think of it simply as *helping*.

If coaches badger certain members of the team because they aren't cutting it, they may end up quitting. In the business world, coaching is about helping employees succeed, not badgering them until they become so demoralized they quit!

When an employee isn't performing as well as hoped, the first step is to make sure the employee understands what is expected. Perhaps he simply doesn't understand the expectations of his position. It's possible he was given misleading information from coworkers and is following bad advice.

Be sure the company and the employee are on the same page. Ask if there is something preventing him from performing up to expectations. There may be a problem with the equipment he's working with, or information he depends on from others may be coming in late, and those are variables he's not in a position to control. He may assume the company is already aware of the situation.

Questioning the employee may reveal that further training is necessary. If the employee is one for whom English is a second language, it's possible the employee didn't fully understand the training he received. Or, he could have received inadequate training. For those who come into

jobs where the incumbent has left for another position and no training is available, there may be a longer learning curve for those who have to figure it out on their own without the benefit of any mentoring or job-specific training.

Not everyone comes to the table with the same set of skills and experience. Those differences need to be taken into account. For example, say the person who just left a position was an ace at doing spreadsheets. The replacement just hired can't produce them as fast as the former employee could. That doesn't necessarily make this person a bad fit for the job, just in need of some extra training and experience with spreadsheets. She may be an ace at a different aspect of the job, like adding numbers in her head to give cost estimates at a moment's notice, or being able to remember facts and figures without having to look up the information, which comes in handy during meetings. Recognize an individual's strengths, and coach on the weaknesses.

Just as people are unique, so are the solutions to the problems that come up in the course of their employment. Learn to coach to the individual based on the individual's needs and personality. It may sound like a lot of work, but saving an employee may be better than replacing one.



Best practice

Supervisor contact is critical

Regular supervisor contact is critical for employees to feel engaged in their jobs. Because employee engagement is directly linked to company profitability, employers should do everything they can to engage employees. Since providing recognition is one way to engage employees, here are a few ideas:

1. It costs nothing to walk around the facility or office, talk to employees, and show some interest in their jobs. Many supervisors take a "hands-off" approach for fear of being seen as micro-managers, but straying too far in that direction could be viewed as indifference.
2. It also costs nothing to tell an employee that he or she is doing a good job. It's "reward and recognition" in its simplest form, and yet it's surprisingly effective at boosting morale.
3. Be approachable. If employees feel they can't approach a leader with a problem or a question, it seriously hampers the flow of a good working relationship.

It doesn't take a large budget to recognize employees for their efforts. A little communication can go a long way toward increasing employee engagement.

Gaining acceptance for change

Change is inevitable. And inevitably, some people will resist change. Employers don't typically have problems gaining acceptance for a positive change that benefits employees. After all, who would argue with a change in wages, when the change is an increase in pay?

Unfortunately, even when a change is effectively neutral, and does not increase or decrease the burden on employees, they may view it as negative change — because learning something new always requires extra work.

The process of change management generally involves three steps: preparation, management, and reinforcement. Gaining acceptance ideally starts in the first step, since employees should be prepared to accept a coming change. Unfortunately, some change is necessitated by circumstances, and sharing details (e.g., of a pending layoff) may not be desirable. This makes proper handling of the last two steps all the more important.

Employers can gain acceptance for change through a deceptively simple process: Make the employees realize that the change is positive for them. This may not work in all cases or for all employees (no single approach will work for all employees, all of the time). However, even an obviously negative change should have some positive aspects.

For example, a reduction in pay would be almost universally viewed by employees as negative, but if it avoids layoffs (and thereby avoids increasing the workload on employees while keeping the company afloat) then it has positive aspects. The difficulty lies in showing employees how the positive aspects outweigh the negatives.

Explaining the reason

Ideally, organizations will be able to involve employees in the process of implementing changes. Acceptance is usually easier to obtain when employees are part of the process. In some cases, employees might even initiate the process by requesting a change in the workplace, such as a different (or more effective) procedure. However, even where the company initiates the change, it may be possible to involve employees in the transition process.

Unfortunately, many types of changes only allow for limited employee input. Whether the change is a reduction in wages due to economic conditions or a software upgrade to a new operating system, the employees may not have any choice in the matter. In these cases, explaining the reason why the change is needed can help gain acceptance. While the employees may not have any option other than accepting the change, the company may also not have any option other than implementing the change.

For example, if a new operating system is being introduced, the underlying reason might be that the old system is obsolete or will no longer be supported, and the company has no choice but to upgrade. Employees might be informed that the company recognizes how the change will be difficult for a time, but the realities of the business world have placed the company in the same boat as the employees. The change must be made, with no other options.

In cases where a new machine is being added or a piece of equipment is being replaced, employees may need to understand that the upgrade will allow for more efficient operation. Learning to use the new equipment might take some time, but will ultimately improve overall operations. There might even be some positive outcomes, such as reduced need for overtime because of the increased efficiency.

If employees understand the reason for the change and why it is needed (or why it is unavoidable), they will usually come to accept the change more quickly. Essentially, keep the employees informed to avoid the impression that the company is making changes without caring how those changes might impact the employees.

Situation analysis

The habit of resistance

Humans are creatures of habit, and habits can be difficult to change. Many people will prefer to continue doing things “the old way” even in the face of indications that the new way is better. Part of the resistance to change may be that learning new procedures can seem daunting (which is a perceived negative) compared to using procedures that are well known and comfortable (the potential future benefit is unknown).

Since nearly every change will affect a number of employees, the organization must also be prepared to deal with collective resistance. When several employees resist a change, they will likely give support to each other, and this can strengthen their resolve against the change.

Critical steps to obtain buy-in for change involve providing information on the reason or need for the change, explaining the expected outcome or benefits, and defining the employees’ roles in the process. Keep in mind that a benefit for the company (such as cost savings) may not motivate employees. If possible, employers should describe the benefits in a manner that is tangible to the employees, such as costs savings that are expected to result in larger profit sharing bonuses.

Even if resistance continues, organizations can take some comfort in the fact that after employees are required to adapt to the change, they are still creatures of habit, so eventually the new procedure will become part of their new habits.

Stages of change

People going through changes often exhibit the same reaction as those going through the stages of grief: denial, anger, bargaining, depression, and acceptance.

Although these stages do not always occur in the order listed, they most often *do*. Regardless of the order, employers may have to deal with one or more of these stages. Note that the size or impact of the change may not matter. Whether the company is simply adopting a new computer system or is forced to downsize, some employees may be resistant to the change.

Denial. Employees may express denial by refusing to accept the change or refusing to recognize the silver lining. Refusing to accept the change usually isn’t an option, unless the employee is willing to quit the job — but telling the employee that he or she is welcome to quit isn’t likely to increase acceptance. Similarly, telling the employee that the department or company needs to move in a new direction, and the employee can either get on board or get left behind, is unlikely to maintain positive relations.

Explanations of the underlying reason for the change and/or its positive aspects may not be immediately accepted, but should at least get the employee started on the path to acceptance. Most change is either an investment in the future or an effort to prevent future problems. While employees might not want to accept the change, they will have to realize that they cannot refuse

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to accept the need for the change (especially since the need is outside their control). It may be that employees will have to put in extra effort at the beginning, but will realize benefits later on.



Anger. A common reaction to change is anger, whether directed at the circumstances that necessitated the change or directed at the company itself. A bit of frustration with circumstances is normal, and employers may not be able to do much more than try to maintain focus on production while the anger runs its course. However, employers should take steps to prevent that anger from becoming directed at the company or at coworkers.

For example, in an economic downturn, employees may face pay cuts or layoffs, which can result in anger directed at the company for making those decisions. Again, showing the underlying need for the change and the reason for the cuts may help the employees understand the decisions.

Reserved

Showing that everyone in the company has made sacrifices can help, along with pointing out that the organization as a whole is also a victim of circumstances. An employee might feel angry or frustrated about general economic conditions (or even a personal financial situation), but should not turn that frustration toward the company itself.

Bargaining. This response is partially an extension of denial, but also suggests that the employee has gotten over the initial denial and recognizes that the change is inevitable. It will most commonly involve an effort by employees to exempt themselves from the change. Perhaps an employee will ask why he can't continue doing things the old way, or perhaps an employee will argue some personal hardship caused by the change.

While a company might be sympathetic, it cannot start making exceptions for individual requests. Doing so might prevent it from solving the underlying problem or situation that created the need for change. While a direct argument that everyone is "in the same boat" is unlikely to increase acceptance, it may help to point out that the company cannot make exceptions for some individuals without creating an implied obligation to make exceptions for everyone.

Note that when bargaining fails, an employee may return to the anger stage.

Depression. This stage is more commonly associated with grief and less common with accepting change. Most likely, it will manifest as a longing for the way things used to be, before the change. Some employees may be thinking that "it was easier before" or similar thoughts.

While not truly "depression," this sense of loss can be real (especially in the case of financial cuts), and employees may address their feelings by commiserating among themselves. The employer's reaction may be to show compassion while ensuring that employees are not discussing the issue during productive working time.

Acceptance. The last stage is acceptance of the change, which may seem ideal, but there's a significant difference between employees who happily accept the change and those who grudgingly accept the change. The change management process may not be complete. Reinforcing the change can still be necessary, and might include recognition of the positive aspects realized.

Dealing with change in unsettled times

Calls for change within an organization can provoke especially intense resistance. When uncertainty is such a prominent and threatening part of the world around us, people naturally seek the constancy and routine nature of their jobs as a safe harbor from the storm. Unfortunately, it's also at times like these that businesses may need to change to survive.

If such a call for change were to occur (or if it already has), the challenge would be to help the company implement the changes necessary by ensuring that employees are fully engaged in whatever the change initiative may be. The trick is doing this precisely at the same time employees are the most anxious about (and resistant to) change.

Helping employees cope with change

In uncertain times, employees turn to their supervisors as a key source of information and for guidance. Helping employees adapt to changes that affect them is a part of a supervisor's job. Doing this effectively will minimize unproductive time implementing the changes that have been requested. So, how can a leader help the team better cope with change?

- **Understand how people react to change.** There are three main reasons people dislike change: First, they fear the unknown. Second, they fear they may lose something because of the change. Third, change implies the possibility of failure. Understanding employees' fears can help a leader effectively address them.
- **Keep the lines of communication open.** Employees need to know what is going on. When they don't know what is happening, they start to fear the unknown, or imagine that things are worse than they really are. Encourage them to ask questions, and explain how a specific change is likely to impact them.
- **Acknowledge the emotional turbulence the change may create.** Even a top performer may exhibit sadness over abandoning long-held ways of doing business or having coworkers they consider friends laid off, even if they understand that the action was necessary for the health of the organization.
- **Be a role model.** Employees will look at how management reacts to the change. If managers show a positive attitude and a conviction that everything will work out for the best, it will rub off on employees, and they may not find the change such a scary proposition.

Understanding that change is not easy is the first step in helping employees accept it. Give them plenty of opportunity to discuss the impact of the change, and keep them informed regularly as the change is implemented so that they understand the process and how it will affect them. By remaining positive about it instead of bringing up the negatives, employers can instill a sense that change is sometimes necessary, but will ultimately yield future positive results.



Best practice

Getting buy-in for change

The company is starting a new initiative (e.g., a wellness program, a move to four 10-hour days, or a telecommuting program), and not all supervisors are on board with it. How does the company get their buy-in for change, or at least convince them not to vent their discontent in front of their employees?

1. Change is best won by posing a united front by management. Supervisors publicly need to look like they're on board, even if privately they are not. By promoting personal views that are contrary to the company's position, supervisors undermine senior leadership. Be sure they understand the consequences of their actions.
 2. If possible, get their input in the decision-making process before a final decision is made. They may be more accepting of an initiative that came about as part of a process where their opinions and suggestions were solicited, rather than where a decision was handed down by executives without any input by those who may be hardest hit by the change.
 3. Enunciate the reasons for the change and all the positives that can come from it. Acknowledge the potential problems and the solutions evaluated to deal with them.
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Six steps to manage change and improve engagement

When employees are engaged — that is, when they are positively committed to their work and the organization — the organization benefits. One of the most critical times to have high employee engagement is when changes in technology or work processes are introduced into the organization. Maintaining or achieving engagement requires planned change management. The following steps can help the organization implement change smoothly:

- 1. Assess employees' readiness for change.** Some individuals may embrace change, while others will be resistant. Anticipating employees' readiness allows the company to plan how to address any concerns they may have.
- 2. Get management involvement and support.** Change requires visible and active top management support. Create a steering committee of top executives who will demonstrate their commitment to the rest of the organization.
- 3. Include mid-level support early.** As early as possible, include mid-level managers and supervisors in the change process. They need to know what is happening, but they also need to be given appropriate training to manage change among their employees.
- 4. Develop and implement a communication plan.** The key to successful change management is communication focused on sending and reinforcing key messages. Top management must be committed to meet with employees at all levels, beginning with middle management and supervisors. Emphasize that communication is a dialogue, not a selling job. Management should listen to concerns, acknowledge feelings of fear and anxiety, and reassure employees.
- 5. Educate and train.** Much of the concern employees have about change can be linked to feelings of failure and loss of security. Anticipate the types of training and education employees will need. Providing training early in the change process (prior to the actual change) helps employees build skills and confidence, which will allay fears and anxiety.
- 6. Set expectations and provide feedback.** Whatever the change, employees need to know what is expected of them. Supervisors should provide timely feedback and recognize accomplishments throughout the change.

Getting employees to buy in to change early is key to preventing resistance and keeping morale high. Regular communication as well as careful preparation will help to minimize any negative consequences and encourage optimal employee engagement.

Tips for managing change

Changes may be necessary to keep up with or surpass competitors, but few people embrace change — most resist it. Employees may believe that the change won't last; that they will lose authority, status, or security; or that they will fail in their new role. Employees may also resent being asked to take on more responsibility, or they may not believe in the change.

In other words, resistance to change usually happens because employees feel threatened in some way. Whether this threat is real or perceived, the challenge is to manage change in such a way that employees can cope with it and accept it. Here are some tips on doing this:

- 1. Anticipate the impact.** Once informed that a change is coming, assess how each employee will respond to it by considering how the change will affect each individual.

2. Understand why people accept change. People do things for their own reasons. Accepting change is no different. Some employees will accept change because of personal gain, such as increased security; more money, authority, or prestige; better working conditions; more self-satisfaction; or improved networking opportunities for long-term growth. Others may accept it because of they appreciate a new challenge, or they see that the change is a way to reduce boredom.

3. Communicate. Talk to employees about current problems, the solution(s) the change will bring, and the benefits to each of them. Even while meeting employees in a group, take the communication to a personal level by discussing employees' individual concerns and how the change will benefit particular employees.

4. Educate. Communication is not a one-shot deal. Keep talking to employees and educate them about the need for the change. If new skills are needed, show them how they will be obtained. Reassure them that managers are there to support them through the change.

5. Involve them in the change. Often, the implementation of a change is configured at the lowest level in the organization. Ask for employee input. When employees are involved in creating the change, they are more likely to buy into it.

If employees still resist, try a give-and-take approach, if possible. If that doesn't work, managers may need to resort to discipline to make sure employees stick with the change. Implementing a necessary change takes time and consistency, but trying to understand employees and involving them in the change should maximize buy-in as well as the likelihood that the change is implemented successfully.

Performance reviews

Performance reviews are often one of the most glossed-over activities that a supervisor performs. Often, not much thought is put into them and they are done in a cursory manner so that time can be spent on more productive activities. However, poorly executed performance appraisals can have very serious ramifications for a company.

Time and time again, employers have gotten into trouble by terminating an employee for poor performance, when the company's documentation actually had a record of positive performance reviews with no hint of any problems. When that occurs, courts will assume that the employer actually had other reasons, possibly discriminatory reasons, for terminating the employee, and the termination is looked at with a high degree of scrutiny. So it's very important to clearly and accurately document an employee's work performance and not take the process lightly.

A major error many supervisors make is failing to document problems with under-performing employees. This is the area where lack of documentation will hurt if a lawsuit is filed. Appraisals should accurately reflect how an employee is doing. It's difficult to be critical, and the first impulse may be to be kind in appraisals, especially if the employee's pay is impacted and the review will be part of the employee's permanent record. No one said supervising employees was easy, and the job requires being both fair and impartial.

Although delivering negative feedback is difficult, if the employee is not aware of areas that need improvement, he or she will have a difficult time improving and meeting goals and expectations. Be specific by providing concrete examples of how to improve in given areas.

Effective, clear goals and objectives let employees know what is expected of them. Goals and expectations should be communicated as something the employee can reasonably expect to achieve. Organizations may find it helpful to identify such things as a time frame to achieve the goal, the resources that may be required, and the conditions in which the goal is to be achieved.

The more specific the information, the less ambiguity employees will have in regard to what they need to do, and the better the chance they have of achieving the goals.

Giving feedback

Employees want to know how they're doing at work. Maybe not so much if they know they're not performing up to standards, but when they are, they certainly appreciate positive feedback. They also like to know what's expected of them, what they need to do to improve, to get promoted, to get a better raise, to climb the corporate ladder, and so on. Even if they're content where they are, they want to know their efforts are appreciated.

Enter the performance appraisal. In general, supervisors don't like doing them, and many employees dread them, fearing the worst. They often aren't conducted on time but are delayed, requiring any salary increase (if one is tied to the review) to be prorated back to the employee's anniversary date, which causes additional headaches for the payroll department.



In addition to the problems with conducting performance appraisals on a timely basis, how does an organization know that the performance appraisal process measures everything desired? Are supervisors evaluating consistently throughout the organization? Are there any patterns where some supervisors are categorically too lenient and others are too strict? Do some supervisors conduct reviews on time and others lag far behind?

Here are some things to combat these problems:

- Base performance appraisals on job-related, objective criteria — not subjective criteria — so there is less “wiggle room” in the evaluation process.
- Keep a schedule for supervisors with reminders far enough ahead of time so they have time to prepare for an employee's performance review and hold it on time.
- Tie a supervisor's timely performance reviews of his or her employees to the supervisor's own compensation by means of an incentive plan, or tie it directly to the supervisor's base salary.
- Train supervisors on how to be critical, fair, and unbiased in their assessments. Be sure all supervisors have the same understanding of what the terms on the appraisal form mean.

- Train supervisors on the importance of being honest. When an employee is disciplined or terminated for poor performance, it is hard for an employer to justify dismissal if all the employee's past performance reviews were positive.

Performance reviews may not be the most well-received undertaking in an organization, but their importance to each employee, and to the organization as a whole in terms of keeping adequate documentation, cannot be overstated

Performance appraisal guidelines

Few managers or supervisors enjoy doing performance appraisals. They take time, they can be uncomfortable, and can lead to poor morale or legal complications if not done correctly. However, the appraisals supply information that can be very useful.

Some companies have formal performance appraisal programs, and others have little more than a policy of open communication used to cover any performance issues. Since appraisals are not required, some companies choose not to conduct them at all. There is no set process for what is right for all companies. Company policy and culture need to be considered in determining which strategy works best.

Too often, supervisors are not candid in their appraisals and gloss over issues, causing employees to believe they are performing better than is the case. That approach deprives employees of knowledge that they need to improve and may cause confusion if the employer disciplines them for their performance. Inaccurate appraisals have been a problem for supervisors and their employers in discrimination and other litigation.

Performance appraisals are communication tools used to identify employee strengths and weaknesses. They are also tools to communicate goals and achievements. The information can help the organization be more productive. Effective appraisals avoid being adversarial in nature, but are honest. They let employees know how they're doing, what they can do to improve or move up, and provide an opportunity for recognizing good performance.

Other benefits of performance appraisals include the following:

- They provide opportunities to identify new ideas and improved methods.
- Well done appraisals help avoid potential legal issues.
- They allow employees to see how their work fits into the company goals, and why their work is important.
- They provide opportunities for employees to convey personal conflicts that adversely affect their work performance.

Poorly run performance appraisals may have a negative impact. They may:

- Not advise employees of the problems they are having and provide a false sense of comfort.
- Lead employees to feel that they are adversarial and are used to place blame for overall company performance.
- Inhibit open communication between the managers and the employees.
- Be used as an opportunity for managers to promote their biased opinions of certain employees.

Performance appraisals should be designed to gather facts, identify potential problems before they arise, and provide for open communication. The appraiser needs to be objective, and needs to be familiar with the appraisal process along with how the information gathered is or can be used.



Best practice

Five tips for performance evaluations

- 1. Include the date.** A discussion with an employee regarding performance should include the full date, including month, day, and year. Consider also including the day of the week in any disciplinary warnings, which may help identify patterns. For example, if an employee missed three days of work near the end of 2012, the documentation might list the dates as September 28, October 19, and December 7. However, the fact that each missed day was a Friday could be significant.
 - 2. Count the good and the bad.** A performance evaluation should not focus only on where the employee needs improvement. Even if the employee could best be described as “average,” the reviewer may be able to include some positives, such as pointing out that the employee has stopped interrupting others during staff meetings.
 - 3. Offer facts, not generalizations.** List objective information or first-hand observations, but avoid making characterizations. For instance, state that the employee was observed chatting with coworkers on three occasions, but don’t describe the employee as a gossip.
 - 4. Beware of discrimination.** As a continuation of the previous item, don’t make assumptions about the employee. Statements such as “Marsha’s lack of focus is somewhat understandable with two young children at home” could come back to haunt the company as evidence in a gender discrimination claim.
 - 5. Short and sweet, but complete.** When describing positive attributes, note the specific accomplishment. Rather than writing that someone is an exemplary employee, write that the employee finished all projects on time and under budget.
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Establish goals and communicate expectations

One of the first things to establish is what the goals of the company are and how employee tasks and performance fit into those goals. From there, the goals of the employees’ positions can be formulated and geared to mesh with the company goals. These need to be communicated to the employees. Knowing where they fit into the big picture provides them with a feeling of value and knowledge that the work they do has a place of importance in the company’s overall goals.

To help establish goals, the appraiser may want to review each employee’s training, experience, skills, and qualifications, along with his or her job performance since the last appraisal. This should be done prior to the appraisal. The appraiser may want to consider this information in regard to the employee’s career opportunities in the company, or any obstacles that may exist.

Goals should be communicated as something the employee can reasonably expect to achieve. Organizations may find it helpful to identify such things as a time frame to achieve the goal, the resources that may be required, and the conditions in which the goal is to be achieved. The more

specific the information, the less ambiguity employees will have in regard to what they need to do, and the better the chance they have at achieving the goals.



In addition to communicating the company goals and the employees' position, the appraiser also needs to communicate the expectations of each employee. This information will help make evaluating employee performance easier. The expectations, as opposed to the goals, may focus on tasks that are not consistently required, but are needed only on occasion, or perhaps only once for a specific project.

Some of the information regarding expectations may be found in job descriptions. However, some expectations may be more detailed than the job descriptions provide.

This is an area where the employee may be able to provide some input. Instead of dictating what work should be done, appraisers may want to allow the employee to provide insight into the functions of his or her position to better understand some possible expectations.

Some companies allow for employee input prior to meeting with a supervisor or other appraiser.

Ensure consistency

Some organizations perform the same type of appraisal for all employees, while others have different types for different levels of employees. Appraisals for management level employees, for example, may have more qualitative information than line employees. This may be because management level employees do not engage in activities that are easily quantifiable; i.e., they do not complete 500 widgets a day, but they may put in place a process that increases the department's output of widgets.

Appraisers have different tactics and different personalities, but the process should be designed to be as consistent as possible. This can be aided with the use of forms. The forms can be tailored to gather both quantitative and more qualitative information — that is, they can force the appraiser to rank the employee on only a given scale, or they can allow for notes from both the appraiser and the employee. Allowing the employee to explain or supplement the comments is very valuable.

The design of an appraisal form cannot guarantee rater consistency. Appraisers may, however, learn to be more consistent with appropriate training.

Training

Those who need to perform employee performance appraisals may benefit from learning some of the pitfalls to avoid and how to handle certain situations. It may help them to know about rater biases and what to do if an employee refuses to accept responsibility for his or her performance.

At the very least, those who are to perform appraisals will need to know the process for doing them — who they are to appraise, what forms to use, what information to gather, when to perform the appraisal, and why they are doing them in the first place.

From there, they can be taught how to rate employees, what to evaluate, and how to score. Additional training can include the following:

- Maintaining open communication;
- Documentation of the appraisal as well as the employee's ongoing performance;
- Appropriate places to hold the appraisal;
- Listening skills; and
- Coaching.

Employee performance appraisals can run the gamut from basic open communication between management and employees to formal processes. Whichever one is used should be truthful and based on facts. Information should be documented, but such documentation should refrain from including information that involves age, race, gender, or any other protected class.

Informal appraisals

Employers can track an employee's performance using any system (formal or informal) that it deems appropriate. As long as the process is administered fairly, without discrimination, the specifics are at the company's discretion. Even informal reviews should be documented, however.

If a manager has legitimate concerns about an employee's performance, the situation should be documented and discussed with the employee. The employee should be made aware of the problems and given an opportunity to correct them (usually in a specified time frame, such as 90 days). After all, if performance concerns aren't shared with the employee, the individual cannot be expected to improve.

Although employment is at will and employers don't need a specific reason to fire someone, most employers do not fire for no reason at all. In short, employers should be able to document a reason, and the at will concept simply means that the company doesn't have to meet a specific legal standard or justification (which is one reason that an evaluation can be informal).

The review process should make the employee aware of expectations and the consequences for failure to meet them, and the employee should be given time to correct the issue. This may involve regular follow-up meetings (perhaps every 30 days during the 90-day period) to discuss what is working and what improvements are still needed.

The manager should be aware that notes about the meeting and reviews could become evidence if a termination is ever challenged. This may seem unlikely, but employees don't normally have a very good understanding of employment laws, and they may have a misunderstanding that "you can't fire me for no reason" (even though employers actually can do so).

The matters discussed should be documented, and the employee should be given an opportunity to sign the statement. Often, forms used for this purpose will include a statement near the employee's signature to the effect that "I understand that my signature only acknowledges this

discussion, and does not indicate my agreement or disagreement with the plan.” If employees still refuse to sign, the manager can make a note that the employee was given an opportunity to do so.

A system like this will allow employers to track (and document) the employee’s performance, and if a termination becomes necessary, the employee should at least understand the reason, even if he or she does not agree (employees rarely agree that they should have been fired).

Situation analysis

Refusing to sign

Another option if an employee refuses to sign his or her performance review (or disciplinary documentation) is to offer the employee an opportunity to provide a written statement that outlines his or her reasons for disagreement. While this may initially feel uncomfortable (perhaps for both the employee and the supervisor), the employee may come to appreciate the opportunity to provide formal feedback, and may take time to carefully organize his or her thoughts.

When the employee provides a statement of disagreement, this not only creates an additional opportunity to discuss the situation, but it provides documentation that the employee did, in fact, receive the original document. An employee who refused to sign the original document should not be able to later claim that he or she wasn’t aware of it if the employee provided a written statement showing his or her disagreement.

The employee’s statement also documents the exact nature of his or her disagreement for future reference. This should reduce the chance of future misunderstandings over the situation.

The supervisor (or other company representative) may decide whether to consider the employee’s comments, or whether to explain why those objections are not relevant. Even the language of the employee’s statement may be a consideration when deciding on future action.

For example, if the employee respectfully disagrees and offers valid points of contention that could be addressed through mutual agreement, the supervisor may choose to work with the employee to improve relations in the future. Conversely, if the employee provides a self-serving statement that blames others and the employee refuses to accept any responsibility, the statement could be an indicator that the situation is unlikely to improve, and may even result in termination.

Using peer performance reviews

A supervisor’s view of an employee does not always tell an organization everything it needs to know. This is where peer performance appraisals come in. A peer performance review is an assessment of an employee’s performance by his or her peers in the area, department, or organization with the goal of helping the worker improve performance. These appraisals engage employees by asking them to identify their coworkers’ strengths and weaknesses, to develop

legitimate solutions to fix potential or current issues, and to think constructively about continuous improvement possibilities.

Peer performance reviews give employees a glimpse at how several different individuals (not just their managers) view their abilities or job competencies. This type of appraisal also gives the organization greater insight into an employee's strengths and weaknesses. While a manager might have an overall view of how an employee meets expectations, coworkers may provide details specific to the job and how the employee works with others.

This type of review also reminds employees that their actions affect their coworkers and they must be accountable to one another, not just to the boss.

However, peer performance reviews won't work for every employer or department. They generally aren't as beneficial for larger organizations or departments that are extraordinarily busy, as the process can be time consuming. Peer performance reviews are also not a good fit for departments in which employees hold highly dissimilar positions. Likewise, when employees are not knowledgeable of their coworkers' job duties or responsibilities, they're unlikely to provide useful ratings or feedback.

Additional issues with the peer review process include bias. Individuals' appraisals may be colored by their relationships with their coworkers. Employees who are close friends will likely hesitate to provide negative feedback, while employees who have an antagonistic relationship with a coworker might struggle to find something positive to say.

How to design peer appraisals

Some companies have official peer performance appraisal programs, while others simply have a policy of open communication. There is no single option that is right for all companies. Organizational policy and culture must be considered in determining which strategy works best.

An organization might offer an employee who is up for review the option of requesting peer review, might require an annual peer review as part of the appraisal process, or might use peer reviews on an as-needed basis, such as when a team is suffering from morale or productivity issues.

Employers must design peer review surveys carefully. Survey questions may look different for each functional area and might have to be designed with input from the workers in the corresponding area or department. This has the benefit of addressing the goals and objectives of the

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employees involved, while providing a sense of ownership for all. Additionally, surveys must be of an appropriate length. If they are too long, employees will tire of the process and rush to complete the survey, resulting in less accurate data. Surveys should be completed anonymously.

When the review is complete and a copy of the report is provided to the employee, the individual's manager or a member of HR should discuss the results with him or her. Remember that employees may be concerned or frustrated by feedback, and follow-up can help interpret the information. Clarity surrounding the process and individual employee results may also help to avoid any animosity that could result between coworkers.

Guidelines for successful appraisals

Give feedback throughout the year. Don't discuss an employee's performance only once a year. Giving employees regular feedback throughout the year means they won't be surprised come performance review time. Addressing performance issues as they occur gives the employee the opportunity to correct them. Performance management is a year-round event, not a once-a-year event.

Give positive feedback. Be sure not to only criticize what needs to be improved, but also praise what the employee has been doing well. Positive feedback is just as necessary as negative feedback.

Research. Appraisers who try to do appraisals off the cuff, without understanding what projects the employee is working on or how that employee performed for the previous appraisal period, are not going to provide useful and objective reviews. Do the appropriate background work, and go beyond checking boxes on a form and writing a few comments.

Deliver appraisals promptly. By delaying appraisals beyond their due date, employees receive the message that there are more important things to do than to provide them with feedback on their performance.



Best practice

Tips on delivering evaluations

The meeting should be scheduled in advance, and should be on or very near the expected date of the review (e.g., near the employee's actual anniversary date). Surveys have shown that employees commonly feel dissatisfied if the annual review process is conducted several weeks late or is rushed. This seems to hold even if the employee is given a retroactive pay increase — because there was still a period of uncertainty for several weeks. The meeting should also allow plenty of time for both participants to speak. The review should not have to be cut short because one of the participants has another meeting.

Consider holding performing reviews in a neutral location, other than the supervisor's office. If a review is held in the office of the manager conducting the review, the employee might feel like it's being held on the manager's "turf," which can be uncomfortable. As an alternative, use interview rooms (perhaps where HR interviews potential applicants) that provide neutral ground and also make the meeting

seem more official (rather than feeling like a quick gathering in the boss' office). This can also help remove distractions of phone calls, other employees stopping by, and so on.

Many employers allow the employee to request the presence of an HR representative during performance reviews. The HR rep does not participate in the review, but merely takes notes and observes. Employees might choose this option in cases where interpersonal conflict with the supervisor might be a concern (human nature results in some disagreements, which can be uncomfortable when confronting a superior). Since the HR rep is just an observer, the employee and manager should direct their comments to each other (as if the HR rep was not there), but the presence of another person can help moderate any conflict, and provide a witness in cases of disagreements about the fairness of the review or in case other questions arise.

The most common problem is the actual delivery. That is, being sufficiently positive in recognizing good performance, and giving criticism that is constructive and presents clear expectations for improvement. All too often, a manager will be reluctant to document problems, and will only give a verbal warning. Unfortunately, if termination eventually becomes a necessity (or the individual is selected for layoff) the documentation may not accurately reflect the justification to terminate. Obviously, this could lead to potential discrimination claims if the employee is a member of a protected class (race, gender, national origin, etc.) but it can also be a concern for any employee (e.g., if a young white male requests FMLA leave to care for his wife's newborn child, and is fired shortly thereafter).

Performance appraisal limitations

While performance appraisals offer many benefits, you should recognize the potential drawbacks as well. If an employee's performance is below expectations, the appraisal process allows for reinforcing expectations and laying out a plan for improvement. The theory is that an underperforming employee will improve performance based on this feedback. But what if the employee has been meeting or exceeding expectations?

Despite the statistical impossibility, a majority of employees tend to think of themselves as "above average." Of course, there is a difference between "above average" and "exceeding expectations." Depending on your established goals, it could be possible for most employees to exceed expectations. Anyone who completes the assigned work on time is likely meeting expectations (if this never happens, consider whether your goals are too ambitious). Employees who take on extra projects or go beyond the established goals would exceed expectations, at least in some areas.

If employees understand the goals and know they exceeded expectations, they most likely expect their performance evaluation to reflect those efforts. A company may evaluate seven to ten output areas (such as quality, quantity, teamwork, etc.), and employees who exceed expectations should be recognized. However, surpassing expectations in two or three areas, while meeting expectations in the other five or six areas, may result in an overall rating of "meets" rather than "exceeds" expectations.

Therein lies the limitation. An employee who was hoping for an "exceeds" rating may be disappointed with a "meets" rating. This could result in frustration, or even cause the employee to wonder why he or she bothered with the extra effort simply to "meet" expectations (and potentially be denied a higher raise for achieving the "exceeds" category). You now have a high performer who is frustrated and may feel the extra effort wasn't appreciated.

Unfortunately, the other side of this coin isn't much better. If an employee exceeded expectations and was given that rating (as he or she expected), the employee should feel some satisfaction that the extra effort was recognized. However, the positive rating is unlikely to push the employee to even higher levels. The employee got exactly what was expected, and is already a valuable and productive employee.

In short, giving a positive review can offer satisfaction through recognition, and hopefully encourage the employee to remain with the company, but it isn't likely to make a good employee even more productive. And if the review was lower than expected, the employee may feel frustrated that the extra effort did not result in additional rewards.

So what should you do?

First, ensure that all employees understand your evaluation criteria. If your intent is to use three categories (does not meet, meets, or exceeds expectations) and you expect most employees to fall in the "meets" category, make sure they understand this in advance. Another option is to add another category such as "exceptional" so that more employees can be rated as "exceeds" and simply adjust the pay raise percentages for each category.

Second, if employees are exceeding expectations, make sure their efforts are immediately recognized by managers, rather than delaying recognition to the annual performance review (see the section for **Ongoing performance appraisals** later in this chapter). In many surveys, a common reason for employee frustration is a lack of recognition, so the formal recognition provided through annual appraisals is still important. In addition, adding the fourth category of "exceptional" may allow you to rate employees as "exceeds" and yet still encourage even higher output by pushing them to be exceptional.

Using performance appraisals effectively

Performance appraisals are often not given the attention they deserve. It's easy to leave them until the last minute, then rush through them without really making sure the information is accurate or looking back to see what employees accomplished. It's also a common practice to overlook an employee's shortcomings and be quite generous in scoring, especially if an employee's raise is based on the evaluation. But this may be doing the employees, and the organization, a disservice.

To think of performance appraisals from a different perspective, it might be helpful to consider those organizations that use forced ranking systems. In this type of system, also called "forced distribution," employees are ranked and distributed so that 10 to 20 percent are in the top category, 70 to 80 percent are in the middle, and the remaining 10 percent or so are at the bottom.

In some organizations, the bottom 10 percent are let go and others are hired to replace them. In this manner, the organization continually upgrades the caliber of the workforce. This type of system supplies plenty of incentive for employees to work hard and put forth effort into their work. They know that if they are a low performer, they will lose their jobs. This method also keeps the high performers on their toes.

In contrast, compare that method with an organization that has no forced ranking and which accepts the great majority of employees being evaluated at "meets expectations." Such an organization may have a tendency to evaluate lower performers at an acceptable level, and not give much additional credit to the high performers, so that the documentation shows little difference between the two.

Where is the motivation for the high performers to continue to perform at a high level when the low performers do equally well on performance reviews and get the same raise? In this type of organization, the low performers have no incentive to perform at a higher level because there are no real consequences to performing at a low level. Similarly, the high performers have no incentive to maintain their high level because their effort isn't recognized or rewarded any differently. Everyone is the same regardless of effort and accomplishment. No one has incentive to perform well.

In reality, most systems are a hybrid of these two extremes. However, the problem with being falsely generous with performance reviews is that while it may help the individual get a better raise, it hurts the organization as a whole. Supervisors should look at the big picture and what is best for the organization, not just the individual employee.

Consequences of false positives

Providing "false positive" documentation in an employee's performance review doesn't help the employee improve, if that's really what he or she needs to do. Talking to the employee at various times throughout the year about problems, and giving advice on how to improve, is a great idea. However, if none of this is reflected on the performance evaluation, it might never have happened. No one else will know of these efforts, and nothing will be "official."

In addition to this aspect, false positive documentation can really hurt the organization if a claim goes to court. Consider what would happen if an employee filed a complaint alleging that the organization terminated him for an illegal reason (such as race, national origin, or age discrimination), but the company contends that it was due to poor performance. Then imagine that the documentation has little evidence of poor performance. It may be true that the employee's performance was poor, but if that isn't reflected on the one document that should be reflecting it, it's going to look like the termination was pretext for another reason, possibly an illegal reason.

Accurate reflection of an employee's performance is more important than wanting to be nice or making sure the employee gets a good raise. As shown above, the consequences of approaching appraisals that way can be counterproductive to employees and to the organization. It's better to be honest and fair to all.

Ongoing performance appraisals

The performance appraisal remains part of a performance management system, but it is only one small component. It should virtually become a non-event because performance management relies heavily on informal, ongoing feedback from supervisors to employees.

Even if the organization does not have a performance management system, supervisors can provide ongoing feedback, with the result that conducting performance appraisals will no longer be such an arduous task.

Feedback really matters; it can change employee behavior, but only if it is done right. Three easy-to-use feedback tips are:

1. Give feedback regularly. When an employee is doing something right, let him or her know immediately, and make the feedback specific, such as, "That was great the way you diffused that angry person on the phone. You turned a bad situation into a satisfied customer."
2. Give it in a timely manner. Praise in front of others; correct in private. But always make it timely.

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3. Schedule regular “stuff” meetings. Schedule a monthly 15-minute meeting to go over things the employee is working on.



When it is time to prepare the employee’s annual review, the notes from the “stuff” meetings should make completing sections of the performance appraisal easy because everything is already documented. And it will be a “no surprises” meeting for the employee, too. Frequent communication and feedback take the stress out of a dreaded event and allow greater focus on future development to help the employee achieve organizational goals. That’s the essence of true performance management.

In regularly scheduled “stuff” meetings, discuss and document several topics:

“How is your job going?”

“How is your progress on...(goals)?”

“This is what I see working.”

“This is what I need you to do differently or to improve.”

“What can be done to make your job/product/service better?”

“What can improve your work or the work of the department?”

“What can I do to help you?”

“Are there developmental or career opportunities that you would like to discuss?”

Giving regular meaningful feedback reduces the risk of having to confront problems in the annual appraisal meeting. But to facilitate the annual meeting and make it a conversation, ask the employee to complete the appraisal form and bring it to the meeting. During the meeting, ask for the employee’s input first, including (if appropriate) his or her rating. Concentrate the discussion on any areas of disagreement.

For example, if the form uses a rating system of 1 to 5 and the supervisor rates the employee a 2 while he rates himself a 4 or 5, a serious perception problem exists. Discuss the difference of opinion, asking the employee for specific examples to support his or her rating. If the

employee shows that a higher rating is in order, initial the change and move on. If not, the difference is an area ripe for a developmental action plan.

Correcting past inconsistencies

It sometimes happens that an employee is not being held accountable for meeting the expected performance standards. It's bad enough when this happens during a single employee's performance review, but sometimes the problem involves an entire department, and the problem of "letting things slide" may have been going on for years.

There is no easy way to announce that everyone will now be held accountable for meeting higher expectations, but the situation won't improve by itself. Even though a supervisor might not have held employees accountable for years, this doesn't create an obligation to continue "letting things slide" in the future.

Steps to follow will likely include training supervisors on the new standards and how to apply them (and holding supervisors accountable for failing to do so). It may also be necessary to hold meetings with groups of employees to explain the criteria so everyone knows what standards will be evaluated and to ensure that employees understand the potential consequences of failing to meet expectations.

Since the standards were not consistently applied in the past, it may be best to assume that everyone has a clean slate (unless some employees actually were given warnings, of course), and move forward with performance improvement plans or similar enforcement (which might eventually include terminations) based on evaluations under the new process.

As a basic example, an employer might change a policy from "eight unexcused absences in 12 months will result in termination" to a policy of "five unexcused absences in 12 months will result in termination" with the new provision effective on the first day of the next calendar month. Similarly, employers can change the evaluation process for consistent application to all employees. The 12-month period would begin on the effective date of the policy change, ignoring any absences before that date. While this might give a "clean slate" to some employees, they will be subject to the higher standard from that point forward. This is more defensible than retroactively applying a new policy to absences already incurred.

While employees who underperform may not have been held accountable in the past, new expectations can be enforced in the future. Discipline or termination based on objective and documented standards is defensible, particularly when those standards are consistently applied. This doesn't mean some employees won't challenge any adverse employment actions, but that is a risk regardless of circumstances.

To use the previous example, an employee who is terminated for excessive absences shouldn't have a successful discrimination claim if the company can demonstrate a legitimate, non-discriminatory reason for its action based on evaluations or criteria that were communicated to employees and implemented as of a specified date. A critical issue is that employees should understand why the adverse action is taken, which means communicating throughout the process. For example:

- Explain the new expectations to the employee. If deficiencies are identified, explain the problem and provide an opportunity to correct the problem. Identify the potential consequences of failing to improve, and describe a time frame for future evaluations. If follow-ups show that the employee has not improved, then consequences may be applied.

- In improvement does not occur, the termination should not come as a surprise to the employee because the expectations and problems were clearly identified, and despite the opportunity to improve, the deficiencies remained.
- If everyone is held to the same standards, and the criteria are consistently applied, employees should not be successful in attempted lawsuits. And if they understand the expectations, along with their failure to meet them, they will hopefully be less likely to attempt a lawsuit in the first place.

Documentation is key for avoiding liability

Consider this scenario: Over the course of the last month or so, Marge has been slipping in terms of adherence to work rules. She's been coming in late, seems to be gone from her workstation quite a bit, and others have complained that she is "over-socializing" in the office. The supervisor let it slide, because up until now, she's been a good worker. The supervisor had a couple of conversations with her, but didn't document them because he didn't want to put a black mark on her otherwise spotless record.

One month later, she is still coming in late, and now her work is starting to suffer. She is handing in paperwork after it was due, and her attitude could use an adjustment. Still, the manager hesitates to come down too hard on her. He tells her that if she doesn't improve, he will have to write her up. He also talks about possibly transferring her to a department that is less busy, thinking this might spur her to improve.

Another couple of weeks go by, and the situation has only gotten worse. The supervisor finally decides to write her up, but hears from the HR director that Marge filed an age discrimination complaint with the EEOC. She claims her supervisor made disparaging comments about her age (she's 53), stating that she isn't a "high energy" person, and threatened to transfer her to a less desirable position in another department.

She also claims there is no basis for this treatment other than her age because her performance record is absolutely spotless. She's right that her record shows no indication of any performance problems whatsoever because nothing was ever written down. With no written record, it comes down to her word against the supervisor's.

In a court of law, a lack of written documentation for performance issues is always looked upon suspiciously, and an employer's statements about performance problems that are undocumented are assumed to be pretext for discrimination.

Lessons for supervisors:

1. Don't let things slide. Deal with performance issues as they arise, and write it down.
2. Document verbal warnings. Make a notation of what was said and what performance issue was being addressed, and put it in the employee's personnel file.
3. Document word for word. This is especially important where an employee uses foul language or says something else that can be considered insubordination. Don't be shy about documenting profanity; it's more shocking when seen in writing.
4. Watch for off-hand remarks. Even innocent comments can be misconstrued. Even a good intentioned joke about age can come back to haunt the company.
5. Don't be too soft. The company relies on supervisors to appropriately discipline employees for unacceptable performance or behavior.

How to botch positive feedback

Managers hear time and time again the importance of providing employees with feedback, specifically praise, but handing out compliments just to cross a task off a list will quickly be recognized by employees as insincere. In fact, falling into any of the following feedback traps may not only fail to motivate employees, but could even have a negative effect.

Let the methods get tired. If the only mode of praise is sending congratulatory emails, they'll probably mean less and less to employees over time. Consider the occasional greeting card, in-person praise, a department-wide announcement, or even a letter sent to an employee's home.

Don't be afraid to get creative. For example, consider talking behind an employee's back, but in a positive way. Singing praises to others will usually get back to the employee. When it does, employees will not only know that their hard work is appreciated, but they'll probably be pleased about the boost to their reputation.

Leave out the details. Delivering praise without getting specific can come across flat and disingenuous. When commending an employee for a job well done, explain precisely what the individual accomplished.

Employees do want to know if they've succeeded overall, but they'll remember feedback on the specifics. If an individual's people skills contributed to a project's success, say so, and give examples.

If employees aren't giving anything to praise them for, don't exaggerate or manufacture something. Instead, consider whether it might be time for a conversation about performance levels.

Sample Performance Appraisal Form

Name _____

Title _____

Date of appraisal _____

Your performance during _____ is appraised on this form.

Every effort is made to present a fair and impartial review of your performance and how you are doing as an employee at this company. Your strong points, contributions, and accomplishments are noted, as well as areas needing improvement.

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Performance Appraisal Criteria			
Performance factor	Exceeds requirements	Meets requirements	Below requirements
Accuracy			
Thoroughness of work			
Job knowledge			
Quantity of work			
Initiative			
Attitude			
Flexibility			
Resourcefulness			
Dependability			
Working relationships			
Adaptability			
Safety			
Attendance			

Comments:

Reviewer Instructions: Performance factors rated “Exceeds requirements” and “Below requirements” must be supported with comments in the following section.

Overall performance rating:

Reviewer Instructions: If all or a majority of ratings fall in the same category, then the overall rating would be that category. If there is no obvious overall rating, it is the responsibility of the reviewer to determine the weighting factor of each rating to determine the overall rating.

- ☐ Exceeds requirements — Performance exceeds requirements for most major accountabilities. Results are consistently at this level.
- ☐ Meets requirements — Performance meets requirements for all major accountabilities. Results fully meet expectations of job performance.
- ☐ Below requirements — Performance does not meet minimum requirements for the job. Significant improvement is needed for results to be acceptable.

Major Accomplishments:

Significant Changes in Performance Noted Since Last Review:

Key Areas for Performance Improvement:

Prepared by: _____ Date: _____

Manager approval: _____ Date: _____

HR approval: _____ Date: _____

This review has been discussed with me:

Employee name/signature: _____ Date: _____

Access to personnel files

Various laws require keeping records, but they do not specify where to store those records. For example, the EEOC requires employers to save records that might be relevant in a discrimination suit for at least one year. This includes records on hiring, promotion, demotion, transfer, termination, and rates of pay. These are typically included in personnel files.

Communicating with employees may include sharing information from personnel files, even if the company doesn't want to share that information. A number of states have laws which require employers to grant access to personnel files. Depending on the law, employees may have rights to such access for up to one year after leaving the company, or may even have the right to make a copy of the file. Of course, employees can only obtain access to their own files, not to the files of other employees.

Even if state law does not allow the employee access to personnel files, employers should consider providing copies of documents that might otherwise have been in the employee's possession. For example, employees might normally be given a copy of an annual performance evaluation, but may have lost or discarded those reviews. If an employee requests access to the personnel file, the full access might be denied (if state law doesn't require access), but the employee could still be given copies of those reviews (the employee should have kept them, and would have had them anyway).

Most commonly, an employee will request access to his or her personnel file in reaction to a workplace conflict, whether an accusation of discrimination, or some other claim of unfair treatment. Employers can certainly ask the reason for the requested access, although state law may require access even if the employee does not offer a reason. If the employee is willing to share a reason, however, the company might be able to begin resolving the conflict.

Since the request for access may indicate a problem, employers may want to use the opportunity to investigate the allegation. For instance, if an employee wants to review his file because he believes that he is being treated unfavorably compared to other workers, the organization may want to investigate the complaint of favoritism. Also, employees who access their files or make copies may be contemplating a discrimination claim. Even if the claim has no merit, it is in the organization's best interests to resolve the employee relations problems.

In short, employers might need to consider a request to access a personnel file as a complaint about working conditions (especially if the employee provides a reason for the request that may indicate a problem) and respond the same as any other complaint about working conditions, discrimination, favoritism, or similar problems that may arise in the workplace.

Contents of personnel files

When choosing what to put in the personnel file, remember that employees may have the right to access the file. For public (government) employers, most states allow employees to review their personnel files. For private companies, 17 states allow current or former employees to review their personnel files upon request (as of May 2012). These states are Alaska, California, Connecticut, Delaware, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, Oregon, Pennsylvania, Rhode Island, Washington, and Wisconsin.

State provisions address issues including who has access (current and/or former employees), how often records may be accessed (typically once or twice per year), and whether copies may be obtained. Generally, an employer does not have to mail a copy to the employee, but only allow the employee to review the file in the workplace.



This is something to keep mind when deciding where to retain certain records. For example, investigating a harassment allegation might generate witness statements, and the accused employee does not have a right to see those statements. They could be stored in a separate file and only made available if the claim goes to litigation. In some cases, the allegation may involve inappropriate conduct by a supervisor who has access to personnel files, and this is yet another reason to store those statements separately.

Supervisor files

The Human Resources department (or similarly designated department) should be the repository of the “official” personnel files for employees. This is the file that will be produced if the company is audited by the Department of Labor, investigated by the Equal Employment Opportunity Commission, and so on.

That said, if an employee or former employee sues the company, a discovery request (specifically, a Request for Production of Documents) will be worded very broadly so as to request any and all files that pertain to the individual in question. This will probably encompass any files that supervisors may have on an employee, so it’s best to be careful about what’s in it.

Supervisors are generally responsible for a variety of employee relations issues, including the handling of discipline, hiring, workers’ compensation issues, time off issues, and so on. As a result, they need to keep track of employees. It’s okay for them to create their own files, but the rules that govern HR’s files also govern these extra files.

What should (and shouldn't) be in the file

First and foremost, medical information should not be kept in employees' general personnel files, but should be separate. The Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA) both require medical information to be kept separate, with access limited only to those with a need to know, and to be kept confidential. These types of records may include workers' compensation injury reports, FMLA medical leave requests, FMLA medical certifications, health insurance forms, disability forms, and so on.

Second, depending on whether the company is governed by a collective bargaining agreement or by policy, employers should look to see if any disciplinary action has expired and should be removed from the file. A union contract often includes a clause specifying that verbal or written warnings are to be pulled from the file after six months (or other specified time period), and are not to be used as a factor when considering discipline at a later time. Employers may also have a policy in this regard.

I-9 forms, the forms used to determine employment eligibility, should be kept out of the personnel file. The reason for this is that if they are kept in a central location, they are easy to produce within three days (as is required by law if the company is audited by ICE, Immigration and Customs Enforcement, a part of the Department of Homeland Security).



Best practice

When to remove discipline

Many employers will remove (or lower) a disciplinary record after a certain period of time (such as one year). If the employee has improved, there is no reason to keep the same level of warning in place for an indefinite period, and employers can modify the file to remove or reduce the level of discipline over time.

Employers should have guidelines for which actions can be removed. For example, if an employee has been showing up late for work, but then shows up on time for a full year, the company might remove any warnings for tardiness. However, if an employee sexually harassed a coworker, the company's response to any future harassing conduct by that individual may have to consider previous conduct, even if the first incident occurred several years before. An employer's response to harassment must not only stop the conduct, but ensure that it does not recur, so allowing the employee to start with a "clean record" for this situation may not be appropriate.

State laws on employee access

Except for OSHA exposure records, access to personnel records is governed by state law (in the private sector). For instance, in Arizona, employees have a right only to records of exposures to potentially toxic materials or to their own drug test results. California allows both employees and former employees to see their records relating to grievances or performance. Excluded,

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however, are records pertaining to the investigation of a crime, letters of reference, and records relating to a promotional examination.

Florida doesn't regulate access to personnel records in the private sector, so it's governed by employer policy. In Illinois, employers must grant at least two inspection requests by an employee in a calendar year at reasonable intervals. However, employers don't have to provide access to letters of reference, test documents (except for cumulative scores), personal information relating to another person, records that may pertain to another judicial proceeding, and other documents — and employers need not allow employees to remove any part of their personnel records from the premises.

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Introduction

Picture this: employees are happy and like coming to work. They seem satisfied with their jobs. What could be wrong with that? Nothing, unless they're not going the extra mile, and they're not pushing themselves to improve. They may be happy, but they're not engaged. So what's the difference?

A happy, satisfied employee is content with his or her job. That's not a bad thing, but it only goes so far. For example, an employee might be happy with her job because she doesn't have to work too hard, and she can coast through the work day. She doesn't feel the need to go above and beyond what's expected of her, to push the limits of her abilities.

In contrast, an engaged employee is not only satisfied with her work, but is encouraged, and rewarded, for going the extra mile. Engaged employees feel a sense of ownership and commitment not just to their job, but to their peers, customers, and employer. Engaged employees are more productive, yield higher quality results, and demonstrate better customer service.

It is estimated that, at the average company, 25 to 30 percent of employees are fully engaged. An estimated 55 percent of employees are not particularly engaged, while the remaining 20 percent are actively disengaged. While there may be no saving the last group, the 55 percent is where employers can make a difference. They can be reached with the right tools.

Reaching these employees begins with recognition, which is the first section in this Rewards and Advancement chapter. Recognition and rewards are two distinct and separate things. Most people want recognition for their accomplishments and desire appreciation for their work. Employees are no different. A recognition program may include monetary or other types of rewards (plaques, certificates, etc.). But what is more important to employees is the sincere and specific expression of appreciation from management of their efforts, performance, and accomplishments.

Since engaged employees exhibit higher performance, they may also be candidates for advancement. The second section in this chapter addresses these high-potential employees, specifically how employers can identify them and help them meet career goals.

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Even if some employees aren't interested in advancing to management, they probably won't be happy with a stagnated career. The third section covers employee development, which does not necessarily have to include advancement. Even cross-training employees to perform different jobs can help them develop a better understanding of the organization and the role they play. Cross-training can also help protect the company in the event that some employees leave unexpectedly.

Of course, some training will prepare employees for advancement, and the fourth section covers training for advancement. This doesn't necessarily mean that an employee leaves the former position and enters a management role, but could simply mean that the employee moves up the ladder within the existing job (perhaps getting promoted from "Programmer Level 1" to "Programmer Level 2"). Training might not even be directed by the company, but communication of expectations can allow employees to direct their own training and prepare themselves for advancement.

Finally, life isn't all about work, so the last section of this chapter addresses work/life balance and wellness. In many cases, work/life balance can tie in with rewards; for instance, a dedicated employee might be allowed to work a flexible schedule or even telecommute after proving that he or she is trustworthy enough to work without supervision. Wellness programs can tie in also, since the overall purpose of rewards and incentives is to maximize retention and productivity. Healthy employees will be more productive and are less likely to need time off for medical conditions.

Recognition and rewards

Recognition and rewards are vital and necessary elements of any employee retention program, and should be the centerpieces of the program.

Good reward and recognition programs are often overlooked or conducted improperly, but if done correctly, rewarding and recognizing employees can have a dramatic and lasting positive impact.

Unfortunately, many companies often try to meet the recognition needs of their employees by increasing pay or enhancing their performance bonus program (rewards). But money may not be the best form of recognition — it's simply too impersonal.

Money is a significant factor of employee turnover, but a worker who feels unappreciated and undervalued will feel unwelcome and *will* leave — even if the compensation is competitive.

Therefore, keep these underlying principles in mind with regard to recognition:

- Total compensation is a major factor workers consider when choosing an employer, but employees usually won't continue to work for money alone.
- Once a worker has established a relationship with a company and has ironed out compensation issues, his or her concern switches to the amount of recognition and appreciation he or she will receive.
- Employers cannot put a price tag on a quality employee or on continued superior performance. Money isn't the only form of recognition — non-monetary gestures can be equally appreciated.

Employee Retention

Once a company has found good, quality employees, it wants to keep them. Bringing in new employees almost always has an associated cost in both productivity and profits.

Employers use a variety of methods to lessen the risk of losing good employees. Some laws dictate certain treatment of employees, such as Title VII of the Civil Rights Act (discrimination) and the Fair Labor Standards Act (minimum wage and overtime). However, for the most part, the strategies that an employer uses to retain employees are left to the employer's discretion.

Benefits

Many employers offer certain benefits to help increase employee retention. Some of the common benefits include paid vacations and holidays; health, dental, vision, and prescription coverage; paid sick days; and retirement plans.



Cross reference

For more information about benefits, perks, bonuses, incentives, and paid leave, see the **Determining compensation** section of the **Planning and Advertising** tab.

Employers may offer many other benefits; this list is not at all comprehensive. However, outside of offering traditional benefits, employers can use other strategies to entice employees to stay. These may include instituting a flexible schedule, allowing casual dress, improving the physical working environment, and simply appreciating an employee's good work.

Recognition

Some employers show their appreciation of a job well done with recognition, and some have formal recognition programs. Formal programs, however, are not necessary to get results. Some studies have indicated that one of the most important aspects of individuals' professional lives is appreciation for the work they're doing. This type of positive feedback may also improve morale for other employees, knowing that if they, too, perform well, they may be recognized.

This is the type of strategy that can be implemented even during more difficult financial times, when increases in pay and other traditional benefits may not be feasible. Most employees simply want to be treated well.

Communication

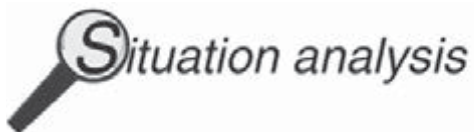
One of the reasons employees excel is that they understand the goals of the company, the department, and their supervisor. They also understand their own goals, responsibilities, and expectations. This information needs to be communicated to employees so they can understand and excel.

Another form of communication that can be used is one that simply keeps employees involved in projects, decisions, and plans. This will not only provide for opportunities for employees to expand their knowledge and efforts, it may also provide input from untapped sources.

The more engaged an employee is, the more productive he or she is likely to be, and the more likely that person is to put in what's called "discretionary effort." Discretionary effort is the effort employees put forth to go above and beyond what's expected of them; in other words, effort put forth at the employee's discretion.

Unfortunately, when employees don't feel supported by their managers, or when communication is lacking, employee engagement and discretionary effort both plummet. Some employees will still find ways to go above and beyond, but other high-potential employees will reduce their efforts to match their perception of the limited opportunities that are available.

Employers can help employees stay engaged by making sure the expectations for each individual employee are clear, verifying that employees have the tools to do their job, and ensuring that they aren't encountering any roadblocks along the way. This requires asking for and listening to employees' feedback. This can not only help the organization understand whether it's really helping employees to do their jobs, but employees who feel they have a voice may already be on the road to higher levels of engagement.



Do your employees have one foot out the door?

A 2013 study by Manpower revealed that 86 percent of employees intend to look for a new job in 2013, but this doesn't mean that employers will lose most of their workforces. While many employees are actively seeking new employment, others are passive job seekers who simply keep their eyes open for other opportunities.

The fact that 86 percent of employees are unhappy enough to look for a new job, however, may suggest that they are not as happy, engaged, or productive as they could be. If a company recognizes the potential impacts of declining morale and engagement, any effort to increase those levels should also serve to decrease turnover. A few strategies to increase engagement include ensuring that employees are aware of career opportunities, that they have the respect and support of their supervisors, and that they have interesting and challenging work.

Stay interviews

Whether using them or not, many employers have heard of exit interviews as a means to identify why employees leave the company, and even learn what the employee liked about the company. But there's no reason to wait for an employee to leave before asking about those concerns; at that point, it's too late to save the employee. Instead, employers may conduct "stay interviews" with current employees to identify what they like or don't like.

When managers or supervisors conduct stay interviews, they probably won't get honest feedback if the problems involve the manager. For example, asking an employee if he or she has thought about looking for other work could easily be taken the wrong way, perhaps raising concerns that layoffs might be coming.

However, employers can develop questions that are less threatening (or even somewhat fun) and put them in a survey that employees from each team can complete and submit anonymously. Separating the surveys by department allows the comments about managers to be assigned to that manager, without identifying exactly who made the comment.

Some questions that might sound less threatening could include:

- If you won the lottery and could afford to retire tomorrow, what would you miss about the company? Is there anything you wouldn't miss?
- What do you like best about your job? What don't you like?
- Do you feel that your accomplishments are recognized? Do you prefer public or private recognition?

Whether asked by a manager in a face-to-face meeting or provided in an anonymous survey to employees, these types of questions could reveal opportunities for the company to improve employee retention.

Training

When expectations are understood, some employees may need some training to meet these expectations. This type of employee development may have a positive double-edged effect in that it should improve the performance of the employees receiving the training, and it indicates employer commitment to supporting the efforts of the employees as they improve their performance.

In addition to training employees for performance improvement, sometimes managers and supervisors are not aware of methods for recognizing their employees and communicating to them. In this situation, the managers and supervisors may be trained to communicate effectively and to properly recognize employees for their work.

Giving recognition

The way in which recognition is given is important. A good idea can be ruined by a poor presentation, such as tossing a certificate on someone's desk as recognition for years of service. Be sure the way in which recognition is given is appropriate.

Unless a company is small, and all positions are similar, an employer will likely need more than one type of reward program. For example, a reward system that is applicable for a sales team probably isn't applicable for a manufacturing team. While some reward programs can apply across all levels of the organization (such as profit sharing plans), these programs tend to lack the individual recognition that a targeted reward program can provide. While a profit sharing check is always appreciated by employees, it may not provide the individual appreciation that the company hoped to show.

A reward program may therefore have to be based on the goals of an individual or team, rather than the overall goals of the company. The connection to the company goals should still be maintained, but a targeted reward will have a bigger impact on employee morale and motivation. Also, the reward need not involve cash or equivalent compensation.

Studies have shown that rewards which provide something more tangible may go further in motivating employees. Consider that the traditional gold watch given at retirement is intended, in part, to remind the employee of his service to the company whenever he checks the time. A reward need not be as elaborate as a gold watch, but the concept of providing a constant reminder remains the same.



Best practice

Recognition tips

The following are guidelines and suggestions to help make personal recognition of employees as effective as possible. Make sure the recognition is:

- **Specific** — Recognize a specific behavior, event, or accomplishment. Describing it in detail will carry more meaning in the worker's mind than simply saying "Hey, nice job!"
- **Sincere** — Employees will quickly see through any lip service recognition. To be effective, recognition should be genuine and heartfelt.
- **Timely** — Saying "thanks" for actions taken three weeks ago will have little impact on an employee today, and may actually do more harm than good.
- **Fair and consistent** — In a typical company, not all relationships are cordial. Because of this, it is extremely important not to let personal feelings or bad chemistry play a part in personal recognition.
- **Unconditional** — True praise should ask for no work or response from the individual receiving it. If praise solicits or even leaves room for a response from the recipient, it may not be praise at all. A statement such as, "Pat, your performance is outstanding. Your numbers are by far our best. How are you doing it?" may not be true praise.

Public recognition

Workers generally want to be recognized for their professional accomplishments, milestones, personal achievements, and significant events in their lives. For these situations, recognition from the company needs to be significant.

The opportunities for public recognition are unlimited. But there are a few things to keep in mind:

- Always ask permission to give public recognition to avoid any conflict that may develop with the worker and other employees.
- Make sure the recognition is appropriate for the organization. The public recognition must fit into the culture of the company. The entire organization should be educated on what the recognitions are all about, what they mean, and why they were established.
- Make sure the employee desires public recognition. Some employees may be shy or introverted, and may feel embarrassed about being called out in public.
- If recognizing personal (non-work) achievements, discuss the situation with the employee before hand. For example, an employee who volunteers at a charity may not

want public recognition, or may be a volunteer for reasons that the employee is uncomfortable discussing (such as religious beliefs).

If the employee prefers to avoid public recognition, the outcome of giving public praise may be the opposite of the desired effect.



Be sure recognition fits the employee

Fred is an extremely successful employee. He consistently exceeds sales goals, makes customers feel like they truly are number one, and will stop at nothing to help another employee. Fred does all this with a positive attitude and a smile on his face day after day.

Recognizing the value that Fred brings to the organization, his employer wants to do something big to reward his efforts, so it arranges a companywide ceremony to name Fred employee of the year. Amid “oohs” and “aahs,” the company announces that Fred’s contributions are so valued by the organization that he is being awarded a two-week cruise for two — paid for entirely by the organization. On top of this generous award, it’s revealed that Fred will receive two additional weeks of paid time off (PTO) so that he doesn’t have to use his existing PTO to take the trip.

Fred gives thanks for the reward, but something about his demeanor seems to indicate that he’s less than thrilled. Just where did the employer’s great idea backfire?

One of the most important steps in rewarding employees is to do the homework necessary to make sure that the rewards and incentives presented to employees are actually things that the employees value. Especially since, in Fred’s case, the company was honoring him individually, the employer definitely should have taken the time to find out what kind of reward best suited him.

As it turns out, though many employees would be excited about two weeks paid time on a cruise ship, Fred is a homebody — and he gets seasick. Furthermore, since Fred’s salary is garnered through commissions, he’s concerned about the income he’ll lose from being out of the office for two full weeks. To make matters worse, Fred’s wife isn’t able to take two weeks off from her job to go on the cruise with him.

Fred didn’t end up going on the cruise at all. In fact, since the tickets were non-refundable and purchased ahead of time in the names of Fred and his wife, they went to waste. Though slightly disappointed about the nature of the reward, Fred keeps a positive attitude — that is, until tax season arrives.

Unfortunately, the other thing Fred’s employer forgot to consider is that the gift the company gave to Fred comes with tax obligations. In most cases, benefits that are provided to employees as rewards must be counted as income, so employees will be required to pay taxes on the value of such items. There are some fringe benefits that are specifically excepted and do not need to be counted as taxable income. For example, meals, employee discounts, tangible achievement awards for length of service or safety achievement, and items of minimal value can be given to employees tax free.

However, since Fred’s “achievement award” was neither a length of service award nor an award for safety achievement (and the vacation was not a tangible award),

the cruise that Fred was awarded is not exempt from tax obligations. Fred's "award" would need to be counted as income and taxed as such.

At the end of it all, Fred owes several hundreds of dollars in income taxes on a trip he didn't want and never took. Though the employer's intentions were good, it ended up giving Fred something that didn't make him feel rewarded at all. In fact, Fred now feels as though the organization hasn't made an effort to get to know him as an individual. Had the employer done a little investigating, or simply asked Fred what type of reward would be most exciting to him, it would have known how unsuitable this particular reward was for Fred. Certainly, with a little more consideration, this grand gesture could have been much more successful.

Service awards

Appreciating employees — and letting them know it — is an extremely important part of employee retention. There are many instances where employees should be recognized, and one of the most common and perhaps most expected by employees is recognition for longevity with a company. This event is known as milestone recognition or a service award.

Companies typically recognize employees who have been employed with the company for a designated number of years (e.g., 5, 10, 20, 30, or more years of service). The reasons for implementing a service award program can be varied. However, the most common reason is to publicly demonstrate to employees how much they are appreciated — either through a gift, a

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certificate, or a service award dinner. Studies have shown that implementing an employee service award program can have a significant impact on employee loyalty, morale, and turnover, while at the same time promoting the company's culture.

There are companies with experts available to design a service award program for an employer if they choose that route. Their involvement can be very limited (e.g., supplying a catalog of items for the employer to choose from), to the more complex (e.g., online ordering available to employees for flexibility and paperless administration). These specialized companies can help an employer communicate the recognition program to employees as well.

Awards can range from the traditional merchandise (e.g., plaques, award pins, clocks, crystal, award rings) — to lifestyle gifts (e.g., DVD players, tools, fashion accessories, home and garden items) — often imprinted with the company logo.



A small company may choose to administer the program in-house, keeping track of service milestones on a spreadsheet, and purchasing suitable gifts as needed.

The amount of money budgeted for a customized program is all that limits the possibilities.

The following factors should be considered when creating a service award program:

- Company culture;
- Budget;
- Number of service years to be recognized;
- Administration of program; and
- Method of recognition (e.g., awards, gifts, dinner, etc.).

Rewards without a budget

Studies repeated several times since the 1940s confirm that what employees want — *even more than a raise in pay* — is to be appreciated for their contributions.

Even when cash for tangible rewards is limited, employers can find ways to recognize employees. Here are some that don't require a penny or a superior's permission:

Give a genuine “thank you.” Those two overlooked words mean more to employees than any other type of recognition. Here's a simple formula to use: Thank the employee by name, then state what he or she did to earn the thanks. Explain how it adds value to the company. Then thank him again by name.

Listen. Listening is also an underrated recognition activity. Ask for ideas and opinions, and *really* listen to what is offered. If a suggestion is put to use, make sure to credit the employee.

Write a personal note. Handwrite a thank you note and send it by mail to the person's home. Or, email a superior concerning an employee's specific job well done, and copy the employee.

Send a birthday card. Sign and mail a personal note; don't lay it on the employee's desk!

The following ideas may need a small budget (and perhaps authorization) to implement:

Special time off from work. Give a day off for perfect attendance or for achieving a goal.

Gift certificates. Give gift certificates to a restaurant or movie tickets (accompanied by a written thank you) for achieving targeted goals.

Monthly birthday celebrations. Buy (or bake) a cake or cookies to celebrate birthdays.

Surprise treats. Spring for donuts or fruit, especially during high stress times. Order in pizza or sandwiches when the staff has to put in extra hours to get a job done.

Flex time. Allow flexibility in work hours where possible.

Get ideas for other means of recognition from employees: they will always be the foremost authority on what motivates them and makes them feel appreciated. After offering a certain type of recognition, find out how they feel about it. Remember, the goal is to make everyone feel good about work and to let them know they are appreciated.

A reward and recognition program does not have to be complicated or costly. A genuine effort to acknowledge both the efforts of individuals as well as the contributions of the team is really all it takes to make sure employees feel appreciated.



Best practice

Recognizing performance

Recognition can come at many times and levels:

- Daily feedback for a job well done;
- Praise for a project completed;

- Employee of the month programs;
- Recognition for activities outside of work (community or charitable service);
- Celebrations for meeting sales or production goals;
- Awards for long-term service; and
- Retirement parties.

Recognition need not be expensive, and it doesn't need to be a tangible object. To some employees, extra time off would mean more to them than a plaque or other physical award. Find out what employees would most appreciate, and offer that as an incentive.

Developing incentive programs

The number one factor that negatively impacts employee productivity is poor management, according to a survey by the Society for Human Resource Management. Fifty-eight percent of employees chose this option. In second place, at 38 percent, was lack of job motivation, and in third place, at 26 percent, organizational changes.

Positive feedback is important to good management and employee engagement.

Part of the problem with poor management lies in the employees' perception that they aren't appreciated. Incentive programs can help to engage employees and decrease some of the negativity. In devising an effective incentive program, consider addressing these management responsibilities that affect productivity:

Communicating goals. To motivate employees, explain how their work advances the company's goals. For example, a company might set a goal to grow 10 percent. To employees, this objective may have no connection to their day-to-day work. To create that connection, show employees how their work contributes. Ways to accomplish this include explaining how the team's effort is part of the company goal, and giving recognition, rewards, or bonuses when objectives are met.

Providing tools. Employees require tools to do their jobs, such as equipment, supplies, and access to information. Rules that impede access to these tools can decrease productivity.

Providing feedback. Managers and supervisors provide oversight and assistance, but constant oversight can increase anxiety, especially if supervisors only speak out when something is wrong.

Remember that oversight can also be used as an opportunity for positive feedback. Consider the following management styles:

Anderson uses a "hands off" approach. If employees need something, they must ask. Anderson assumes everything is fine unless a problem is reported. No encouragement is given on a day-to-day basis.

Baker frequently asks employees how things are going, and if they need anything. If a project is going well, she congratulates the employees on their progress and tells them to keep up the good work. If not, she works with them to improve the situation.

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While these examples show radically different styles, neither is ideal for all employees. While Anderson's hands-off approach might leave some employees confused or feeling isolated, other employees might appreciate the feeling of being trusted to fulfill job responsibilities. Those same employees might find Baker's approach to be suffocating.

Leadership includes providing oversight, input, and direction. Each manager may have a different leadership style, but almost any approach can be modified to provide more positive feedback.



Best practice

Retention without raises

When money is tight and raises are on hold, morale may plummet. However, there are options for offering intangible rewards that don't cost anything.

Flexible scheduling. Provide the option of working flexible hours. In these arrangements, businesses generally have certain core hours when employees must be at work (say, 10 a.m. to 3 p.m.) to schedule meetings. Outside of those hours, employees can start and leave early or start and leave late, as long as they put in their eight hours. It helps employees to better schedule appointments, get to kids' soccer games, and so on. Departments can have a schedule to be sure that all morning and afternoon hours are covered.

Flexible schedules can also benefit the company by allowing coverage for customers in different time zones. For example, a New York employer that allows employees to work late may be better able to reach potential customers in California.

Additional vacation time. Offering additional vacation days is a perk that doesn't require additional money, especially if the time can be unpaid. It may reduce productivity based on fewer man-hours worked overall, but what is gained in morale may more than make up for it. Being able to leave a couple hours early on a Friday is a big morale-booster.

Don't forget positive feedback. Don't let employees stop feeling appreciated. Increase the positive feedback, both in verbal and in written form. Give certificates of appreciation to reward hard work, to reward a department when a production goal is reached, or to reward the sales staff when a major new client is brought on board. Studies show that small, heartfelt gestures of appreciation mean more to employees than expensive but impersonal recognition.

Communicating goals

Employees are often told of companywide goals such as sales objectives and production deadlines, and they certainly need this information. However, employees should also be told how their work contributes to those goals.

Think about the most recent meeting which presented company goals. Did the meeting explain what was expected of each employee, and how their efforts would be rewarded? Or did the meeting simply tell them, "We need to work harder this year"? A goal provides motivation by

giving employees an objective. With no target to shoot for, day-to-day efforts lack purpose. Making the connection between job tasks and company goals provides that purpose.

Studies have shown that a large number of workers may feel disconnected from their employers, may not identify with their employer's goals and objectives, and that many just show up for the paycheck. They often don't understand how their job contributes to the whole organization and furthers its goals. Managers should not only explain what is expected, but how employees' efforts contribute. Otherwise, employees begin to feel like tiny cogs in a huge wheel.

When employees understand how their efforts contribute to the company, they will feel more connected to the company. Communication of goals should:

- Promote goals on the team or individual level,
- Provide continual feedback and support, and
- Explain the rewards.

Let employees know how their efforts are part of the company objectives. If the company goal is to increase sales by 20 percent, tell employees how their day-to-day efforts contribute, and what the rewards will be for success.

The efforts of each individual contributes to success and should be recognized. Provide day-to-day feedback on an individual level. This requires more effort, but personalized feedback has a greater impact. The idea is to support the efforts of each employee.

Simply saying "good job" upon meeting a goal is not sufficient, especially if the process took weeks or months. Employees should not work for months with no feedback. Continual support is needed to show appreciation. This might be as simple as telling employees, "Good work today, team." Of course, personalized feedback is best, such as, "You provided some good suggestions in today's meeting."

If the only feedback is negative, morale will suffer. Fortunately, reprimands are only necessary when a problem arises, but opportunities for positive feedback are continual.

Even negative feedback can be constructive. Consider the following two responses to an employee's suggestion:

"We already thought of that, and it won't work."

"Good idea. The company considered it, but found that it wasn't feasible. You're thinking along the right lines, though. Keep the ideas coming."

Both responses convey the same information, but leave a very different impression. The second response is more positive and sets a goal of coming up with more ideas. It lets the employee know that his or her effort is appreciated. With this simple response, the supervisor has communicated an expectation and shown appreciation.

Giving recognition

Day-to-day feedback lets employees know how their work contributes to company goals. The other side of this coin is showing appreciation by recognizing achievements.

Recognition often comes in the form of a bonus check. This is not bad, but when it is the only form of recognition, the reward is impersonal. Employees' efforts should be recognized along the way. Set a goal to recognize the efforts of at least one employee each week.

Suppose the company sets a goal of \$100,000 in sales, and promises a bonus if the goal is met. After weeks of overtime, the team manages \$99,000, and no bonus is given. How do the employees feel about the extra effort? They won't feel appreciated, and are more likely to grumble the next time the company sets a goal — especially if no appreciation was shown along the way.

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A better approach might be to offer a percentage reward based on production — the more that gets done, the larger the reward. Even if the larger goal is not met, the employees get rewarded for their efforts and are more likely to work harder for the next goal.

If this approach does not gain support from company owners, area managers and supervisors can still offer recognition in the form of a celebration lunch or end-of-project party. Consider other types of recognition besides financial rewards — a celebration lunch or barbeque, for example. Whether or not the goal was met, employees will know that their efforts were appreciated.

Sample letter of appreciation

Date

Employee name

Dear (name),

On behalf of all the employees of (company name), please accept my sincere appreciation for the stellar job you have done over the past several months for (describe the project or performance goal). It was an enormous undertaking that clearly demonstrates your superior management and leadership abilities.

Thanks to your dedication, we are now enjoying (the result of the work). You should take great pride in this accomplishment. During the next few days I hope to personally thank each member of your team but, in the meantime, please pass along my gratitude and that of all the employees of (company name) for a job beautifully done!

Sincerely,

Manager name, title

Sample letter of recognition

Date

Employee name

Dear (name),

On the occasion of your (year) anniversary with (company name), please accept my congratulations and thanks for being such an exemplary employee.

Your (describe professional skills) has contributed significantly to the success of (company name), and your commitment to the company and to your team is genuinely appreciated. Your (describe personal qualities) are an inspiration to all of us who work with you.

We hope that the years ahead bring us the continued pleasure of working with you, and in turn, also reward you with the professional satisfaction and personal happiness that you deserve.

Sincerely,

Manager name, title

Sample bonus award letter

Date

Employee name

Dear (name),

We are thrilled to present you with a check for your (fiscal period or other achievement) bonus award in the amount of \$____. This bonus is a direct result of your excellent performance, your contributions, and the goals that you achieved on behalf of the company during (period or project). We appreciate your ongoing dedication and insight to the continuing development of the company.

| Please accept this check with our sincerest congratulations and best wishes for future success.

Congratulations!

Manager name, title



Motivating employees

Motivating employees requires addressing a number of areas: creating an encouraging work environment, providing support and feedback, and implementing effective management and leadership techniques.

A good work environment caters to the employees' desires for autonomy and control, support, and challenges.

Providing support and feedback lets employees know that the company values their efforts. Not all motivation techniques apply to all employees. Some employees prefer to keep to themselves and focus on work. Others require interpersonal support and positive feedback. Determine what motivates each type of employee, and strive to provide that motivation.

When tailoring the approach to motivation, treat all employees fairly and equally.

Motivating employees means both managing and leading. Managing means allocating resources, scheduling training, and handling the other “impersonal” aspects of the job. Leading means facilitating communication, providing feedback, setting an example, and building a team environment.

Autonomy and control: Show employees that they are trusted to handle responsibility, and give them flexibility in completing tasks. Empowering (rather than managing) employees grants them freedom. Constant oversight can increase anxiety and reduce their feeling of flexibility.

Be sure that managers, supervisors, or other mentors are still available to provide oversight if the employee needs assistance. Granting freedom does not mean isolating employees.

Support: Employees want to feel that their work and their contributions are important. Some need to know they are valued as people in addition to being valued as employees. Showing support may mean walking around to ask how a project is going, or providing positive feedback and pointing out things that employees are doing correctly.

Giving positive feedback does not equal giving compliments. Know the difference between complimenting an employee (“you’re a good worker”) and giving positive feedback on a task or skill (“you handled that customer with professionalism and courtesy”).

Some employees need more frequent praise than others. In particular, younger employees and new employees generally need more positive feedback.

Sometimes, employees need support that cannot be provided in the work environment. Employees who carry around the burdens of their personal life may be distracted. Thus, many companies offer employee assistance programs (EAPs) to provide services from psychological counseling to financial planning.

Challenges: Employees can get bored with repetitive work. Work that is mentally challenging or stimulating utilizes problem-solving skills and provides a sense of achievement. Oddly enough, the reward for hard work can sometimes be more responsibility.

Attempt to determine what motivates the employees. An employee review that includes a discussion of what the employee enjoys about work, what is not enjoyable, and what the company can do to challenge the employee might allow for better job placement or task assignment.

Motivating the individual

It can be difficult to remember that employee motivations vary widely and the organization’s ideal development path for an employee might not match the employee’s ideal choice. Not all employees want to move into management, not all want to work longer hours for more money, and some are even uncomfortable with the public recognition that drives others.

The concept of one-to-one management treats each employee as an individual who is uniquely motivated. In some companies, this concept drives the design of rewards and benefits packages for individual employees. This can be difficult at the corporate level, especially in large companies.

However, one-to-one management can apply at the team level, where it may simply mean that managers expend the effort necessary to understand what really drives individual employees. It may not mean customizing a benefits package, but it does mean customizing the methods used to inspire each individual.

After acknowledging that employees are motivated differently, the challenge is recognizing that even a single employee's motivation might be somewhat varied. For instance, an employee who isn't interested in moving into a management role might still desire more responsibility or leadership opportunities within the current position. Another employee might be motivated by the ability to work remotely. Employers must avoid the temptation to define an employee's motivation too simply.

Understanding employees' motivations can take some time. Observing how employees react to certain demands and opportunities can offer ideas, and should be followed by a conversation with the employee about what motivates them. An initial meeting may not produce answers if the employees have not thought about what they want from their careers; some may not even know what would motivate them most. However, they should start thinking about these issues before the next meeting, and later meetings may uncover more productive information.

Throughout the process, keep in mind that some employees may be in the wrong jobs, or even at the wrong company, with no options to increase motivation in their current roles. Where this might be the case, be sure to hold all employees to a standard level of performance and impose discipline when necessary. If some individuals are allowed to slide, the result may de-motivate your high-performing employees.

One-to-one management can help motivate employees by providing a vision for the future. However, employers may have to throw out assumptions and both observe employees to determine what they enjoy or dislike, and speak to employees about what they want.

Motivation tips

Situations or actions that can damage employee morale and motivation include:

- Poorly communicating expectations,
- Excessive rules and restrictions,
- Activities that are "removed" from production (excessive meetings),
- Internal competition that leads to "in-fighting," and
- Giving criticism without positive feedback or suggestions for corrections.

Reserved

Situations or actions that can enhance and increase/maintain motivation include:

- Providing variety and rotation to break up “routine” work,
- Defining and clearly communicating goals,
- Showing support and giving constructive criticism for mistakes,
- Allowing flexibility in how the work is done, and
- Trusting employees to handle responsibilities.

Motivating the unmotivated

Motivating employees is a key leadership responsibility. While motivation alone does not ensure high performance, it is one of the two factors necessary for achieving high performance (ability is the other factor). Even highly motivated associates may not be successful if they lack the ability, skills, or competencies necessary to perform their jobs well. However, it is also true that highly skilled associates will not achieve high performance if they are not motivated to do so, even if they are capable of it.

There are two fundamental, universal techniques that leaders can use to effectively motivate their employees: feedback and reward.

Feedback is important because it helps employees understand what they are doing well and what they can do differently in order to achieve high performance, predefined goals, or to successfully complete tasks. Receiving praise for good, effective performance can encourage associates to continue such performance. Receiving constructive feedback where performance is lacking offers clear expectations, direction, and guidance on how to improve performance. This is particularly helpful when there are misunderstandings about expectations or instructions.

Rewards are another powerful motivational technique. There are two types of rewards: intrinsic and extrinsic. Intrinsic rewards fulfill employees’ inner needs (such as for affiliation and esteem) so that employees know their work matters, is worthwhile, and has a purpose. Extrinsic rewards fulfill the need that associates have for external things or objects to denote their accomplishments.

Examples of extrinsic rewards include monetary awards, gift cards, plaques, titles, certificates, a larger office, and so on. Examples of intrinsic rewards include recognition, praise, appreciation, providing more responsibility or more challenging opportunities, and so on. It is important to remember that extrinsic rewards only meet one aspect of employees’ motivational needs. To create optimal motivation, extrinsic rewards should be used in combination with intrinsic rewards.

There are some challenges to motivating employees. First, an employee’s needs at one point in time may differ from that same employee’s needs at another point in time. Also, there are considerable differences in people’s motivations, because each person has different needs. What motivates one employee may not work for another. Supervisors must get to know their employees and determine what type of motivation works best for them.

High-potential employees

Research has shown that if an employer loses someone performing in the top 10 percent of the organization, the impact will be five to 10 times more devastating than losing an associate who performs at an average level.

Employee Relations Essentials

When determining which employees to develop, it is important to remember that just because an employee is a high performer in his current position, it does not automatically translate that he or she will be a high performer in an upper-level position. The level of complexity increases the higher up the ladder. Different positions require different attributes. The attributes that are necessary to be a successful executive are different from those necessary to be a successful manager.

For example, while one position requires the individual to be visionary and see the big picture, the other requires a skill at implementation of policies and procedures, and paying attention to detail. An individual may not be capable of shifting gears from one set of traits to the other.

Generally, 3 to 5 percent of the total employee population will be in the high-potential group. This is the group to target for development through succession planning.

Identifying high potentials requires an assessment process. First, the upper-level positions to be filled via the succession planning process must be analyzed to determine what is necessary in terms of:

- Knowledge
- Skills
- Abilities
- Traits
- Experience
- Education
- Certifications or professional licensing
- Core competencies

After this is done, look at the pool of employees and decide who may have the foundation to fill one or more of these positions. Identify what education, experience, and other qualifications they have, and what they are lacking. Determine what their interests are in terms of future career direction. Their training and development can be geared in that direction if it is consistent with the overall succession plan.

Using competencies

It's extremely important that employers identify what is expected from employees in particular positions, and one method of doing this is a competency-based performance management system. While it may seem like an intimidating term, competencies can be understood as the knowledge, skills, abilities, and characteristics required to be successful in a particular job or organization.

When used as a part of performance management, relevant competencies are identified for the organization as a whole as well as for each position. These competencies consistently reappear within an organization and throughout an employee's career, which helps to translate an organization's overall vision into its daily operations.

Workforce planning

Workforce planning is necessary to ensure that staffing levels are strategically aligned with the company's business priorities. Effective workforce planning exposes talent deficiencies and needs, identifies recruiting issues, and clarifies organizational and employee development priorities. Workforce planning is the highest level at which an organization can identify the critical

workforce skills and competencies that the organization expects all employees to personify. For example, in the service industry, active listening and good communication skills (both oral and written) are probably among the essential competencies.

Job descriptions

Once the workforce plan has identified the competencies that are most valued by the organization, create job descriptions that both include and expand upon them. Job descriptions should not only carefully describe each position and the competencies required to successfully perform them, they should also take into account how each job works to accomplish the organization's overarching mission. Assigning competencies to each position helps develop a framework on which employees can depend to accurately illustrate the expectations of a position.



To learn more about developing accurate job descriptions, see Job Descriptions under the **Planning and Advertising** tab.

With the new job descriptions based on relevant competencies, design the interview process to identify applicants who most embody the competencies defined as being integral for each job. For example, if a job requires the ability to work well under pressure, ask applicants how they have managed stress or dealt with deadlines in their previous experiences.

The same competencies that drive the interview can also direct much of the feedback an employee receives regarding his or her performance. When it comes time for a formal performance review, employees should be evaluated on how well they have demonstrated the identified competencies in their day-to-day work. Employers who utilize competency-based performance management can also create a 360-degree feedback program (a tool which surveys multiple individuals to gather feedback on an employee's performance) based on the competencies most desired for the job each individual holds.

When used consistently, competencies can permeate almost every facet of an organization. They make it simple for everyone in an organization to understand what the expectations are for each employee and for the business as a whole. Remember that giving careful consideration to the competencies assigned to individual positions is the best way to ensure that the right people are hired for the right jobs.

Retaining top talent by aiding development, mobility

To avoid the high costs of turnover, more companies are making employee retention a top priority. These efforts are often centered on development, since talented employees aren't likely to stay working for a company if there aren't opportunities for them to grow.

Usually such growth and development involves talent mobility — moving employees from one role to another within the company. However, the concept is not without challenges, among them the fact that some leaders don't want to see top-notch performers leave their teams.

As a result of this “too valuable to lose” attitude, some managers may discourage employees from seeking internal positions or even attempt to block transfers. This might just send your most talented employees right out the door looking for opportunities elsewhere.

To encourage top talent to look for career opportunities internally, some companies make aiding employee mobility a part of every manager’s job responsibilities.

Facilitating talent mobility might include activities such as encouraging employees to take leadership courses and seek management roles, or it could mean suggesting a lateral move to an open position that fits an employee’s changing career interests and abilities. The objective is to find a good match between the strategic goals of individual employees and those of the company.

In addition to the standard performance review metrics, managers might also be evaluated on their ability to help their team members move within the company. Some are given bonuses for employees who get promoted, while other managers might not be considered for senior positions themselves unless the people on their teams have been helped to transfer into desired roles.

You cannot prevent all employees from leaving for greener pastures. However, by ensuring employees have opportunities to grow within your company, you’ll be giving them at least one reason to stay.

Identifying high-potential (HiPo) employees

The organization might need supervisors’ help to identify HiPos, but once they’ve been recognized, it becomes the job of the entire organization to make sure they stay — and stay satisfied.

Once HiPos have been identified, don’t assume they’ll want the same future that the company has planned out. Invite the employees to discuss their career goals and explain the expectations that may come with a high-potential designation.

Not all employees will be thrilled with a HiPo designation. An employee may be interested in going back to school, may be planning a career change, or may not want the additional responsibilities or work hours that might come with a higher-level position. Some high-potential employees may simply love what they’re doing and may not wish to take on a more expansive role within the organization.

Even if an identified HiPo doesn’t want to move up the ladder, keeping that individual on board should still be a priority. Continue the career conversation to see what the company can do to motivate these employees to stay. High-potential employees who don’t have a desire to move up are still quite valuable in their own right, and their talents may extend to developing other employees, as well.



Assessment factors to consider

In making an assessment of each individual, consider a number of factors:

Review the employee's work history, both internal and external, to look for a history of progressively responsible experience. Some past experience may not bear on the employee's current position, but may prove helpful in a future position.

Take into account the employee's current and past performance, as measured by performance reviews.

In addition to the standard performance review, develop a list of core competencies for the upper-level positions, and evaluate the employee with respect to each competency.

Reserved

Employee Relations Essentials

Consider implementing 360-degree feedback evaluations to determine any weak points of the employee. For instance, an employee might meet deadlines ahead of schedule and churn out consistently good work, but treat vendors poorly or have a history of not returning phone calls. This could show a lack of respect for others, which may not otherwise be apparent.

Consider training the employee has received, as well as how well the new information was integrated into his or her current job. If the employee had trouble implementing or adapting to new procedures, that could be significant. A capacity to learn and the willingness to adapt are important attributes.

Consider the employee's initiative in taking on new projects and coming up with new ideas. This may indicate a propensity to look at the big picture and a desire to steer the course of work projects and take responsibility for them.

Consider conducting a personality profile to assess an individual's inclination toward a leadership role. Other desirable traits can be assessed in this process as well.

Consider implementing a series of assessment centers. These put employees in real-life work situations and evaluate how they handle them. This can give an idea of how well an employee "thinks on his feet," handles multiple interruptions, juggles priorities, handles irate people, and so on.

Give higher-level responsibilities to employees in their current positions, and see how they do. This might be a special project or an ongoing responsibility. Have a mentor available to help. Learning by doing is the best method, and may be the best way to judge how an employee will perform at a higher level.

Determine what new relationships are needed in employee development. If someone's experience is weak in a certain area, see that the employee spends some time in that department and learns the process. Cross-functional training is highly valuable in understanding how different facets of the organization are interconnected. Determine how well that information is integrated by the employee. An employee's learning agility will be an important component of the assessment.

Other factors should be taken into account, such as a demonstrated willingness to take risks, the capacity to think outside the box, receptivity to criticism, the employee's dedication to the development process, the ability to think globally, and an understanding that the decisions he or she makes will have far-reaching impact.

EQ, or emotional intelligence, should be considered. EQ is manifested by the degree the employee motivates others, treats others with respect, demonstrates team-building and relationship-building skills, is aware of his or her own faults (and seeks to correct or minimize them), and so on. It considers traits such as empathy, self awareness, and social skills.



Best practice

When to look outside

It is important to note that it is not necessarily desirable to fill all upper-level positions from within. While employers want to maintain some continuity, they also want to bring in fresh ideas and experiences. When determining which employees to develop for future positions, consider bringing in some new blood, especially where a knowledge or experience gap exists in available talent from the employee pool.

Taking the next step

Make a determination, based on the employee's background and interests, which positions the employee might be a good fit for and the degree of suitability for each position for which he or she might be considered. The employee's training and development should be geared toward these positions, or a particular position, if appropriate. Ideally, the employee will receive the education and training necessary to be qualified to perform in the new job before actually being called upon to do so.

Determine on an individual basis what hurdles an employee must overcome to move up one to two levels in the organization within a relatively short period of time, generally 36 months or so. This is a commonly used measurement for determining a high-potential employee. If the employee can overcome the obstacles (obtain the required training, knowledge, and experience), he or she should be considered as having potential. If not, it doesn't mean the employee can't be developed and move into a higher-level position, but he or she probably won't be a contributor at a level deemed critical.

In determining whom to develop, take into account which positions may need to be filled sooner. Then determine which employees might be put on the fast track to be ready to fill these positions. These positions will be more specifically geared to certain people because of the time frame involved. This is more along the lines of "replacement planning" than succession planning because the need is more immediate.

Choose wisely

In the course of the employee development process, make wise decisions. Some employees may only be competent up to a certain level. It is not wise to assume that all employees who appear to have potential will actually thrive in an executive or upper management capacity. Don't take a great manager and place the person in a position that is over his or her head, thereby creating an ineffective executive.

Challenge them

Many employees identify challenging work as something they want from their jobs. Perhaps even more than middle-of-the-road performers, HiPos are likely to become bored if they're not presented with challenges.

Employee Relations Essentials

HiPos not only appreciate special assignments and training opportunities — they expect them. After identifying an employee as high potential, an extra investment in that individual only makes sense. A HiPo designation without any special treatment is likely to feel like nothing more than lip service.

It's important to have several possible roles in mind for high-potential employees. If several HiPos have been identified for only one job, other HiPos may become disengaged. By identifying several (or many) HiPos for a variety of critical positions, the employer removes the risk of eliminating the job they thought they were preparing for. This may also open the door to create more well-rounded employees by helping them learn a variety of skills that could apply to any number of top positions.

An organization's ability to thrive depends largely on its ability to keep its best talent. Work with managers and supervisors to identify high-potential employees. Once identified, make sure their expectations align with those of the organization and stay in contact with them regarding their development. The extra effort could result in the development of a future leader.



Involve managers

Recognizing potential in employees is one of a manager's most important duties. By seeing beyond what an employee can do and noticing what they could do, managers become integral in individual employee development and in the growth of the organization.

Supervisors are in one of the best positions to spot employees who could fill critical positions within the organization. Success as a manager may even be assessed, at least in part, on their ability to recognize talent and develop employees.

Sometimes HiPos are easy to identify. They may stand out among their peers in both ability and attitude. While current job performance can be one good indicator of an employee's potential, employers can also assess employees on whether or not they possess certain ideal characteristics that have been identified by the company. For example, depending on the nature of the business, a company might seek to identify individuals who:

- Consistently command the respect of their peers, supervisors, or subordinates;
- Have proven over time to have the willingness and ability to master new skills;
- Excel in team and individual settings and are natural leaders among peers;
- Regularly look for ways to improve products and work more efficiently;
- Are open to constructive criticism; and/or
- Have a firm understanding of customers' needs.

It can be difficult to determine whether an individual employee is a high potential. If an employee spends the majority of her time working with customers, for example, the company may want to obtain client feedback regarding how successful that employee is at meeting customers' needs. If most of an employee's work is conducted internally on teams without direct supervision, consider gathering feedback from the individual's colleagues rather than relying on observation.

Should HiPos be informed?

Deciding whether to alert high-potential employees that they've been identified can be a tough decision. On one hand, alerting HiPos could encourage them to stay with the company. A study from the Center for Creative Leadership indicated that 77 percent of high-potential employees rank formal recognition as important to them.

On the other hand, alerting HiPos could also have the effect of dividing the workforce into those employees who feel valued by the organization and those who don't. If HiPos are publicly identified, the company could lose some middle-of-the-road performers who feel they aren't being properly recognized. Everyone seems to think they're above average. A company may even lose some high-potential individuals who were not identified and recognized.

Though many HiPos will have the people skills they need not to offend their non-HiPo peers, be sure to keep an eye out to ensure that a high-potential classification hasn't gone to someone's head. If a HiPo is acting superior to other employees, remind him or her that part of being high potential is knowing how to conduct oneself and work effectively with others.

Employee development

One of the most important functions of the HR department is to help manage the career paths of employees. When the employee takes responsibility for his or her career management, the employee is engaging in career planning. At the point where the employee's needs match up with the company's needs, the process of career development is born.

Of course, if the employee's career goals do not match up with the company's needs, the employee may seek to advance his or her career with another company. Employee development can therefore improve retention.

The employee is ultimately responsible for his or her career path. However, it's important that both the employee and the company understand that career development is a two-way street.

The organization must communicate to workers that if an employee is interested in a specific career path, the employee should make that known to his or her manager.

Employee development isn't all about advancement, however. It includes steps taken to make employees more effective in their current positions, making them more versatile, helping them to work more effectively with other employees or customers, and even helping them to work more effectively within a team (teambuilding).

Designing employee career paths

An employee's career development has multiple stages (beginning, intermediate, and final). This requires a list of jobs and the logical progression from one to another. For example, an employee accepts an entry level position (beginning stage) as a bookkeeper in the accounting department. This employee becomes increasingly competent while learning the organization's rules and procedures. As time passes, the employee decides to stay with the company and wants to follow a career path to get to his or her ultimate job or position — accounting department manager.



At this point, the employee tells his or her manager about the desired position or long-term goal. The manager would then communicate this information to the HR department. The HR department will set into motion the necessary career development program to help the employee reach the goal. As the employee moves along the career path (bookkeeper to accountant to senior accountant), there is time for HR to review his or her career plans and make additional choices or changes (intermediate stage).

At the final stage in the employee's career, the position of accounting department manager is ideally reached. The employee continues to redefine his or her career development goals (for example, deciding now to move to a non-profit organization and work for less salary — but

assuming the position of chief financial officer). Of course, the ideal is not always achieved, but if opportunities are not even available at a company, employees may look elsewhere.

Career development programs can take many different forms, such as:

- Internships,
- Career planning seminars,
- Computer-based training,
- Job rotation/enlargement,
- Mentoring, and
- Succession planning.

Obviously, the development of any particular employee will depend on a number of factors, including the employee's desires and capabilities, the needs of the company, and the opportunities available. Organizations can work with employees to find opportunities to advance, or at least offer a chance to try out different jobs based on the individual's strengths.

The 80/20 rule

For decades, employers assumed that most employee issues (productivity, efficiency, performance, and so on) followed a standard bell curve. Under this theory, a small percentage of employees are top performers, another small percentage are low performers, and the majority are average. While there may be some truth to this distribution, it does not account for the actual output or impact of the effort, often causing a presumption that most of the output is generated by the largest group.

More recently, researchers are starting to believe in a "power curve" or 80/20 rule which focuses on the critical impacts of the upper group. While the split isn't always exactly 80/20, many situations indicate a significant disparity between output and input. For example, in the health care industry, it has been estimated that about 20 percent of patients use about 80 percent of health care resources. In the criminal justice system, about 20 percent of criminals are responsible for about 80 percent of crimes.

Employers might find similar distributions in a variety of areas. For instance, a manager might spend a small percentage of time working on tasks that are high priority, and most of the time on administrative matters. Other situations to consider include the following:

- Do 20 percent of your customers provide 80 percent of your revenue?
- Do 20 percent of your employees account for 80 percent of your sales?
- Do 20 percent of your employees account for 80 percent of the disciplinary problems?

Identifying areas where the 80/20 rule applies should not result in ignoring the majority of employees or customers, but may help focus more attention on critical areas, or on the most valuable areas. In some cases, the 80/20 rule identifies areas in which focused attention could yield substantial results. For instance, if 20 percent of employees are causing 80 percent of disruption, addressing just that 20 percent could yield big results for the organization. Similarly, the loss of employees (or customers) in the upper 20 percent can be devastating compared to the loss of someone outside that group.

If you determine that 20 percent of your salespeople account for 80 percent of revenue, you'll want to make sure you devote considerable efforts to support that group. The idea is not to focus all of your efforts on just those individuals, but to ensure that the most lucrative customers

remain loyal and satisfied. For instance, there may be situations where a top-performing employee helps to keep others on the team motivated and functioning.

Similarly, a strategy of focusing on the highest performing employees should not be interpreted to denigrate the larger group. They are certainly necessary, perform a substantial amount of work, and most likely are consistent and reliable workers. Rather than supporting only upper-echelon employees, it also pays to work to help mid-level contributors become great employees.

The point is to identify where you might get the most return on your efforts, identify top priorities, and ensure retention of the most valuable group (whether employees, products, or customers). While that doesn't mean ignoring other tasks, individuals, or products that don't have such a high outcome ratio, it may help focus attention on individuals or tasks that create the most significant outcomes.

Focus on strengths

Each employee is a unique individual with strengths and weaknesses. Some people are detail-oriented, while others are more creative. Employees will be drawn to tasks at which they feel competent, and a manager can provide such opportunities.

In short, focusing on strengths means providing challenges. This does not mean challenges that frustrate employees. It means providing an opportunity for employees to stand out.

When the particular skills of an employee are used, that employee contributed to the company's success. With a system in place for rewards and recognition, achievements can be highlighted. The company should point out how the abilities of an employee contributed to success.

Examples of performance that show highly developed skills might include:

- A forklift operator with an exemplary safety record;
- An assembly worker who taught herself to make minor equipment repairs to save production time;
- An office worker who wrote a computer program to improve efficiency.

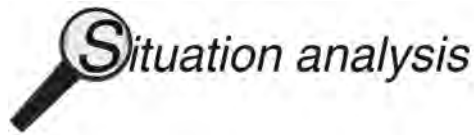
Each employee has many unique skills he or she uses daily to keep the company running. These skill sets are their strengths. Taking time to recognize and highlight these achievements does not require an award ceremony. Simply pointing out the employee at a safety or staff meeting will show appreciation.

Once these strengths are identified, managers will know which employees to go to for solutions. Using the special skills of a particular employee puts that employee in the spotlight, and lets him or her know that the company recognizes and appreciates those abilities.

Do not wait until an annual performance review to highlight strengths. Appreciation should be shown as needed. However, the performance review allows the supervisor not only to point out strengths, but also to learn about previously unknown skills and issues in the workplace.

A review that includes a discussion of what the employee enjoys about work, what is not enjoyable, and what the company can do to challenge the employee might allow for better job placement or task assignment.

Reserved



Are employees bored at work?

Anyone can become bored with their job, but if a feeling of monotony remains for an extended period of time, the company might also begin to notice related problems involving poor attitudes and reduced productivity. Recognizing that particular employees are bored is only half the battle: it's figuring out *why* they're bored that can lead to practical solutions.

For instance, an employee might experience boredom because his job does not present him with an intellectual challenge or an occasion to use his creativity. Employers might be surprised to find that in some instances, employees who were thought of as lazy simply need additional responsibilities or more challenging work.

Additionally, an employee who doesn't seem fully engaged may not have the right job for his personality. Realizing that a particular job isn't a good fit may be a situation which takes some time to correct. While an employer may not be able to immediately change an employee's position, it can work with that individual to focus on future goals and career advancement, perhaps outlining relevant skills the employee could acquire or educational opportunities he could pursue.

As is often the case, one of the best ways to address a problem like this is to discuss the issue with the employee. Employees who are bored at work often feel as if their supervisors underestimate their abilities, so talking to them about how they're feeling is a good start toward making them feel valued *and* getting to the heart of the issue.

Grow with a performance management system

Every organization wants its employees to perform as well as they can. Yet, a tool that is supposed to help them do that — performance appraisal — fails more often than not.

The problem is that a performance appraisal is a lagging indicator of past performance. It looks backward at what an employee has done. That doesn't necessarily predict what an employee may (or could) do in the future, especially if aspects of the job or certain responsibilities change. It is also usually a single annual event that both employees and supervisors dread because it often focuses on pointing out and correcting problems.

More often than not, it uses ambiguous measurements and a subjective rating system that leave valued employees wondering how they can achieve above-average status. Furthermore, it is often a bureaucratic nightmare in which getting forms completed and signed by a certain date takes precedence over its supposed function of performance improvement.

Since the performance appraisal fails to achieve what it is supposed to, consider replacing it with performance management. The difference between performance appraisal and performance management is more than just semantics.

Performance management is a leading indicator of future performance. It is not a single event; it is a forward-looking system comprised of job descriptions, performance standards, ongoing feedback and advice linked to organizational goals, and some type of reward system. Each

component of the system is tied to the others, and each is critical to making the process work for the benefit of the organization.

A performance management system that has top-management commitment helps to clarify job responsibilities and expectations and improves productivity. It encourages employee development and drives employee behavior and performance to align with the business' core values, goals, and strategies. As it does these things, it provides a sound basis for rewarding performance.

When all the components are in place, the biggest challenge is training all players — executives, managers, supervisors, and employees — in the workings and benefits of the system. Such training is critical, especially with supervisors, because ongoing feedback and advice are essential to the success of a performance management system.

Key modules in performance management training should include:

- Why and how a performance management system works;
- How performance measurement works (the rating system);
- Roles and responsibilities of both employees and managers/supervisors;
- How to set goals, expectations, and plan performance;
- How to perform evaluations;
- How to give effective, specific, ongoing feedback;
- How to ask for feedback and react to unsolicited feedback; and
- How to identify and address developmental needs.

HR's role in performance management is facilitative. The HR professional provides the tools, training, and guidance to enable operational management to implement the system. Managers will still have to monitor the formal appraisal process (which is generally part of the ongoing feedback), but the task should result in not only better compliance and less dread, but also improved organizational effectiveness.

What do employees want?

Generally speaking, most managers have a higher opinion of themselves than their employees have of them. Unfortunately, few employees are actually given the opportunity to provide feedback on what they want from a supervisor, a fact that may be somewhat responsible for this disconnect.

Supervisors need courage to open themselves up to critiques from direct reports, but finding out what employees want may improve working relationships and overall productivity. However, don't solicit feedback unless it will be taken seriously. If asking for feedback, don't be surprised if employees identify some of these most commonly cited points:

Opportunities and purpose: Employees want opportunities to contribute, to be successful, to be challenged, and to learn new things. They also want to understand how they make a difference in the organization.

Positive and frequent feedback: Employees need to know where they stand, and they want to know that their hard work is valued. Once per year feedback in performance reviews won't cut it for most employees.

Clear direction and goals: In general, employees want to be given the information they need to do their jobs and the autonomy to accomplish those tasks. They do not want someone who micromanages or meddles under the guise of providing direction.

A manager they can respect: Most employees don't want a manager to be their friend — they prefer an individual they can respect as their leader. They want that respect returned as well: employees want managers who sincerely listen to them, collaborate with them, and take their input seriously.

Fairness: Employees want to be treated fairly, and they value managers who set standards and enforce them consistently instead of playing favorites.

Encourage independent and creative thinking

Sometimes it can be difficult to create an environment in which employees feel free to speak their minds. If employees aren't confident about job security, taking the risk of speaking out and potentially disagreeing with a group consensus can be terrifying. However, getting employees to share their ideas without holding back is absolutely necessary for innovation, and innovation is one thing that few companies can survive without.

In some organizations, employees are not comfortable sharing their thoughts for fear of negative repercussions. Employees may not want to appear out of sync with the group, or may not be sure how to express opposing opinions respectfully. In companies where this is the case, it's likely that more than a few bad ideas have been implemented when few employees believed in the idea in the first place.



Benefits of disagreement

While an always-agreeable employee might seem preferable to one who is always contrary, neither is ideal. Of course, contrary comments are not always productive. However, agreeable individuals who only “go along with the crowd” may not truly engage with ideas brought forth in the company.

Somewhere in between these extremes is the kind of employee who listens carefully to ideas and considers them thoughtfully. Most importantly, they speak up when they disagree or don't quite understand something. These employees understand when it's appropriate to offer opinions, while refraining from complaining about details.

Supervisors should create an environment in which employees feel comfortable speaking up and even disagreeing with a group. To accomplish this, they can regularly remind employees that diverse opinions are valued and that everyone isn't expected to agree. When conflict does occur, make sure it stays productive and doesn't get personal. If employees see that conflict often becomes uncomfortable, they're not likely to stand up and disagree in the future.

In a group setting, it can be extremely difficult for employees to refrain from being influenced by other employees' thoughts. When asking employees for creative ideas, encourage them to brainstorm on their own before joining a group. Their ideas are likely to be more unique since they won't follow their coworkers' trains of thought. Since employees may be particularly wary of disagreeing with their supervisors, supervisors should refrain from sharing their opinion until after hearing the views of the group.

When brainstorming in a group, remember that anything goes. While outlandish ideas can be respectfully dismissed, hear employees out and give each idea serious thought. Sometimes ideas that initially seem bizarre could work with a little tweaking, and disrespectful dismissals may discourage employees from bringing ideas to the table.

Even if company culture encourages creativity, employees may not offer up their opinions. When this is the case, specifically ask them to disagree by playing a round of devil's advocate. When each employee takes a turn trying to find a problem with a particular idea, it may make those who harbor concerns feel comfortable sharing them. In the case of particularly heated issues, consider allowing individuals to provide feedback anonymously.

If employees understand the role that healthy conflict plays in brainstorming and decision making, they're more likely to engage creatively and ask the right questions. They're also more likely to refrain from feeling offended when a coworker disagrees with them. Remember, even ideas that are ultimately turned down can make projects or programs stronger since they'll be examined from multiple perspectives before a final decision is made.

Supervisors should understand the difference between employees who are simply contrary and those who are thoughtful and willing to candidly (but politely!) speak their minds. While it's nice to have individuals who often agree and work well together, individuals who are always agreeable might not be helping the organization. In some cases, the very absence of conflict could steer organizational decisions astray.

The Abilene Paradox

When a bad idea gets implemented because no one in the organization feels comfortable speaking out against it, this is sometimes referred to as the Abilene Paradox. Introduced by Jerry B. Harvey in his article, "The Abilene Paradox and Other Meditations on Management," the Abilene Paradox is named after a town in an anecdote Harvey tells.

In the story, a family member suggests taking a trip to Abilene for dinner, and each of the other family members agrees, even though they each have reasons for not wanting to go. Since everyone agrees, the family makes the trip, and it is unsuccessful for all the reasons that each member of the family feared. Upon returning home, the family slowly realizes that, in fact, no one really wanted to make the trip: each family member (even the one that suggested the trip) was simply trying to keep from going against what they understood to be the consensus.

This hesitancy to speak out is not a good thing for any organization. When employees are not comfortable sharing their honest opinions, the consensus of the group won't actually represent the views of the group. It may represent the ideas of one or two outspoken individuals or, as in the case of the Abilene Paradox, the consensus may be against the better judgment of everyone

involved. As a result, employees are likely to find themselves working on more than one project that they don't believe in, which, in the end, won't advance productivity or quality.

So, how do employers encourage employees to speak their minds? First, establish and maintain a culture where creativity and independent thought is never discouraged. Employees who are willing to offer up unique perspectives should be commended for their willingness to share. Managers and supervisors should be reminded to encourage their employees to speak honestly, and this means they should take care to be respectful (and not offended) when employees disagree with them.

Few organizations can survive without at least some creative thinking, and if employees are truly thinking innovatively, there are bound to be disagreements. If company culture begins to view differences in opinion as positive and productive for the organization, managers and employees will also.

It's natural for groups of employees to begin to think alike, but it's a tendency that organizations have to consciously fight against. There may be only one thing worse than an idea or an initiative that failed, and that is when such a failure could have been prevented. While it can sometimes be uncomfortable when employees don't agree, respectful differences in opinion can prevent the organization from implementing ideas that haven't been thoroughly considered.

A call to team-building action

Team building is a process of creating an awareness of, and a commitment to, a collaborative work effort. The organization ultimately benefits from that process through increased profitability because of changed (and improved) work behaviors.

Once the problem is defined and objectives are set, decide on the most appropriate intervention. Interdepartmental conflicts may require the expertise of an outside facilitator. However, problems within a department can usually be addressed in-house, using team problem-solving techniques (provided supervisors are trained in such techniques).

Keep in mind that the goal in team building is not to apply "feel good" experiences to the workplace. Rather, it is to solve the real problems that get in the way of the team's work.

Team-building efforts will be ineffective if the organization does not support teamwork in the first place. That support must start at the top, with executive management demonstrating collaboration as they work together on high-level initiatives. Collaboration must also be reinforced through policies and procedures such as compensation programs and supervisory training programs. When teamwork is supported and encouraged from the top down, interventions are much more likely to be successful.



How to build a better team

Whether or not the company has formal teams or a traditional departmental structure, teamwork is key to getting work done more efficiently and effectively.

Establish clear goals. For a group to work as a team, it must have common goals. Work with team members to make sure they know these goals and how they affect individual work roles.

Clarify roles. Every team member must have the knowledge, skills, abilities, and tools to do their jobs. Sometimes, however, individuals assume responsibility for tasks outside of their job descriptions, and the end result is confusion about who is really responsible for specific activities.

To be effective, every team member must know and understand his or her role and how it affects the role of every other team member. In a group session, facilitate a team discussion of each person's individual role within the context of getting work done. Giving each team member defined authority will help them refrain from competing for resources or control.

Develop communication processes. Within the team, work out methods of communicating progress and success as well as how to resolve conflicts. Consider using a “report card” that spells out objectives, activities, and task assignments (by name) in order to assign accountability — a key element of collaboration.

Provide opportunities for team members to interact. Although work is not a social gathering, provide opportunities for team members to be social. Informal gatherings such as pitch-in lunches or company-sponsored pizza parties help break down barriers and build trust among team members — something that is essential for good collaboration.

Meet regularly. Keeping everyone in the loop is important for collaborative efforts. Schedule regular team meetings to update the team report card of activities, which holds everyone accountable.

Involve the team in decisions. When consensus and commitment are necessary, involve team members in the decision-making or problem-solving activity. When people are part of the process, they tend to own the outcomes and are more likely to fully commit.

Recognize employees and the team. A personal thank you or a handwritten note goes a long way in empowering employees. Likewise, when the team accomplishes milestones, celebrate to show appreciation and to build team pride.

Leadership challenges

Many supervisors feel that, as the leader of their team, they must strive for consistency in performing their leadership responsibilities. While this sounds like a logical objective, it may not be the best leadership philosophy.

Most supervisors manage a variety of people with a range of abilities and developmental needs. Each of these individuals may require a different leadership style to bring out their best. Some people are very experienced, self-directed individuals, while others may be new to the job. Still others may have the skills, but lack motivation. An across-the-board approach to leading people with these various needs may leave some team members wanting more attention while others may feel stifled.

“How to” vs. “want to”

While supervisors can teach most people how to do the job they were hired to perform, they can't give anybody the “want to,” or the internal motivation toward the job. The challenge is to determine where each employee falls on a readiness scale as it applies to their job knowledge (how to) and their desire to perform the job (want to). Knowing that, adjust the leadership style to match their needs:

Low on skills or motivation. Some employees have not yet developed the skills necessary to perform the job satisfactorily, or for whatever reason are unwilling to do the work as required. For these employees, use a very directing or instructive approach.

Low on skills, high on motivation. Other employees may not have all the skills they need yet, but are motivated to perform. These people need a coach or mentor.

High on skills, low on motivation. Still others have the skills, but for some reason, have lost the passion or motivation to perform to the best of their ability. These people need supportive leadership, encouragement, and recognition. They know how to do the work; they just need encouragement to get them past whatever may be holding them back.

High on skills and motivation. Finally, there are those who know what to do and do it daily. These are the people who get the job done. These are also the people most likely to be upset by a leadership style that does not match the maturity level they are demonstrating toward the job. For them, the leadership style should be oriented toward observing and monitoring with a delegating and empowering leadership approach overall.

Take the time to properly evaluate where each employee may be in relation to their capabilities and desire to do the job, and adjust the leadership style accordingly.

When to treat employees unequally

There is much to be said for treating employees equally, and in most cases, that would be the correct thing to do. But not in all cases.

Employees should be treated fairly and consistently when it comes to applying policies and discipline. But in other respects, employees should be treated individually. When it comes to motivating them, or in the manner in which they are disciplined, employees should be treated in the way to which they will best respond. People are different and respond differently to external stimuli and motivators.

Disciplining employees

In coaching or disciplining employees, some may require a tough approach to achieve the desired response, while others may fall apart at that type of technique, and would respond better to a gentler approach. The manner of delivering discipline could have as great an impact on the employee as the discipline itself, particularly if done poorly. Of course, all employees should be treated with dignity and respect, regardless of which approach is taken.

Getting the most from employees is not an exact science. Understanding employees as individuals, and taking their personalities into account, goes a long way toward getting the best performance from them. Train supervisors to understand how to manage different types of personalities, because a “one size fits all” mentality isn’t necessarily the best approach.



For more information on discipline, see the **Discipline and Corrective Action** tab.



Motivating employees

Some employees are motivated primarily by money, while some consider respect and recognition to be more important. This is not to suggest that one employee should be compensated to a higher degree than another who values recognition over money, but be aware that employees want to be recognized for their achievements, and may put a high value on it.

Other employees may find an incentive program to be a strong motivator. An incentive program allows them to control the amount of their compensation by how hard they work or how much they produce. Even an incentive program won't work for everyone, though, because some employees can't handle the pressure. This is where it is essential to have a good match between the job and the individual, and take employees' individual motivators into account.

360-degree feedback

Many organizations align the abilities and goals of their employees with those of corporate strategies. Some organizations like to ensure that their employees realize their potential by identifying their strengths and weaknesses. This type of identification or evaluation may not be fully obtained in standard performance evaluations, as the evaluations do not provide enough or the right type of information. For organizations wishing to know, for example, which employees may be potential candidates for higher-level positions, an effective and properly managed 360-degree feedback process may be the answer.

A 360-degree process is a methodical way of gaining insight, through feedback, into how others in the workforce view an employee. Unlike regular evaluations, the feedback in a 360-degree process comes from a variety of people who are familiar with an employee's work — not just the employee's immediate supervisor.

Using these sources — those that provide a full circle of information (thus, the 360-degree designation) — provides a greater view of how the employee functions. Not only does the company get information on whether or not the employee completes his or her work, but how well he or she interacts with coworkers, those who work for the employee, and/or clients in the process. The feedback comes from those above, below, and beside the employee, providing a more complete picture.

Not all companies use 360-degree processes, and some companies use them only for certain employees, such as supervisors or managers. This information may be used in employee development programs.

Some of the benefits of implementing a 360-degree process include the following:

- Improved self-awareness for those being reviewed;
- Identification of specific strengths and weaknesses to help formulate achievable goals;
- Identification of realistic employee contributions;
- Alignment of employee goals and abilities to corporate strategies; and
- Boosted productivity.

There are a variety of methods for the 360-degree process, but they follow a general pattern:

1. Have a chosen employee invite people who are familiar with the employee's work to take a survey about the employee's work;
2. Anonymously survey those invited people — managers, coworkers, subordinates, and perhaps customers — about that employee's work;
3. Receive the surveys from the invited people;
4. Tabulate the survey information and develop a report;

5. Provide this report to the employee featured in the survey; and
6. Follow up.

The report includes information on how others view an employee's abilities or competencies. It provides insight from sources not generally tapped in a performance evaluation. The employee may then go over the information with his or her manager. The structure may be formal or informal, but the basic premise remains the same.

A 360 evaluation can also be used to identify problems with employees, of course. For instance, if an organization receives complaints about the performance or conduct of a manager, the 360 process may provide a means of gathering information about the nature of the problem without actually interviewing other employees.

Be prepared

Before embarking on a 360-degree process, determine if the organization is ready for such a program. For the process to work properly, there must be an understanding of the process, adequate support, an effective feedback climate, and an openness of those involved to provide and receive feedback. Trying to establish a program without the appropriate foundation usually ends up with negative results.

If the organization is ready to implement a 360-degree process, consider some preliminary activities such as clarifying the goals of the process, determining the reasons for the results, conducting a performance analysis to develop a list of skills and competencies on which employees will be evaluated, aligning the survey items with the outcomes of the process, and selecting who will be evaluated.

Also, consider the time it will take not only to implement the program, but to maintain it. A review of 100 employees, each of whom invites six people to participate, will generate 600 evaluations to go through. Some of this, of course, may be done with the help of software. However, there will still be a time commitment.

Lay the groundwork

After gaining an understanding of the process, begin to generate support for the program. Anticipate any potential objections and prepare an adequate case for the process, keeping in mind applicable business objectives. In addition, be aware of any costs involved and the benefits provided. From there, begin to communicate the intent and progress to those involved, either directly or indirectly.

The participants, along with their managers, need to have the skills to provide an effective and accurate outcome. This may require the development of skills such as coaching, feedback (both giving and receiving), and performance management.



Survey

When ready to proceed with the process, hold an orientation briefing to review the process and discuss such things as confidentiality and ownership of results. From there, the organization can administer the surveys, then produce and disseminate the reports from the results.

It is wise to set deadlines for the surveys; otherwise, they may fall into some of those black holes that can form in organizations. It is also a good idea to provide ample time to take the surveys.

Go over the information

As the survey information is received, it needs to be tabulated and put into a report that reveals the meanings of the survey's outcomes. This may take some time, but helps ensure that the data from the surveys is translated into meaningful information for the subject and the organization.

Those who were the subjects of surveys may need individual meetings to understand the results and set goals. With the insight provided by the survey, an employee can sit down with his or her supervisor and map out a course of action — perhaps some needed training — that would make that employee a greater asset to the department, and therefore, the company as a whole.

Put the information to use

The process shouldn't stop with setting goals, of course. Once goals have been set and a plan of action designed, those who were evaluated should have their progress tracked and their status reviewed in follow-up meetings.

In addition to individual goals, organizational trends should be evaluated from the acquired data. Perhaps more supervision is needed in some areas of the organization. Perhaps the need of another form of intervention is identified. Whatever the outcome, the findings should be communicated to those in the organization who would benefit from this information and can act accordingly.

Many companies choose not to use the information gained from the 360-degree process in correlation to pay increases or promotions, but only as a self-assessment tool for employee development or corporate strategy. If the results are not tied to pay raises or promotions, there may be less a risk of reviewers being afraid to be honest, for fear it may jeopardize a coworker's (and possible friend's) future. Performance evaluations are often the tools used to help determine pay and promotions, and many organizations choose to keep the two separate.

Maintain the program

As stated earlier, the progress of the employees who were evaluated should be tracked and quantified, and ongoing goals established. This should not be a one-time event, but continual. Therefore, the survey should be repeated at the appropriate intervals. Many organizations choose to deploy 360-degree feedback on an annual basis. This may be too frequent for some, so the organization may choose to evaluate some employees one year and other employees the next. The schedule should be determined by the particular needs of the organization.

A 360-degree program may not fit into a particular company at all, and if not done correctly can cause confusion and possibly resentment. Make sure the company can benefit from such a program and is ready to implement it before beginning the process. Such programs can provide many benefits, but only if done properly. The process should not set the ground work for mistrust between coworkers by making one wonder who said what in the review. Instead, it should be used as a tool of construction, not one to foster blame.

A 360-degree program can provide valuable information with which employers and the organization as a whole may benefit.

Training for advancement

Training for advancement will necessarily involve providing opportunities for employees to expand their horizons and increase their potential. The process may include delegating work to an employee to evaluate how the individual handles new tasks (and whether this is something the employee wants to do). It may also involve cross training for other positions, whether lateral jobs within a team, or a higher-level position to prepare for an eventual promotion.

Job rotation can also be an effective means of providing additional training, while at the same time preparing the company for the potential departure or extended absence of another employee.

In some cases, the training required will be beyond anything the company can directly provide, but assistance might still be available. For example, if an employee desires a position for which he does not have the required education, an employer might provide educational assistance to help the employee obtain the necessary degree.

Delegating is not just for grunt work

Contrary to popular opinion, delegation is not about handing off the least desirable tasks to a subordinate. Delegation is about finding ways for employees to grow, both personally and professionally, and does far more than just help get work done. It can be used as a leadership development tool.

Employee Relations Essentials

Delegation involves tapping into employees' potential. One employee might have a particularly good mind for the technical aspect of the job, while another has a flair for the public relations side. Identify these high-potential employees and select them for further development. In contrast, a potentially promising employee might not be able to grasp certain fundamentals of the leadership position, or may be simply ill-equipped to take on such a role. But whether an employee rises to the occasion or not, these things are good to know, regardless of which way they turn.

The questions below can help supervisors decide if they are ready to use delegation as a leadership tool:

- Are they receptive to employees' ideas?
- Are they prepared and willing to accept that employees will make mistakes?
- Are they ready to share success with employees?
- Are they ready to exercise self-restraint and let employees operate independently?

If supervisors can answer yes to these questions, they are ready to begin delegating. The four steps in the delegation process are:

1. Plan the delegation.
2. Assign the task(s).
3. Determine if the employee is ready to execute the task.
4. Follow up with the employee.

There are five key activities to include:

1. List the tasks that are appropriate to delegate.
2. Identify associates who are ready to take on added responsibility.
3. Determine the specific results expected.
4. Determine how often to check in.
5. Develop expectations for reporting activity.

To be successful, the delegation should set clear expectations and deliverables prior to allowing the employee to work on the task. To gauge how well an employee has accomplished the task, the results should be SMART: specific, measurable, attainable, realistic, and timely.

It is difficult to strike the right balance between hovering and being available to answer questions. Constant oversight will undermine ownership of the task, and the employee may see it as a lack of confidence in his or her abilities.

Instead, determine when it is appropriate to check in, and adhere to the schedule. At the same time, have an open-door policy. Be available in case questions arise prior to the next check-in meeting. While check-in meetings can be relatively short, schedule formal follow-up meetings at regular intervals to discuss the project in further detail.



Delegation roadblocks

Leaders may be reluctant to delegate. Some of the more common excuses for not delegating include:

- “I can do it better.” In reality, employees are talented and have the potential to successfully complete delegated tasks. It may take them longer, or they may take a different path, but in the end, the task will be completed successfully.
- “My employees won’t respect me.” Employees will respect leaders who are willing to develop them and help them become prepared for future roles in the organization.
- “I will lose control.” The leader is ultimately responsible for the successful completion of his or her tasks. Although the employee shares authority, the leader still has control and remains accountable.
- “What about my personal satisfaction?” There is a sense of personal satisfaction in completing a task. However, there is also great satisfaction in helping an employee stretch and reach his or her potential.

In addition to excuses, there are obstacles that hinder a leader’s ability to delegate. These obstacles may be personal or organizational and include the following.

Personal obstacles:

- Having a negative attitude toward delegation
- Having a leadership style that doesn’t lend itself toward employee development

- Having difficulty communicating clear expectations
- Lacking knowledge on how to delegate

Organizational obstacles:

- Hierarchy
- Procedures or rules
- Organizational culture
- Unidentified skills and talents of the employee population

The last delegation roadblock to be aware of is resistance from employees. Employees have reasons why they fail to cooperate or participate. Those reasons include:

- **Fear of failure.** Employees are afraid to make mistakes and have a fear they will fail. A leader should understand that mistakes may happen, and a mistake needs to be looked at as a learning opportunity, not a failure.
- **Perception of the task.** If the employee has the perception that the task has only been delegated because the leader doesn't want to do it, there may be resistance. Prior to introducing the task, be prepared to discuss the task in a positive manner, and explain how this can be a learning and development opportunity.
- **Fear of hurting someone.** An employee may resist a delegated assignment if he or she perceives someone may feel hurt in the process. For example, if accepting the task means someone else will have to take on more work or that someone may be disappointed that he or she wasn't chosen, there may be resistance.

Overcoming the roadblocks to delegation (excuses, obstacles, and resistance) will allow the organization to reap the benefits of the process. Employees will experience added responsibility and the organization will benefit in terms of results.

Delegation will keep employees engaged and motivated because they are involved. An effective leader uses delegation to ensure that the organization operates at its fullest potential — instead of leaving potential undeveloped and untapped.

Cross-train to back up critical jobs

In good times or bad, cross-training makes good sense. It provides backups to critical jobs, allows for flexibility, and improves productivity.

In an ideal world, all employees would be cross-trained in all jobs. In some companies, that actually happens. Most organizations, however, don't have the resources to cross-train everyone in every job. So, how does an employer determine who should be cross-trained?

1. Identify the critical jobs. Eliminate from immediate consideration jobs that require certification or licensing. From the remaining jobs, determine which jobs or job functions are most critical to the department. Ask yourself, "If Tim were not here tomorrow, how would his job get done? If the job were not done, what effect would it have on productivity and customer satisfaction?"

Jobs that have an immediate effect on productivity, revenue, or customer satisfaction and are so specialized that they are only performed by one person are top candidates for cross-training.

2. Decide the primary purpose for cross-training. Will cross-training provide for backups? Or will it allow rotating all employees among jobs in the department? The purpose will determine whether to train employees in every function or just the most critical ones.

3. List the job's tasks and the skills required. A well-written job description serves as a training outline.

4. Prioritize tasks and skills. Prioritizing allows for training on the most critical components of the job first, even if the intent is to cross-train an employee on the entire job.

5. Select employees to be cross-trained. A willingness to learn is key to effective cross-training. Unless the plan is to cross train an entire department, identify who would like to be trained (many employees want this opportunity to learn new skills and have diversity in their work).

6. Determine the best training method. If training only one or two individuals, on-the-job training will work well. For groups of employees, other methods such as classroom training may be more efficient. The method chosen will also determine whether an outside trainer is needed. Whichever method is selected, use written objectives and training plans, including checklists and job aids.

7. Develop a schedule and stick to it. Make cross-training part of the job — a “have to do,” not a “nice to do” — especially if the intent is to provide a backup. Remember that refresher training may be required, since employees who learn a task may not recall the specifics if called upon to perform that job months (or even years) later.

Developing a cross-training system may be time-consuming, but the resulting benefits and advantages are definitely worth the effort in the long run.

Regardless of company size, cross-training makes sense. In addition to making sure work is always covered, it offers:

Flexibility and improved productivity. In manufacturing organizations, for example, cross-trained workers can pitch in where they are needed to accommodate production schedules. Cross-training can also ultimately result in reducing the number of individual, specialized jobs, because workers can be assigned where they are needed.

Consistency of output. Instead of second-guessing how something is done and winging it, which can result in making errors, employees filling in for one another perform to the same quality standards. This requires more than mere training, and the replacement may have to spend a few shifts (even one day per month) performing the job to develop the necessary skills.

Improved teamwork. When employees learn each other's jobs, they begin to understand the interrelationships of all jobs and develop a bigger picture of the organization. They may also gain an appreciation for the challenges of another person's job. That promotes teamwork, and teamwork results in improved efficiency.

Better recruitment and retention. Cross-training improves morale, builds skills, and develops employees, all of which lower turnover and give an organization the reputation of being an employer of choice. The bottom line is reduced hiring and training costs.

Improved organizational agility. In today's competitive market, change happens quickly. Cross-training develops a learning attitude and provides employees with skills that can be adapted to new uses.

Cross-training, like any investment, comes with a price tag. At a minimum, if cross-training is done in-house, the cost is the training time of the trainer and trainee(s). Informal on-the-job cross-training can be an efficient way to train one or two employees at a time, but for larger groups or ongoing cross training, a more formal program anchored in the classroom is more effective and efficient. Such a program may require using a professional trainer to develop

training materials and job aids. The complexity of such training, of course, will depend upon the jobs and the organization's needs.



Training through job rotation

The implementation of job rotation is becoming more and more common, and is often used as a training and career pathing tool. Organizations often use entry-level job rotation training to expose new employees to a variety of business experiences which have been compressed into a relatively short period of time.

An organization's job rotation program can be formal or informal. However, the more formal and structured the program is, the more quantitative the measurements of employee skill levels will be.

A typical job rotation cycle can last from one to two years, depending on the size of the organization. Each assignment in the rotation can last from four to eight months.

There are four major benefits that organizations get from job rotation. The first is that managers (with input from HR) can assess new employees' skills and use that information to determine where they should be placed after the job rotation cycle ends.

The second benefit is that HR can use the information gained from each manager's review of the employee to identify future leaders. This in turn allows those employees to be groomed and nurtured to move into management and/or executive-level positions.

The third benefit is that job rotation allows the employee to be exposed to the organization's culture across various business units, including foreign locations. This will also help in the career pathing process because employees have a chance to experience living in different environments. This can help them decide where they are interested in living after the job rotation cycle ends.

Risk management is the focus of the last benefit. Because employees have worked for different managers and have gained a wide variety of business knowledge, they are able to step into different jobs when there is a need (for example, during a period of an increase in retirements, resignations, or layoffs).

How adults learn

In general, adults take responsibility for their own learning. When providing training to adults, however, employers should take into account several characteristics of adult learners:

- Adults usually want to utilize knowledge and skills they have learned soon after they have learned them.
- Trainees are interested in learning new concepts and principles; they enjoy situations that require problem-solving, not necessarily learning facts.
- Adults learn better if they are active participants rather than passive learners.
- Adult learners want to relate the new material to past experiences of their own.
- Students will learn best if they are able to proceed at a reasonable pace.
- Motivation is increased when the content is relevant to the immediate interests and concerns of the trainees.
- Adults like immediate feedback.

Both trainees and the instructor should be active in the learning process. A training environment that keeps these characteristics in mind while addressing the variety of learning styles can be very effective.

Learning styles categorize how adults take in and process information. The main learning styles are visual, auditory, and kinesthetic.

Visual learners learn by seeing. Effective training tools include videos, PowerPoint presentations, diagrams, computer-based training programs, handouts, or any material that includes illustrations. Visual learners may like to take notes during lectures.

Auditory learners learn by hearing. Effective training tools include lectures, discussions, question and answer periods, or anything that gets the class talking. Auditory learners may like to make tape recordings of class sessions.

Kinesthetic learners learn by doing. Effective training tools include participating in demonstrations, role-playing exercises, or any exercises that involve trying out new skills. Kinesthetic learners may want to volunteer to participate in class activities.

Effective training programs address all of the learning styles and avoid long lectures or endless presentations. Training should be designed to present material on a topic and then break up the class with brief discussions, exercises, demonstrations, quizzes, games, or other activities to reinforce the content and draw out questions before moving on to the next topic.

Learning environment

Adult trainees are interrupting their busy schedules for training because they feel the training is important. To respect this, the training environment should be set up to minimize distractions. Trainees should be asked to shut off their phones and pagers. Because adult learners' time is at a premium, classes should start and end on time.

However, because adults learn by sharing their experiences, the trainer should maintain an informal classroom atmosphere that encourages questions and interaction. Providing beverages and snacks makes the trainees more comfortable about getting up to move around when they feel the need to stretch.

Online training should be conducted so that the trainee does not have to answer the phone or emails, or be interrupted by coworkers, during the training period. Technical difficulties present another distraction. Trainers should give the trainees detailed instructions on how to use the software before leaving them to the training program. Technical support should be immediately available.

Useful content

Adults learn best when the training content is immediately useful on the job. Adults are focused on their present tasks, so they may not see the relevance of training content that might be useful for a future project. The trainer should use examples, demonstrations, and practice exercises that are targeted to the job.

The trainer can facilitate learning by asking for questions and relating the responses to the trainees' work duties. The trainer can suggest how the materials can help the trainees set priorities on the job. Handouts should be concise and useful references.

Adult learners lose interest or become impatient if they feel that the training content is not as advertised. Even though adults learn by sharing experiences, they expect the trainer to be knowledgeable in the subject matter. The presentation must be smooth, practiced, and well organized.

By outlining the course objectives at the start of class and referring to them as the information is covered, the trainer displays confidence and the trainees know what to expect. Discussions are a wonderful learning tool, but being sidetracked by unrelated topics is a waste of time. When discussions wander, the trainer should reign in the class with a reminder that it is important to stick to the itinerary.

Sharing experience

Adults bring loads of experience to the classroom, and everyone will benefit if the trainer encourages the trainees to share their experiences. The trainer should encourage discussions and networking both during class and at breaks. The entire class, including the trainer, should be ready to learn from the trainees, and the trainer should recognize trainees who have relevant expertise.

Computer-based training presents challenges to trainee interaction. If several trainees are taking the same online training programs, the trainer can set up a chat room or have email discussion assignments to promote interaction.

Provide feedback

Since adults like to know where they stand, the trainer should continuously inform the trainees of their progress. This should be done in a way that will not give anyone a feeling of failure in front of their peers. Feedback becomes much more important if the class is for some type of qualification or certification and the trainees need to meet certain criteria to pass the course.

After each exercise or quiz, the trainer should discuss correct replies and allow time for trainees to go back and make corrections to their work. Adults like to be rewarded. Small prizes for class participation are appreciated. When the class is over, the trainees should feel that their expectations have been met and that they have accomplished the course objectives.

Adults like to give their opinions, but they don't have a lot of time to complete extensive training evaluations. Evaluations using checklists or short answers can meet this challenge. If trainees are involved in ongoing training programs, they want to know that their opinions matter. The trainer should acknowledge changes to the program that were prompted by trainee evaluations.

Establishing a Tuition Assistance Program (TAP)

In an effort to retain good employees, many organizations are offering a wider variety of employee benefits in addition to wage increases. Employers also see value in investing in their employees' efforts to improve their job-related skills and knowledge, and to acquire the education necessary to enhance their management skills or prepare for career-related promotional opportunities.

For these reasons, organizations may offer financial assistance to employees who wish to further their education through Tuition Assistance Programs (TAPs). Tuition assistance programs have proven to be effective tools in the retention of motivated employees and the creation of a highly-skilled workforce.

Some employers require that the employee's field of study relate to a current or future position in the company. For example, it may make sense to sponsor an employee in purchasing who wishes to get a degree in finance. However, it may be impractical for a company to sponsor an employee who operates a printing press and wishes to get a degree in history.

On the other hand, there is a philosophy that no education is ever wasted. Employers that offer TAPs to employees regardless of how that education may apply to the employee's work feel that the costs of the program are repaid by an employee that may be happier and more productive.

The employer may establish eligibility criteria for such programs. That criteria may include that the employee:

- Have a certain level of seniority;
- Be employed for a minimum period of time before applying;
- Finish the course of study within a certain period of time;
- Stay with the company for a specified period of time after making use of the program;
- Only enroll at a specified school, in a specified course of study, or in a certain major.

Organizations may place guidelines and restrictions on such programs. For example, the TAP may only cover the tuition for courses in the core curriculum of a program, and then only in certain majors (for example, accounting, business, or finance). If a student wants to take courses outside of the curriculum, they may need to provide proof the classes are required for the major or would pay dividends for the company.

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The TAP may require that the employee repay any money received toward tuition reimbursement if the employee discontinues classes. The employee may be required to repay the money to the employer while waiting for a refund from the university, if they are to receive a refund at all.

Employers also differ in that some only provide benefits for graduate-level study. Some company TAPs only apply to pre-approved courses, programs of study, or majors for benefits to apply.

Organizations that do support a well-rounded continuing education by supporting courses that fall outside a core curriculum or major generally end up with employees that have improved problem-solving skills.



How is assistance paid?

Organizations may also require that the student/employee maintain a certain grade point average (GPA) to continue receiving the program benefits. The employer may decide to make the amount of tuition that is to be reimbursed dependent upon the GPA; for example, a company will pay 100 percent of tuition for a 4.0 GPA, but a reduced percentage for a lower grade point average.

Employees/students may also be responsible for the initial payment for courses upon enrollment, with the employer reimbursing the employee later, perhaps quarterly, by the semester, or after a final grade has been awarded.

The TAP may also require that the employee/student remain with the organization for a determined length of time after completion of a program. If not, tuition benefits may need to be repaid.

As an added incentive to employees, some organizations also make available tuition assistance or grants to dependent children attending college or technical schools. Again, many organizations make availability of the assistance or the amount of payment dependent upon performance in the program, such as grades.

Who administers the program?

Tuition assistance programs are usually administered through an organization's Human Resources department or are part of an employee's benefits package. Employees who received tuition assistance from employers also receive a federal tax exemption up to a specified dollar amount each year. Employers often provide for reimbursement up to that amount.

Evaluate whether such a program would benefit the organization. There are a variety of different ways to structure a TAP. Check with a local technical school or community college on price breaks on specific programs or degrees, or whether instructors could come to the facility to teach for a group of employees.

Any way the TAP is structured, organizations have seen real benefits to these types of program.

Improve tuition assistance

Many employers who offer these programs experience relatively low participation and are unsure how to get the most out of their investment. With some work, a tuition assistance program can evolve to help efficiently and effectively cultivate and maintain highly skilled employees, which is especially important in the face of a nationwide skills gap.

To avoid paying for tuition unnecessarily, let employees know that costs submitted will be verified. They should be required to itemize and provide receipts for any expenses that are reimbursed. Employees may be discouraged from taking courses that are not work related if they must explain the relation of courses to their professional lives.

Also remember that though many employees will enroll as non-traditional students, their approach to higher learning can still follow the example of traditional college-bound students. Look into colleges' placement testing that allow students to test out of some courses and move directly to higher-level instruction.

Don't sell the company short by assuming that employees' enrollment in a particular college or program isn't significant. At least half of all college students are adult learners, a great majority of whom are funded at least in part by tuition assistance programs. Remember that colleges and universities are businesses, too, and they are fully aware of the impact that these programs have on their own bottom lines.

With this in mind, don't be afraid to negotiate with institutions for discounted tuition rates or other arrangements that could further benefit employees.

If a tuition assistance program is not benefitting the company as much as expected, consider setting more stringent guidelines regarding reimbursable courses of study. The company may even want to determine the specific courses or programs that are (or are not) eligible for tuition assistance.

However, even if courses seem to have little or no relevance to the company's business function, don't overlook the value of courses that teach critical thinking or creative skills. While employers have every right to restrict employees to a more career-centered path, they might also want to consider the benefits of a broad educational scope.

Conduct some research to determine which institutions would best suit employees. Consider a school's reputation for quality, along with its convenience and ability to accommodate employees' needs. Not every institution will be equally suited to fit a company's educational needs. After weighing options, limit those from which employees can choose, or simply recommend some over others.

Top five promotion mistakes

The most common mistake organizations make when hiring or promoting managers and executives, according to a survey by Right Management, is failing to define and assess those roles most crucial to successful performance.

More than four out of 10 companies cited inadequate definition and evaluation of roles critical to successful performance as the number one mistake businesses make in hiring and promoting managers and executives, according to the survey. The most common mistakes organizations make in hiring and promoting managers and executives are:

1. Inadequately defining and evaluating roles critical to successful performance, chosen by 43 percent of respondents;
2. Insufficient grooming of high-potential employees through coaching, mentoring, and training programs, 41 percent;
3. Using overly subjective criteria and unreliable assessment tools, 29 percent;
4. Too much focus on the basic requirements of the jobs to which people are being hired or promoted — such as managerial and interpersonal skills — and not enough emphasis on less apparent talents, such as morale or team building, 27 percent;
5. Giving inadequate consideration to people from outside the organization, 20 percent.

According to a survey, it costs an average of 2½ times an individual's salary to replace an employee who doesn't work out. These costs are reflected in recruitment, training, severance costs, and lost productivity.

To combat these mistakes, human resources can:

- Define what it takes to be successful in a given position. This includes establishing the skills, abilities, and competencies of the successful candidate.
- Be sure the career pathing programs are effective in adequately preparing high-potential employees for advanced positions.
- Evaluate assessment tools; if they're not doing the job in matching people to positions, it may be time to investigate other methods.
- Look outside as well as within the organization for talent. It is not *always* preferable to hire from within. Hiring from the outside can bring an infusion of fresh ideas to the table, as well as skills or knowledge that are lacking internally.

Sample promotion letter

Date

Employee name

Dear (name),

Our most genuine congratulations on your promotion to the position of (title)! As we are all familiar with your achievements as a (previous position), no one was surprised to learn of your promotion.

Your excellent record of achievement is an example for all of us to follow. You should take much pride in your accomplishments. We are proud to have you working with us and look forward to your continued contributions!

Sincerely,

Manager name, title

Sample promotion announcement

Date

To: All Employees

From: Manager name or department

RE: Promotion Announcement

We are happy to announce the promotion of (name) to the position of (title). (Name), who joined (company name) in (year), has served in the following roles (list position titles), most recently serving in the position of (most recent job title).

This promotion recognizes the contributions made to (company name) and the accomplishments achieved during (name)'s tenure with the organization, and is effective on (date). We wish (name) the best of luck as (he/she) takes on new job responsibilities.

Please join us in congratulating (name) on (his or her) promotion!

Work/life balance & wellness

Work/life balance and wellness are separate initiatives, and while employers can have one type of program without the other, adopting both can reinforce the message that the company is concerned with employee's personal lives and well-being. In that sense, the two programs go hand-in-hand.

Helping employees maintain work/life balance is a challenge because employees have different perspectives of what constitutes the best balance. An employee who has young children and also has responsibilities to care for aging parents may value options like flexible time or reduced hours far more than an employee who is primarily interested in moving up the corporate ladder.

Of course, maintaining balance means keeping the balance in workloads as well as personal lives. While an employer may certainly consider a request for greater balance (whether flexible hours, a different schedule, or some other change), be wary that granting the request does not increase the burdens on other employees, who may have to cover for someone else. This upsets the balance.

Not all workplaces are conducive to programs for work/life balance, and even those that can make changes might be limited to certain departments or job classifications. However, any organization can implement a wellness program. Essentially, these programs encourage employees to live healthier lifestyles, since the majority of health problems (such as diabetes, heart disease, and lung disease) can be controlled through personal choices in eating, exercise, and refraining from smoking.



Work/life balance

Balancing work, life, and family is important for all workers. If employee relations are to remain good, the employer must take steps and implement programs to help employees with this balancing act. Further, if employers want to attract and retain quality workers, they must address work/life needs. If Employer A will not give an employee time off to take his dog to the vet, then he will go to Employer B, who will give him the time off.

Work/life programs do not have to be expensive or complex. Just adding flexible work schedules may be all that is needed to give employees the work/life balance they need. This is the most common solution for increasing work/life balance, but depending on the employees' personal situations, other options, such as dependent care, might be considered.

Keeping the balance

At first, it might seem that having employees dedicated to work above all else is a good thing, but when employees' work/life balance is off, they're probably not at their best. The stress of too much work could leave employees fatigued, potentially causing them to make mistakes they wouldn't otherwise make. Constant stress and fatigue can even cause employees to get sick and be absent from work more often.

Throw in the added pressures of a personal life that isn't getting the attention it needs and it becomes even clearer how an over tasked employee might not be at his or her best. Employees' attitudes might suffer if they resent the toll their work is taking on their home life. They may even feel the effects of burnout, which can contribute to higher turnover rates.

Unfortunately, an employee who isn't able to achieve balance might not recognize this as a problem, so it may be up to employers to determine whether or not employees' workloads are balanced enough to allow them to perform at their full potential. While managers and supervisors may be able to observe this just by keeping an eye on their direct reports, other approaches such as employee surveys, one-on-one interviews, or small focus groups can also be helpful to gather specific feedback from employees on the subject.

Encouraging balance

One of the most common ways to help employees achieve balance is to allow them some flexibility in when and where work may be done. Allowing employees to work from home or at varying times during the day (or night) could make the difference between a solid and a strained personal life.

Creating flexibility with scheduling is not only likely to ease the stress levels of current employees, but may also be a means of attracting candidates to the organization. Some studies even suggest that employees work harder for employers who provide work/life balance — as much as 21 percent harder according to a study conducted by the Corporate Executive Board.

One of the biggest mistakes is to provide employees with perks that they don't value. For example, depending on company culture, employees might value an investment to provide onsite fitness facilities. But there's also the possibility that employees don't view this as a benefit, or that they won't use it to improve their work/life balance. Find out what employees want and what will help them achieve balance before making a costly investment.

Who wants flexibility?

Many people have the misconception that individuals with families are those that most want flexibility in order to balance their work and family commitments. However, studies have repeatedly shown that flexibility is extremely important to other groups of workers as well.

Members of Generation Y may not have young children, but they value the flexibility to put their personal lives at the same priority as their work lives. Gen X and Yers tend to view work as mobile. Many of them have a firm grasp on technology and have a hard time understanding why work can only be done in an office environment from 9 to 5.

In addition, older workers who wish to stay in the workplace longer may also want the flexibility of part-time scheduling or intermittent work. Employers may be able to keep these workers in the workplace longer, which can facilitate knowledge transfer to younger employees.

Communicate, communicate, communicate

If the company does value work/life balance, make sure employees know it. Distribute information to convey the importance of this concept and show the company's commitment to it. If the organization has an Employee Assistance Program (EAP), make sure employees know that it exists and that they can use it to get help if they're having trouble balancing responsibilities. An employer may even be able to work with the EAP provider to get feedback (anonymous, of course) about the struggles employees are facing to achieve work/life balance.

Impacts of long-term high output

When workloads increase, most employees initially respond by working extra hard, but few can keep up a frenzied pace for the long haul. For some, the herculean effort no longer means a few weeks here and there, but has become the new baseline. Addressing stress and burnout often means reducing demands on employees, but this might be something the organization is not willing (or able) to do.

For employees experiencing high levels of stress over long periods of time, it can be an extremely short trip from burned out to disengaged, and that should matter to the organization.

While demanding job responsibilities can cause burnout over time, this isn't the only cause. Other common reasons may include unclear job expectations, inappropriate resources, and even personality factors.

Because employees may fear the repercussions of complaining, the organization will likely need to ask employees in a nonthreatening way (perhaps through anonymous surveys) about their stress levels and any changes they might like to see in the workplace or in company policies. Small changes (like flexible scheduling, increased recognition, or clarifications of priorities) can also help combat burnout.

Managers: Your eyes and ears

Even if employees aren't talking, managers and supervisors can provide input. Encourage them to report any signs that stress is reaching dangerous levels or that employees' work habits and/or output are changing. Indicators might include a once-stellar and highly motivated employee who has become cynical, inefficient, and disengaged. Employees may stop offering input or solutions, or a previously enthusiastic attitude may have disappeared, replaced by skeptical remarks and heavy sighs.

Employees who are burned out (or on the verge) can be brought back. Encourage managers to talk to employees whose attitudes and performance have changed to find out what can be done. Help them realize that it's a fundamental part of a manager's role to recognize employee fatigue and make the adjustments necessary to ensure that employees can remain focused and productive. Also, be ready to help them devise a strategy or obtain the resources needed to get employees on the road to recovery. The following offers a few factors that might need to be addressed, and may help employees avoid burnout during extended periods of high output.

Unclear job expectations. Some employees cannot articulate what it means to be successful in their positions, or may not even know if they are doing well. Make sure employees understand their responsibilities, and how much (in terms of time or output) is expected. In particular, confusion may arise if the job duties have evolved or changed, perhaps because of new processes or because of new duties after a restructuring or reduction in the workforce.

Inappropriate or limited resources. If a team doesn't have the appropriate resources (such as equipment or training), they should at least know that the company is working to obtain what they need. In cases where resources are simply unavailable, acknowledge the limitations and help employees find a workaround. For instance, if the missing resource is manpower, help employees to identify priorities within current workloads and determine where new projects fit in the list.

Personality factors. Watch for employees who consistently go above and beyond — to a fault. Some individuals don't know whether it's okay to say "no," and may continue to accept assignments to the detriment of their stress levels and personal lives. Setting boundaries may help prevent the eventual burnout.

Lack of control. Employees may feel they don't have control over their own time (perhaps last minute projects are constantly popping up) or that they're not involved in the decision making process. Giving employees as much authority as possible may help them organize their work and manage their time more appropriately, helping them avoid burnout.



Cross reference

See **Dealing with burnout** later in this chapter.

Being addicted to work

In many organizations, difficult times for employers over the past year or two have translated into more responsibilities for individual employees. Unfortunately, the more responsibilities employees amass, the more difficult it may be for them to maintain balance between their work and personal lives.

A study from CareerBuilder addressing work/life balance indicates that a substantial number of employees struggle to separate their professional and personal lives. The study even suggests that some employees may be *addicted* to work. According to this study:

- 24 percent of workers reported that when they're at home or out socially, they're still thinking about work.

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- 19 percent often dream about work.
- 16 percent stated that most of their conversations (at work, home, or out socially) always tend to focus on work.

Employees also reported difficulty with personal relationships as a result of such an intense focus on business. In fact, 22 percent of workers indicated that they don't have time to pursue personal interests because of work, while 12 percent said that the amount of time spent on work causes friction with their family. Perhaps most surprisingly, 9 percent of respondents indicated that they are more concerned about approval from their boss than from their family.

Helping employees achieve balance between their personal and professional lives is definitely in the organization's best interest. Employees who are balanced and not overly stressed will typically perform better, be happier, stay with the organization longer, and have lower rates of absenteeism.

However, some managers feel powerless in helping their employees achieve work/life balance, particularly when they don't have funds allotted to provide certain perks to their employees. But encouraging work/life balance doesn't have to cost a thing: the number one perk craved by many employees is flexible scheduling. This could include allowing employees to set their own schedules or letting them work from home on occasion.

Even if the company cannot give employees the kind of flexibility they desire, it can still be beneficial to consider options for helping employees.

For example, supervisors might have the authority to make it easy for employees to trade shifts with one another or make their schedules available well ahead of time. Steps like these, though simple, can support employees' efforts to coordinate their personal and professional lives.

To learn how to improve employees' work/life balance, start by asking them. Find out how they struggle, why they struggle, and what they think could be done about it. Employees are in the best position to explain how they could get their job done without sacrificing their personal lives.



Stress on the job

Job stress poses a threat to the health of workers and, in turn, to the health of organizations. Job stress can be defined as the harmful physical and emotional responses that occur when the requirements of the job do not match the capabilities, resources, or needs of the worker. It can lead to poor health and even injury.

The concept of job stress is often confused with that of a challenge, but these concepts are not the same. A challenge energizes people psychologically and physically, and it motivates them to learn new skills and to master the job. When challenges are met, employees feel relaxed and satisfied; thus, challenge is an important ingredient for healthy and productive work. The importance of challenges in work lives is probably what people are referring to when they say a little bit of stress is good.

While it is true that some stress probably is a good thing for most people, studies indicate that too much job stress has become a common and costly problem in the workplace. For example:

- One-fourth of employees view their jobs as the number one stressor in their lives.
- Three-fourths of employees believe that today's workers have more on-the-job stress than a generation ago.
- Problems at work are more strongly associated with health complaints than are any other life stressor — more so than even financial problems or family conflicts.

Causes of job stress

Nearly everyone agrees that job stress results from the interaction of the worker and the conditions of work. Views differ, however, on the importance of worker characteristics versus working conditions as the primary cause of job stress. These differing viewpoints are important because they suggest different ways to prevent stress at work.

According to one school of thought, differences in individual characteristics, such as personality and coping style, are most important in predicting whether certain job conditions will result in stress. In other words, what is stressful for one person may not be a problem for someone else.

This viewpoint leads to prevention strategies that focus on workers and ways to help them cope with demanding job conditions. Although the importance of individual differences cannot be ignored, scientific evidence suggests that certain working conditions are stressful to most people. Such evidence argues for a greater emphasis on working conditions as the key source of job stress, and for job redesign as a primary prevention strategy.

On the basis of experience and research, the National Institute for Occupational Safety and Health (NIOSH) favors the view that working conditions play a primary role in causing job stress. However, the role of individual factors is not ignored. According to the NIOSH view, exposure to stressful working conditions (called job stressors) can have a direct influence on worker safety and health. But individual and other situational factors can intervene to strengthen or weaken this influence.

Examples of individual and situational factors that can help to reduce the effects of stressful working conditions include the following:

- Maintain a balance between work and family or personal life.
- Develop a support network of friends and coworkers.
- Maintain a relaxed and positive outlook on life in general.



Cross reference

For information on helping employees deal with stress, see the **Managing Problems** tab.

Job stress and health

Stress sets off an alarm in the brain, which responds by preparing the body for defensive action. The nervous system is aroused and hormones are released to sharpen the senses, quicken the pulse, deepen respiration, and tense the muscles. This response (sometimes called the fight or flight response) is important because it helps us defend against threatening situations. The response is preprogrammed biologically. Everyone responds in much the same way, regardless of whether the stressful situation is at work or home.

Short-lived or infrequent episodes of stress pose little risk, but when stressful situations go unresolved, the body is kept in a constant state of activation, which increases the rate of wear and tear to biological systems. Ultimately, fatigue or damage results, and the ability of the body to repair and defend itself can become seriously compromised. As a result, the risk of injury or disease escalates.

In the past 20 years, many studies have looked at the relationship between job stress and a variety of ailments. Mood and sleep disturbances, upset stomach and headache, and disturbed relationships with family and friends are examples of stress-related problems that are quick to develop and are commonly seen in these studies.

These early signs of job stress are usually easy to recognize. However, the effects of job stress on chronic diseases are more difficult to see because chronic diseases take a long time to develop and can be influenced by many factors other than stress. Nonetheless, evidence is rapidly accumulating to suggest that stress plays an important role in several types of chronic health problems — especially cardiovascular disease, musculoskeletal disorders, and psychological disorders.

Stress, health, and productivity

Some employers assume that stressful working conditions are a necessary evil — that companies must turn up the pressure on workers and set aside health concerns to remain productive and profitable in today's economy. But research findings challenge this belief. Studies show that stressful working conditions are actually associated with increased absenteeism, tardiness, and intentions by workers to quit their jobs, all of which have a negative effect on the bottom line.

Studies of so-called “healthy organizations” suggest that policies benefitting worker health also benefit the bottom line. A healthy organization is defined as one that has low rates of illness, injury, and disability in its workforce and is also competitive in the marketplace. NIOSH research has identified organizational characteristics associated with both healthy, low-stress work and high levels of productivity. Examples of these characteristics include the following:

- Recognition of employees for good work performance,

- Opportunities for career development,
- An organizational culture that values the individual worker, and
- Management actions that are consistent with organizational values.

Preventing job stress

No standardized approaches or simple “how to” manuals exist for developing a stress prevention program. Program design and appropriate solutions will be influenced by several factors, such as the size and complexity of the organization, available resources, and especially the unique types of stress problems faced by the organization.

Although it is not possible to give a universal prescription for preventing stress at work, it is possible to offer guidelines on the process of stress prevention in organizations. In all situations, the process for stress prevention programs involves three distinct steps: problem identification, intervention, and evaluation. For this process to succeed, organizations need to be adequately prepared. At a minimum, preparation for a stress prevention program should include the following:

- Building general awareness about job stress (causes, costs, and control).
- Securing top management commitment and support for the program.
- Incorporating employee input and involvement in all phases of the program.
- Establishing the technical capacity to conduct the program through specialized training for in-house staff or use of job-stress consultants.
- Bringing workers or workers and managers together in a committee or problem-solving group to develop a stress-prevention program.

Research has shown these participatory efforts to be effective in dealing with ergonomic problems in the workplace, partly because they capitalize on workers’ first-hand knowledge of hazards encountered in their jobs. However, when forming such working groups, care must be taken to be sure that they are in compliance with current labor laws.



Best practice

Methods for reducing stress

Some proven methods for reducing job stress in any organization include the following:

- Ensure that the workload is in line with workers’ capabilities and resources.
 - Design jobs to provide meaning, stimulation, and opportunities for workers to use their skills.
 - Clearly define workers’ roles and responsibilities.
 - Give workers opportunities to participate in decisions and actions affecting their jobs.
-

- Improve communications and reduce uncertainty about career development and future employment prospects.
 - Provide opportunities for social interaction among workers.
 - Establish work schedules that are compatible with demands and responsibilities outside the job.
-

Three steps toward prevention

Low morale, health and job complaints, and employee turnover often provide the first signs of job stress. But sometimes there are no clues, especially if employees are fearful of losing their jobs. Lack of obvious or widespread signs is not a good reason to dismiss concerns about job stress or to minimize the importance of a prevention program.

Step 1: Identify the problem — The best method to explore the scope and source of a suspected stress problem in an organization depends partly on the size of the organization and the available resources. Group discussions among managers, labor representatives, and employees can provide rich sources of information. Such discussions may be all that is needed to track down and remedy stress problems in a small company. In a larger organization, such discussions can be used to help design formal surveys for gathering input about stressful job conditions from large numbers of employees.

Regardless of the method used to collect data, information should be obtained about employee perceptions of their job conditions and perceived levels of stress, health, and satisfaction. The list of job conditions that may lead to stress and the warning signs and effects of stress provide good starting points for deciding what information to collect.

Objective measures such as absenteeism, illness and turnover rates, or performance problems can also be examined to gauge the presence and scope of job stress. However, at best, these measures are only rough indicators of job stress.

Data from discussions, surveys, and other sources should be summarized and analyzed to answer questions about the location of a stress problem and job conditions that may be responsible. For example, are problems present throughout the organization or confined to single departments or specific jobs?

Survey design, data analysis, and other aspects of a stress prevention program may require the help of experts from a local university or consulting firm. However, overall authority for the prevention program should remain in the organization.

Step 2: Design and implement interventions — Once the sources of stress at work have been identified and the scope of the problem is understood, the stage is set for design and implementation of an intervention strategy. In small organizations, the informal discussions that helped identify stress problems may also produce fruitful ideas for prevention. In large organizations, a more formal process may be needed. Frequently, a team is asked to develop recommendations based on analysis of data from Step 1 and consultation with outside experts.

Certain problems, such as a hostile work environment, may be pervasive in the organization and require companywide interventions. Other problems, such as excessive workload, may exist only in some departments and require more narrow solutions, such as redesign of the way a job is performed. Problems may also be specific to certain employees and may be resistant to any kind of organizational change, calling instead for stress management or employee assistance

interventions. Some interventions might be implemented rapidly, such as improved communication and stress management training. Others may require additional time to implement, such as the redesign of a manufacturing process.

Before any intervention occurs, employees should be informed about actions that will be taken and when they will occur. A kickoff event, such as an all-hands meeting, is often useful for this purpose.

Step 3: Evaluate the interventions — Evaluation is an essential step in the intervention process because evaluation determines whether the intervention is producing the desired results. Be sure to establish time frames for evaluating interventions, and verify that interventions involving organizational change receive both short- and long-term scrutiny. Short-term evaluations might be done quarterly to provide an early indication of program effectiveness or possible need for redirection. Long-term evaluations are often conducted annually and are necessary to determine whether interventions produce lasting effects.

Remember that employee perceptions are usually the most sensitive measure of stressful working conditions and often provide the first indication of intervention effectiveness. Also keep in mind that the job stress prevention process does not end with evaluation. Rather, job stress prevention should be seen as a continuous process that uses evaluation data to refine or redirect the intervention strategy.

Flexible scheduling

Flexible work schedules are becoming common, especially for workers in some occupations. Among the major occupational groups, flexible schedules are most common among management, professional, and related occupations. Flexible schedules also are prevalent among sales and office workers. In contrast, fewer natural resources, construction, maintenance, production, transportation, and material moving workers have such flexibility.

A flexible work schedule is an alternative to the traditional 9 to 5, 40-hour workweek. It allows employees to vary their arrival and/or departure times. Under some policies, employees must work a prescribed number of hours per pay period and be present during a daily “core time.” The Fair Labor Standards Act (FLSA) does not address flexible work schedules. Alternative work arrangements such as flexible work schedules are a matter of agreement between the employer and the employee (or the employee’s representative).

There are many approaches to flexible scheduling. Some companies have multiple options available. A few of the more common types of flexible scheduling are:

- Flex time
- Alternate fixed workweek
- Compressed workweek
- Part time



Flex time

Flex-time programs usually allow workers to vary their start and end times each day while still working the core business hours and still working at least eight hours per day.

Benefits of flex time

- Reduces employee absenteeism and tardiness
- May reduce overtime costs
- Serves as a recruiting tool
- Reduces turnover
- Provides more staffing options
- Can help service customers in other time zones

Flex-time problems

- Potential for inadequate staffing during certain times (such as Friday afternoons)
- Difficult to schedule meetings
- Can cause friction between those who can't use flex time
- Can cause customers difficulty in obtaining certain services or reaching certain individuals
- Supervisory constraints

Alternate fixed workweek

Another form of flexible scheduling is the alternate fixed workweek. This type of workweek, unlike flex time, is usually a fixed arrangement (meaning it doesn't vary from day to day or week to week). Instead, workers are given the opportunity to fix their workweek on nontraditional days. For instance, if the regular workweek is 40 hours per week, Monday through Friday, from 8 a.m. to 5 p.m., an alternate fixed workweek might be 40 hours per week, Wednesday through Sunday, 8 a.m. to 5 p.m. The hours or times don't change, but the days do.

Compressed workweek

Compressed workweeks take the regular 40 hours of work and condense them into fewer than the typical five days. A common option includes four 10-hour days.

Benefits of the compressed workweek

- Reduces absenteeism and tardiness
- Allows workers to enjoy extended time off
- Can lead to higher productivity
- Allows for customer contact at irregular times
- Cuts down turnover

Possible problems

- Not everyone may be eligible
- Fatigue can set in for some workers
- Scheduling can be difficult
- Safety considerations of long hours

Part time

This type of scheduling has fixed workdays and hours each week, but does not accumulate 40 hours per week. This type of schedule can be used in conjunction with a job-sharing program, where two employees share the performance of a specific job (one employee works Monday through Friday from 8 a.m. to noon, another employee works the same job Monday through Friday from noon to 4 p.m.).

Use pilot programs

When instituting a new flexible scheduling program, it's a good idea to try a pilot program, either using the entire company or one department. This will give an idea of how the program might work and help identify any potential problems.

Allow departments to retain control

Another method of ensuring flexible scheduling does not create problems is to allow departments the opportunity to control their participation in the programs *when* it is creating an undue hardship. This can eliminate staffing concerns and customer service issues.

Dealing with burnout

Burnout is a term to describe physical or emotional exhaustion resulting from long-term stress or lack of work-life balance. It can happen to anyone, in any kind of job. Unfortunately, it is most likely to occur when employees have the least capability to address it, often arising during long periods of heavy workloads.

Symptoms can include exhaustion, depression, headaches, upset stomach, and difficulty sleeping. Burnout can also create feelings of apathy, negativity, frustration, and loss of motivation. In extreme cases, symptoms can manifest as behavioral changes such as angry outbursts, withdrawal, or constant complaining.

Many organizations may know of one or two employees who consistently lack the desired level of motivation, but those individuals may have issues other than burnout. However, if an employee who normally demonstrates high levels of performance starts exhibiting these symptoms, these may be warning signs of burnout. The manner in which the company addresses the situation should reflect this awareness.

For example, if a valued employee is exhausted, complaining more than usual, and starting to experience performance issues, discipline may not be the best response. Obviously, speaking to the employee about the situation will be necessary. But rather than imposing a performance improvement plan (which may increase existing stress levels), keep an open mind to the possibility of reducing the employee's workload, or suggesting a few days off, to help the employee get back in balance.

A manager who knows his or her employees should recognize if someone is using burnout as an excuse for problems that pre-date the burnout claim. But where burnout could be a legitimate issue, it may help to point out that burnout can happen to anyone, and employees shouldn't be ashamed to admit that stress can have adverse effects.

For example, if performance is declining due to burnout, and the employee is working longer hours in hopes of meeting deadlines, the display of dedication might be rewarded with time off to recover, rather than punished with demands for immediate improvement under threat of discipline. While a manager should not attempt to diagnose conditions such as depression or burnout, recognizing the symptoms may justify suggesting time off, or mentioning that the Employee Assistance Program could provide help through counseling.

Even if full days away from work aren't possible, shorter breaks may help employees mentally recover. Busy employees may be tempted to skip lunch, for example, but taking a full hour lunch break might help the employee refresh his or her mind and return for a more productive afternoon. Even taking a 10 or 15 minute walk during a morning or afternoon coffee break can provide a mental diversion.

A little support from management to encourage maintenance of work-life balance may help employees through difficult times. Employees who know that they have support to take breaks or time off, if needed, and know that help is available upon request, may get some mental relief simply from realizing that they aren't alone in the situation.

Encouraging work/life balance

More and more companies are providing benefits to their employees with the good intentions of helping them balance their work lives with their personal responsibilities. A *Human Resources Executive* study indicated that 80 percent of employers worldwide actively support family-friendly atmospheres in their workplaces. However, a 2010 Society for Human Resource

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Management study stands in contrast, indicating that almost 90 percent of Americans feel that work/life balance is a problem in the United States.

Though the two sets of findings don't seem to coalesce, it is possible that both are relatively accurate. Although many companies' intentions to encourage work-life balance are realized, some may lack follow-through, while others may be sending mixed messages. A company may implement a policy or deliver a message to demonstrate the value it places on work/life balance, only to undermine such efforts with its everyday practices.

Below are some red flags that may indicate that the work/life balance program may be falling short of helping some employees:

- Generous vacation allowances are often cashed out by employees who are too overtasked to take time off. Worse, employees are regularly losing vacation under a "use it or lose it plan" because they aren't able to use the time.
- The company has a "relaxation room" but the company tracks how much time employees spend there rather than paying attention to the amount of work they get done.
- Successful employees are allowed to take unpaid time off, but time taken is often held against them when it comes time for raises or consideration for a promotion.
- Employees are paid for their lunch breaks. When the policy began, it was meant to encourage employees to take a lunch, but it's made them feel as though they must eat at their workstations.
- Employees are allowed to set their own hours, but those who leave early (because they come in early) are regarded as slackers.
- The organization boasts a results-only work environment but still uses hours worked as a metric on performance reviews.
- Though telecommuting is allowed for some employees, these individuals are often left out of the loop and treated like second-class employees.
- Employees are told that the organization respects their personal time, but they are still expected to respond to emails and phone calls in the evenings and on weekends.
- Flex time is allowed, but the terms of its use are unclear. Employees who overuse it may be reprimanded, but are never told what the company considers to be acceptable use of the benefit.

The moral of the story is that if the company truly values work/life balance, it must be consistent in the messages it sends. Policies may be a necessary start, but the organization must enforce them in a way that doesn't undermine the very principles they are meant to support. If employees feel that work/life balance perks always come with a catch, they're not likely to utilize them.



Best practice

Help vacationing employees unplug

A seemingly endless supply of surveys and studies say that U.S. workers are terrible at taking vacations. Even when workers do take time away from work, few completely unplug and leave work at the office, two things experts say are necessary if employees want to truly de-stress.

For many workers, the idea of removing themselves from the workplace completely is hard to implement. This is especially true for workers who don't have the support of management.

If you want your employees to take the time they need to rejuvenate and return ready to tackle their work, try these tactics to encourage a relaxing vacation:

- **Plan for absences.** Consider cross-training your teams so there is always someone who can perform another teammate's essential functions while he or she is away. Adequately covering employees' responsibilities allows them to not think about work while on vacation.
- **Disconnect.** If your company provides employees with a cellphone and laptop, have them leave those devices in the office while away. If the employees use their own devices, encourage them not to check in, and then don't call them unless absolutely necessary.
- **Model the desired behavior.** The single best way to inspire specific action is to demonstrate it. When it is your turn to go on vacation, plan, disconnect, and enjoy.



Why employees are NOT out to lunch

A survey by Right Management found that about one-third of employees have lunch at their desks each day. Another one-third take no lunch at all, or only take time out occasionally.

There may be an explanation for this — in fact, there may be several.

First, employees today are busier than ever. With layoffs or hiring freezes, surviving employees have more responsibility. Downsizing efforts also may have left employees with lasting anxiety about the security of their own jobs. Even if the organization encourages breaks, employees may feel as though they simply don't have the time. They also may fear being perceived as a slacker if taking breaks isn't common in the organization.

Employees who eat lunch at their workstations could be a problem in terms of how they are paid. Non-exempt employees must be paid unless they are completely relieved from duty. If the company allows non-exempt employees to eat lunch at their workstations while they continue to work, be sure they are paid for the time. If no lunch is taken, ensure that the time the employee would be allotted for a lunch break is not deducted from their pay.

For exempt employees, compensation is not as much of a concern. Still, it may benefit employees to take a break during the day, potentially improving both productivity and morale.

If refusal to take breaks is common, it's a good idea to find out why. If employees seem to be concerned about their image, reassure them that the organization not only allows for breaks, but *prefers* that employees take them. Make it known to all employees that individuals who take breaks as allowed by company policy will not be punished or looked down upon in any way.

If employees have too much work on their figurative plates to enjoy a meal off a literal one, the company may need to reallocate workloads or shuffle deadlines. Remember that employees skipping breaks could well be a symptom of a larger problem. Workloads will ebb and flow in

most organizations, but if employees are facing consistently heavy loads that rarely allow for breaks, other symptoms (including burnout and even health problems resulting from stress) may arise. Dealing with the root of the problem may be the best course of action.

Aside from discussing the preference that employees take breaks, supervisors can also encourage the practice by setting the example. Even if policies clearly state that breaks are encouraged, employees still might look to leaders to find an unwritten expectation.

Telecommuting or telework

Telework (also called telecommuting) is performing work at a location other than an “official duty station.” With portable computers, high-speed telecommunications links, and ever-present pocket communications devices, many employees can work almost anywhere at least some of the time.

Telecommuting provides benefits for both employers and employees. Research shows that telework improves the quality of work/life and job performance (i.e., reduces office overcrowding and provides a distraction-free environment for reading, thinking, and writing). Studies have also found an improvement in retention, leave usage, and productivity.

Employing remote workers also creates flexibility in hiring. If the company is restricted by location, it can hire the best and the brightest individuals from just about anywhere.

Maintaining supervision

If the company adopts a telecommuting program, the challenge will be to manage employees from a distance. Here are some tips for managing telecommuters:

- 1. Provide autonomy.** Supervisors can't be micromanagers and expect to be good telemanagers. They need to be able to trust employees, delegate responsibility, and communicate well.
- 2. Pick the right jobs.** Jobs that are best suited for telecommuting are those that require independent work, need little face-to-face interaction, and can be managed by results, not time.
- 3. Select the right employees.** The best candidates for working remotely are those who need little direct supervision, work well on their own, take initiative, and communicate well.
- 4. Make teleworkers part of the team.** Include off-site employees in staff meetings by conference call, and invite them to the office periodically for meetings and social events. Don't let them become invisible.
- 5. Maintain appropriate records.** If telecommuters are nonexempt, they must be paid overtime, so appropriate records must be kept.
- 6. Treat remote workers the same as onsite employees.** Make sure they understand they are available for promotion, training, and recognition, and include them in special assignments.



Best practice

Communicating with remote workers

Remote workers pose unique challenges. For example, how does the company make sure remote workers are on task, on schedule, and performing up to par? These types of issues almost always come down to communication.

Before allowing an employee to work remotely, there are a number of questions to consider. How will they contact supervisors and coworkers? How frequently should such communication occur? When are remote workers expected to be available? When contacted, how quickly are remote workers expected to respond? Addressing these questions at the start of a remote relationship will make sure everyone is on the same page.

Since remote workers may be in different time zones, everyone may need to be flexible about meeting times. Establishing a routine for communicating with remote workers can help. For example, a weekly phone conference may keep everyone in sync, even if it's just to check in.

Initially, the company may set up frequent times for a new remote employee to check in, but consider reducing this frequency as the individual proves that he can stay on task without hand-holding. If the company can't trust an employee enough to give him some freedom, he may not be a good candidate for remote work; he'll likely spend much of his work time reporting on what he is doing rather than actually doing the work.

Remain flexible and when new issues arise, work with employees to find appropriate solutions. Though remote workers can pose some challenges, careful planning and an open mind can help an organization utilize these workers to their full potential.

Telecommuting policy

Experts agree that telecommuting should not be implemented casually. If the company wants to reap the benefits telecommuting offers, the first step is to put a telecommuting policy in place. Needless to say, top management support is critical. Before drafting a policy, consider the following:

- **Which positions are suitable?** Both exempt and nonexempt positions may be appropriate for telecommuting. The best potential telecommuting positions are those that require individuals to work independently, have little need for face-to-face interaction, entail concentration, and can be managed by output, not time spent on the job.
 - **Who is eligible?** Policies often dictate how long employees must be in a job before becoming eligible, as well as how well they must perform to maintain the privilege.
 - **How will employees be selected?** If a number of individuals express interest in telecommuting but only a limited number can be accommodated, the policy should outline the selection criteria, taking into account non-discrimination laws such as the Americans with Disabilities Act.
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- **What kind of schedule will telecommuters keep?** Some policies allow for telecommuting only on certain days of the week and require employees to be available during core business hours.
- **How will timekeeping be done?** The requirements of the Fair Labor Standards Act (as it pertains to overtime, for example) apply to nonexempt telecommuters.
- **Who will provide equipment?** The policy should address whether the company will provide a computer, for example, or pay for Internet service.
- **How will the employee safeguard company information?** Security — electronic and physical (locked filing cabinets) — is critical for any off-site location.
- **How will technology support be provided?** The policy should address what type of technical support (if any) the company will provide to offsite employees.



The telecommuting policy aside, an often overlooked facet of telecommuting is the selection of supervisors of telecommuters. Not every supervisor makes a good telemanager. A micromanager, for example, probably would not be a good candidate to supervise remote workers. Look for individuals who:

- Trust their employees;
- Delegate responsibilities;
- Manage by results, not details; and
- Communicate well.

Once the company has identified eligible job criteria and potential supervisors, be sure to *train* supervisors so that they have a thorough understanding of the telecommuting policy and how to put it into practice. With a good policy in place and properly selected and trained supervisors, both employees and the company can start enjoying the benefits of remote work.

Good candidates for telework

All or parts of many jobs are appropriate for teleworking.

Usually 100 percent of a position is not appropriate for teleworking. Teleworkers may perform part of their job at their official duty station. Workers will usually need to continue to live in a location which enables them to come in to their official duty station on a regularly scheduled basis, and on an as-needed basis for meetings and other special activities.

As examples, telecommuting is feasible for work that requires:

- Thinking and writing — such as data analysis, reviewing grants or cases, writing decisions or reports.
- Telephone-intensive tasks — such as setting up a conference, obtaining information, following up on participants in a study.
- Computer-oriented tasks — such as programming, web page design, data entry, and word processing.

Telecommuting is not suitable for employees who need to be in the office to learn the organization, who require on-the-job training, who need close supervision, or who thrive on interaction with coworkers and would suffer from the isolation of working alone.

To be a successful teleworker, workers should be organized, disciplined, and conscientious self-starters who require minimal supervision.

Telecommuting should not adversely affect either the worker's own performance or that of coworkers. Thus, if a job involves frequent interaction with coworkers or customers, teleworkers must be expected to be available via email or the telephone at the same times as they would otherwise be at work for this interaction.

Although telework will give some employees more time for their family responsibilities, duty time must not be used for providing dependent care or any purpose other than official duties.

If a company allows telework, it must ensure that the offsite workplace is safe and adequate. The site must also be free from interruptions and provide the necessary level of security and protection for company property.

Telecommuting risks and rewards

Negative aspects of telecommuting include a lack of employer supervision, a potential loss of productivity due to distractions at home, security of company information at the home office, the lack of "face time" with other personnel from the company, the difficulty holding meetings, and safety and legal issues.

To have an effective telecommuting program, certain guidelines are helpful:

- Have the employee designate a particular area in the home as the "home office";
- Have the employee complete regular time cards as a record of the hours worked;
- Have the employee be mindful of ergonomic issues in the home work area;
- Consider implementing formal agreements with telecommuters stating the hours that will be worked and the expectations.

Certain problems that can crop up include:

- Employees who use most of their day to attend to personal matters and don't actually get much work done;

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- On the flip side, employees who don't know when to "turn it off" and end up working more than 40 hours because the office is right there, and create obligations to pay overtime;
- Employees who injure themselves at home and claim it was a work-related injury (with no witnesses);
- Employees who want to telecommute permanently as a means to accommodate a disability.

The Occupational Safety and Health Administration (OSHA) issued a policy on home offices on February 25, 2000. The policy indicates that employers are not responsible for inspecting an employee's home to be sure it is safe, that employers aren't liable for employees' home offices, and that OSHA will not inspect home offices. However, employers are still responsible for the safety of employees who work at home, and it is possible that an employee will sustain a recordable injury in the home office that arises out of his or her employment.

For workers' compensation purposes, a home office is considered a satellite worksite, and courts look at certain factors to determine whether an injury occurred while the employee was actually engaged in work. Those factors include whether there is business equipment at the home office, how regularly the employee performs work there, whether the injury occurred in the specific area of the home designated as the home office, and if it occurred during the employee's normal work hours.



Best practice

Telework tips

Establish a routine: Once employees start teleworking, they will have 24-hour access to work. They may be tempted to work longer hours. However, working too much can cause stress and stress-related illness. Knowing when to stop is essential for effective performance. One way to get around overwork is to implement specific business hours. Set firm starting and stopping times, and communicate these to managers. At the office, there are routines that structure workers' time. If workers are at home, it may help to establish their own routine so they don't overwork.

Establish goals: Ensure employees develop a list of goals and assignments for the days they telework. Have them report their progress on these goals at reasonable intervals.

Set deadlines: Follow the same rules for deadlines as if workers were in the office. If workers are mailing reports to the office, make sure workers send them so they arrive the day they're due or earlier. If sending work electronically, it should also arrive on time.

Avoid distractions: Encourage telecommuters to avoid teleworking on days when there may be distractions at home. If workers have an elderly family member, an infant, or a toddler needing care, it may be difficult to complete any work. Telework is not a substitute for childcare or eldercare.

Maintain regular communication with workers: Supervisors need to be in frequent communication with teleworkers. Both sides need to keep the other informed of the status of work, progress, difficulties, etc.

Dependent care

The term “dependent care” generally refers to programs and policies companies implement to help employees care for family members. These programs assist employees in caring for:

- Young children
- Adult children with special needs
- Parents

Some dependent care programs may simply be extensions of work/life programs already available. For instance, flexible scheduling may be all that is needed to allow an employee to care for a family member. Other dependent care programs may be more complex. For instance, establishing a long-term care insurance policy program for employees may require more thought and cost on the employer’s part.

Companies that offer some type of dependent care program may experience many benefits. These can include:

- Easier recruiting/retention
- Less absenteeism/tardiness
- Higher production and quality (employees aren’t as likely to be preoccupied with how to take care of dependent care issues while at work)

There are many types of dependent care programs available. These include:

- Child care assistance
- Adoption aid
- Long term care insurance
- Flex time and leave policies
- Dependent care financial assistance
- EAPs
- Informational meetings and resources
- Child care centers (onsite, employer-sponsored, emergency child care, etc.)

Determining what type, if any, dependent care program to implement is directly related to the employees’ needs. The best way to assess this need is to survey employees. The organization may not be able to implement all programs employee would like, but surveying employees should identify the most popular options.

Other options to help maintain balance

While flexible working hours are most popular in helping employees balance their personal obligations with their business obligations, they are not feasible for all organizations (or even all departments within an organization). Dependent care is also popular because it addresses one of the biggest time demands on employees. However, it can be expensive, and might not be utilized by a significant percentage of the workforce.

There are many other options for employers, however, with a variety of cost ranges.

Offering on-site clinics or health care services can help employees schedule check-ups for minor concerns, without having to take much time off to do so. Having an on-site nurse can also encourage employees to actually visit a medical professional, when they might otherwise not have the time, money, or inclination to do so.

Some employers have provided more basic services, such as car washing, oil changing, or dry cleaning pick up to help employees maintain balance. There are any number of additional options, depending on what issues are creating conflict for employees. The intent is to reduce stress and time demands — in other words, remove the feeling that “I need to take time off in order to take care of (something).”

Some employers have even arranged for the delivery of fresh fruits and vegetables to the workplace. This can help employees reduce the number of trips to a grocery store, while also contributing to healthy eating habits.

Wellness

Wellness programs provide a variety of activities and resources designed to help employees better balance their work and home lives. Wellness encompasses all programs designed to assist employees with problems at or outside of work, which do not directly apply to the company’s business. These can include:

- Fitness facilities
- Smoking cessation classes
- Health screenings
- Nutrition courses
- Mental health services
- Counseling services
- Support groups

A corporate wellness program can range from giving educational brown-bag lunch seminars and subsidizing employee health club memberships to providing onsite biometric screening and outfitting an onsite exercise facility.

Offering a company wellness program delivers benefits that go beyond improving workers’ health and reducing healthcare costs. A successful program can:

- Help recruit employees
- Lower employee training costs due to reduced turnover
- Decrease absenteeism and disability claims
- Increase morale, team building, and productivity
- Reduce workplace accidents
- Reduce lost work time due to employee illness

The core component of a wellness program is the comprehensive personal wellness profile. The company uses this information to determine the direction it needs to take to help its employees become healthier. The profile can be culled from various sources.

Employee health risk appraisal

One source for the comprehensive personal wellness profile is the employee health risk appraisal. Health risk appraisals can take the form of a voluntary questionnaire and/or medical screenings. The questionnaire asks workers about risk factors, family health history, and existing health habits.

Companies may also perform voluntary medical screenings or checkups that cover a limited set of tests. Common screenings are:

- Lipid (assesses total cholesterol, LDL cholesterol, and HDL cholesterol);
- Blood pressure;
- Blood sugar (glucose);
- Body fat;
- Pulmonary function; and
- Hearing and vision.

Many companies allow the employee to repeat the screenings annually and compare the information to the previous year. That way, both the company and the employee can monitor health issues important to them.

Once the questionnaire and the health risk screenings are completed, employers can use the data to get an idea of the health issues that workers could encounter in the near future. This information can also be used to predict increases or decreases in health care costs.

Education

Another important part of a successful wellness program is informing and educating employees on health issues. This can be done by offering seminars or brown-bag lunches, setting up health fairs, or publishing an employee wellness newsletter.

Employers can promote a healthy diet by identifying restaurants or other eateries near the facility that serve nutritious meals. Post a menu from these businesses so workers can see what they have to offer.

Along those same lines, consider posting nutritional information on snacks in the vending machines. Educating employees on the amount of fat and calories in these foods could help them choose more nutritious snacks.

Posting a Body Mass Index chart in the company cafeteria or workout facility is a great way to make employees aware of what their ideal weight should be in relation to how tall they are.

Stress management

This usually consists of helping employees learn how to relax. Meditation is one relaxation technique that is sometimes taught. Yoga is another popular relaxation technique offered.

Time management is a great way to get stress under control. Teaching employees how to manage their time properly will cut down on their stress level and help the company's bottom line.

Conflict resolution courses or brown-bag lunches are a great way to inform workers about how to resolve disputes and prevent violence at the workplace.

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Factors within the company that contribute to employee stress can also be addressed with the wellness program.

Exercise

Physical inactivity and the resulting increase in body weight account for around 300,000 premature deaths every year. To encourage employees to exercise or to be more active, companies can offer subsidized memberships at local health clubs or YMCAs/ YWCAs. Or, they can have onsite workout facilities that workers can use before and after work and even on weekends.

One way to encourage the use of the exercise facility is to have employees log in and out. The time spent at the facility can be tracked and workers can earn points toward gift certificates for health and fitness stores.

Employers can also initiate different types of physical activity in and around the facility. Set up a walking trail or start a stair climbing challenge so employees use the stairs rather than the elevator.

Regular exercise can go a long way in improving employees' health and well-being. However, it's just a part of the total wellness program.



Nutritional counseling

Teaching workers the proper way to eat is essential for helping them lose weight and prevent illness. Onsite nutritional counseling is an effective way to communicate with workers who have questions about their diet.

Steps to prove to employees that the company is serious about proper nutrition include:

- Warning them about fad diets

- Telling them about the hazards of the high-fat lunch
- Checking out vending machines and eliminating any bad snacks
- Shifting the offerings in the cafeteria to healthier foods.

Healthcare advice line

Some corporate wellness providers offer phone advice and counseling from qualified healthcare professionals. This is a great boon to those employees who have to manage chronic conditions like diabetes.

Frequently asked questions can also be included in a paycheck stuffer, posted on bulletin boards, or published in an employee newsletter.

Onsite biometric screening

This optional piece of the wellness pie can be somewhat expensive. However, it often reaches employees who may not go to a doctor for screening. Usually companies have health professionals come onsite annually to perform the screenings. Some larger corporations, which have health professionals on staff at all times, conduct the screenings themselves throughout the year or when new hires come on board.

Health advocacy program

A health advocacy program is one of the most effective ways to reach workers. Healthcare professionals talk with individual employees about their individual health issues. This one-on-one relationship with the healthcare advocate builds up a level of trust with the employee. The more the employee discusses health issues with the healthcare advocate, the stronger that relationship becomes.

Not every employee in the organization will need or want a personal health advocate. However, workers who have been diagnosed with a disease or illness may want that type of coaching to help them deal with it. Employees who have a high risk factor for a certain disease would also benefit from talking with a personal health advocate. These health advocates look to address the employee's personal health needs and, in the long run, influence the attitude of the employee. The result is a worker who feels connected to the company wellness program.

Employee assistance programs

Many employers offer employee assistance programs (EAPs) to workers and their families. Personal problems can affect both job performance and the employee's health, so it's in the best interest of the company to help. Some of the issues that can be addressed by an EAP are financial, legal, marital, and substance abuse issues.

Wellness: What's in it for the employer?

What's the payback for the time, effort, and expense of putting together a wellness program? Research indicates that there is a \$2 to \$7 return on investment (ROI) for every dollar spent. That's because healthy employees:

- Miss less work,
- Are more productive at work,
- Have fewer workers' compensation claims, and

- Go to the doctor less often.

Having healthier employees lowers health insurance premiums (especially for companies who are self-insured), which adds to the employer's bottom line. However, these results do not show up immediately. It takes, on average, two to four years to see cost savings. But when the savings begin, expect to save up to \$200 each year in medical claims per employee.

The actual cost is different for each company since each company has different needs. Companies can start out with little capital investment and work into the program as the budget allows. If the economy is in a downturn, that's even more reason to have a wellness program.

Wellness: What's in it for the employee?

Most of us can stand to lose a little weight, learn how to eat healthier, and get more exercise. Just getting regular exercise adds several years to the average person's life span. Losing weight can add three to seven years and quitting smoking can add up to 13 years to the average life span.

Some companies even include spouses in the wellness program. They benefit from the same perks and programs as the employee. To make the program known to spouses, it's a good idea to mail the information to the employee's home or include it as a paycheck stuffer.

How to get employees involved and interested

There are many different ways to involve employees in the wellness program.

To encourage participation, it may be helpful to offer incentives of some type. These can be things like:

- Quarterly gift certificates;
- Raffles to attract walk-ins to health fairs;
- Free or subsidized health club memberships;
- Extended lunch hour (with free lunch and door prizes) for employees that participate in a theme walk event (football walk, poker walk); or
- Establish an account for each employee that participates, and track their involvement for a payout of some type.

Design and distribute posters throughout the company announcing the beginning of the wellness program. Make the posters eye-catching and unusual so they draw the employee's attention.

Offer educational programs like smoking cessation, nutrition, and exercise. Again, make sure spouses receive information on these programs. Even if they are not eligible, they can suggest that their husband or wife attend and get involved.

Having a workout facility onsite can make a big difference. Dedicate a room, get some decent workout equipment (treadmills, stair climbers, weight machines, and exercise mats), and make sure everyone who will use it gets a training session.

Smoking and wellness programs

Since the release of the first Surgeon General's Report on smoking in 1964, knowledge about the health consequences of tobacco use has greatly increased, and so has the list of illnesses and conditions linked to smoking. The Surgeon General's report now reveals that smoking can cause disease in nearly every organ of the body, and kills almost half a million Americans each year.

Employees who quit smoking can experience immediate health benefits in the form of improved circulation and a reduced risk of heart attack, certain types of cancer, and stroke. While smoking cessation programs can certainly be offered as part of a wellness program, some employers want to go further to encourage employees to quit smoking.

Can employers ban smoking? Many employers ban smoking on company premises, and have the right to adopt policies regarding what activities are allowed on company property. If employees violate a non-smoking policy, they can be subject to discipline, just like any other policy.



Can employers refuse to hire smokers? Some employers even refuse to hire individuals who smoke. However, this is not allowed everywhere. In some states, an employee's right to engage in legal activities is protected, and employers can't take any adverse employment action against individuals (this includes firing or refusing to hire someone) based on their participation in legal activities during non-work time.

Other states specifically protect an individual's right to smoke on his or her own time. In those states, employers cannot refuse to hire smokers. Otherwise, employers can make it a policy to refuse to hire smokers and can also discipline (or terminate) individuals who are smokers, even if they aren't lighting up on work time or on company property.

Can employers charge smokers more? Some employers also want to charge smokers more in health insurance premiums in comparison to non-smokers. Charging smokers more in premiums than non-smokers is essentially the equivalent of providing a reward to employees who

are able to stop smoking (or who refrain from smoking). According to the Department of Labor, medical evidence suggests that smoking may be related to a health factor, and nicotine is a powerfully addictive drug. Providing a reward for not smoking would be considered a standards-based program under HIPAA, which means that the initiative would need to meet the five requirements for a standards-based wellness program.

Starting a wellness program

The most important factor in the success of a wellness program is the amount of support that upper management gives the program.

To put it bluntly, the wellness program will not survive without visible support from the company president, CEO, vice presidents, and/or other top management personnel.

Not only upper management, but all managers need to get on board and support the program. The reason for this is that employees will soon determine which managers feel the wellness program is a waste of time and money. If they work for one of these managers, the employees may feel participation is frowned upon.

Wellness committee

After getting senior management support, the next step is to select a wellness committee. This committee should be made up of a mix of employees from each of the major departments in the company (for example: marketing, sales, facilities, human resources, information services, distribution, accounting, and procurement). Don't forget to include satellite locations and facilities, and second and third shift operations.

Why does the committee need to be made up of a mix of employees? A representative wellness committee can promote the program at the "grass roots" level. Each major department has a member acting as a liaison between the committee and their department. They can answer any questions that their coworkers, supervisors, and managers may have about the wellness program.

Since the committee has already received approval for the program from management, they need to concentrate on coming up with program ideas, planning them, and promoting the programs to coworkers. They may also be involved with actually working at the program activities, so make sure their supervisors are aware of the time commitment necessary. However, since the program has full support from upper management, this shouldn't be a problem.

At the first working meeting, the wellness committee needs to prepare a mission and vision statement for the future of the wellness program. Subsequent meetings can be devoted to working on the operating plan and timeline.

The operating plan

The operating plan is the foundation of a wellness program. It provides a timeline for establishing the program and measuring how successful it will be. The plan takes the information from the employee health risk appraisal and the personal wellness profile and uses it to define objectives and goals for the program.

Just remember, the objectives and goals need to be measurable and so does the plan for determining the success of individual program components.

Budget

A wellness program budget may be a worthwhile endeavor. If the committee can get senior management to commit funds, the program stands a better chance of succeeding. It's a good idea to have someone familiar with preparing budgets help with this.

Since the first year of wellness program implementation is so important, don't be cheap! The first year budget needs to be large enough to kick the program off and ensure its success.

After the program is started

It's a good idea to add new activities to the wellness program. This helps keep interest levels high among participating employees and can also bring in new employees.

One way to determine what types of activities to add is to survey employees and ask them what they'd like to see added. Offer an inexpensive prize for every employee who returns a survey to encourage participation.

Obtaining feedback from all levels of management is also very important. Often, managers will get direct feedback from employees and can share this information with the wellness committee.

Use the data to update the wellness program operating plan. The plan should be updated at least yearly.

Ergonomic evaluations

Part of a wellness program should include ergonomic evaluations of workstations to reduce potential injuries.

Ergonomics is the science of fitting the job to the worker. In the workplace, ergonomic principles are used to make alterations to a job so that it conforms to the person doing that job, rather than to force the person to fit the job. Redesigning various job functions to match a person's stature will reduce stress on the body and eliminate many potential injuries associated with the overuse of muscles, unnatural postures, and repetitive motions.

Ergonomic solutions may involve the redesign of tasks, workstations, tools, lighting, and equipment to fit a worker's physical capabilities and limitations. This may mean adjusting the height of a workstation or a computer screen, or rearranging the steps in a process so the worker will not have to lift and twist in the same motion.

Technological advances, which result in more specialized tasks, higher assembly line speeds, and increased repetition are often major causes of ergonomic problems. Consequently, workers' hands, wrists, arms, shoulders, backs, and legs may be subjected to thousands of repetitive twisting, forceful, or flexing motions during a typical workday. When this occurs on the job, the stress on those body parts builds up over time and results in musculoskeletal disorders (MSDs).

The goal of a workplace ergonomics program is to reduce or eliminate the risk factors that lead to MSDs. Jobs that expose workers to excessive vibration, repetitive motions, heavy lifting, awkward postures, and continual contact pressure will be assessed and ways found to reduce exposure to those factors that cause MSDs. Identifying ergonomic risk factors in the workplace is the first step toward making changes that will improve the safety and health of all workers.



Workers who perform repetitive procedures or work in positions that put a great deal of stress on the musculoskeletal system can suffer ergonomic stress. This stress can be caused by any number of factors, including repetitive motion, excessive force, mechanical stresses caused by tools or machines, poor posture, awkward positioning, lifting, vibrations, temperature extremes, and unaccustomed activity.

The cost of worker injuries and illnesses caused by these ergonomic stressors is staggering. Over one-third of all workers' compensation costs are associated with MSDs, injuries caused by trauma to the body occurring over a period of time. A conservative estimate of the medical costs of treating one industrial case of carpal tunnel syndrome, a type of disorder affecting the wrists and hands, is about \$20,000 a year.

This cost estimate does not take into consideration the costs involved with lost work time, replacement workers, and reduced productivity. Lower back pain, for example, which is often associated with improper or repeated lifting or sitting for an extended period of time, is responsible for about 1,400 lost work days per 1,000 workers every year. Only the common cold and the flu cause workers to miss more work annually.

NIOSH guide for developing an ergonomics program

The National Institute for Occupational Safety and Health (NIOSH) issued guidelines for developing practical and cost-effective approaches to protecting workers from job-related musculoskeletal disorders. It describes the basic elements of a workplace program aimed at preventing work-related MSDs by focusing on management commitment, worker participation, and training as essential elements in an overall ergonomics program. It also includes a "tool-box" which is a collection of techniques, methods, reference materials, and other resource information to help employers develop a successful program.

Elements of Ergonomics Programs: A Primer Based on Workplace Evaluations of Musculoskeletal Disorders outlines methods that are commonly used for identifying, correcting, and preventing MSDs. The book covers these basic steps for controlling work-related musculoskeletal disorders:

- Determine if musculoskeletal problems exist.
- Develop roles for both managers and workers in the ergonomics program.
- Recognize and fill training needs.

- Gather and analyze data to define the scope and characteristics of ergonomics concerns.
- Develop control solutions.
- Establish health care management.
- Create a proactive ergonomics program.

What are musculoskeletal disorders?

Musculoskeletal disorders are caused or aggravated by repetitive motions, forceful exertions, vibration, mechanical compression (hard and sharp edges), and sustained or awkward postures that occur over extended periods of time. MSDs can affect nearly all tissues, the nerves, tendons, tendon sheaths, and muscles, with the upper extremities being the most frequently affected. These injuries range from disorders of the back, the neck, the arms and legs, or the shoulders and involve strains, sprains, or tissue inflammation, and dislocation.

Workers suffering from MSDs may experience less strength for gripping, less range of motion, loss of muscle function, and inability to do everyday tasks. These painful and sometimes crippling injuries develop gradually over periods of weeks, months, and years as the result of the repeated actions required to perform their jobs.

Awareness is the key to preventing serious MSD injuries. It is important for employers and employees alike to know the signs and symptoms of MSDs. These signs and symptoms are often ignored because they seem slight at first and go away when the employee is not at work. However, as time goes on, the symptoms increase and last longer until finally it's impossible to perform simple tasks such as holding a drinking glass or keyboarding. Early intervention is essential to recovery.

It's important to train employees about MSD signs and symptoms and encourage them to report symptoms as soon as they become aware of them. Early reporting is essential to lessen the severity of the injury. The longer warning signs are ignored, the more damage is done, the longer recovery takes, and in some cases, the damage may be irreversible.

Signs and symptoms

The presence of MSD signs and/or symptoms is usually the first indication that an employee may be developing an MSD. The signs are objective physical findings that an MSD may be developing. The symptoms, on the other hand, are physical indications that an employee may be developing an MSD.

Symptoms can vary in severity, depending on the amount of exposure to MSD hazards and often appear gradually, for example, as muscle fatigue or pain at work that disappears during rest. Usually symptoms become more severe as exposure continues. If the employee continues to be exposed, symptoms may increase to the point that they interfere with performing the job. Finally, pain may become so severe that the employee is unable to perform physical work activities.

Risk factors that cause MSDs

The initial symptoms of MSDs may include fatigue, discomfort, and pain; as tissue damage worsens, other symptoms, such as weakness, numbness, or restricted movement, may also appear. Work-related MSDs occur when the risk factors that cause or contribute to musculoskeletal system pathology are associated with a person's job duties. Workplace musculoskeletal disorders are caused by exposure to the following risk factors:

Repetition: Doing the same motions over and over again places stress on the muscles and tendons. The severity of risk depends on how often the action is repeated, the speed of movement, the number of muscles involved, and the required force.

Forceful exertions: Force is the amount of physical effort required to perform a task, such as heavy lifting or pushing/pulling, or to maintain control of equipment or tools. The amount of force depends on the type of grip, the weight of an object, body posture, the type of activity, and the duration of the task.

Awkward postures: Posture affects muscle groups that are involved in physical activity. Awkward postures include repeated or prolonged reaching, twisting, bending, kneeling, squatting, working overhead, or holding fixed positions.

Contact stress: Pressing the body against a hard or sharp edge can result in placing too much pressure on nerves, tendons, and blood vessels. For example, using the palm of the hand as a hammer can increase the risk of suffering an MSD.

Vibration: Operating vibrating tools or equipment that typically have high or moderate vibration levels such as sanders, grinders, chippers, routers, drills, and other saws can lead to nerve damage.

Reserved



Introduction

Sooner or later, every company will have to deal with an underperforming employee who is just not demonstrating the skill levels necessary for the job. It may be lack of job knowledge, technical skills, or basic organizational ability, but whatever the situation, it will have to be addressed promptly. To delay handling the issue could send an unintentional message to other employees that the company is willing to accept poor performance.

Most employers will also have to deal with conflict between employees, or other conduct problems. These situations can be quite different from issues involving performance or lack of skill. While an underperforming employee might only need training in a new skill, a conduct problem is entirely within the employee's ability to control. In other words, a lack of job skills might be something that the company can address through normal means, but a lack of conflict resolution skills might be something that the employee is responsible for correcting.

The first section of this chapter covers corrective action and documentation, starting with an overview of the purpose. Employers should remember that the term "discipline" comes from the Latin word "disciple" and refers to teaching, not to punishing. Whether the concern is a performance issue or an attendance problem, the job may not be completed according to expectations, and employers will have to respond or risk allowing the situation to continue.

The second section covers employee conflict, including workplace violence. In any large group of individuals, conflicts will arise from differences in beliefs, personalities, or working styles. These issues may not affect job performance (that is, work may still be getting done on time), but they certainly affect employees' abilities to work together. Remember that violence can include bullying, intimidation, or other forms of conflict between employees.

The third section of this chapter discusses the importance of consistent enforcement, whether enforcing company policies or performance expectations. Supervisors are not immune to the personality conflicts mentioned above, or may develop friendships with some employees, so this section also addresses the problems of fairness and favoritism, even if the problem is only one of perception and not reality.

Corrective action and documentation

Employers should keep in mind that different types of infractions may require different approaches. For example, a performance problem may result from lack of training or lack of motivation, and the response may differ based on the underlying reason. Essentially, some external factor may need to be addressed. In other cases, such as attendance or attitude problems, the conduct at issue should be within the employee's power to change (where the employee can choose to improve) and the response may convey an expectation for that change to occur.

To deal with a performance problem, first determine the root cause. It could be a lack of ability, motivation, or perhaps some personal problem that is causing the poor performance. Without taking the time to properly diagnose the situation, employers may choose a course of action that only makes things worse. For example, if it seems that the problem is simply a lack of effort, a supervisor may increase pressure on the employee. However, if the real problem is lack of skills, the added pressure may only magnify the performance problem.

After determining if the performance deficit is a “can’t do” or a “don’t want to do” problem, the company can plan a course of action to address the issue. If a performance problem results from a lack of skills, instruction and coaching may be the answer. However, if the problem is lack of motivation, then setting performance goals that clearly spell out what the employee needs to do to improve, along with the consequences for failure, may be required.

Discipline basics

Occasionally, situations arise where it is necessary to discipline an employee. This usually occurs when the employee's conduct adversely affects the efficiency or operation of the workplace or the work environment. Conduct problems typically involve failure to comply with written or unwritten rules of the workplace, such as coming to work on time, following orders, communicating with customers or coworkers, or using company equipment.

When an employee's performance or conduct is not adequate, it is sometimes necessary to administer disciplinary action. Such action can be wide-ranging and may vary depending on the severity of the misconduct.

The goal of discipline is to correct misconduct and modify unacceptable behavior. The goal is NOT to punish the employee. Discipline, if imposed, should usually be progressive, beginning with the minimum discipline necessary to correct the offense. Of course, some misconduct may be serious enough to justify an immediate response involving a high level of discipline or even discharge. In addition, penalties should be reasonably consistent with those imposed on other employees for similar offenses in similar circumstances.

Companies should clearly state work rules and guidelines and specific disciplinary actions that can be taken for violations. Policies need to be provided to all employees. In fact, it is a good idea to have all employees read and sign a statement that they have read, understand, and will comply with policies and procedures and understand the consequences for failure to comply.

Be careful, however, that written policies do not limit flexibility or create obligations on the company. For instance, if a progressive disciplinary path is defined, include a statement that the policy does not obligate the company to follow the steps in sequence. Although discipline should be consistently applied, employers still need flexibility because each situation is unique.

Define discipline

The word “discipline” should not be used lightly in the workplace. Only use it for specific, defined situations. For instance, one company may define discipline as “action which is recorded in the employee’s personnel file, i.e., written reprimand, suspension, reduction in pay, or termination.” Another company may include “verbal warnings by a supervisor” in its definition.

Defining discipline helps take the guesswork out of the process. The goal here is to make certain that discipline is objective, in compliance with stated policy, and carried out effectively and efficiently. Some situations will require a certain form of discipline, regardless of whether or not the progressive discipline process has already begun.

It is also important that a discipline program spell out who can administer what type of discipline. This is important where less formal measures, such as verbal warnings, are concerned. Is a supervisor’s admonishment of an employee considered discipline? Are only verbal reprimands from management considered “discipline” in terms of the discipline policy?

Discipline and corrective actions are tools to help supervisors maintain an efficient and orderly work environment. If used properly, they will assist employees in correcting unacceptable behavior and performance that may threaten their jobs. Failing to correct inappropriate conduct and performance may lead to more serious problems. It may also harm the morale of employees who are working according to the rules and are meeting performance standards.

The time and effort spent to correct problems early is a good investment. Dealing with any concerns early can avoid problems later, including loss of employees’ respect for the supervisor and for the supervisor’s authority.



When to discipline

If faced with a situation where there is apparent employee misconduct, the first question to ask is whether any discipline is appropriate; that is, whether the misconduct is severe enough to warrant discipline.

If discipline is appropriate, the next question to ask is, are there sufficient facts to justify the discipline. The key factors to consider include the following:

- Do the facts establish the employee did (or failed to do) the things claimed?
- Did the employee's behavior violate an established rule or requirement?
- Did the employee know (or should have known) of the rule or requirement?
- Has the rule been enforced consistently?

Showing that the employee knew (or should have known) of a rule or requirement may seem like a minor issue, but lack of knowledge (like lack of training) can account for some misunderstandings. In other cases, common sense should have told the employee that certain conduct was not appropriate in the workplace. In any event, the initial verbal warning should serve to make the employee aware of the rule or requirement, if the individual was not already aware of it.

Most employers follow a policy of progressive disciplinary action. Repeated violations lead to increasingly severe corrective action, culminating in termination.

Penalties for misconduct can range from warnings (oral or written) to short suspensions (generally three days or less), long suspensions (usually more than three calendar days), demotions, or termination.

Warnings and suspension

Warnings are the most lenient form of progressive disciplinary action. An employee will receive a verbal or written warning to stop the unacceptable behavior. The warning may list actions needed to be taken to correct the behavior and the consequences for repeated violations. Keep a copy of all warnings, including notes about verbal warnings.

Notes on a verbal warning need not be extensive, and might be retained in the supervisor's files rather than being placed in the employee's "official" personnel file. The record should include the date of the warning and the nature of the discussion. For example, "On May 22, 2012, Katherine Smith arrived 15 minutes late. I delivered a verbal warning, and pointed out that this was the third time she has been late this month. She agreed to arrive on time from this point forward, and understood that the next incident will result in a written warning to be placed in her file."

In some cases, it is in the company's best interest to remove an employee from the workplace pending an investigation or as a corrective measure. When issuing a suspension, be sure to inform the employee of the reason for the suspension, the duration of the suspension, expected behavior following the suspension, and the consequences for repeated violations. Keep written documentation of all suspensions.

Administrative leave

In some cases, it may be necessary to place one or more employees on administrative leave while an investigation is pending. This is commonly done while investigating claims of discrimination or harassment, since it may be necessary to separate the alleged offender from the alleged victim until the credibility of various witness statements can be evaluated.



Cross reference

For more information, see the section on **Discrimination/harassment claims** in the **Protected Rights and Actions** tab.

However, administrative leave might be necessary for other types of workplace investigations, whether evaluating possible theft or waiting for the results of a drug test. Since the company won't know if the employee actually violated a workplace policy until the investigation is complete, questions may arise as to whether the administrative leave should be paid or unpaid.

The company could explain to the employee that payment for the time on leave may depend on the investigation outcome. For instance, if the company determines that no violation occurred (or that the degree of violation did not justify an unpaid suspension), the involuntary leave time will be paid. However, if the investigation discovers that the employee engaged in conduct that would justify an unpaid suspension, the administrative leave may be deemed part of that suspension, and would be unpaid.

The employee should also be told that, whatever the outcome, the individual will be informed of the investigation's conclusions and will be given an opportunity to respond before a final determination is made.

Ideally, the investigation can be concluded in a relatively short amount of time (a day or two) and the status of the suspension can be determined before the next regular payday. However, delays can occur for a number of reasons, such as a need to interview additional witnesses who were not initially identified, or a need to wait for drug test results that won't be available for several days.

It may even happen that the timing of the potential offense coincides with payroll processing, and the company has to decide whether to process a normal paycheck (counting the suspension as paid time) or record the time as unpaid.

If the investigation outcome is uncertain, the administrative leave should be paid. An employee who is potentially innocent should not suffer a loss of income for several days while waiting for the company to complete an investigation. If necessary, the company can impose an unpaid suspension at a later time.

Of course, employers may also experience situations where the violation is obvious, and the company is only investigating to document a decision already made. If the circumstances clearly justify an unpaid suspension (or termination), then administrative leave may be unpaid. In these cases, the employee would still be called back to review the outcome and the consequences — whether this verifies or extends the unpaid suspension, or whether the employee is terminated based on the investigation results.



Cross reference

For related information, see the section on **Last day of work** in the **Involuntary (Employer Initiated)** tab.

Referral to EAP

An employee may be violating work rules because of personal problems. In some cases, it may be advisable to offer the employee the opportunity to use an employee assistance program (EAP). It may be appropriate to use other forms of disciplinary action (warnings, suspensions, etc.) in conjunction with the referral. Employers should maintain records of all referrals.

Referrals to an EAP are sometimes part of a “last chance agreement,” where an employee agrees to certain considerations (perhaps attending counseling) and understands that successful completion of a program, or attendance at a specified number of sessions, is a requirement of continued employment. Failure to meet the requirement may result in termination.

Transfer or reassignment

An employee’s behavior may improve through transfer or reassignment to a different work area. Other forms of disciplinary action may be used with the transfer. For example, a demotion to a lower position in another area can remove an employee from the area, or might remove the individual from a position in which abuse of authority had occurred.

Termination

The final step in progressive disciplinary action, or the result of a serious offense, is termination or discharge. It may be appropriate to terminate an employee for such things as theft, poor job performance, unexcused absences, harassment of other employees, violent threats or actions, or repeated unsafe behavior.

Determining the penalty

Several factors come into play in determining an appropriate penalty. Included among them is the basic concepts of corrective, progressive discipline. That is, select the minimum discipline likely to correct the offense. Second, fairness and consistency must be assessed.

Consequences should be reasonably consistent with the discipline administered in similar situations against employees with similar records. This means that employers should carefully weigh a number of things in determining how severe a disciplinary penalty should be, including:

- Nature and severity of the offense,
- Employee’s previous record,
- Employee’s potential for rehabilitation,

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- Penalties imposed on other employees in similar situations, and
- Disciplinary guidelines or policy.

Oral actions and other informal discipline can usually be given without undue formality. For more serious discipline, formally notify (in writing) the employee of the discipline being proposed and the incident(s) or conduct upon which it is based.



Best practice

Tips for discipline

Define who can administer discipline.

Don't look the other way. When discipline is first needed, administer it.

When issuing verbal discipline, make it known to the employee that he/she is being disciplined.

Ensure discipline is in compliance with any collective bargaining agreements.

Keep in mind that policies, employee handbook, etc., may well be implied contracts. Stick to them.

Document performance or conduct issues.

Document feedback, counseling, and training.

Use progressive discipline for most offenses.

Be consistent.

Discipline overview

One of the more difficult tasks a supervisor faces is disciplining an employee. It is never a comfortable issue, and when done badly, can lead to high-cost lawsuits. But certain measures can be taken to lessen the employer's liability:

Know the rules and policies: Generally, discipline is justified for a violation of a rule, policy, work procedure, office practice, or conduct standard that prohibits whatever the employee has done. This does not mean that every possible violation must be covered by a written rule. Some actions are so obviously wrong that no written policy is necessary. For example, a company may not have a rule against dumping garbage on a supervisor's desk, but such action could result in discipline even without a written policy.

Also, supervisors generally have the authority to establish operating procedures, work rules, and other conduct expectations. If employees fail to follow verbal or written directions or requests, decide whether to discipline the employee for insubordination or for failure to follow supervisory directions or policies.

Analyze the problem: Based on the initial information, determine the nature of the problem and whether the problem is related to conduct or performance. Most of what follows is intended to address conduct problems, but some of the communications described are also applicable to

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performance issues, bearing in mind that the response will be different (e.g., discipline may be used to correct conduct, while training may be needed to improve performance).

Investigate to get the facts: Complete a reasonably full and fair investigation before taking disciplinary action. Interview any pertinent witnesses and consider all the facts and mitigating factors. In most cases, the employee's first or second level supervisor will conduct the investigation. However, in cases involving allegations of waste, fraud, abuse, or other serious misconduct, the supervisor should contact Human Resources.

In conducting the investigation, determine the answers to the following questions, at a minimum:

- What actually happened?
- When did it happen?
- Where did it happen?
- Who witnessed the event?
- How did the event or situation occur?
- Why did it happen?
- Who was accountable for the incident?

In most cases, written documentation will be required. Write up the events that occurred, sign, and date them. This should be done as soon after the event as possible while the facts are fresh in witnesses' minds. In serious instances of misconduct or possible criminal conduct, a formal investigation may need to be conducted where questions are asked of witnesses and affidavits taken.

Get the employee's side of the story. A third party reviewing the case will want to know whether the employee was given a chance to present his or her version of the events leading to the disciplinary action.



Best practice

Gathering information

After gathering the appropriate information but before making a decision on what corrective measures to take, talk to the employee to get his or her side of the story. An employee who is confronted with workplace issues either has to admit it and explain it, deny it, or say nothing. This is important for both conduct or performance issues. These discussions can shed light on why problems are occurring. When meeting with the employee, consider the following process:

Tell the employee the general facts related to the case and that an investigation is ongoing. Ask if the employee knows anything about it. Avoid being accusatory or confrontational, but try to get at the facts.

If the employee asks if he or she is being accused, explain that this is only an investigation and a decision will not be made until all available facts have been reviewed.

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Take notes and record the employee's responses.

If the employee does not give his or her version, ask the employee to put it in writing and provide it.

Explain that the employee is obligated to respond truthfully to any questions.

To close the meeting, ask the employee if there is anything else that he or she has not shared.

Once the facts concerning the performance or conduct problem are known, take steps to correct the situation. This involves explaining expectations, offering assistance, and following through with action if the employee does not meet expectations.

Verify that rules have been communicated and consistently enforced: There are two other questions that supervisors must consider when contemplating discipline:

- Did the employee know about the rule or, if not, is the offense so obvious that he or she could be expected to know about it without being told?
- Has this rule been consistently enforced in the past and, if not, were employees warned that it would be enforced before this incident?

There should be some evidence that employees were told of a rule, or knew about it, before discipline is imposed. A rule can be communicated in many ways, including posting on bulletin boards, issuing memos, publishing a handbook, holding orientation sessions or meetings, discussing it in a one-on-one counseling session, and so on.

If the employee can show that the rule has not been consistently enforced, regardless of whether it was communicated, disciplinary action may not be justified. This does not mean a rule can never be applied if management has not been consistently enforcing it. However, it does mean employees must be clearly warned that it will be enforced before imposing discipline on anyone for breaking it.

Be consistent. Discipline should be consistent in terms of giving similar types of discipline for similar infractions. While it may be human nature to treat star performers differently from marginal employees, if two employees are both guilty of abusing sick leave, they should be treated similarly — not one person receiving a suspension while the other receives an undocumented slap on the wrist. Even in non-union settings, a history of past practice is important to take into account when imposing discipline.

Consistency is important not only to demonstrate fairness to all employees, but to protect the company from potential liability. If an employee is eventually terminated for some infraction and challenges the decision as wrongful termination (based on discrimination or retaliation, for example), the company cannot merely point to misconduct. It must show that the employee would have been terminated for that misconduct. If previous actions have not been consistent, the assertion that the company would have terminated the individual (regardless of circumstances) may not have credibility.

Make the decision to discipline: After answering all the questions discussed previously, supervisors should be in a good position to make a decision on whether to administer discipline.

Make the response fit the “crime.” Severe infractions warrant more severe forms of discipline, up to and including discharge. Less severe infractions warrant lighter impositions of discipline. An exception may be where progressive discipline is imposed for successive violations of the same infraction.

Be sure discipline is not done in retaliation for a protected activity. Protected activities are those protected by law or public policy, such as when an employee files a workers' compensation claim, takes a medical leave of absence, complains about questionable business practices, participates in union organizing activity, files a complaint with the Occupational Safety and Health Administration (OSHA) about an unsafe condition or practice, files a complaint with the Equal Employment Opportunity Commission in regard to discrimination, or requests time off for jury duty. This is just a sampling of protected activities.



For more information, see the tab on **Protected Rights and Actions**.

Document, document, document. Document at the time something happens so the details aren't forgotten, but remember to keep it objective. Instead of documenting "the employee has a bad attitude," document the facts: "On Monday, April 2, the employee refused to cooperate when given a specific assignment, despite repeated requests." Be detailed. If specific words the employee said are crucial to the case for discipline, document what he or she said word or word as soon as possible. Now is not the time to be shy. If profanity was used, write it down; it looks much more shocking on paper and strengthens the case for discipline.

Never terminate an employee on the spot. Suspend an employee and send the person home if necessary, but never terminate an employee in the heat of the moment before all the facts can be investigated. Supervisors should always check with HR before terminating an employee. They may be aware of additional factors that bear on an employee's termination that must be taken into account.

Have a discipline policy. This tells employees what they can expect and what is expected of them. It should outline examples of violations. It should *not*, however, be written in such a way as to limit discipline options. Never state that all discipline will be first in the form of a verbal warning, then a written warning, then suspension, then termination. That takes away flexibility to impose more severe discipline when it is warranted. Instead, include a statement that the employer retains the right to assign the level and type of discipline it deems appropriate, and reserves the right to change the policy.

Have the employee sign an acknowledgment form. When discipline is given, the employee should acknowledge in writing that he or she received a notice of the discipline. It does not necessarily mean he or she agrees with it. If the employee refuses to sign the form, document that the employee was given an opportunity to sign but refused to do so, and have a witness sign that the notice of discipline was delivered.

Remember what it's for. The word discipline comes from a Latin word meaning "to teach." The purpose of discipline is not punishment, but the correction of undesirable behavior. Remembering this distinction may put the process in perspective and make it a little less uncomfortable.

Follow the OODA loop

The acronym OODA stands for Observation, Orientation, Decision, and Action. The term was developed during the Korean War to describe how fighter pilots react during aerial combat, but the concept has been adopted in some management circles.

Anyone who has driven a car has gone through the process hundreds of times — observing other traffic, positioning the vehicle to avoid obstacles, deciding on a response such as braking, and acting on that decision. Then the loop immediately begins again.

Employers follow this process on many levels, from monitoring financial situations in order to position the company for growth to observing employee interactions and deciding whether a reward is deserved or whether discipline is warranted.

Training supervisors about the OODA loop may help them conceptualize the basic steps for managing their employees.

Observation

Supervisors need to remain aware of what is happening with their teams. This doesn't mean that supervisors should stand looking over their employees' shoulders throughout the day, but it does mean they should keep their eyes and ears open.

When the issue is a potential problem, early detection will allow the supervisor to start preparing to address the situation. Many situations won't involve discipline, but may nevertheless require the supervisor to recognize a need, such as a request for accommodation.

Orientation

This is the stage where the supervisor prepares himself or herself to address the situation. In many cases, this preparation will include documenting the observations made. In some cases, the supervisor may have to position himself or herself for further observation, as in the case of an employee who is suspected of being under the influence of drugs or alcohol.

Depending on the nature of the situation, the supervisor may need to gather resources, perhaps checking relevant laws or policies, or even speaking with HR for guidance on how to proceed. As an example, a supervisor who will address a disciplinary problem might check the employee's file for previous disciplinary actions and obtain a form to create a formal written warning.

Decision

Once the situation has been defined and the supervisor is in a position to address it, a decision must be made. The supervisor can decide how to approach the employee and plan out what to say. The supervisor should also decide how to handle likely responses from the employee, which could range from denial of the problem to anger or crying.

Action

The final step is to act on the decision. For purposes of employee relations, this is the actual meeting with the employee, but also preparing any subsequent documentation. If following up with the employee will be necessary, the supervisor should make notes or reminders to do so.

Following the action step, the loop begins again as the supervisor observes the effects of the action taken and determines any next steps.

Communicating success and failure

Supervisors must effectively communicate with employees on a regular basis, not only at the start of employment, but throughout the entire relationship. Supervisors should regularly meet with each employee they supervise to discuss expectations, provide directions, and solicit feedback. These meetings should be conducted one-on-one and in person. When appropriate, these meetings may be followed up with documentation in the form of notes, memos, or e-mail.

Although communication comes in various forms, supervisors should rely on e-mail and memos only when necessary. It is important to establish a face-to-face communication with each employee so that ideas, expectations, and concerns can be shared.

Positive communication is also an important tool for supervisors. Commendations, verbal praise, acts of appreciation, and other forms of recognition usually manifest into more positive work production, and supervisors should document such recognition. In some cases, however, employees will not meet expectations for conduct or performance, and the supervisor must communicate with employees on these matters as well.

There are two general types of employee problems: conduct and performance.

A conduct problem is a “won’t do” situation. If the employee has attitude problems, lacks motivation, doesn’t arrive on time, or has broken a rule, the employee may have a conduct problem. If a failure to meet performance standards is willful or intentional, this would also be a conduct issue rather than a performance issue.

A performance problem is when the employee “can’t do” what it takes to perform acceptably in the job, perhaps for lack of skill, knowledge, or ability.

Analyzing the problem is important because conduct or behavior problems are dealt with differently than performance problems. Discipline is used to correct conduct problems, while performance management is used to deal with performance problems.

Supervisors must focus only on the performance or conduct problem. In many cases, an employee may be dealing with a personal problem that is causing the job-related shortfalls. Supervisors should not attempt to address an employee’s underlying personal problems. The employee can, however, voluntarily obtain help for any personal problem.



Cross reference

For more information, see the section on **EAPs for performance improvement** later in this chapter, or the **Employee Assistance Program (EAP)** section in the **Managing Problems** tab.



Discipline or coaching?

The extent to which positive reinforcement and coaching can be used will depend on the nature of the situation. For example, if an employee is regularly arriving late or leaving early, the corrective action may focus on discipline and the potential consequences for failing to meet expectations. However, if an employee appears to lack motivation in tackling assignments, then encouragement and coaching could be helpful.

Positive reinforcement will have to consider the employee's needs. Some employees may feel that they are being micromanaged, and may want a supervisor to “back off” and allow more autonomy. Other employees might prefer to have clear expectations, and may need regular feedback on the work they are doing to remain confident going forward.

Coaching is commonly used as part of employee development and career pathing — to help the individual advance through the ranks or achieve career goals (which could even be a lateral move, not a promotion). For problems that might be otherwise be addressed with discipline, an alternative approach is a combination of the “warning” system and what is sometimes thought of as “coaching.”

To understand the difference, it's important to realize that the progressive disciplinary approach (verbal warning, written warning, suspension, termination) was actually developed by unions to prevent terminations without warnings. Since relationships between employers and unions are sometimes adversarial (or were at the time the approach was developed), this system may not be applicable in all workplaces, even though most employers use it.

A different approach is to treat employees as responsible adults. Instead of threats regarding discipline and consequences, employees are informed that they have certain responsibilities to the employer, just as the employer has responsibilities to the employees.

Reserved

For a successful employment relationship, each employee needs to take responsibility for meeting performance standards (or whatever the problem might be). If the employee is not doing so, and discussions of the problem have not been successful, the individual may even be given a day off (with pay) to think about the situation. This is not a disciplinary suspension, but rather an opportunity for the employee to think about his or her future with the company. Giving the time with pay shows the company's commitment to maintaining a positive relationship.

If the employee can return with a commitment to improve, all should be well. If the employee cannot hold up his or her responsibilities, the employment relationship may have to be terminated. Even in that case, the employee may be offered a chance to resign, with severance pay, rather than being fired. Some employers handle separations in this manner, partly because it maintains positive relations and reduces the odds of litigation for wrongful termination.

Implementing corrective action

A supervisor may report that an employee “just isn’t working out” and needs to be let go. However, a discussion with the supervisor may find that the employee has not gone through any corrective action measures. The supervisor might agree, but may have already made up her mind to terminate the employee after “building a file” to document all problems.

A formal corrective action plan (CAP) is meant to solve a performance problem and retain an employee who might otherwise be terminated. Unfortunately, in practice, some CAPs do little more than provide documentation to justify an employee's termination.

Assuming that a CAP is intended to save an employee, or at least give him or her another chance, consider revising the procedures to focus on problem-solving. Incorporating some elements of a traditional CAP, this approach includes early involvement, a modified CAP, and the removal of corrective actions.

Regardless of whether an employee exhibits behavior problems or performance issues, the sooner a supervisor addresses the problem, the better the chance of actually solving it. In early involvement, supervisors learn to identify the deviant behavior or performance; sit down with the employee in a private conversation to explain the problem; and work with the individual to come up with a solution, indicating that improvement must be made and sustained.

It should be noted that if the problem is behavioral, correcting it is within the means of the employee, since he or she has control of the behavior. If, however, the problem is performance-based, the employee may require additional skills, knowledge, or tools. Where this is the case, the supervisor must play an active role to help the employee remove the deficiency.

A key part of the solution is a checkpoint to review progress. If the problem goes away by the checkpoint, then no other steps need to be taken. If, however, the problem persists, then corrective action kicks in.

A modified corrective action plan includes several of the steps in a traditional progressive CAP: a verbal warning; if no change, written warnings; then suspension or termination. If early intervention fails to eliminate the problem, the supervisor meets with the employee to provide a documented verbal warning, which puts the employee on notice. If the behavior or performance does not change, the supervisor's next step is to issue a written warning.

The policy should state that a specified number of written warnings (such as three) within a given time period (for example, 12 or 18 months) results in *automatic* termination. The employee must understand the consequences of receiving these written warnings.

Refocusing the corrective action plan on early intervention instead of disciplinary action — and training supervisors how to become involved at the first sign of a problem — can save employees, reduce turnover costs, improve employee relations, and even reduce the possibility of litigation for wrongful discharge by disgruntled employees.

Do all employee problems require corrective action?

Corrective action is the process supervisors take to fix an employee problem. If the problem goes unresolved, the last step in a traditional corrective action plan (CAP) is termination. Which of the following three situations would merit implementing a CAP?

Situation 1: Receptionist ignores telephone calls. Customers complain that when they call the company, the phone rings and rings, and sometimes no one answers. The receptionist is responsible for greeting visitors, answering the phone, and taking orders, so the potential impact of failing to answer the phone is lost revenue.

Situation 2: Worker fails to begin another task once he finishes his main job. A worker was hired to run a compacting machine that compresses waste materials. His supervisor has found him sitting idly after he finishes compacting the day's waste, even though there are other tasks that can be done in the department.

Situation 3: A sales representative fails to make her quota of outgoing calls to potential customers. Sales representatives are required to make a specified minimum number of outgoing calls to generate sales. One of the sales associates has failed to make her quota for two months straight.

Actually, none of these situations merit an immediate CAP. The first response in all of these situations is to investigate and then implement an appropriate solution.

In **Situation 1**, the investigation might show that the employee was only partially at fault for failing to answer the telephone. Sometimes she would be engaged in a conversation with a walk-in customer, and she would continue the conversation instead of answering the phone.

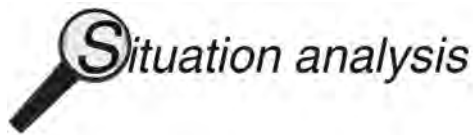
The investigation might even discover a software glitch in the voicemail system. If the receptionist was on the phone helping another customer, incoming calls were supposed to go to voicemail. However, a software flaw caused incoming calls to go unanswered, unknown to the receptionist.

The receptionist may resolve to answer all incoming calls by the third ring, excusing herself from conversation to do so. Along with fixing the voicemail system, this solution would make a CAP unnecessary.

In **Situation 2**, when the supervisor discusses the worker's problem with his boss, the manager should ask, "What is he trained to do?" If the supervisor failed to train the employee on other jobs and to express his expectations about work to be done, discipline is not the answer. The supervisor should meet with the worker in private, discuss the specifics of the jobs to be done, and train the worker.

In **Situation 3**, the sales associate might fail to make her quota of outgoing calls because she was on the phone selling large quantities of product to customers who had called *her*. Phone records could confirm the incoming calls, and sales reports would show closed sales. In this case, a congratulatory note from the department manager might be in order for a job well done!

At times, performance or behavior issues require putting an employee on notice. However, before doing this, take the time to investigate and find the underlying causes of the problem. If the employee simply lacks an understanding of the job or lacks training on how to do it, or if there are organizational issues that inhibit desired performance, those issues should be addressed before resorting to discipline.



Confiscating cell phones

Company policy forbids employee use of personal cell phones at work except with approval, such as in potential emergency situations. Several employees have been using their cell phones during work hours against the policy, and continue to do so, despite repeated warnings. The company is considering confiscating their cell phones. Is this allowed?

Confiscation of employee personal property could lead to liability issues. Since the cell phones are in the employer's possession, the company could be responsible if they're lost, stolen, or if personal information on them is compromised. However, the company can require employees to leave cell phones in their cars during work hours, and access them only during lunch and breaks. The company can also discipline employees for repeatedly violating the policy.

Effective discipline

When administering discipline, there are many issues to consider. How serious was the offense or violation? What discipline has been used in the past? Is this a first offense? How employers administer discipline can make all the difference in correcting the problem.

If faced with a situation where there is apparent employee misconduct, the first question to ask is whether there are facts that support the argument that misconduct occurred. These facts can come from a variety of sources, including:

- Visually seeing the performance problem;
- Performance appraisals;
- Quantifiable performance (i.e. quality); and
- Investigation reports, such as witness statements from other employees

If the facts support a performance or behavior problem, the next step is to determine if discipline is necessary. If it is a minor performance issue, a simple coaching session may be adequate to remedy the situation, without ever placing the issue in the formal discipline track.

When an employee's performance is not at the level the company expects, it is important to determine the cause. Some questions to ask include:

- Does the person actually have the skills or capabilities to meet the company expectations?
 - Has the person been formally trained in the problem area?
 - Has the person had an adequate practice/orientation period?
 - Has the employee recently taken on new responsibilities?
-

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- Have other employees with similar skills been able to meet expectations?
- Is the performance deficiency within the person's control (i.e., was adequate equipment provided)?
- Has management clearly communicated expectations?
- Are personal problems affecting the employee's performance?

Answering these questions may help determine underlying causes of the employee's performance problems and help in developing an effective corrective action plan.



Beware of third-party misconduct investigations

Before using a third party to perform an employee investigation for misconduct, the employer will want to understand all the state and federal laws and regulations related to background checks. One important law is the Fair Credit Reporting Act (FCRA).

This act protects employees by requiring employers to follow certain steps, including obtaining the individual's written consent, when obtaining a consumer report from a consumer reporting agency. The FCRA provides an exclusion for certain employee misconduct investigations. Employers are allowed to use consumer reporting agencies to investigate suspected employee misconduct, such as sexual harassment or theft, without first obtaining the employee's consent. Employers must still provide notice to employees, but not until after the investigation.

Determine the appropriate consequence

Consequences should be reasonably consistent with the discipline administered in similar situations against employees with similar records. This means that employers should carefully weigh a number of things in determining how severe a disciplinary consequence should be, including:

- Nature and severity of the offense,
- Employee's previous discipline record,
- Employee's potential for improvement,
- Consequences imposed on other employees in similar situations, and
- Disciplinary guidelines or policy.

Verbal warnings and other informal discipline can usually be given without undue formality. For more serious discipline, formally notify (in writing) the employee of the discipline being proposed and the incident(s) or conduct upon which it is based.

Written documentation of verbal warnings are often kept in the supervisor's files and given to the employee, but usually not in the personnel file, though this is a matter of company policy.



Best practice

Deciding on appropriate discipline

Factors to consider in determining the appropriate level of discipline include:

- 1) The employee's status as probationary or regular
 - 2) Length of employment
 - 3) Work performance history
 - 4) Prior warnings/counseling (Has the employee been counseled about this issue before?)
 - 5) Prior disciplinary action (Have there been other disciplinary issues with the employee?)
 - 6) Time elapsed since prior action or notice
 - 7) Severity of the offense
 - 8) Whether there were extenuating circumstances
 - 9) Whether there was malice on the part of the employee
 - 10) Employee performance based on recent evaluations
 - 11) Documentation of any prior disciplinary action (particularly how it may appear to a neutral third party who reviews the documentation)
 - 12) Whether the supervisor can clearly demonstrate that the employee was aware of rules, expectations, and consequences
-

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Possible disciplinary/corrective actions or penalties for misconduct are listed below:

Oral or written counseling: Providing oral or written counseling is often the first step in correcting a conduct problem. Counseling is not considered a disciplinary action. It is when the supervisor tells an employee that a particular conduct or behavior is unacceptable, and if it happens again, discipline may result. It is important to document this discussion (make a note that oral counseling was given, or keep a copy of the written counseling) so if the employee commits the same infraction again, the supervisor will have proof that the employee knew about the rule and that a warning was given.

Oral or written counseling is the mildest form of corrective action and, for minor infractions or a first offense, is often enough to solve the problem. This type of letter should generally include the following elements (see the sample provided later in this chapter):

- An explanation of the conduct or behavior that is causing concern. Indicate dates and times if applicable.
- An explanation the impact of behavior on organization. Example: “Your carelessness resulted in [outcome]” or “Your neglect of duties compromises patient care.”
- A citation of the rule or policy violated. Indicate whether the employee was previously counseled for similar misconduct: Example: “You were orally counseled for (misconduct) on (date).”
- A list of expectations for future conduct: Example: “You are expected to arrive and be ready to work promptly at the beginning of your work shift” or “You are expected to control your temper in the workplace.”
- An indication that a copy of the letter will be placed in the employee’s personnel file.
- An acknowledgment of receipt, and the employee’s understanding that further infractions may result in disciplinary action, up to and including termination.

Letter of warning: A letter of warning is the least severe type of formal discipline, usually issued by an immediate supervisor. It is a written statement of admonishment given to a employee for an act of misconduct. The letter outlines the specific unacceptable conduct, states such conduct will not be tolerated in the future, and warns that further misconduct will result in more severe disciplinary action. See the sample provided later in this chapter.

Letter of reprimand: A letter of reprimand is a written statement normally issued by the immediate supervisor for significant misconduct, or repeated lesser infractions. A reprimand is very similar to a letter of warning. It outlines the unacceptable conduct, states that the misconduct must stop and, if it does not, more severe discipline will occur.

This type of letter should generally include the following elements:

- A statement that the employee is being reprimanded for violation of a policy or rule, with a description or list of violations.
- Details of the violation with an objective statement of the facts.
- A description of any previous counseling or discipline for similar misconduct, and the dates of those events.
- A statement of expectations for future conduct.
- A warning that further violations may result in stronger disciplinary action, up to and including suspension or termination.
- An acknowledgment of receipt, and the employee’s understanding that further infractions may result in disciplinary action, up to and including termination.

Suspension: A suspension from duty involves an employee being formally directed to remain away from work for a specified period of time, often without pay. Because the employee loses the pay that would have been earned, suspensions are more severe than letters of warning or reprimand. Some employers prefer to impose paid suspensions because the loss of wages may create the impression that the employee is being punished, and the purpose should be correcting behavior, not punishing the employee.

Imposing a paid suspension may seem counter-intuitive, but it makes sense as part of a last-chance agreement. Essentially, the employee is told to take a day off with pay (to demonstrate the company's commitment to the employment relationship). During that time, the employee is typically asked to think about his or her commitment to resolving the situation, and possibly write a letter explaining that commitment — or if the employee cannot improve, write a letter of resignation. The employee should understand that if the situation does not improve, or if any continued problems occur, the result may be immediate termination.

Reduction in pay or demotion: This penalty involves moving an employee into a lower grade. Although it is not generally used in discipline (because it is more like a punishment than an inducement to improve), it is sometimes appropriate. For instance, situations involving negligence that may endanger other employees, or cases involving an employee who abused authority, may justify removing that authority.

Termination: This is the most severe form of discipline. It is used when all other efforts have not succeeded in correcting an employee's conduct, or when a first offense is so serious that the employer has no interest in correcting an employee, such as workplace violence.

Make disciplinary meetings count

When meeting with an employee to discuss disciplinary action, it is important to have the appropriate people present. These can include the employee's immediate supervisor, manager, Human Resources department representative, employee representative, and safety or security personnel.

At the meeting, the alleged rule violation will be explained and evidence and documentation presented. The employee should be permitted to discuss his or her side of the story. The employee's arguments should be taken into account before making a final decision about disciplinary action.

Keep written records to show that the:

- Complaint was formally presented to the employee.
- Employee signed a statement acknowledging the complaint.
- Employee responded to the complaint.

After informing the employee of the disciplinary action to be taken, make sure the employee fully understands what he or she is expected to do to correct the behavior. And, follow up at reasonable times to ensure performance improvement is occurring on schedule.

Written communication must be clear, accurate, and timely. If an employee has a performance or conduct problem, documentation may help the employee see the mistake and convince him or her to change behavior.

Objectivity is essential. Supervisors must handle problems as business issues. Effective business decisions and effective documentation are based on an objective analysis of factual information. The analysis must consider all available information and be free of emotion and bias.

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When an employee's performance is not successful, supervisors should be able to demonstrate that they made reasonable efforts to assist the employee. The documentation should allow a reviewer to conclude that (1) the employee has violated a rule or failed to perform his/her job successfully; and (2) a supportive supervisor made a sincere effort to help the employee succeed.

In performance cases, the employee must understand the standards and that he or she is expected to meet, and should be given a full and fair opportunity to meet them.

In conduct cases, it is important to communicate the conduct-related rules to the employee. If the employee is later disciplined for the same or similar offense, the company will be able to prove that the employee was aware of the rules. This requires communicating:

- The assistance that will be given to the employee to correct the problem, and
- The consequences if the employee does not improve his or her conduct.

For example, if an employee continually arrives late for work, the first step might be counseling to ensure that the employee is aware of the requirement to arrive on time. If the employee continues to be late, a supervisor would usually impose formal disciplinary action, such as a letter of warning. If the problem still does not improve, the employee ultimately may be fired.

Any disciplinary action would be based on a legitimate reason such as failure to follow supervisory instructions for arriving to work on time, and applied in the context of how the problem behavior adversely affects the team and the company.

Adhere to union employees' Weingarten rights

Union employees have the right to have a representative present during an interview that could lead to disciplinary action. However, a few restrictions apply:

The Weingarten right entitles employees only to *union* representatives. It does not entitle them to attorneys, non-employees, or supervisors. In one case, an employee requested a friend who worked out of his home, 120 miles from the place of employment. The court found that the employer's refusal to allow the presence of this individual did not violate the Weingarten right.

Organizations are not obligated to remind an employee of Weingarten rights. However, employees do have the right to know the subject of an interview.

The requested union representative must be available. An employee cannot delay an interview to wait for an unavailable representative. If the preferred representative is not available, the employee must choose another. In one case, an employer refused a request for a union steward because the steward was on a lunch break. The court ruled that this was a violation because the steward was on the premises and was scheduled to finish the lunch break in 15 minutes. Therefore, the steward was "available." Unfortunately, the court did not define availability beyond this ruling.

Simply informing an employee of disciplinary action, without conducting an interview, does not violate the employee's Weingarten rights.



Best practice

Other tips for discipline

Don't look the other way. When discipline is needed, administer it. It's hard to administer discipline, but failing to act when an offense first surfaces will not improve the situation. This can, in fact, be a disservice to a worker, rather than a benefit to them, which most managers intend.

Conduct disciplinary talks in private.

Be calm, but firm and professional.

Ensure discipline is consistent with any collective bargaining agreements.

Document feedback, counseling, and training.

Document properly! Poor documentation can be as legally dangerous as no documentation.

Ensure managers and supervisors know when, how, what, and where to document.

Use progressive discipline for most offenses.

Be consistent.

Coordinate with payroll/benefits departments if time off is involved.

Sample letter of counseling

To: Employee name, title

From: Supervisor name

Subject: Letter of Counseling

This is an employee counseling letter for your unauthorized absence from duty.

Your scheduled lunch period is from 11:30 a.m. to 12:00 p.m. On June 6, 2010, you did not return from lunch until 1:00 p.m. You did not request approval for your absence. You could not give a legitimate reason for returning late or for failing to request leave. Therefore, you were charged one hour of unexcused absence, which is unpaid, unapproved leave.

In deciding to issue this letter, I have considered that during your new employee orientation in October 2009 and later during a staff meeting on January 12, 2010, you were informed of the requirement to take no more than your authorized lunch, and to request advanced approval for leave if you wish to be away from work longer. You may submit requests for time off to me or to (authorized person) if I am not available.

In the future, you are expected to take only the authorized lunch period and to follow procedures for requesting time off if needed. You are cautioned that any future misconduct of this nature or other misconduct could result in a disciplinary action, up to and including termination. If you have any questions about leave approval policies or procedures, I will be happy to answer them.

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If you believe that personal, medical, or other problems contributed to your actions, you may provide documentation of the medical condition or raise these problems. You may also contact the Employee Assistance Program at [telephone number] for assistance. You can contact the Personnel Office at (telephone number) if you need further information concerning medical documentation requirements.

Sample letter of warning

To: Employee name, title

From: Supervisor name

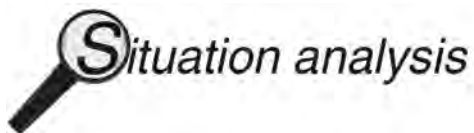
Subject: Letter of Warning

(NOTE: The main body of this letter may be nearly identical to the letter of counseling given above, but may include the following additional content.)

You may make a written explanation to be retained with this letter of warning. A copy of this letter of warning, along with any written explanation made by you, will be retained in my supervisory employee files for not more than one year after the date you acknowledge receipt. The letter will be removed and destroyed from my supervisory employee files if you separate from employment prior to the end of the one year period. The letter may be withdrawn for destruction earlier than the expiration of the one year period if your conduct is considered to warrant such. I will inform you in writing if such becomes the case.

I acknowledge receiving this document. I understand that my signature does not indicate agreement, but only receipt of this information.

Employee's signature _____ Date _____



Refusing to sign

Employees sometimes refuse to sign a letter of acknowledgment, even when the statement includes a disclaimer that the signature only indicates receipt, not agreement. Employers may consider this a deliberate refusal to follow the supervisor's instructions, and may impose further discipline for that refusal. As with any disciplinary action, the employee should be warned of the consequences for failing to follow directions or requirements.

An employee's refusal to even acknowledge the discussion may indicate that the individual is unwilling to take responsibility for his or her actions. For this reason, some employers will terminate for refusal to sign (and as noted, this consequence should be communicated to the employee). Courts have upheld terminations under these circumstances.

Sample letter of termination based on conduct

To: Employee name

From: Supervisor name

Subject: Notice of separation

In previous meetings on (dates) and in letters of warning dated (date), you were informed about the need to change your conduct in the workplace. The consequences for failing to do so were explained, yet your conduct remains unacceptable.

(explain deficiencies as in the examples below)

Example: You were abusive, disrespectful, and insubordinate to your supervisor in a meeting you had with her on April 12, 2010. In the meeting, you stood up and stated in a very loud and hostile manner that you did not want to talk to her. You walked away from her office despite repeated direct orders to stay. In addition, on two occasions (March 15 and April 3, 2010), you used abusive language and gestures in conversations you had with the secretary. After each of these instances, your supervisor told you that your behavior was inappropriate.

Example: You have continually failed to follow instructions regarding leave procedures and, as a result, you have been warned about unexcused absences. You were notified on November 12, 2011, in writing by your supervisor of the procedures to follow for requesting sick leave and vacation. On November 30, you failed to call your supervisor to request sick leave until 11:00 a.m. At that time, you were informed again that you must call your supervisor within one hour of the beginning of your shift to request sick leave. On December 15, you again failed to follow instructions when you called your supervisor at 9:00 a.m. and requested vacation for the day. Your supervisor informed you again that vacation must be approved in advance. On January 15, you called your supervisor at 10:00 a.m. and requested sick leave. These were determined to be unexcused absences.

Because these conduct issues remain unresolved, despite my belief that you could have made positive changes, your employment at (company) is terminated effective (date).

Writing an effective incident description

One of the most important portions of any disciplinary report is the incident description. This portion of a record contains the facts of the incident that led to a disciplinary action, and can make or break a case against a company, should the offender sue for discrimination, retaliation, or wrongful discharge. However, it is the incident description that can be the most difficult portion for a supervisor to complete.

Here are some tips to make the task a little easier.

Who, what, where, when, why, and how

Like a news reporter, supervisors will want to use the “who, what, where, when, why, and how” method to describe what happened. Who did what? Who saw the offender do what? Where and when did it happen? When asked what happened and why, what was the offender’s explanation? Why is what the offender did wrong? Here is an example:

At (time), on (day), (date), the employee (describe action). The employee said (what). Then the employee (describe action). When interviewed after (what action), (witness/victim name) said that he/she (saw, heard, smelled, tasted, etc.) (what). When asked why the employee (took what

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action), he/she said (response). The supervisor explained that (what action) violates (what, e.g., policy) and is unacceptable. Employee was told (expectations) and responded that (response).

Good descriptions will use the sense of sight, smell, taste, touch, and hearing. For example, “I saw you roll your eyes then shake your head,” “I heard you sigh deeply then say ‘whatever,’” or “I smelled cigarette smoke in the locker room.” These facts provide images that help to support a supervisor’s decision to discipline an offender.

Supervisors should not forget to include the senses of witnesses. For example, “They told me that they saw you arrive to work at 8:25 a.m.” Witness observations can be credible evidence. However, the supervisor should be sure to obtain a written statement from the witness before taking any disciplinary action. That way, the supervisor has proof of the observation, even if the witness is later pressured by the offender to back out of his/her testimony in court, should the case ever reach a trial.

When describing observations, supervisors should use objective facts about the behavior, rather than general subjective conclusions. If subjective conclusions are used, they should be supported with objective facts. Here are some examples:

NOT: You dressed poorly.

BETTER: You came to work in yellow flip-flops and blue jeans with several ragged cuts in both knees. You stated that flip-flops were fashionable and that your jeans “came from the mall like this.”

NOT: You were unsafe.

BETTER: You were caught not wearing your air-supplying respirator in the tank.

NOT: You were drunk.

BETTER: You slurred your speech and your breath smelled like beer. John Smith reported that you came within one foot of hitting him/her with your forklift that morning.

NOT: You were sleeping on the job.

BETTER: I could hear you snoring in your chair in front of your computer. I could also see your head leaning forward, your hand resting on the mouse, and the screen saver running.

In addition to avoiding subjective conclusions, supervisors should avoid assumptions about the offender’s intentions. No one really knows what was in the mind of an offender when he/she committed an offense. Avoid terms like “intentionally,” “knowingly,” and “purposely.” Instead, supervisors should stick to the observable facts.

Explanations, denials, and conversations

Immediately after an incident or when confronting an offender about an incident, supervisors often ask the offender what happened, if the offender did it, and why and how it happened. Responses to these questions may:

- Show (though his/her own words) the offender’s state of mind,
- Show that the offender admits to or denies the offense,
- Provide the offender’s initial explanation, and/or
- Prevent the offender from changing his/her story.

If the offender denies the offense and is later proved to have committed the offense, the supervisor may discipline the offender for not only committing the offense but lying about it. In addition, adding the offender's responses to an incident description shows that the supervisor has considered the offender's side of the story.

Similarly, other conversations that are related to the incident should be covered in the incident description to give the complete picture.

Effects of the incident

All measurable, negative effects on the company and its employees and customers, as a result of an incident, should be noted in an incident description. This includes any direct or indirect costs, statistics, missed opportunities, negative publicity, employee turnover, customer loss, property damage, disruptions, etc. Supervisors may wish to attach documents, photographs, and other evidence that show these negative effects. Negative effects are objective and can further justify a disciplinary action.

However, because disciplinary reports may someday appear in open court records or in the wrong hands, it is critical that supervisors watch how they write down the effects of an incident. In fact, admitting that an offender's behavior had a certain effect on the company could pose a liability. Instead, supervisors may want to consider stating that the behavior *could have had* a certain effect.

Attachments

Other documents that support the facts of the incident description should also be attached to the disciplinary report. These might include:

- Accident reports
- Police reports
- Written or tape-recorded statements of witnesses
- Photos, videotapes, or drawings of the incident scene
- Computer records
- Time sheets
- Security access records
- Production records
- Illness or injury records
- Maintenance records
- Inspection records
- Previous warnings
- Training records
- Counseling records
- Performance improvement objectives and follow-up records
- Other records and reports

Writing incident descriptions is never easy, but armed with the tips above, the task may be a bit easier.



How to conduct verbal counseling

Verbal counseling is usually the first formal step in the disciplinary process (unless of course the offense is severe enough to warrant other action). Usually conducted by a supervisor or manager, verbal counseling is one of the most frequently used, and mildest, forms of corrective action. Verbal counseling is designed to eliminate misunderstandings and establish desired standards of conduct or performance before a serious problem arises.

To be effective, verbal counseling should be conducted as soon as a supervisor recognizes an employee is having a performance or conduct problem. Verbal counseling is not appropriate for serious offenses, unless used in conjunction with other corrective measures.

Verbal counseling may be appropriate for such things as:

- Occasional, minor tardiness;
- A new employee who wasn't trained on a particular work rule;
- Failure to follow a minor work process rule (using the wrong form, etc.);
- Poor performance or attitude; and
- Other company-defined issues.

Once the supervisor/manager becomes aware of a problem and determines verbal counseling is the appropriate action, the supervisor should set up a time and location to speak to the employee. The location needs to be such that privacy is ensured, and there needs to be sufficient time to carry out the counseling. Furthermore, sufficient time needs to have passed to ensure the supervisor is calm and can discuss the problem in a non-angry manner.

Also, keep in mind that an informal chat in the hallway may not get the job done as far as improving performance. For the verbal counseling to be effective, it should be clear that counseling is occurring because of an identified performance issue. A private discussion with a closed door and limited interruptions should fully inform the employee of expectations and permit the exchange of information critical to effective counseling.

The supervisor also may find it helpful to prepare ahead of time for the counseling session by outlining the problem areas AND determining specific suggestions for improvement. Many supervisors and managers find it beneficial to let the employee provide a suggested corrective action approach and, if adequate, use that approach.

During the counseling

While the counseling session is in progress, the supervisor needs to be positive, yet firm. Counseling should be constructive. The goal is to improve the employee's performance, not to punish.

A productive approach to improving performance generally consists of reviewing job requirements with the employee, specifically defining the problem and determining objectives the employee will work toward.

It doesn't do much good to beat around the bush in a verbal counseling session. The goal is to identify the problem and fix it before it gets to a more serious level. Being candid can help accomplish this goal.

Don't pry into personal issues, but do examine any underlying work-related reasons that may be causing the employee's performance problems.

While presenting the issue to the employee, supervisors need to cite specific examples:

"You appear to be short with customers and coworkers."

"Your tone is coming across as harsh."

"You've been late twice this month."

Attitude is a common problem supervisors have with employees. However, employees are likely to be defensive if questioned about their attitude. Instead, consider saying the perception is that the employee has a problem. "Bob, you may not mean to sound harsh, but you're coming across this way to your coworkers."

The employee should be given specific examples, since the term "attitude" is vague. For example, Bob may sound harsh to coworkers because he makes sarcastic remarks, or because he is dismissive of ideas presented by others and claims that his way is always the best way.



Cross reference

For more information, see the **Negative attitudes** section in the **Managing Problems** tab.

After the counseling

Document the counseling session. This will provide a basis for follow up and also give the supervisor documentation if the problem persists and further action is needed.

Follow up is critical where verbal counseling is used. If the employee does not improve, or the problem is not corrected following counseling, it may be necessary to move to the next phase, usually a written warning. Generally speaking, if a person has been counseled twice without improvement, it is time to take a more severe action.

Some organizations find it useful to submit a letter or memorandum to the employee, clarifying what was discussed in the counseling and emphasizing certain points. If used, make certain the communication is confidential, with copies given only to the employee and the supervisor's own file. Some companies may place the documentation in the personnel file; however, if the situation warranted only verbal counseling, it may not be worthwhile to give it the formality of placing in the personnel file.

It may seem that once a verbal counseling session has ended, the process is finished. To truly ensure lasting performance improvement, it is a good idea to provide positive reinforcement of the desired behavior. "Bob, you really seem to be communicating effectively with customers and coworkers."

When should discipline start over?

Sooner or later, a manager will have to discipline an employee for a policy violation, whether sexual harassment, negative attitude, poor attendance, or dress code violations. Following the warning, the employee's conduct may improve temporarily, but the employee will later revert to old habits.

If the employee maintained improvement for several months before the next violation, managers may wonder if they should pick up discipline where they left off, or start over at the beginning, when a typical disciplinary progression looks like this:

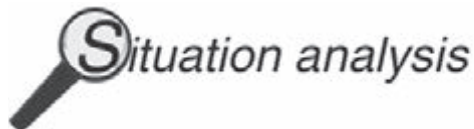
1. Verbal warning.
2. Written warning.
3. Final warning or suspension.
4. Termination.

If an employee was given a final warning that the next violation would result in termination, but the situation improved for eight months before the next incident, should the manager terminate, or start over with another verbal warning?

There is a third option, and that is repeating a step or going back a step. The manager could meet with the employee, reiterate that the employee was made aware of expectations, and note the new violation. However, in consideration of the fact that situation had improved, the employee is being given one more final warning to meet expectations. It should be clear that the employee will get only one "second chance" and will not get a new "final" warning every few months.

There is a point, of course, when discipline should start over. Unfortunately, that point is not clearly defined, and may differ with circumstances. As an example, if an employee with a tardiness problem was given a final warning, then had no issues for nine months, the next event of tardiness need not result in termination, and perhaps not even another final warning. It may be reasonable to go back to the written warning. The manager could explain that, because of the previous violations and reminders, the employee does not have a "clean slate" but the company is giving consideration for the improvement shown. The manager should be clear that the employee will not continue to receive endless warnings.

The decision of whether to continue to the next step, repeat a step, go back a step, or even start over is at the employer's discretion. The decision may depend on the nature of the conduct and the duration of the improvement period. For serious conduct such as sexual harassment, any future violation might result in picking up where the previous discipline left off, even if the next violation did not occur until years later. However, if the conduct involved tardiness and the employee had no issues for more than a year, it could be reasonable to start at the beginning when another incident occurs.



Giving progress reports

For any disciplinary action, the manager should hold follow-up meetings at defined intervals, especially to report satisfactory results. All too often, a manager will meet with the employee only when additional problems occur, and follow-up meetings should not be limited to giving negative feedback. The meeting can be an opportunity to give positive feedback and also to reinforce the expectation, such as “we’re happy with your progress, and we expect this improvement to continue.”

As another example, if an employee repeatedly violated the dress code and was given a final warning, but the situation improved for only two or three months before the next violation, this may justifiably result in a conclusion that long-term progress is unlikely, and carrying out the consequences of the final warning may be necessary. However, if the employee had no problems for six to eight months after the final warning, and then another violation occurred, the manager could issue another final warning (repeating the most recent step). Similarly, if progress was sustained for a full year before the next violation, the manager might go back a step and issue another written warning (without going back to the beginning).

At any particular step of discipline, the employee does not need to be told that improvement is only “expected” for a certain number of months. However, if improvement does occur, the manager may take that into consideration. Employees may be given a second chance, but not necessarily a third or fourth chance. If an employee shows repeated relapses, the manager may reasonably conclude that the problem is not going to go away and apply the resulting consequences.

A rolling time frame

When evaluating what time frame or improvement period should result in giving consideration by repeating a step or moving back a step, employers should consider using a rolling period that “looks back” at a particular time period from the most recent violation. Using a rolling year allows the company to keep a running total of violations and apply discipline based on the incidents in a specified time frame.

For example, an attendance policy might allow no more than five unexcused absences per year, but this does not have to be a calendar year. It could be a 12-month period looking back from the date of the most recent unexcused absence. As time goes by, older absences will drop from the employee’s record when they fall more than 12 months before the current date. Managers

may keep a running balance and continue through each disciplinary level until either (1) there are zero incidents for the defined time period, or (2) the number of incidents drops to “acceptable” levels for that time period.

When setting a time frame, consider what level of violations the company is willing to accept. To use a generic example of a “production error” that results in a ruined product, a standard of four incidents in 90 days would allow an employee one incident per month without ever getting a warning because the employee would only have three incidents every 90 days. If this is not acceptable, it may be necessary to apply a longer time period such as four errors in six months. Then, an employee who has one incident per month would get a verbal warning after four months, a written warning after another four months, and so on.

If this employee meets acceptable standards during any six-month period, the company does not have to give a clean slate, but could repeat a warning or drop back one level (which would be a clean slate if only a verbal warning had been issued).

However, if an employee had numerous incidents in a short time period and received both a verbal and written warning (e.g., eight incidents in seven months), but then only had three incidents for the next six months, the written warning might be dropped, with the verbal warning kept active. Then, if the employee works another six months with fewer than four incidents, the verbal warning is also dropped and the employee has a clean slate. This allows the employee to reduce the level of discipline by meeting expectations for the specified period of time.

As noted, employers can establish any time period (or any number of incidents) based on their evaluation of what is acceptable for the particular issue, whether tardiness, unexcused absences, errors, or other problems. However, employers should keep in mind that whatever number is selected (particularly for attendance), some employees may “play the system” and keep their absences just under a level that would result in discipline. While the majority of employees should be trustworthy, a few may “game” the system.

This “gaming” can be more easily addressed if the company repeats or drops back one level of discipline, rather than granting a clean slate. Moreover, as noted previously, the employee does not have to be given a third or fourth chance to improve. Although a second written (or second “final”) warning might be issued, there is no obligation to give a third chance. Giving consideration for prior improvements does not create an obligation to continue giving the same consideration endlessly.

Performance issues

Most performance problems are corrected informally during regular discussions with employees. In these discussions, supervisors should discuss the requirements of the performance plan, any specific deficiencies in the employee’s performance, and what the employee must do to perform at an acceptable level.

A Performance Improvement Plan, or PIP, is a way to outline a clear plan for an employee’s improvement in work performance. It may be the means necessary when all other efforts (coaching, discussions, and warnings) have failed.

Positive feedback is good if warranted, but if the employee is not meeting expectations, do not hide concerns behind sympathetic words. Be clear that continued unacceptable performance could result in loss of employment. Maintain copies of examples of the employee’s performance. Records should be kept and shared with the employee at reasonable intervals.

Employee Relations Essentials

During this process, supervisors should be able to determine if the employee needs additional training. Be very clear with the employee about the consequences of any failure to meet expectations. Waiting until the end of the year and surprising an employee with the news that performance is unacceptable is not a good idea. A supervisor should begin dealing with any performance problems, or potential problems, as soon as the issue is identified.

The initial response may be a performance counseling letter (see the sample later in this chapter). However, if improvement is not forthcoming based on early efforts to resolve the situation, a formal PIP may be needed. Inform the employee that performance is unacceptable, and give the employee a reasonable period of time to show that he or she can do the work at an acceptable level. This notice and opportunity period become the heart of the PIP.

The length of time given for the employee to improve performance to an acceptable level will vary depending upon the nature of the work assignments. The opportunity period is normally at least 30 days. It is most often 90 days, but can be shorter or longer depending upon the type of duties in the position.

Reserved



Best practice

What a PIP should not be

Many employers have an understandable wariness about terminating employees and want documentation to back up the decision. Part of that documentation may be a PIP, but that isn't the point of the process. If a PIP is nothing more than a paperwork exercise and doesn't actually give an employee an opportunity to improve, courts and juries are likely to recognize this.

In one case (*Phillips v. StellarOne Bank*), a district court sent a case to jury after noting that the employer seemed to set PIP goals so high that the employee couldn't reach them. The PIP actually gave more weight to the employee's claim that he was terminated for discriminatory reasons — in this case, his age.

In another case (*Burnsed v. Pasco Regional Medical Center*), an employee was placed on a PIP but was then removed from the work schedule and was not allowed to pick up any shifts (despite the employee's frequent calls). Since the employee had taken intermittent leave under the Family and Medical Leave Act, a federal trial court in Florida held that the case could be made that the PIP was simply part of a plan to terminate the employee.

Likewise, if the goals of a PIP are unclear or vague (perhaps they require an employee to "improve sales"), the plan won't help the employee understand what improvement is needed. Clear goals, expectations, and time frames will help employees understand precisely what they must do to improve and ultimately stay with your company.

The goal of discipline is not punishment, but correction of the undesirable behavior. A PIP can be drawn up which makes the steps crystal clear to the employee regarding what the employee must do to bring his or her performance up to acceptable levels, or face further discipline or termination. The PIP should indicate the following:

- What specifically is needed to bring the employee's performance up to an acceptable level,
- What assistance will be provided,
- If and when follow-up sessions will occur,
- The date by which improvement must be seen, and
- The consequences of failing to improve by the specified date.

Expectations should be clear and in measurable results (e.g., pack a minimum of 60 boxes per hour, if lack of production is the issue) or behaviors to follow (e.g., be at the desk working by 8:00 a.m. each work day, if tardiness is the issue). Expectations should be so specific that the employee can't claim that he or she didn't understand what was expected. For example, telling an employee she must increase her number of sales calls only gives her a vague sense of direction; on the other hand, telling her she must increase her number of sales calls from 50 to 75 per day is specific, clear, and most importantly, measurable.

Employee Relations Essentials

Depending on the nature of the job and the problem that needs to be corrected, it may be appropriate to offer assistance in a variety of ways:

- Additional training,
- Coaching or a buddy system,
- Observation and feedback,
- Checklists or a list of rules,
- Closer supervision, or
- Counseling and employee assistance programs.

The duration of a PIP may vary depending on the type of work, the time it would generally take to show measurable results, the time it would take for improved behaviors to surface, or the time it would take for the employee to show he or she can stick with the acceptable behavior. Depending on these factors, the time frame can range from 30 days to 180 days.

Follow-up sessions performed at regular intervals during the PIP time frame give the employee a report card of his or her progress. If the employee is failing to improve, look for other types of assistance that may help the employee succeed.

Clearly spell out the consequences the employee will face for meeting or failing to meet acceptable levels of performance by the end of the PIP period. If the employee has reached an acceptable level of performance, there is no need for any further disciplinary action except to keep providing feedback and encouragement to the employee. However, if the employee is still performing unacceptably, further specific action is called for, which may include termination.



Best practice

What a PIP should be

PIPs are meant to benefit both the employee and the employer. They must include goals and markers that employees could reasonably be expected to achieve. That doesn't mean lowering standards, but if otherwise fair PIP requirements cannot be attained by a particular employee, a PIP might not be an effective option. If the employee simply cannot meet expectations, consider whether immediate termination is warranted.

Employers must consider the changes expected and how long it may take to reach those goals. While 90 days may be appropriate for some plans, six months or longer may be necessary, depending on the nature of the improvement expected. The time period, as well as the potential consequences for not meeting requirements (discipline, termination, or demotion), should be spelled out in the plan.

How to use a PIP

First, consider the nature of the problem. As the word "performance" in the name suggests, PIPs are used for performance problems rather than behavior issues. While a PIP could be instituted to give an employee a formal time frame to improve an attitude problem, for example, it's more

likely to address more objective issues that can be identified through goals. A PIP won't typically be the answer for misconduct like harassment.

Next, make sure a decision is consistent with performance feedback that the employee has received. A PIP should not be the employee's first indication that there is a problem.

Finally, consider whether other employees are held to the same standards. For instance, implementing a PIP for an older worker when similar performance problems from a younger worker are ignored could create the appearance of discrimination.

The supervisor is responsible for ensuring that the employee is given a reasonable and fair opportunity to improve. The supervisor should give specific direction on expectations, keep a copy of written instructions, and provide frequent feedback on work products.

Providing this level of supervision helps ensure that the employee has been given all the assistance necessary for improvement during the opportunity period. In many cases, an employee's performance will improve to an acceptable level. If not, the documentation created during this process will be the basis for discipline or termination, and proof that the employee received a full and fair opportunity to improve.

The employee is given a letter or document that:

- Identifies the indicators or areas in which the performance is unacceptable, with specific examples of the deficiencies;
- Outlines the specific period of time the employee is being given to demonstrate acceptable performance;
- Describes the improvements that are expected;
- Indicates what the supervisor will do and what special training (if appropriate) will be given to help the employee improve; and
- States that if the employee's performance does not improve to an acceptable level, it may be necessary to terminate the employee.

After writing the PIP, meet to discuss the content in depth with the employee. Explain what the employee is expected to do and how the supervisor will contribute to a successful completion of the PIP. The supervisor must follow up on the employee's progress, meet with the employee to review progress, and ensure that the employee has the appropriate resources available to be able to perform as expected. The supervisor should document these discussions to keep a record of the employee's progress, or lack of progress, throughout the designated time period.

The PIP should be completed to cite the performance areas in which the employee is below standards, and should contain the following:

- A clear description of the problem and the expectation. Cite previous instruction, counseling sessions, and direction provided in each area. Clearly explain the impact and/or consequence of the behavior to the department, organization, team, etc.
- Provide a plan of action for the employee, which, if followed, will result in resolution of the problem. Identify specific actions and/or behavior required to correct the problem.
- Describe how the supervisor will assist the employee. Ask what the employee needs to address the problem. Activities may include training that will be provided, monitoring, and a description of how the supervisor will monitor the employee's progress.

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- The duration of the PIP should be noted. Generally, a PIP can last from 60 to 90 days. It is important to stress that if the employee's performance improves during the designated time period, he or she will be responsible for sustaining performance that meets standards beyond the time period.
- Indicate intervals for giving the employee progress reports. Hold regular meetings with the employee to go over the progress or lack of progress. Progress reports should be prepared noting the employee's improvement or lack of improvement and should be furnished to the employee after each meeting.
- State the consequences for not improving performance or not making enough improvement at the end of the designated time period. This could include demotion, suspension, or dismissal.

During the PIP, if the employee's performance improves to a successful level, issue a letter informing the employee of this. Also, inform the employee that if performance deteriorates to an unacceptable level within one year from the PIP period, the supervisor may recommend his or her removal without affording an additional opportunity to improve.

If the employee's performance does not improve, one option is to reassign the employee out of the job. If there are no vacant jobs for which the employee is qualified and can perform acceptably, then termination may be the only option.

While the intent of a PIP is to provide a designated time period to make improvements, be sure to specify that employees are not guaranteed employment for the full duration. In some cases, it will become obvious that progress is not being made, and in others, the employee might engage in behavior unrelated to the PIP that justifies termination.

While employers certainly want to create a record of an employee's performance, this is not the true purpose of a PIP. The PIP is meant to help an employee get back on track and avoid a termination. If the employee ultimately doesn't meet expectations, at least the employee had a fair opportunity to do so.



Can a PIP prove discrimination?

Many employers implement performance improvement plans (PIPs) to give employees a clear sense of expectations and a time frame in which to accomplish them. While employers do have the option to terminate a poor performer, a PIP gives the employer the chance to save the costs of replacing the worker, and gives the employee a chance to keep his or her job.

Unfortunately, not all employees are grateful for the opportunity, and some even view it as a punishment. In one court case, a 51-year-old employee with a record of marginal performance alleged discrimination, claiming that a PIP was an adverse employment action taken against him because of his age.

The employee alleged that his supervisor treated him "dismissively" and failed to provide clear guidance regarding his responsibilities. The supervisor felt that the employee did not take his job seriously, that he improperly delegated responsibilities to others, and that he failed to comply with directives. After a performance

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review indicated that the employee was not meeting two of his seven job objectives, he was presented with a PIP and given 90 days to bring his performance to an acceptable level or face the possibility of reassignment, demotion, or termination.

Not only did the Third Circuit Court of Appeals find the employee's proof of age discrimination to be lacking, but it ruled that the PIP was *not* an adverse employment action because it did not cause the individual to suffer a loss of pay, benefits, or status. The court indicated that the PIP was not a punitive action, but was, in fact, the opposite in that it gave the employee a chance to keep his job instead of being summarily terminated.

Reynolds v. Dept. of the Army, Third Circuit, No. 10-3600 (July 22, 2011)

While this ruling was consistent with the rulings of other courts, it does not mean that a PIP can *never* be considered an adverse action. If a PIP is accompanied by a change in pay, benefits, or responsibilities for the employee, it could be considered an adverse action and may then support a discrimination claim.

As long as a PIP doesn't come with a change in pay, benefits, or status, employers should feel comfortable imposing them without fear that they will be viewed as adverse employment actions.

Sample performance counseling memo

To: Employee name, title

From: Supervisor name

Subject: Performance Counseling

We have had several discussions concerning your performance in [describe area]. I have offered several suggestions to you about how to improve your performance, such as [list examples]. Unfortunately, these efforts have not resulted in the expected level of performance.

As we discussed yesterday, I have scheduled you to attend [a course or training session]. If you have other suggestions that will help improve your performance, please let me know.

To date, I have used informal methods to address the performance deficiencies. Unless your performance improves, I will have to rate you as "Below Expectations" in this area. This will result in the use of a formal performance improvement plan which will provide you a specific period of time to show that you can perform at the "Meets Expectations" level and remain at that level for one year. If you are still not rated as meeting expectations after the plan, or you do not hold that performance for one year, I would have to take action to reassign you, change you to a lower grade, or remove you.

I am informing you of this so that you realize how serious this situation is. I am hopeful that you will give some serious thought as to what is preventing you from meeting performance expectations and then redouble your efforts to improve. Again, if you have suggestions, I am happy to hear them.

If you have any questions, please feel free to talk to me.

Sample Performance Improvement Plan letter

To: Employee name, title

From: Supervisor name

Subject: Performance Improvement Plan

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This Performance Improvement Plan (PIP) has been initiated due to the difficulties you are having in meeting the performance standards of your job (or an overall evaluation of Below Expectations on your review dated _____). I hope our discussions regarding your performance and this memorandum will give you a thorough understanding of the standards expected, and assist you in making the improvements necessary to meet those expectations.

(List areas of failure to meet standards, cite specific examples, and explain the expectation.)

(Describe how to improve performance, and give examples of how the employee can improve performance. Provide a clear directive to the employee, such as “You are instructed to do the following:”)

You and I will meet weekly to review your progress. Please check with me as frequently as you wish to discuss these items or any matters that need clarification.

After 30 days, we will meet to review discuss your progress toward meeting your job standards and what is needed for your continued improvement. At this time I will complete a Performance Progress Report.

At the end of the (60 day or 90 day) period from the start of this PIP, we will meet to discuss your progress, at which time I will complete a Final Performance Progress report.

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I believe you can improve your work to meet or exceed the standards. However, if significant improvement is not made within the next ____ days, further action may be necessary. This could include demotion, suspension, or dismissal. Let's work together so further action will not be necessary.

A copy of this memorandum will be placed in your personnel file.

I HEREBY ACKNOWLEDGE RECEIPT OF THIS MEMO

Employee's signature _____ Date _____

Sample PIP progress report

To: Employee name, title

From: Supervisor name

Subject: Performance Progress Report

This is a summary of the discussion we had yesterday. We talked about the progress you have made in your work performance since our original discussion of your work deficiencies on (original date of discussion).

(Summarize the discussion, how the employee responded, and indicate whether the employee is progressing.)

I hope that continued effort on your part will allow you to achieve the standard of performance we both desire within the ____ day time period as mentioned in the Performance Improvement Plan memo.

A copy of this memorandum will be placed in your personnel file.

I HEREBY ACKNOWLEDGE RECEIPT OF THIS MEMO

Signature _____ Date _____

Sample successful PIP letter

To: Employee name, title

From: Supervisor name

Subject: Improvement of Performance to an Acceptable Level

In a letter dated _____, I informed you that your performance was unacceptable in the following areas: (summarize areas and previous discussions)

You were also informed that you would be given an opportunity to demonstrate improved performance, and that I would be evaluating your performance during that period. Based on my evaluation, I am pleased to inform you that your performance has reached the level required. Accordingly, no further action will be taken to remove or reassign you at this time.

Your performance, of course, must continue to be acceptable. If your performance again becomes unacceptable before (date one year after PIP), I may recommend your removal or reassignment without affording you an additional opportunity to improve your performance. Therefore, I encourage you to continue your efforts.

Please let me know if you have any questions concerning this matter.

Sample termination letter after PIP

To: Employee name, title

From: Supervisor name

Subject: Final Performance Report

In previous communicates on (date), we discussed your performance and provided opportunities to improve. Despite this opportunity, your performance is not meeting the standards or expectations for the position. (explain deficiencies as in the examples below)

Example: You have failed to perform at an acceptable level in the accuracy of your work. There are typographical and/or grammatical errors in over 45 percent of the documents you have typed over the past three months. You have also failed to type correspondence in the proper format, even though you have received training in formats and you have a copy of the correspondence manual that has been discussed with you by your supervisor on several occasions.

Example: You have demonstrated a general failure to grasp and retain information that is necessary for the successful performance of your job. You have received training in the preparation of project reports from your supervisor, yet you consistently fail to produce a report that is acceptable. On the [customer] project report, you failed to include a description of [essential requirement]. Your work on the [customer] report was disorganized and contained several repetitive and simplistic statements. These reports had to be redone by other employees.

Because your work continues to be unacceptable, and my efforts to encourage improvement have not been successful, your employment at (company) is terminated effective (date).

EAPs for performance improvement

When deficient performance (perhaps measured in terms of work output, attitude, or attendance, for example) becomes a chronic issue, it is time to take corrective action, and that should include giving the employee both the opportunity and the resources to fix the problem.

One resource to consider is the company's employee assistance program (EAP). It's important to talk with employees to discern whether the services of an EAP are appropriate. For example, issues such as chronic absenteeism or tardiness can have many different causes, such as:

- **Childcare:** A babysitter quit unexpectedly.
- **Eldercare:** An elderly parent or grandparent requires frequent medical attention or care for dementia or Alzheimer's.
- **Transportation problems:** The employee's car broke down and the bus schedule makes the employee late.
- **Family illness:** A spouse with cancer requires transportation to and from chemotherapy.
- **Legal problems:** The employee's house is in foreclosure.
- **Substance abuse:** The employee — or a spouse or other family member — is abusing drugs or alcohol.

Below are steps to follow when including in an EAP as part of a corrective action process:

1. Document the performance problem. One incident may not warrant corrective action. But if a pattern of deficient performance appears, document it carefully, including the date, the time, and a description of the incident.

2. Have an informal private discussion with the employee. At this time, review the problem and go over the specifics documented. Explain why it is a problem by reviewing job expectations. Then ask the employee for an explanation, such as “Why do you think this is happening? Is there something going on that I should be aware of that may be contributing to this problem?” *Note:* If the employee discloses a personal problem, remain neutral. Do *not* try to diagnose or counsel, just listen.

Remind the employee about the EAP. Give the employee the information and suggest that he or she contact them. For example, say: “As you may know, the company has a voluntary employee assistance program. Here is the contact information. You may find that talking with the EAP counselor may help you resolve these performance issues we have discussed. Using the EAP is voluntary. If you choose not to use it, there will be no consequences. However, you are accountable to correct your performance problems.” Be sure to document the discussion and provide a copy of the documentation to the employee.

3. Continue with the corrective action process, if necessary. If the employee does not resolve the performance issue within the specified time period, continue with the corrective action process. However, repeat the suggestion to use the EAP as a possible way to correct performance issues and include it in the documentation.

If the company doesn’t offer an EAP, there are other resources that can help employees. It’s a good idea to become familiar with the provisions of any health care benefits (whether or not they cover counseling, for example) or identify resources in the community that employees might wish to utilize.



Best practice

Remember the basics

Regardless of whether the performance problem is rooted in a lack of skills, motivation, or both, the following general principles apply to improving an underperformer:

- Deal with the issue as it arises. Don’t put it off until the next performance review.
- Make the employee personally accountable for his or her own performance. Involve the employee in developing whatever performance improvement plan is appropriate.
- In describing the performance deficit, give specific examples of when and how the employee has fallen short of the goal.
- Give the employee a clear picture of expectations by explaining what meeting (or exceeding) expectations should look like.
- Provide frequent feedback as the performance improvement plan unfolds. Recognizing and reinforcing even small improvements are key to successful behavior modification.
- Document each meeting to discuss the problem. Draft a memo to the employee after each meeting that outlines the problems discussed, any improvements noted, and the agreed-upon actions for performance

improvement. If improvement does not occur and termination becomes necessary, this documentation can serve as proof of efforts to address the problem and give the employee fair warning.

Managing older workers

One of the first rules of management is to refrain from acting on assumptions or stereotypes. For example, assuming that an older individual would not be as creative, physically able, or efficient as a younger worker are all good ways to invite a lawsuit based on age discrimination.

Older workers can be a significant asset to a workforce, and older employees have recently been inclined to stay in the workforce longer. While employers don't want to tailor the way they treat older workers based on stereotypes, they do want to get to know them on an individual level and find out what makes them tick.

As is the case with most employees, this involves basic communication. Simply talking to older workers can give an excellent idea of what they want and need from the job. While some may want flexibility to work fewer hours or a varied schedule, others may be just fine with continuing on a 9 to 5 schedule.

Respect and acknowledge the contributions of older workers. Giving them the respect they deserve will make older workers more comfortable sharing their knowledge, something that can benefit the organization greatly when these individuals retire.

It's also important to clearly communicate consistent expectations to all employees. Never assume that an individual wouldn't be interested in a certain type of training or initiative because of his or her age. All employees should be given the same opportunities, and all employees can be required to learn new skills.

When older workers aren't working out

While employers must not take action based solely on stereotypes, legitimate problems with older workers may arise that must be addressed. A worker's age does not exempt him or her from discipline (or even termination) that may result from performance problems.

For example, a 65-year-old employee has many years of service, and while his performance has typically been stellar, he seems to have become more and more forgetful, resulting in many serious mistakes. The company wants to terminate him, but given his history with the company, would prefer that he simply retire.

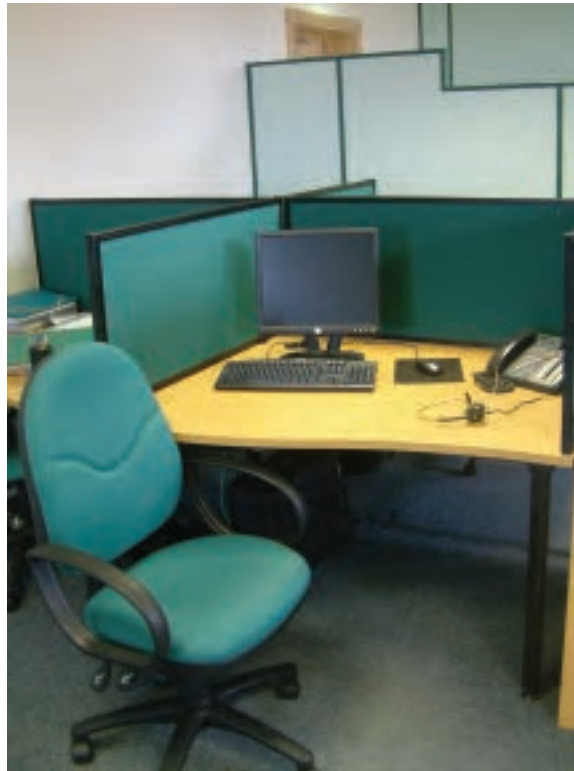
In a case like this, the first priority is to review documentation of the employee's history of performance problems. Don't fall into the trap of giving a positive review based on performance in years prior to the period covered, if recent performance has been lacking. As performance problems arose, meetings with the individual should have made sure that he understood what needed to change and what the potential consequences were if it did not improve.

As performance problems arise, it's also a good idea to ask the employee if there is anything the company can do to help him improve, such as writing down steps or procedures. If there's a possibility that the employee has a disability under the Americans with Disabilities Act, evaluate possible accommodations that could help the employee satisfactorily perform the essential functions of his or her job.

Employee Relations Essentials

If such steps are taken but the circumstances still necessitate termination, the company may proceed as long as the termination is not “because of” age. Older workers can still be required to meet the same standards as other employees.

While a company cannot *force* an employee to retire, offering the opportunity to retire instead of being terminated for performance is an option in a situation like this one. The company may be able to offer a retirement package that includes a waiver of age discrimination claims. Such an agreement allows for a safer termination of an older employee.



Attendance issues

Nearly all employers establish expected working hours when employees are required to be in the workplace, performing their job duties. Some employers may have flexible working arrangements or may even allow employees to work from home by telecommuting, but in all cases, employees who don't put in the required time are less likely to meet other job expectations.

Some types of absences are protected by laws like the Family and Medical Leave Act, and will have to be excused. However, unless otherwise protected, employers can take action against employees who regularly call in sick, show up late, go home early, or take extra time during meal and break periods.

Attendance problems may include failing to report for work for an entire shift, as well as arriving late and leaving early. Employees miss work for a number of reasons, and those reasons are usually legitimate.

Legitimate absences may be pre-approved (such as vacation) or beyond employees' control (such as illnesses or injuries). Although legitimate absences can become excessive, employers must be careful addressing the issue with disciplinary action, especially if the employee has a disability

protected under the Americans with Disabilities Act (ADA), or if the absence is covered by the Family Medical Leave Act (FMLA).

Dealing with recurring legitimate absences should begin with interviews and counseling. If necessary and possible, consider a transfer to another position that supports the employee's availability. Be aware that forcing a lower position on an employee might be construed as discipline and subject to challenge if the employee is protected by the ADA, FMLA, or similar state statutes.

Finally, if the employee is unable to fulfill the duties and obligations of employment, termination may become an option. In some states, the employer may need to show not only that the missed work is excessive, but that the employee will continue to miss work.



Cross reference

For more information on legally protected leave, see the **Managing Problems** tab for the section on **Suspected abuse of leave policies**, and the **Protected Rights and Actions** tab for the types of leave that might be available.

Unexcused absences might include abuses of company policy, such as abusing sick leave. Unexcused absences can be addressed with appropriate disciplinary action. For example, if an employee has a habit of calling in sick on days that she requested vacation (but the vacation was denied) the employer can take action based on suspicion of sick leave abuse, even without proof.

A pattern of absenteeism, as well as actions taken, should be documented. Also, the employer should have proof, or some reasonable evidence or suspicion, that the employee is abusing privileges. Employers should not violate the employee's privacy in obtaining this evidence.

The disciplinary action will depend on the degree of the problem, company policy, and other factors. As with any disciplinary problem, employers generally begin with verbal and written warnings, then progress through other stages of the company disciplinary policy. Employers may need to determine if some absences are legitimate and others are unexcused.

Suspicious absences and other borderline issues

Sometimes, employees push the limits — not a lot, but just enough to cause inefficiency, lack of productivity, and probably a few headaches. They sit on the borderline of whether discipline should be imposed. Employers might be tempted to let them slide for a while until their behavior gets worse or until they do something that can't be ignored. In the meantime, though, they might be getting away with things they shouldn't be getting away with. Look at the examples below and see if anything looks familiar.

Suspicious absences. An employee seems to have unspecified absences primarily on Mondays and Fridays.

First, it is helpful to track the employee's absences. Marking them on a monthly calendar (being sure to cover several months if the problem has been ongoing) provides an effective and particularly illuminating picture because it makes the pattern easy to see.

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Dealing with the situation may require no more than showing the employee that the company is keeping track and seeing a pattern that looks suspicious. Sometimes, just knowing that someone is watching is enough to get an employee to fall in line. If that doesn't work, consider imposing discipline.

Doctor's note for an excuse. Some employees seem to believe that if they provide a doctor's note, the company is obligated to excuse the absence. This simply isn't true. Employers may request a doctor's note to verify an otherwise legitimate absence. And of course, if the employee's absence resulted from a medical condition that might qualify under the FMLA or the ADA, employers may have obligations to respect those rights, or at least investigate. But a doctor's note which simply says that the employee was "sick" does not have to be accepted as an excuse for an unplanned absence.



Chronic lateness. An exempt employee never seems to get to work on time. Exempt employees get a weekly salary and must be paid for a full day if they work any part of it. But this employee leaves at the end of the day with everyone else, takes the full lunch hour, and doesn't seem to be making up the time that is lost by coming in late. Other employees are beginning to notice.

Again, documentation will help. Informally keep track of the number of days the employee is late, and the number of minutes he or she is late each day. Add it up. If the employee is 15 minutes late on four days, that adds up to an hour of lost time and productivity. Bring that to the employee's attention. Ask how and when he or she is making up this time. Maybe the employee is performing some work from home, but the company can still insist on keeping regular hours at work. Explain that everyone is expected to be in the office during office hours (unless excused in advance), and that coworkers are working the full office hours, so he or she is expected to as well. Indicate that lateness impacts others' work and may cause resentment.

Too much personal time. An employee spends too much time on the internet surfing personal websites and sending personal emails. This is the same person who also spends a lot of time on the phone on personal phone calls. It's so noticeable that other employees have complained. Again, documentation is helpful. Have the IT department investigate how much time is spent on the computer on non-work-related activity. Check the phone records of numbers called, received, and length of time on calls. Add up the productive time that is lost due to time spent on personal matters.

Present this documentation to the employee for an explanation. Now, it's possible there is a family crisis going on. If that's the case, suggest that the employee take some time off to settle his or her personal affairs, because too much work time is being lost. If there is no such

explanation, let the employee know that continuing to spend an inordinate amount of time on personal affairs will be met with discipline.

Often the key to handling employee issues is to have documentation of the policy violation. When presented with the evidence and the knowledge that the company is aware of their conduct, many employees will change their ways.



Best practice

Addressing attendance issues

Employees miss work, and often for valid reasons. Unfortunately, some employees seem to abuse the system. Where this is the case, start by making sure **all** employees understand attendance expectations. If that doesn't fix the problem, consider:

Requiring employees to contact a supervisor directly. It's easier for an employee who can call a coworker or send an email to communicate that he is going to miss a day of work. If the individual has to call and speak to a supervisor directly, however, he might think twice about missing work for a less than valid reason.

Asking why. Some supervisors are worried that they'll violate an employee's rights somehow by asking for the reason for an absence. If an employee is ill, the company can (and should) ask for enough information to determine whether FMLA is involved. It's easier for employees to call off for no good reason if they're not asked for a reason in the first place.

Looking into suspicious absences. If certain employees are constantly ill on Mondays and Fridays, discuss those observations with the individual and even ask the employee to provide proof of his explanation. The conversation alone may help to curb future abuse.

How much leeway with paid time-off policies?

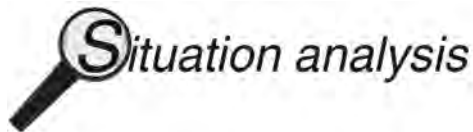
Neither state nor federal law requires employers to provide vacation time or paid sick leave to employees. However, where paid time off is provided, some state laws do address how the time off is earned and administered. Despite these variations, employers generally have quite a bit of freedom in how they choose to administer paid time-off policies. Some of the most commonly asked questions on this topic area are addressed below.

Can employees be forced to use vacation time to cover for absences occasioned by the employer? If the organization shuts down for a day, exempt employees must be paid for that time (nonexempt employees don't need to be paid for that day, since they only need to receive payment for hours actually worked). However, both exempt and nonexempt employees can be forced to use any vacation time or other paid time off that they have available to make up for the time not worked. (If exempt employees do not have paid time off available, however, they still must be paid for an absence occasioned by the employer.)

Can a company deny requests to take vacation during certain dates/times? Yes. Employers have the right to control when vacation can be taken and the amount that may be taken at any particular time. If an employee requests to take vacation when someone else in

that department will be away, the company may deny the request. Of course, employees should have a reasonable opportunity to take paid time off that is provided to them. If there are times and/or dates during which the use of paid time off typically causes problems, it's a good idea to communicate these issues with employees ahead of time where possible.

Can a company have different time off policies in different business locations? An employer may have different policies for different locations. This practice may even be necessary to account for varying state laws. To have a policy that applies to all the company's locations in all states in which it operates, the policy must consider the states' laws that are most beneficial to employees.



An employee may be abusing sick leave

An employee called in for two days, claiming she was too sick to work. However, she was seen by other employees at a local farmer's market, and also having dinner in a restaurant with her family. The company has a no-fault attendance policy which assigns one point for each absence, but this employee never seems to accumulate enough points for termination. Can she be fired for abusing sick time anyway? What should be done?

The best initial response is to inform her of the suspicions and clarify that any further abuse will result in termination, regardless of how many points she has. She may be using sick days as extra vacation days. Signs of abuse might include patterns of calling in sick Fridays, Mondays, and before a holiday. It can also include "working the system" by calling in sick shortly after a few points have been removed from the employee's record. A point system does not require employers to forgive abuse, and the company can modify the policy to allow for termination in cases of abuse, regardless of how many points have been assigned. Failing to effectively address the situation could result in further abuse.

Employee conflict and resolution

Conflict is an inescapable part of any workplace where people share different needs and priorities, work styles, communication styles, and points of view. Some conflicts between employees will resolve themselves and some may even produce useful competition or change.

Although some conflict can be healthy, most conflict shreds the cooperative fabric of the workplace. If left alone, conflict can lead to low morale, an "us against them" attitude among workers and departments, and higher stress levels for everyone. It can also reduce productivity and impede open and honest communication.

Whenever two or more people spend time with one another, differences of opinion are bound to occur. Unfortunately, those conflicts affect the bottom line. The worst kinds of workplace conflict can be personality conflicts, especially when the personalities involve an employee and a supervisor. Left unchecked, those conflicts can escalate to litigation, especially if the employee is in

Employee Relations Essentials

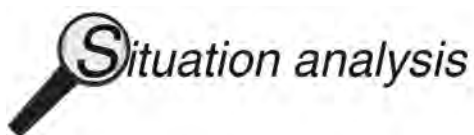
a protected class. Even if the conflict does not rise to that level, it can cause absenteeism, reduced productivity, poor morale, and increased turnover.

On the other hand, some conflict is good: It can encourage diverse opinions and creativity and enhance communication. But for conflict to achieve these goals, it has to be managed appropriately. The operative word, of course, is *managed*. Managing conflict effectively requires:

- A conflict resolution policy that holds people accountable to resolve conflict at the lowest levels, and
- Conflict resolution training for supervisors and employees.

To resolve conflict successfully, an employer must first identify its source. Conflict can originate from a number of different areas:

1. Differences in communication styles,
 2. Performance issues,
 3. Competing needs and priorities,
 4. Differences in work styles, and
 5. Personality conflicts.
-



Requests to talk off the record

Mark visits his supervisor and says he wants to talk. He says he has concerns, but he doesn't want to make a big deal out of them, so he's wondering if he could talk "off the record" for a few minutes. When asked about the nature of his concerns, he says he doesn't want to share details unless he's assured of confidentiality. The manager wants to be sensitive to his problems, but isn't sure about keeping a promise of confidentiality. What should the manager do?

A manager really can't assure him that the comments are off the record without understanding the nature of his concerns. Explain to Mark that when certain issues come up (especially those that have to do with violence, harassment, or discrimination), the organization has an obligation to take action, and that may require that sharing the information he provides. Inform Mark that his comments will be kept confidential where possible, but such promises cannot be made without knowing the context of the situation.

Consider these key strategies for resolving conflict successfully:

- Take the employees aside to discuss the matter when tempers have cooled down.
 - Identify the heart of the problem, complaint, or conflict situation.
 - Listen actively and ask clarifying questions. Do not accuse someone of wrongdoing without knowing all the facts.
-

- Don't take sides, but try to be fair to both; give each person an equal chance to present his or her side of the story.
- Fix the problems that can be fixed. If the issue is caused by a difference in work styles or mismatched priorities, it may be possible to find a compromise or other solution.
- If it's simply a conflict of personalities, treat it as a performance issue. Tell employees they don't have to get along, but they are expected to act in a professional manner when dealing with each other at work.
- Follow up as necessary to make sure the problem doesn't persist.

Although interpersonal issues can be difficult to resolve, the job rarely gets easier by ignoring the conflict. In fact, it is likely that the situation will become bigger, involving more employees and affecting morale. Therefore, it is important to tackle the hard stuff head on. Doing so may help maintain the respect of employees and peers, improve productivity, and reduce turnover. Show that the company is on top of the situation and won't let interpersonal issues get out of hand.



Best practice

For the good of the team

Although a manager might assume that a conflict between two employees only affects those individuals, other employees are likely being drawn into the conflict. Coworkers form friendships and may take sides in an argument, however trivial. This creates a distraction for employees who are not directly involved, but feel the need to support their friends. Some signs that conflict exists and is likely affecting others may include:

1. Two employees actively avoid each other or intentionally provoke each other,
2. Everyone is aware that two employees don't get along,
3. Employees who are not directly involved have been discussing the situation among themselves,
4. Other employees have told a manager about the problem.

While the first warning sign is a red flag that management needs to respond, the second and third signs illustrate that no matter which employee is "winning" the fight, the company is losing in terms of damaged morale and lost productivity. The last item is perhaps the biggest signal that the conflict is getting out of hand. It suggests that employees are fed up with the situation and expect management to fix the situation. A manager who refuses to address a situation may have to be addressed regarding his or her responsibilities as a leader.

Five ways NOT to manage conflict

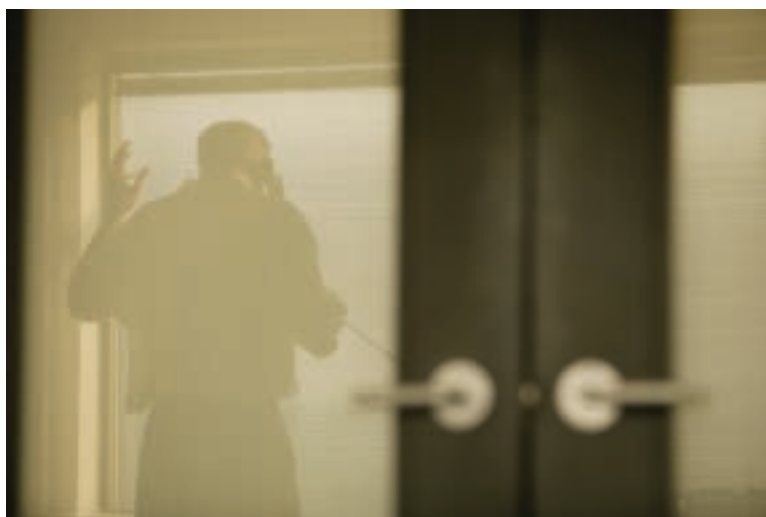
Even within the strongest work teams, interpersonal conflict will likely rear its ugly head at some time or another. Though employers might like to stay out of personal conflict between employees, if the conflict is happening within the workplace, it's probably affecting work.

Employee Relations Essentials

Of course, how a company handles conflict will depend somewhat on the individuals involved, as well as the type of conflict. However, there are some approaches that probably *shouldn't* be taken regardless of the type of situation. For instance:

- 1. Do not ignore the conflict and hope it will go away.** Even a conflict that appears to be purely personal can drastically affect workplace productivity and morale. Though it may be uncomfortable to investigate an apparent personal situation between two employees, remember that they made the personal issue work-related by allowing their issues to surface in the workplace. Whatever the conflict, if it's affecting work, it's likely evident to other workers as well. Chances are that the people directly involved aren't the only ones being affected by it.
- 2. Do not write off a conflict as a personal issue.** Employees can certainly bring personal conflicts into the workplace, and such a conflict may not initially have anything to do with work. However, it's quite possible that something in the work environment is exacerbating the personal problem; the employees might otherwise have been able to keep it out of the workplace. Talk to employees about the circumstances of their work situation that might be bringing out the conflict. Perhaps it's not clear whose responsibilities are whose, or perhaps certain individuals' assignments don't make sense, for example.
- 3. Do not make their problem the company's problem.** Yes, conflict on the team is a problem, but don't take the responsibility of solving the problem for the employees. They should know that, as adults, they are expected to take action to remedy their issues. Make sure they know the potential consequences for failing to deal with the problem appropriately.
- 4. Do not spend more time discussing the problem than considering solutions.** The part of the conversation that outlines the issue at hand should be brief, and should involve only enough fact-finding to begin working toward a solution. Employees should not get the impression that the company is interested in placing blame. The main focus should always be remedying the situation. If a discussion with employees isn't productive toward that end, redirect it.
- 5. Do not assume the problem is solved.** A problem-solving session with the employees may have seemed successful, but assuming the problem is remedied without following up is almost as bad as failing to address it in the first place. After some time has passed, speak to the employees about how the solutions are working. If necessary, troubleshoot the situation again.

Employers cannot prevent or solve all conflicts. If two employees still can't effectively work together, separate them if possible. An employee may need to be disciplined for behavior that doesn't improve, and in the worst-case scenario, an employee may even need to be terminated.



Managing conflict requires respect, not agreement

Typically, conflict involves some kind of perceived threat to a person's well-being. Conflict may be created by both emotion and facts, and they aren't always perceived objectively by the parties involved. Still, it's important to remember that they are based on individual perception.

Conflict that is not addressed will most likely escalate and erupt. Don't assume the problem is resolved just because it's no longer visible; it's more likely that the situation is festering and quietly becoming worse.

Employees' perceptions of individual situations probably won't line up with each other, and that's okay. With conflict resolution, determining who is right and who is wrong is seldom the end goal. Instead, both parties to a conflict must feel as though they are valued enough to be heard. An employer's job is not to change perceptions, extinguish the conflict, or make two parties see eye to eye. Instead, it's to figure out a way to help two employees respect one another's perspectives enough to work together without feeling threatened.

Follow these steps to address workplace conflict:

Step 1: Hear employees. Make sure all parties involved have an opportunity to express their perspectives and perceptions individually, finding out what each sees as the root of the problem. Hear them out separately before trying to bring them together. Approach these discussions with an awareness of any personal biases. Remember that individuals' thoughts and perceptions are influenced by their own life experiences, culture, and values. The way employees react to certain situations will not always make sense, but this should not be a barrier to conflict resolution if the manager is able to respect individual employees' positions.

Managers should also consider providing statements that employees can use when they find themselves in conflict with coworkers. Very often, employees simply don't know how to respond effectively to perceived challenges, and may end an encounter by using an angry retort. Providing a "script" of simple phrases may help them react more appropriately. For instance, managers might suggest that employees respond to a perceived challenge by saying, "I have to respectfully disagree, and I suggest we discuss this with our manager." This response is far more appropriate than saying, "No, you're wrong about that," and it also provides a signal to the coworker to request outside mediation rather than degenerating into an argument.

Step 2: Outline the end goal. After hearing separately from the employees, bring them together and have them summarize their perspectives and the overall conflict. Remind employees of the expectation that they respect one another's viewpoints, but acknowledge that they don't necessarily need to agree. Refrain from taking sides during this conversation and from assuming that either party is "just being difficult." Conflicts are much more likely to arise from real differences.

Help the employees outline what work they need to get done together and remind them of the effects their conflict is having on other employees. Offer them a chance to outline how that job will get done without conflict in the future. Discuss what must change in order for them to work together effectively. The employees may have requests for one another in terms of expected behavior.

The company will likely have certain expectations to convey as well. In particular, the company may ask for a commitment to change, and require that the employees refrain from drawing others into their conflicts. They should not be looking for coworkers to support their side, but rather working to eliminate the friction.

Step 3: Outline the consequences and monitor progress. Once this conversation is complete, review the expectations for each employee. Be sure to also outline the consequences if such expectations are not met. Depending on the seriousness of the conflict, it may also be

appropriate to set a date to review the situation and discuss any associated progress or setbacks. Be sure to recognize positive changes.

Some conflict resolution efforts will go more smoothly than others. In the simplest situations, conflict arises out of basic miscommunication. In others, employees simply want to know their point of view is respected by the company and by their coworkers. Unfortunately, not all situations will be remedied easily. Remember that an employer's job is not to make all employees agree, but to make sure they respect one another. Employees who won't make an effort to do so may not be the right fit for the team or for the organization.

Can't respect? At least accept

Supervisors want respect from their employees, and many surveys of employees indicate that they want supervisors they can respect, rather than supervisors who will be their friend. However, respect must be earned, not demanded. Employees may arrive with the opinion that a supervisor deserves respect, but circumstances may cause the employees to lose respect for a supervisor. Employees may become disrespectful if they perceive the supervisor as "unfair" or unqualified, and may become argumentative or may even start ignoring their supervisor.

If this happens, the supervisor (or even representatives from HR) may be tempted to tell an employee that "you need to respect your supervisor." However, these commands are unlikely to make the employee view the supervisor as someone deserving of respect.

Rather than telling an employee to respect a supervisor, you may want to try telling the employee to conduct himself or herself with civility and accept the supervisor's authority. The former suggests that you are telling the employee how to feel or think, while the latter is simply telling the employee what type of behavior is expected in the workplace.

There is also the possibility that the employee's outward behavior may improve, but the underlying problem may still be simmering.

Explain to the employee that addressing his or her underlying concerns is a priority, and be sure to follow up with the supervisor to address the employee's perceptions (whether valid or not, perception is reality for many people). Then, inform the employee that you expect him or her to accept the manager's authority and refrain from overtly disrespectful behavior.

Of course, employee conduct that is clearly disrespectful does not have to be tolerated. Employees can be held accountable for their actions (although employees do have a protected right to discuss their working conditions if they are acting on behalf of others toward improving those conditions). But personal gripes and complaints are not protected, and extreme behavior (such as making threats) can even cause employees to lose those protections. In other words, you may not be able to demand respect, but you can address disrespectful conduct.



Cross reference

For more information on the right to discuss working conditions, see the section titled "NLRA Rights" in the chapter on **Protected Rights and Actions**.

Should you skip the investigation?

Often, employee conflicts arise due to personality differences or breakdowns in communication. Once the conflict begins, flaring tempers and frustration can hinder a supervisor's resolution efforts. In some cases, the supervisor may suspect that no investigation could possibly uncover the facts in a "(s)he said/(s)he said" case.

Even if investigating seems like a waste of time, skipping the entire investigation may not be appropriate. At a minimum, holding separate meetings with each employee and listening to each employee's concerns should be part of the resolution process. However, supervisors may be able to take some shortcuts with an understanding of the limitations of an investigation's potential findings.

For example, the supervisor may recognize that the events described by each employee will likely suggest that they are both victims of the other's conduct, and evaluating their credibility or determining who was "wronged" may not be necessary for a resolution.

To illustrate, suppose two employees started fighting after Rhonda shared her personal marriage troubles with Karissa, who in turn shared that information with several other coworkers, and the story continued to spread. As often happens, the facts became distorted (and even embellished) with each retelling.

Rhonda became angry and reacted by spreading her knowledge of Karissa's personal life, with a few embellishments of her own added in. The rumors have become disruptive to the team, and the two former friends are at each other's throats. The supervisor learns of the situation (whether through rumors, observation, or formal complaints) and isn't sure how to proceed.

Keep in mind that, in this example, the underlying facts are known. When a supervisor is dealing with emotional reports from frustrated employees, the supervisor might expect to face hours of interviews just to determine "who started it." Even if that can be determined, it may not actually help resolve the conflict (if a guilty party is unwilling to admit an error).

Ideally, coworkers would respect confidentiality and refrain from gossiping, but the reality is that any employee who reveals personal information to coworkers takes a risk of that information being shared with others.

While an employee's frustration over a violation of trust is understandable, the issue to address is the conflict created, not to pass judgment on "who started it." In other words, the primary concern is the ability of these employees to work together effectively in the future, and get them to stop intentionally creating additional problems (particularly when their actions are disrupting other employees).

The supervisor might therefore move directly to addressing the conduct. After meeting with each employee individually and listening to their concerns, the supervisor will outline the expectations for them to work together professionally, regardless of personal conflicts, and explain the possible consequences for allowing personal feelings to inhibit their performance (or the performance of other employees).

After meeting individually with each employee, the supervisor should not normally attempt to have a group meeting. In many cases, bringing conflicting employees together won't help them work things out (if they could work things out, they wouldn't be in conflict).

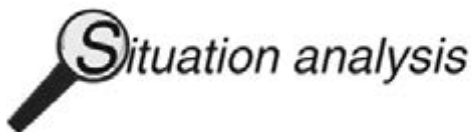
Since one or both employees are likely to mention the rumors, the supervisor should be prepared to address the issue, and might begin by asking how each employee would like to see the situation addressed. Obviously, the supervisor doesn't have to follow a specific suggestion, but asking the question may help to generate some understanding about the company's limited ability to address the situation.

For instance, the supervisor might explain that the company could investigate, interview everyone involved, and make a credibility evaluation of who is telling the truth. However, the supervisor would still be limited to addressing the impacts of the conduct, such as reminding all employees about the importance of treating coworkers with respect and refraining from spreading false rumors. Further, if either employee was found to have violated a policy, discipline might be imposed, but the focus would still be ensuring effective working relationships in the future.

The supervisor might also explain that the company could require an apology from the guilty party, but this assumes one person would admit to impropriety and apologize (and actually “mean it” rather than just saying it). Even if an apology was given, the next step is to forgive and move on, not to escalate the situation. Asking each employee what they hope to accomplish by pursuing the matter may help them understand this (and understand that any disciplinary action taken would be confidential, not shared with the other employee).

The supervisor might explain that, for these reasons, determining who was at fault is not the primary concern. Rather, the concern is their future conduct. Therefore, the employees are being reminded about conduct expectations. Each employee would be asked to report any future conflicts (rather than lashing out) and each would be advised to refrain from perpetuating the dispute. Employees retain control over their reactions to any given situation. They can choose to let things go and work together, or they can choose to hold their anger and attempt to place blame, but the second choice is not conducive to resolving the situation.

A willingness to let the matter drop, without further pettiness (and working together effectively), is all the company can ask. Both employees should be willing to move forward, not continue looking backward or trying to correct (or get even for) prior bad acts. If either employee continues to cause further disruption, there may be consequences.



Accusations of harassment

A supervisor has an obligation to address discrimination or harassment complaints, even if the alleged conduct occurred outside of work. However, if a dispute does not involve inappropriate comments or conduct based on membership in a protected class, it would not be unlawful harassment.

Employees who make accusations of harassment don't always understand what that term means. In a legal sense, harassment is unwelcome conduct based on membership in a protected class (such as age, race, gender, or national origin). Any credible report of harassment must be taken seriously, but employees who engage in offensive conduct due to personal differences may not be guilty of unlawful harassment.

Of course, offensive conduct can detract from productivity, damage morale or working relationships, and result in employees wasting time while at work. So even if the “harassment” was simply a disagreement, the employer still faces an employee relations issue, and possibly a violation of policies on professional or respectful conduct toward coworkers, but not necessarily a violation of state or federal discrimination laws.

Understanding and preventing workplace harassment

Recognizing, dealing with, and preventing harassment is a difficult task, but it is critical that such situations are handled properly and in accordance with the law. Otherwise, the employer can be subject to severe penalties. Not only that, but if a supervisor is directly involved in the harassment or alleged harassment of an employee, the employer can automatically be held liable because supervisors are presumed to be acting as agents of the employer.

Harassment encompasses more than just sexual harassment. It encompasses any harassment that is based on a protected class, including age, race, sex, color, religion, national origin, disability, and so on. It is any unwelcome verbal or physical conduct that is based on a person's protected status.

Examples of unwelcome conduct may include:

- Sexual advances or pressure for dates;
- Slurs, comments, jokes, or innuendos;
- Inappropriate touching or threats;
- Inappropriate gestures, pictures, or slang expressions; and
- Inappropriate graffiti, symbols, or objects (such as a noose or swastika).

The law doesn't prohibit simple teasing, offhand comments, or minor isolated incidents such as a one-time reference. However, when these types of inappropriate conduct are left unaddressed, unlawful behavior or conduct may ensue. It's important to note that an employee may joke along with coworkers just to save face, but may actually be very uncomfortable with the situation. If an employee says he or she is uncomfortable or that certain conduct is unwelcome, the safest course of action is to take that statement at face value.

There are two types of harassment: tangible employment actions and hostile work environments.

Tangible employment action. Only supervisors and managers can subject an employee to harassment based on a tangible employment action such as denying a promotion, transferring an employee to an undesirable position, or terminating employment. In the case of sexual harassment, sexual favors may be demanded in exchange for a job benefit or avoidance of an adverse employment action, such as giving a negative performance review just after an employee refuses a request for a date.

Hostile work environment. This type of harassment occurs when unwelcome comments or conduct based on a protected class unreasonably interfere with an employee's work performance or create an environment that a reasonable person would find intimidating, hostile, or offensive. In the context of sexual harassment, a hostile work environment can be created by speech or conduct of a sexual nature, including sexual comments or jokes; sexual suggestions, gestures, or touching; sexual emails; and pressure for dates. For other protected groups, a hostile work environment can be based on demeaning expressions, insulting pictures, or mocking behavior.



A hostile work environment in the legal sense is created where the actions are severe and pervasive enough to create an intimidating or abusive environment. Generally, repeated actions are necessary to meet this legal threshold, but some conduct, such as sexual touching, can be so severe that one incident is enough to create a hostile work environment.

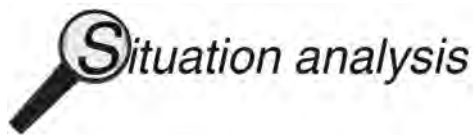
A hostile environment can be created by anyone, including supervisors, managers, coworkers, contractors, customers, even visitors. Be sure to take all reports seriously. Such complaints must be investigated promptly. Once alerted to a problem, employers have an obligation to investigate it, even if the complaining employee later withdraws the complaint.

Any corrective action should be designed to effectively stop the harassment. If it does not, the company may have to resort to greater measures, including termination of the employee(s) responsible for the harassment. Make sure no negative action is taken against the employee who complained. A transfer or reassignment when he or she did nothing wrong may be viewed as retaliation for filing the complaint.

Sexual orientation and gender identity in the workplace

Diversity isn't limited to variations in race and gender among employees; it also entails differences in sexual orientation, religious beliefs, and a host of other characteristics. While uniting diverse backgrounds and qualities can lead to innovation, it can also cause friction in the workplace. Unfortunately, this tension can lead to harassment and discrimination.

Individuals who do not meet most people's definition of "normal" can make others uncomfortable. If employees know or even assume a coworker is transgendered, gay, or bisexual, they may behave differently toward the employee in question. When these issues arise, the company may have to take action.



Contractor harassment

An employee complains that a contractor has been harassing her. He cornered her when she was alone in a room, making her feel uncomfortable. He also made comments on a number of occasions that she felt were meant to intimidate her. What should be done?

The best response is to both talk with the alleged offender (even though he's a contract worker) and raise the issue with the contractor's employer or supervisor. The contractor's boss needs to know what is going on, but the host company is still responsible for protecting employees and maintaining a workplace free of harassment from any source.

Preventing discrimination and harassment

Harassment and discrimination based on an employee not conforming to gender stereotypes — or how society expects a person to behave because they are male or female — can be against the law. For example, allowing coworkers to ridicule or tease a female employee for being too "butch" or unfeminine could be (and has been) considered illegal harassment based on gender stereotypes. Also, outright discrimination or harassment because of a person's sexual orientation or gender identity is illegal in certain states and cities.

Be aware of any company rules, such as an equal employment opportunity policy, barring sexual orientation or gender identity discrimination or harassment. Even if sexual orientation and gender identity are not addressed under the organization's policies, it's never a good idea to look the other way when discrimination or harassment of any form occurs in the workplace.

First, make it clear to employees that guessing about a coworker's sexual orientation because of the way they look or act, or making assumptions about coworkers based on stereotypes of their sexuality or gender identity, is unacceptable. Employees should understand that offensive jokes, the use of derogatory terms to refer to other employees, and the exclusion of or gossip about coworkers can all be hurtful and considered forms of harassment.

Be sure employees understand the consequences of harassment and encourage them to report any harassment or discrimination they witness or experience. Assure them that the company will take any complaints seriously.

Speaking English (or not) in the workplace

In cases where employees come from diverse backgrounds and English is their second language, they may feel more comfortable speaking their native language. The Equal Employment Opportunity Commission (EEOC) specifically addresses company policies regarding the speaking of languages other than English in the workplace.

The EEOC generally takes a hard line against English-only policies, and will presume that an “all English all the time” rule (including breaks and lunch periods) is discriminatory based on national origin. Where employers require that English be spoken at certain times, the policy must be justified by business necessity.

Examples of such a necessity include times where safety may be compromised if there is any lack of communication, such as when using dangerous equipment or working with dangerous substances, or working in a laboratory, refinery, mine, construction site, or other location where accidents or emergencies are likely to occur. Typically, narrowly drawn rules justified by business necessity apply only to certain employees while they are performing specific duties or under specific circumstances.

Other justifications for English-only rules may include communication between employees and English-speaking customers, or communication between employees and supervisors (employers don’t have to hire a translator just so employees can communicate with a supervisor, nor require the supervisor to become fluent in another language).

If there is business necessity for an English-only rule, the company must provide employees with notice of the rule. This notice should inform employees of the general circumstances in which speaking only English is required and of the consequences for violating the rule.



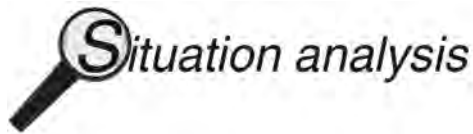
English as a job requirement

If the responsibilities of a job require the ability to read, speak, and write in English, an employer can require that candidates possess those skills. For example, if the employee needs to be able to read and understand technical manuals and lengthy procedural documents, and these documents are only available in English, it’s reasonable to require proficiency in English. On the other hand, it is not reasonable to require proficiency in English if an employee will be doing primarily manual labor while having little contact with others.

The law does not require making accommodations for non-English-speaking employees in the same way employers are required to do so for qualified individuals under the Americans with Disabilities Act. For example, employers need not have documents translated to another language so the employee can read them, if reading is part of the job. An exception is Summary Plan Descriptions related to benefit plans, which may need to be translated if the company has a certain percentage of non-English speaking employees. The other exception is training.

If several employees' primary language is Spanish, and the company knows they are not very proficient in English, it's a good bet they may not understand policies or procedures. Since the company is responsible for making sure employees are sufficiently trained, it may have to provide training, documents, or translation for certain employees in their native language.

Consider, for example, a female employee who is being sexually harassed. If she doesn't understand the procedures for registering a complaint, she has no way to address the situation except, perhaps, to quit. Be assured that the EEOC has a mechanism for Spanish-speaking individuals to file a complaint, however.



Coworkers are speaking Spanish

An employee complains that she thinks her coworkers are saying disparaging things about her in Spanish during their break. She wants them to stop speaking Spanish at work. What should the manager do?

The EEOC frowns on English-only policies, especially when they include breaks and meal times. Employees can only be required to speak English during working time if the organization has a legitimate business justification for it, which would not normally be the case during breaks. Merely speaking another language does not constitute harassment, so the company cannot require those employees to stop speaking Spanish. A manager might explain to them how others might perceive this as isolating coworkers, but be clear that there is no threat of discipline for speaking another language. It might be a good idea to offer sensitivity training to all employees regarding respect for other cultures.

If employees feel uncomfortable when coworkers speak another language, the problem is not the presence of another language in the workplace. Rather, the source of the conflict lies in the mind of the employee who feels offended, even if that employee has no reason to feel targeted. Creating a rule that prohibits employees from speaking other languages only plays to the suspicions or prejudice of the offended employee.

What the law says

To illustrate how strongly the EEOC addresses English-only rules, the following shows the complete text of the agency's regulation, found under the national origin discrimination rules.

29 CFR §1606.7 Speak-English-only rules

(a) *When applied at all times.* A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment. Therefore, the Commission will presume that such a rule violates title VII and will closely scrutinize it.

(b) *When applied only at certain times.* An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.

(c) *Notice of the rule.* It is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language. Therefore, if an employer believes it has a business necessity for a speak-English-only rule at certain times, the employer should inform its employees of the general circumstances when speaking only in English is required and of the consequences of violating the rule. If an employer fails to effectively notify its employees of the rule and makes an adverse employment decision against an individual based on a violation of the rule, the Commission will consider the employer's application of the rule as evidence of discrimination on the basis of national origin.

Workplace violence

Workplace violence isn't just about shootings and physical altercations. It can actually be quite subtle. It can be the angry employee who slams his office door when he's just gotten more work dumped on him; it can be the coworkers who get into a shouting match that escalates into profanity; or it can be veiled (or not so veiled) threats made from one employee to another.

Workplace violence is violence or the threat of violence against employees, customers, or vendors. It can occur at or outside the workplace and can range from threats and verbal abuse to physical assaults and homicide, one of the leading causes of job-related deaths.

This type of behavior is not only hard on the employees, it's hard on others who witness it, and the tension can cause a ripple effect. But employers can take some proactive steps to address these problems.

1. Remind employees of the EAP. Hopefully the company has an Employee Assistance Program, or EAP. Employees may think that the EAP is only for counseling on emotional issues, but many plans offer legal and financial counseling resources, as well as other services. If there is not EAP available, consider offering a list of community resources where employees can get help.

2. Watch for warning signs. Usually, there are signs that something is going on. An employee will become increasingly frustrated, may start lashing out, may pick fights with coworkers, or performance may slide. A formerly good employee may suddenly become a problem employee. If this frustration is allowed to escalate, it may turn violent.

3. Be extra careful with terminations or layoffs. Some employees may become combative if they are terminated. If signs indicate that an employee may become violent, have extra security on hand for the termination or when the employee receives the layoff notice.

4. Take threats seriously. It's easy to dismiss a threat as an ill-considered remark, but one of the common threads found in incidents of workplace violence are that there were warning signs the employer did not take seriously. These are some things to watch out for:

- If an employee makes verbal threats, take it seriously and deal with it as a performance issue. Do not ignore it or let it escalate.
- Discipline employees for violent behavior and threats. Make sure employees know there will be consequences, and that it will not be tolerated in the workplace. This also sends a message to others who have witnessed the behavior and lets them know the organization will address any reported problems.
- Have a procedure in place to handle the situation should a violent act occur at work.

5. Make counseling a condition of employment. If an employee is close to getting fired but the company wants to give another chance, the company can make attendance at counseling a condition of continued employment.

6. Use a Performance Improvement Plan (PIP). Also called a Last Chance Agreement, this written document enumerates exactly what the employee must do to maintain employment. Basically, it's a plan for improvement which, if not followed satisfactorily, allows for termination if the conditions are not met in the specified time frame. It serves two purposes: It gives the employee notice of poor performance and that termination is a possibility; and it gives the employee an opportunity to improve, as well as a blueprint for doing it.



OSHA's position

Although there is no specific Federal OSHA standard which addresses workplace violence, the OSH Act, in Section 5(a)(1), provides that “each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”

In a workplace where the risk of violence and serious personal injury is significant enough to be “recognized hazards,” the general duty clause would require the employer to take feasible steps to minimize those risks. Failure of an employer to implement feasible means of abatement of these hazards could result in the finding of an OSH Act violation.

Negligent hiring/retention

Employers may be liable for actions an employee takes at work if it can be shown that the employer was negligent in hiring or retaining that employee. Employers should take seriously threats and harassment that occur within the workplace and adequately respond to employees' complaints and warnings about potentially dangerous employees.

Background checks may reduce the likelihood of hiring violent employees and reduce the company's exposure. A background check may help demonstrate that the employer did not act negligently if the check provided no reason for concern.

Risk factors

Factors that place workers at risk for violence in the workplace include interacting with the public, exchanging money, delivering services or goods, working late at night or during early morning hours, working alone, guarding goods or property, and dealing with violent people or volatile situations.

This group includes healthcare and social service workers such as visiting nurses, psychiatric evaluators, and probation officers; community workers such as gas and water utility employees, phone and cable TV installers, and letter carriers; retail workers; and taxi drivers.

Protecting employees

The employer should establish a workplace violence prevention program or incorporate the information into an existing accident prevention program, employee handbook, or manual of standard operating procedures. It is critical to ensure that all employees know the policy and understand that all claims of workplace violence will be investigated and remedied promptly.

In addition, employers can offer additional protections such as:

Provide safety education for employees so they know what conduct is not acceptable, what to do if they witness or are subjected to workplace violence, and how to protect themselves.

Secure the workplace and, where appropriate, add video surveillance, extra lighting, and alarm systems. Minimize access by outsiders through ID badges, electronic keys, and guards.

Provide drop safes to limit the amount of cash on hand. Keep the minimum amount of cash necessary on hand.

Equip field staff with cell phones and hand-held alarms, and require them to prepare a daily work plan and keep a contact person informed of their location throughout the day. Keep employer-provided vehicles properly maintained.

Instruct employees not to enter any location where they feel unsafe. Introduce a “buddy system” or provide an escort or police assistance in potentially dangerous situations or at night.

Develop policies and procedures covering visits by home healthcare providers. Address the conduct of home visits, the presence of others in the home during visits, and the worker’s right to refuse to provide services in a clearly hazardous situation.

Take threats seriously and involve the police where there is a threat of bodily harm. If someone is to conclude that the threat is genuine, let it be the proper authorities.

Training

All employees, regardless of their level of risk, should be taught:

- Techniques for recognizing the potential for violence;
- Procedures, policies, and work environment arrangements which control risks to workers;
- Proper use of security hardware;
- The appropriate response to incidents of violence, including emergency situations;
- How to obtain medical assistance and follow-up;
- Procedures for reporting, investigating, and documenting incidents of violence;
- The rules for travel safety; and
- Cash-handling procedures.

Workers with job tasks or locations that place them at higher risk for violent incidents should be provided additional training designed to deal with the nature of the specific risk.

Managers and supervisors should be trained to recognize a potentially hazardous situation or to make any necessary changes in the physical work environment, and to implement policies and procedures.

Managers and supervisors should also be trained in procedures designed to reduce security hazards and to ensure that employees are not placed in assignments that compromise safety. They need to ensure that employees follow safe work practices and receive appropriate training to enable them to do this. They should reinforce the employer’s workplace prevention program, promote safety and security, and ensure employees receive additional training as the need arises.

Security personnel need to be trained whenever possible for the specific job, facility layout, security hardware on premises, and particular high-risk jobs.

Post-employment inquiries about violent employees

Although most employers are reluctant to provide information about former employees to prospective employers, an exception should be considered where the employee engaged in violent behavior and there is a risk that they may do so at the new employer. In some states and circumstances, the company may even be liable if it is asked and fails to notify the prospective employer of known violent acts. Of course, be sure that the information reported is accurate, not hearsay, to avoid liability for defamation.



Cross reference

For more information, see the section on **Responding to reference checks** in the **Related Matters** tab of the **Separations** area of the manual.

Reducing the risk of workplace violence

Workplace violence includes any act in which a person is abused, threatened, intimidated, or assaulted in a place of employment. This includes violent actions such as fist fights, sexual assaults, pushing, slapping, vandalism, sabotage, slamming doors, or throwing objects. Less violent, but still defined as workplace violence, are behaviors like shouting or swearing, stalking, theft, intimidation, and making threats.

Often, workplace violence begins someplace other than the worksite. It could be caused by personal factors, such as financial, legal, or marital problems, drug or alcohol abuse, or mental or physical ailments. Or, it could be caused by workplace factors such as job loss, unequal or unfair treatment or discipline, excessive overtime, or harassment by coworkers.

Unusual and disturbing patterns of behavior that could signal that violence may occur include:

- An obsession with weapons, particularly firearms;
- Direct or veiled threats, which are frequently a prelude to more escalated violence;
- Acts of pushing or other unwanted physical contact;
- Difficulty accepting criticism;
- Social isolation — few or no close friends or family;
- A recent decline in health or hygiene;
- A history of alcohol or drug abuse;
- Intimidation or bullying of others;
- Displays of unwanted romantic interest in a coworker; or
- Recent financial, marital, or legal issues.

Remember, it isn't just employees who are perpetrators of workplace violence. Violence can be perpetrated by customers; vendors; or outsiders, such as a salesperson who visits the facility, a worker's estranged or former spouse or boyfriend/girlfriend, or an acquaintance of an employee.

When threatening actions go unchecked, the employee may repeat or escalate the behavior. Any threats or other acts of violence must be taken seriously, handled promptly, and reported to Human Resources. Past incidents show that employees and supervisors often minimized valid safety concerns and avoided addressing potentially volatile situations, to their later regret.



Preventing workplace violence

In some cases, violent individuals are spurred by some major loss (often their jobs), and many assailants feel that they have been victimized in some way.

It can be extremely difficult to see violent events coming, and unfortunately, some may not be preventable despite an employer's most sincere efforts. However, organizations can still limit violent behavior by clearly communicating policies and following through with them consistently. In short, if an individual lodges a complaint, follow company policy to impartially investigate and act upon that complaint.

Supervisors should always be mindful of signs that may foreshadow violent behavior. Potentially violent employees might start by being verbally abusive to coworkers, or making off-the-cuff remarks about doing violent things or about using weapons. Under a workplace violence policy, these types of actions should merit discipline (a verbal warning at the least). If an employee shows signs of violence (or another employee reports threats or acts of violence), the company should respond immediately, before the situation escalates.

Disciplinary meetings should be short and to the point, and should be held in a room without objects that could be broken or thrown. For a termination, a room near an exit may be best so that a potentially angry employee won't pass many people on the way out. It's also a good idea to address a potentially violent individual with another supervisor or HR representative present.

Discipline or termination should not come as a surprise to an employee. Communicate the repercussions of violence and what, specifically, is considered violence. Individuals who know the rules and see discipline coming may be less likely to react aggressively in the workplace.

Not only does workplace violence affect the people who are subjected to it, but it also affects a company's bottom line. When incidents such as those listed above take place in the workplace and are allowed to continue, there may be a decrease in employee morale, an increase in stress, lower productivity, increased absenteeism, and increased use of company healthcare benefits.

While employers may not be able to prevent all incidents of workplace violence, some measures can decrease the probability of it happening.

Be aware of the risk factors. Certain factors increase the risk of violent incidents. Being aware of these factors helps identify ways to decrease vulnerabilities. For example, employees who deal with the public, with money, who go into peoples' homes, or who deliver goods or

services are most at risk. Those who work late at night, early in the morning, who work alone, or who guard property are also at higher risk. Take steps to protect vulnerable employees, such as having a procedure to check in with another employee at regularly scheduled intervals.

Physically secure the workplace. Physical controls include such things as:

- Installing alarm systems or panic buttons,
- Having a policy prohibiting employees from keeping doors propped open,
- Arranging furniture so that employees who work with the public are not easily physically accessible, and
- Limiting access to areas that require greater security.

Know the warning signs of a potentially violent person. Experts who study workplace violence have identified some warning signs that an employee may become potentially violent. While not all employees who exhibit these signs may be prone to violence, it is in the company's best interest to pay attention when some or all of these are present. Perpetrators may have:

- Antisocial tendencies;
- A tendency to feel wronged or humiliated;
- A tendency to hold grudges or blame others;
- A pattern of challenging authority;
- Sudden, explosive displays of temper;
- An inability to get along with others, or "loner" tendencies;
- Inappropriate reactions to changes in the workplace;
- The attitude that rules don't apply to them;
- A pattern of verbal harassment or abusive behavior toward others.

Take threats seriously. A common thread found in incidents of workplace violence are warning signs that the employer did not take seriously. Things to watch out for:

- If an employee is making verbal threats, take it seriously and deal with it as a performance issue.
- If the company becomes aware of a possible domestic violence issue, it may need to get involved. If an employee or others may be in danger of a violent individual coming to the workplace, the organization has an obligation to protect employees.
- Discipline employees for violent behavior and threats. Make sure employees know there will be consequences, and that such behavior will not be tolerated in the workplace.
- Have a procedure in place to handle the situation should a violent act occur at the workplace.

A policy on workplace violence

A written policy should tell employees that aggressive or violent behavior will not be tolerated and that all incidents will be taken seriously and dealt with appropriately. Key points of an effective policy include:

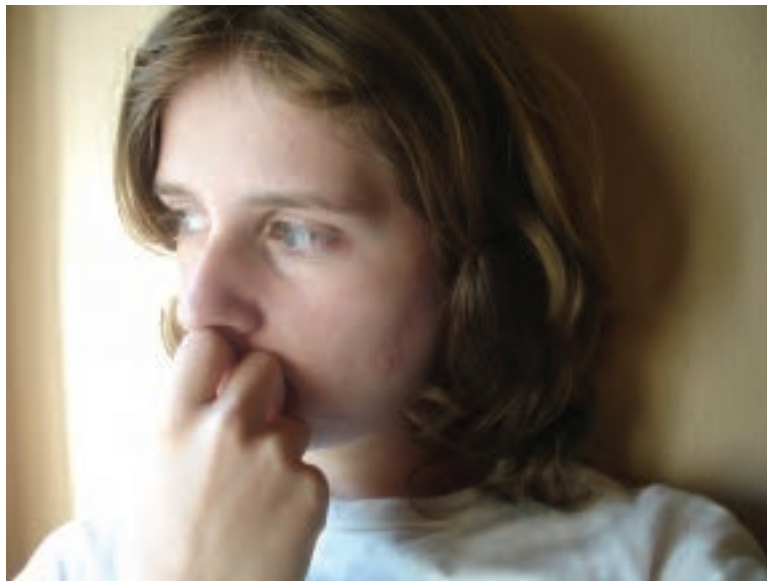
- A statement defining what workplace violence is, so all employees are aware of the breadth and scope (i.e., including things such as threats and intimidation, not just physical assault).

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- A statement that everyone at the company is responsible for maintaining a workplace free from violence;
- A statement indicating the company will take appropriate disciplinary action against anyone engaging in acts of violence;
- A mechanism for employees to confidentially report acts of violence or potential violence;
- Information about the Employee Assistance Program;
- An established system to promptly investigate threats or violent acts; and
- An established team, either within the company or through a third party, to respond to an incident.

A policy by itself isn't enough; it should be accompanied by training. Employees should know how to report incidents of threatening behavior and be given phone numbers for quick reference during a crisis or an emergency. Training may also include topics such as personal security measures and ways to diffuse volatile behavior.

Supervisor training should cover the signs and symptoms that could lead to the potential for violence, basic crisis handling skills, and basic emergency procedures.



When domestic violence infiltrates the workplace

An employee explains that she just broke up with her boyfriend, and had to get a restraining order against him because he has been physically abusive and has threatened her. She says that she's afraid he may try to see her at work. What can be done?

One of the sources of workplace violence is domestic violence that doesn't stay at home. Every year, about 1.5 million women and more than 800,000 men are physically assaulted by an intimate partner, and more than 1 million women are stalked each year. The greatest proportion, about 85 percent, of domestic violence victims are women.

As uncomfortable as it is to get involved in an employee's personal life, if an employee's relationship affects her safety at work as well as the safety of other employees, it becomes the company's business and must be addressed.

Warning signs that employers may need to get involved:

- The employee is receiving threatening emails or phone calls at work;
- The employee indicates a need for tighter security or that someone may “show up” at work;
- The employee informs the company of a restraining order against an individual.

Security measures can include reviewing and tightening procedures such as identification checks, and limiting access to parking areas. If feasible, arrange to have the employee park closer to the building, and/or arrange to have the employee escorted to and from her vehicle. Temporarily relocate her workstation and don't let her work alone or in a remote area.

Have a plan in case the threatening individual tries to gain access to the facility. If danger is imminent or likely, call the police.

Domestic violence leave laws

Some states have employment leave laws specific to domestic violence, and more states are introducing them. These laws generally allow a victim time off from work to take care of matters related to the abuse: to obtain a restraining order, locate alternate housing, find legal assistance, or obtain psychological counseling. Employers are generally prohibited from terminating or retaliating against the employee for taking this time off.

These laws have varying thresholds of applicability, meaning some apply only to employers with a certain number of employees, and some require the employee to have a minimum length of service. In addition, some laws allow a set amount of unpaid leave, while others require the employee to exhaust all vacation and sick leave first. There is also a wide variation in the amount of leave that may be taken, from three days to 12 weeks.

Responding to workplace violence

A workplace violence policy is generally intended to deter violence, but usually doesn't describe how employees should respond during a crisis. A policy might inform employees of what behavior is prohibited, establish a framework for addressing such behavior, create procedures for inspecting workplace areas, and describe how employees can report any concerns.

However, these provisions don't cover what employees should do if a violent incident occurs. The company will probably call the authorities, but they may not arrive for 10 or 15 minutes. If there's a fire in the workplace, employees don't wait for the fire trucks to arrive. They'll hear an alarm and know what evacuation route to follow, where to report for a headcount, and so on. If an act of violence occurs, do employees know what they're expected to do while waiting for authorities to respond?

A significant challenge in planning a response is that the nature of a violent event can't be known, and unlike a fire alarm, a companywide warning won't be appropriate in all cases. For example, if an ex-husband shows up to harass his former spouse, internal security procedures might be able to handle the situation without disrupting most employees. However, if the situation escalates and puts employees in danger, they should be made aware of the situation and know how to react.

Employers might need to communicate a potentially violent incident to employees so they can take steps to protect themselves. This could involve making an announcement over a PA system (even if the announcement is a code), activating an emergency response team to direct employees away from the danger, or providing other warnings appropriate to the situation. Employees can be expected to be responsible for their own safety, but they won't be able to react without some kind of warning.

For any type of threat, awareness is the key. External threats (like criminals) should be addressed by security procedures. However, employees and supervisors may have a role to play in recognizing internal threats (like a disgruntled employee).

Training employees on awareness, and encouraging them to report erratic behavior or other warning signs, should be part of a violence prevention program. Their increased awareness can help identify potential threats, whether internal or external. Employees must also know how to take responsibility for their own safety. By asking them to think about how they might respond to a potentially violent incident, they can start forming a plan for protecting themselves.



Best practice

After an incident of workplace violence

- | Encourage employees to report all incidents and threats of workplace violence.
 - | Provide prompt medical evaluation and treatment after the incident.
 - | Report violent incidents or threats of bodily harm to the local police.
 - | Inform victims of their legal right to prosecute perpetrators.
 - | Discuss the circumstances of the incident with staff members. Encourage employees to share information about how to avoid similar situations in the future.
 - | Offer counseling services to employees who have experienced a violent incident.
 - | Investigate all violent incidents and threats, and monitor trends in violent incidents by type or circumstance. Institute corrective actions, up to and including discharge.
 - | Discuss changes in the program during regular employee meetings.
-

Addressing bullies in the workplace

Most employers know that newsworthy acts of violence in the workplace are relatively rare. But workplace violence doesn't have to involve a fistfight or a weapon to cause problems. Many acts of violence never leave a physical mark, but can have deep emotional consequences and a profound impact on an employee's morale and stress level.

While it's important for managers and supervisors to recognize (and deal with) bullying in the workplace, some workplace bullies are managers or supervisors. When this is the case, it can be especially difficult for targeted employees to make the bullying stop. In rare cases, a manager might not even realize that he or she is engaging in bullying behavior.

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Most adults assume that the bullies they met as children will have “grown up” before entering the workplace. Unfortunately, many bullies continue their tactics at work, and their methods aren’t much different from the ones they employed in their youth.

Workplace bullying is usually repeated abuse of a psychological nature. While bullying can escalate into physical violence, it can be quite harmful to employees even if it never goes that far, and it can be extremely detrimental to performance. Bullying in the workplace can include any combination of the following:

- Excluding or isolating a coworker;
- Publicly berating a targeted individual;
- Falsely accusing someone of making errors;
- Holding an employee to a higher standard or disciplining him/her more severely than others;
- Starting or perpetuating rumors about a person;
- Taking credit for another person’s achievements;
- Insulting an employee’s character, habits, or personal life;
- Attempting to intimidate an employee by staring or glaring; or
- Encouraging others to engage in bullying a specific employee.

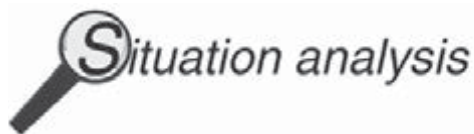
Bullying is meant to intimidate, and a fear that bullying will get worse may be enough to keep a victim from reporting it. It can also be difficult for victims to prove they are being targeted, and it may feel childish to report such actions. Victims of bullying may also fear they will be perceived as the source of the problem.

Since bullying doesn’t have to be overt (and isn’t as recognized as something like sexual harassment or physical confrontation), victims of bullying who choose to report a situation risk being viewed as the source of the problem. Additionally, since many non-violent forms of aggression are not illegal in the workplace, employers are simply not required to be aware of the potential consequences of unchecked bullying.



When bullying is not addressed and is allowed to continue, employers can expect productivity to plummet. Some studies indicate that bullied employees waste up to 50 percent of their time at work defending themselves, networking for support, or thinking about the situation. They also tend to become unmotivated or stressed out and take more sick leave due to stress-related illnesses.

Unfortunately, if employees don't report bullying (and it otherwise goes unnoticed), some may choose to quit their jobs in search of a more friendly work environment. If this happens, the organization could lose a good employee, and the bully (who remains) may simply move on to another victim.



What is bullying?

Bullying can range from verbal abuse or threats to physical assaults. About half of employers have reported that bullying is a problem. Among those employers, most experienced verbal abuse (about 75 percent) followed by malicious gossiping and spreading rumors (about 60 percent). While physical assaults are uncommon, half of the employers who reported that bullying had occurred said that threats or intimidation had been a problem.

Addressing the victims of violence or bullying

Employee conflict that involves shouting or threats has the same effect on employees as sexual harassment, but there are few legal remedies for the victims. While a harassment victim might complain to the EEOC, a threatened employee must primarily rely on the employer to address the situation.

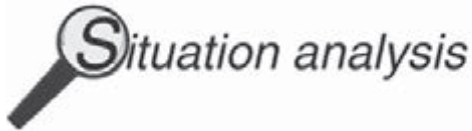
Unwanted physical contact may constitute assault and could involve law enforcement, but other aggressive or threatening behavior will also create fear, distrust, and morale problems. Further, verbal abuse and intimidation are less likely to generate a response from law enforcement, especially if the conduct occurs through email or social media sites. However, these threats still create fear, and the affected employees must depend on the employer to ensure a safe working environment.

After an incident of violence or bullying, the employer's response must go beyond simply disciplining or firing the aggressor. The victim may be distraught or afraid, and may fear retaliation — even if the aggressor was fired, since the offender might blame the victim and knows where and when the victim works.

Employees who witnessed the incident may also fear retaliation, especially if they provided witness statements. If the offender was given a warning but was not terminated, employees who work with the aggressor may feel as if they are walking on eggshells.

While there is no “one size fits all” response for addressing these fears, employers should evaluate what steps could be taken. This might include follow-up meetings with victims or witnesses, transferring the aggressor to another department, or closely monitoring the situation. For example, if the offender stopped making threats, but uses aggressive body language

and biting sarcasm, he or she may continue to create fear. In that case, further discipline or termination may be warranted, even if the actual threats have ceased.



Personal or professional conflict?

Bullying can result from professional differences where an employee or manager attempts to intimidate another employee into doing things “my way,” but verbal abuse may involve derogatory comments about intelligence or competence that is intended to belittle or “put down” the other employee. Even if such abuse appears to be founded in a professional disagreement, the bully has acted inappropriately by making the situation personal, and by using personal attacks.

For this reason, employers are unlikely to successfully resolve the situation by bringing the two employees together to “work out their differences.” Bringing employees together can be an option for some disputes, but when a situation involves abuse, only the bully’s conduct requires correction. A victim should not be expected to work out his or her differences with an abuser, just as a victim of harassment should not learn to put up with harassment. If only one employee’s conduct requires modification, then only one employee should be expected to change his or her behavior.

Having the conversation

Make sure supervisors understand what bullying looks like and communicate that such behavior is never acceptable. Also, make sure that employees who are being bullied by their supervisors have a way to report the abuse without having to confront their supervisors directly and without fearing retaliation. Maintain a clear policy detailing that harassment of any kind will not be tolerated. Include examples of workplace bullying in the policy.

Employees must be held to treating one another with respect in the workplace, and if one employee isn’t doing that, he or she needs to be corrected. To begin the conversation, explain the responsibility of being respectful and outline the unacceptable behaviors observed. Discuss the effects of the individual’s words or actions and the specific reasons the company cannot tolerate the behavior.

If there’s a policy about workplace conduct that the employee has violated, be sure to mention that as well. Throughout the conversation, keep the focus on the bullying employee and his or her actions, rather than allowing the individual to rationalize or justify the behavior. If necessary, point out that there is no valid justification for mistreating others, and that this meeting is about inappropriate conduct in the workplace, not about the reason for that conduct.

Make clear notes about the conversation: when it occurred, and what was discussed, including what is likely to happen if the individual engages in this type of behavior again. While these conversations can be awkward, the goal is to ensure a comfortable environment for all employees.

Investigating bullying

The investigation process should be similar to other claims of unfair, hostile, or discriminatory treatment, and employers might look to their harassment policies and procedures for guidance when responding to reports of bullying. For example, such investigations involve taking statements from victims and witnesses, then asking the accused questions such as “what is your response to these allegations?” and, if the person issues denials, asking why the accuser might lie or exaggerate.

If an employee makes a formal complaint of bullying, treat these reports with the same seriousness as reports of potentially unlawful harassment, and maintain confidentiality to the same extent. Although there may not be witnesses, assume that everything being reported is true. It might be exaggerated, so keep an open mind, but be mindful that the effects on the bullied victim are real, and you’ll need to address them. The employee clearly expects the company to address the situation. He or she may not be happy with the outcome, depending on the actual circumstances, but should at least get a response.

The next step is to investigate. Privately and separately interview the victim and witnesses (if any) to hear their versions of the situation. Then, privately and separately interview the alleged offender or the person accused of bullying. You will need to fully inform the offender about the allegations (otherwise, that person cannot properly respond) but do not share the allegations with anyone who does not need to know.

Give the offender a full opportunity to reply to the complaint. This will likely require revealing the name of the accuser, since the alleged offender cannot respond effectively to vague accusations (or could more easily deny them). The victims may not want their names revealed, raising the same concerns about retaliation that employees commonly fear when reporting discrimination or harassment. Offering assurances of protection from retaliation (and reminding the accused that retaliation won’t be tolerated) are critical components of the investigation process.

After conducting interviews, review all statements and conduct a second round of interviews if you need clarification. It may happen that information arises which requires clarification.

Evaluate the credibility of the statements. If there were no witnesses, evaluate one person’s word against another’s. Even if you don’t think bullying occurred, the employees obviously have problems working together, and the conflict needs to be resolved. For example, the situation might only involve a misunderstanding, but it still must be resolved.

Addressing these situations won’t be simple, and resolving conflict is never easy, but one place to start might be asking two basic questions:

What does the accusing employee want you to do about the situation? You do not have to take the requested action, but asking the question can open the topic for a discussion of options.

What are the employees willing to do about the situation? It can be appropriate to ask both parties what behavioral changes they are committed to make in order to work with each other in the future.

If the investigation affirms that bullying did occur, communicate any recommendations to the victim, the bully, and others involved. This could include directing the bully to stop the behavior, inviting an apology from the bully, conducting individual training, providing mediation or coaching, and using disciplinary action appropriate to the seriousness of the conduct.

In situations where disciplinary action is required, be sure to follow up with the victim and bully to ensure the bullying behavior is not continuing. Following up will be necessary to ensure not only that the inappropriate conduct has stopped, but that no retaliation has occurred.

When a manager is the bully

There are no state or federal laws that prohibit bullying. Of course, if the offensive conduct includes derogatory comments based on protected status (race, gender, age, etc.) then it could result in a discrimination claim. However, when bullying involves sarcastic remarks, demands, yelling, excluding employees, or similar conduct without focusing on a protected class, it probably isn't illegal.

Managers should be aware that many states will accept civil lawsuits against an individual for intentional infliction of emotional distress, so a bullying manager could face a civil lawsuit in extreme cases. Also, if a manager is using intimidation to "make those idiots listen," the employer may deem this a form of workplace violence and hold the manager accountable under a workplace violence policy.

Another consideration is whether a bullying manager is effective at leading his or her team. If the team has problems with morale, productivity, or turnover, perhaps the manager is not an effective leader. This is a performance issue that can (and should) be addressed. Managers need to understand that they are the face of the company to employees, and losing their temper is not acceptable. No matter how frustrating an employee might be, managers need to maintain control. In short, managers need to accept responsibility for their actions and the impact of that conduct on the team.

To address a bullying manager, the employer might suggest (or require) that he or she attend courses on self-control or anger management, perhaps through an Employee Assistance Program.



For more information, see the section on **Employee Assistance Programs (EAP)** in the **Managing Problems** tab.

Another option is to have the manager write a report or letter describing a complaint previously reported by employees and outlining a plan for changing his or her behavior. For example, ask the manager to describe his or her reaction to a situation and explain how it could have been handled better. While this could be accomplished via conversation, allowing the manager time to write things down may help avoid a defensive response to perceived accusations, and may force the manager to evaluate his or her inappropriate reactions.

This self-reflection could help the manager to react more appropriately in the future. If nothing else, a self-evaluation report may provide an idea of whether the manager understands his or her role in the organization, and whether he or she is willing to work toward resolving the situation. If a bullying manager cannot uphold a commitment to change, the employer might consider this in a termination decision. For example, if the self-evaluation report primarily blames other employees for the conflict, the company might decide that this individual isn't suited for a managerial role.

Consistent enforcement

Enforcing policies or workplace rules consistently is critical for a number of reasons. The legal reasons include avoiding claims of discrimination through unequal treatment. A discrepancy in the enforcement of a rule, especially if a minority or other member of a protected class is treated more harshly, can result in claims of discrimination.

Another reason is simply that unequal treatment can negatively impact employee morale, resulting in lost productivity or even increased turnover. Supervisors may believe that favoring a particular employee won't hurt anything — and they may be correct in the legal sense, if no discrimination claims arise. However, other employees will certainly notice the favorable treatment, and may begin to feel resentful that they are subjected to rules or requirements while others are given a pass.

Fairness vs. favoritism

Favoritism, or the act of preferring an individual or group of employees over another, can be a major problem in the workplace if it isn't rooted in legitimate business concerns. For example, if a supervisor favors a top performer by promoting her or giving her choice assignments, the organization has a legitimate business reason for doing so: the individual has earned top treatment based on performance.

On the other hand, a supervisor who gives the same type of perks to an individual because they are friends is probably asking for trouble.

Unfair favoritism is likely to damage employee morale, causing employees to become frustrated and unhappy when they observe preferential treatment. Favoritism can also impact the productivity of both the favored and not-favored employees. Employees who are not favored may eventually become discouraged, feeling that no level of performance will earn them the treatment that favored individuals receive.

On the other hand, favored employees may develop a mentality of entitlement. They may believe their opinions and needs are more important than those of their coworkers. Favored employees might feel that their preferred status gives them some kind of immunity from performance standards. Conflicts may even develop among teammates who recognize and begin to resent preferential treatment given to certain individuals. It could even lead to the stifling of new ideas as employees who are not favored see their contributions ignored.

Either way, favoritism has the potential to damage employee relations. When employees are unhappy about unfair or unequal treatment, they are likely to complain among themselves. These discussions about managers may even be protected under the National Labor Relations Act (NLRA), which protects employees' rights to discuss wages, hours, and working conditions.



Cross reference

For more information, see the section on **NLRA rights** in the **Protected Rights and Actions** tab.

Legal issues

Laws like Title VII of the Civil Rights Act prohibit discrimination against employees and applicants who belong to protected classes. Under these laws, it is clearly illegal to favor a white applicant over an African American “because of” race.

However, many forms of favoritism are not actually illegal. In some situations, favoritism is allowable — even expected. Take the hiring selection process for example: employers often favor applicants who have more work experience or higher academic degrees. While employers may not normally think of this as favoritism, it is a legitimate (and legal) form of discrimination or preferential treatment based on prospective employees’ business qualifications.

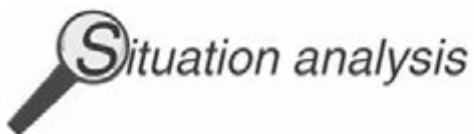
On the other hand, favoritism is not always harmless. When not based on business considerations, favoritism can invite questions about a company’s ethics, decrease employee morale, and even lead to litigation.

If showing of favoritism results in treating certain employees differently in terms of discipline, this could lead to legal liability for the organization. Suppose a favorite employee comes in late. Although the supervisor talks to her about it, she is not disciplined. When another employee comes in late, he is disciplined for it. Same infraction, different discipline. This lack of consistency in imposing discipline could be a legal issue if the second employee happens to be 40 years old or older, or a minority, and claims that the discipline is pretext for discrimination.

The power of perception

It’s important to recognize that the mere perception of favoritism can do damage to the morale of the workforce as well as a supervisor’s own credibility with employees. Employers can limit the chances that employees mistakenly perceive favoritism by making sure performance standards are clear. Employees should understand the objective measures that determine advancement, perks, and compensation. Supervisors should invest time to develop relationships with all employees, not just those to whom they can relate or with whom conversation comes easily.

Many companies have policies prohibiting or discouraging fraternization between supervisors and their direct reports. Even in the absence of such a policy, this can be a good practice to prevent even the perception that favoritism is occurring. Going out with employees for drinks after work may cause other employees to wonder about the motivation behind any perks or benefits those employees receive.



Playing favorites

Like all humans, managers have preferences for certain individuals and personality types. The key is to avoid letting this impact professional relationships.

Most managers don’t deliberately favor certain employees, and may not even realize that the team has a perception of favoritism. To self-evaluate whether personal preferences might be showing, managers should first consider their personal preferences for employees, then honestly evaluate which employees are most valuable and do the best work. Finally, consider which employees receive the most recognition, praise, or feedback.

If the employees who receive the most recognition tend to be individuals with whom the manager is friendly, rather than the employees who do the best work, then it's likely the team is already frustrated by the perceived favoritism. Managers must be constantly aware of personal preferences and work to base employment decisions on business rather than personal preference.

Fighting favoritism

It's somewhat natural to favor certain individuals over others; human beings typically gravitate toward people with whom they can relate. But a supervisor's job is to resist this tendency and remain impartial when it comes to making business decisions. Employees should be rewarded and given preference based only on professional merits, not on personal preferences for one individual over another.

The best defense against the negative effects of favoritism is staying constantly aware of the business decisions made and being honest about the motivation behind them. Encouraging employees to report any concerns can also help ensure uncover any perceived favoritism before it does major damage to employee morale or productivity.

Favoritism may arise in any number of ways. For example, supervisors may have discretion to determine whether employees are allowed (or required) to make up for working time missed due to sick leave or personal appointments. If the supervisor does not require one employee to make up the time, but does require another employee to make up the time by working late, the employee who must work late is likely to be unhappy about the expectation. Most likely, the individual will know who is exempted from that expectation, and will discuss the situation with other employees.

On the other side of that coin, if one employee is allowed to make up for absences and thereby avoid using sick leave (perhaps saving it for future use) while another employee is not allowed to make up the time, there will likely be resentment.

Favoritism may arise in any number of areas, including:

- Unequal enforcement of dress codes (some employees are not addressed even when violating the dress code, while others are held strictly accountable);
- Failure to enforce productivity expectations (if one employee is known to gossip regularly, perhaps even talking to the supervisor, while others are expected to remain focused on work);
- Unequal enforcement of working hours (if one employee often arrives late or leaves early without apparent consequences, while others are given warnings for the same conduct).

Nearly any workplace policy or expectation can be unequally enforced, resulting in favoritism (whether actual or perceived).

Employees naturally form bonds or friendships with coworkers, and supervisors are not immune from doing so. However, if a supervisor becomes too friendly with a particular employee, the supervisor may be less willing to address problems of performance, attendance, or policy violations. Most employees likely have a story to share about a coworker (or former coworker) who wore inappropriate clothing or seemed to take a lot of time off, and the situation was never addressed — even though other employees were not allowed to get away with similar conduct.

Even if the favored employee is a star performer, the supervisor must be consistent in addressing problems. Otherwise, the star performer might even start taking advantage of the situation. If a problem starts small (but is not addressed) and gradually becomes worse, the supervisor may have a more difficult time raising the issue after letting it slide for so long. Even worse, the favored employee might listen to the warning but continue to violate the rules, creating an even more uncomfortable situation for the supervisor (and creating even more dissent among other team members).

This is not to say that supervisors cannot be friendly with employees. However, their primary obligation is to act as a representative of the company, not as a personal friend to employees — and especially not as a friend to only a few selected employees. Maintaining a certain level of distance may be challenging for supervisors, especially those who were promoted from the ranks and become leaders of their former coworkers. However, maintaining consistency and fairness must be part of the job.

Organizations should recognize that the potential for the perception of favoritism already exists among employees. A study in 2012 by Right Management found that nearly half (44 percent) of employees believe that “who you know” is the most important factor in determining who gets promoted, with only 39 percent believing that job performance is the deciding factor. Interestingly, another 13 percent of employees reported that they don’t know what factors are used because the company never made it clear.

Since the majority of employees apparently feel that advancement decisions are made for unknown reasons or because of relationships, employers may need to take proactive steps in not only training supervisors on the importance of avoiding favoritism, but communicating with employees about the requirements for advancement.



For more information, see the sections on **Employee development** and **Training for advancement** in the **Rewards and Advancement** tab.

Possible impacts of favoritism

Workers who believe company decisions are made on the basis of a person’s or group’s relationship with a supervisor may lose trust in their employer and the way business is conducted in general. Morale issues are a huge consequence of favoritism as employees will inevitably notice the difference in the way different employees are treated.

Of course, favoring some employees over others can also result in claims of discrimination. Even if the favored employee is a minority and the less-favored employee is white, there may be claims of so-called reverse discrimination. Keep in mind that an employee need not be a member of a protected class to file a discrimination claim.

Favoritism can also conceal subpar performance by certain employees. The organization may be suffering through the retention of employees who are being protected by supervisors who favor them. Perhaps worse, employees may even be promoted through the ranks due to favoritism, resulting in managers and supervisors who are ill-equipped for their management roles.

If favoritism is so rampant that it affects the company's reputation in the community, recruiting quality employees may be difficult, as they're likely to fear that employment decisions won't be made fairly. Investors may also shy away from companies who are rumored to promote unqualified employees into key leadership roles.

Nepotism

Some companies may also deal with nepotism, a very specific kind of favoritism which involves awarding preferential treatment to relatives. In some cases, it can actually be advantageous for a company to rely upon quality family referrals, but when family members are given preference with little or no regard to merit, problems can ensue.

Isolated acts of nepotism do not typically make up the basis of legitimate discrimination claims, and taken alone, nepotism is not illegal in private organizations. However, on a larger scale, giving unwarranted preference to family members to the detriment of a protected class can lead to litigation. Hiring only family referrals of employees or company owners may constitute discrimination on the basis of race, for example.

Addressing the problem

Favoritism doesn't have to be illegal or even deliberate to be damaging. Even the appearance of favoritism can cause issues among employees.

In order to avoid morale problems and liability, it is best to have a clear, objective policy covering favoritism and the company's position on it. Make sure this is communicated and enforced consistently. If the company already has a policy addressing personal relationships in the workplace, consider reviewing it regularly.

When crafting a new policy or re-evaluating an existing one, examine the effects of favoritism within the company's supervisory chain as well as the organization's needs. The policy might require employees who are immediate family members or in close relationships to notify HR of the relationship, or it might prevent the hiring of individuals into positions which could create conflicts of interest. An anti-fraternization policy warning against supervisors and employees spending extended periods of time together outside work may also be part of such a policy.

Reserved



Introduction

While employers would be quite happy only offering encouragement and otherwise handling positive employee relations, problems between coworkers will inevitably arise. Whether the issue is offensive conduct, relationship problems, or substance abuse, employers will have to manage problems in the workplace. Of course, many situations will be handled by supervisors, who may require training on how to properly (and in some cases, legally) address workplace issues.

The words “offensive conduct” commonly raise thoughts of discrimination or harassment. In fact, a lot of inappropriate conduct doesn’t rise to the level of unlawful harassment, but it can still have a significant — and negative — impact on employees. Offensive conduct can result in lost productivity, increased absences for stress-related illnesses, and can even cause employees to quit their jobs. Unfortunately, it’s usually not the offender who leaves, and an organization could lose a valuable employee while the offender simply finds a new target.

Productivity can be lost in a number of ways. Many employees have complained to a coworker about the behavior of another employee. Looking for support is normal, but it takes up time that could be spent on productive tasks. The affected employee may not be able to focus on work until he or she “works things out.” If this means talking to a trusted coworker, the organization has two employees who are losing productive work time.

Offensive behavior can also indicate a potential for future violence. An employee who makes abusive comments could be showing warning signs that he or she could become violent. If the conduct isn’t addressed, the employee may escalate to displaced physical aggression, such as banging on a desk or slamming doors. At that point, it may be a short step to physical aggression against a coworker.

To create (or maintain) a culture of respect, employers can adopt a policy on interpersonal conduct that expresses the company’s expectation for employees to treat each other with respect. A policy prohibiting discrimination or harassment can serve this purpose by expanding the definition of unwanted offensive behavior.

Employee Relations Essentials

The policy should describe the type of behavior that is prohibited and how to report incidents. It should also include reassurance that the company will not tolerate retaliation against employees who make a report. Finally, the policy should describe the consequences for violations, such as discipline that may include suspension or termination.

This doesn't mean that employers have to monitor the workplace and censor every comment that isn't business related. Some level of workplace banter is acceptable, as long as no one is offended. However, unwanted offensive behavior should be prohibited.

Coupled with the policy should be training for supervisors on recognizing offensive behavior and stopping it before it becomes harassment. Supervisors need to impose discipline when warranted. Effective and consistent enforcement is crucial. If complaints aren't taken seriously, or the company's response doesn't stop the behavior, employees may stop reporting complaints, and will feel they have to deal with it on their own. Morale can plummet if employees believe they are stuck in a hostile work environment.

Difficult conversations with employees

It's inevitable that employers will eventually have to deal with some kind of uncomfortable situation: employees complaining about a coworker who has body odor; an employee who comes to work looking like he just rolled out of bed; another employee showing signs of emotional stress. Some of these are minor annoyances, but some could have greater consequences if not handled properly.

Having these difficult conversations can't be avoided (as least not forever). But they are manageable if the company has a plan before sitting down to talk to the employee. Having a difficult conversation is a little easier with some planning and forethought.

No one wants to have a difficult conversation, especially when the conversation involves a sensitive subject matter. However, ignoring the situation won't make it go away, and will probably make things worse. If employees are complaining about a coworker and the company ignores their cries for help, they will assume that the company doesn't care about their concerns.



Whatever the topic, there are some tips for having a difficult conversation:

1. Always have the conversation in a private place. If a manager's office has windows where anyone walking by can see the conversation, that's not private. In that case, have the conversation in a conference room. Choose a time during which neither party will be interrupted and when the meeting won't have to be cut short by another meeting.

2. Have tissues at hand, just in case. While employers should be tactful, there are only so many ways to deliver bad news, and few are welcomed by the listener. Prepare for any type of reaction, including tears, anger, or even no reaction (which may mean the person is in denial about the problem, or is in shock and doesn't know how to respond — watch for a delayed response in this case).

3. Practice what to say. Put yourself in the other person's shoes to gauge how you would react if those words were said to you. If possible, try role-playing with another person to get feedback. (Make sure the other person is someone who will keep the conversation confidential.)

4. Be brief and to the point without sounding harsh. If it's a body odor problem, say something like: "This is a little uncomfortable for me, but I wanted to let you know that it's been brought to my attention (or I've noticed) that there is a particular odor around you that's a little unpleasant. I know there are a number of different things that can cause an odor, so I don't want to assume it's a hygiene issue, but I wanted to bring it to your attention in case you weren't aware of it."

5. Give the individual time to process the information and respond. The person's initial reaction will help tailor the rest of the conversation accordingly. This may mean being more gentle, giving the person time to compose him/herself, waiting for the anger to cool off, and so on.

6. Show sensitivity and compassion, but be clear on the solution. "I know this is a sensitive issue, but we do need to resolve this."

7. Don't make it personal. Focus on the performance issue. For example, saying "you stink" is a personal attack, but saying "I've noticed a rather strong odor" makes the issue more objective and less personal. Don't place blame or make accusations, but merely bring the matter to his or her attention.

8. Don't "but" in. When listening to an employee's concerns, avoid interrupting and avoid using phrases that the employee may hear as dismissive. Expressing affirmation such as "I understand your concerns" can be part of the conversation. However, resist the temptation to interrupt by offering advice or making comments that might seem to diminish the employee's situation, such as "I understand your concerns, but..." Instead, wait until the employee is finished and then move forward with a statement such as, "Now that I understand the situation, let's start thinking about solutions."

According to several surveys, a majority of employees who were asked to improve their performance were not given instructions or guidance on how to achieve the desired outcome. When an employee is not meeting expectations or has a conduct problem, a supervisor will commonly tell the employee what NOT to do. This kind of communication is common when giving instructions to children ("stop hitting your little sister"), but adults are better able to meet expectations when they have a goal to work toward (that is, when they are told what to do) rather than merely being told what not to do.

Employers, and particularly supervisors, should understand the importance of following up with the employee. A failure to further address an employee's concern may leave the employee feeling that the situation is being ignored. At the other extreme, a failure to address a performance issue might be viewed as tacit approval that everything has been satisfactorily resolved. If the situation has, in fact, improved to satisfactory levels, the employee should be commended on the progress made. Don't ignore the importance of giving positive feedback.



Best practice

Reactions and tactics to avoid

In some discussions about problems in the workplace, employees may react with hostility, denials, or arguments. If this happens, the company representative should not engage in any of the following behaviors:

Do not try to “shout down” the employee or start a contest of who can be the loudest.

Do not take the bait and get off track by attempting to refute the employee’s arguments.

Do not draw comparisons with other employees (e.g., “Why can’t you be more like Sharon? She never complains.”).

Do not ignore the employee’s comments, which may cause the employee to repeat them more loudly. Instead, respectfully dismiss them with a response such as, “We can discuss that later if you’d like, but right now we need to talk about...” or “I understand your frustration, but everyone is held to the same rules.” Then get the conversation back on track.

Body odor

The presence of an employee with an offensive body odor is a surprisingly common occurrence in the workplace, and the matter should be handled with sensitivity. First, address the problem in private. Tell the employee it has come to your attention that he or she emits a strong odor. The employee may or may not be aware of it. Ask if the employee can come up with solutions to the problem, and go over some possibilities together.

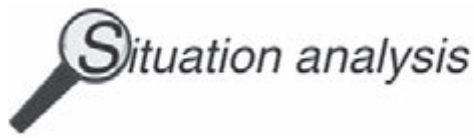
While it’s usually assumed an odor is caused by poor hygiene, that’s not always the case. For example, it could be diet related, a matter of a particular laundry detergent reacting badly with the person’s chemical makeup, or a reaction to medication. If there appears to be no easy solution, suggest that the individual see a doctor for any potential causes, and then check back with the employee in a few weeks. Tread lightly, because an odor could be caused by any number of medical conditions, and employers can’t discriminate against someone because of this.

There may be easy remedies, depending on the nature of the problem. Sometimes it is merely a case of a product interacting with a person’s body chemistry to produce an unwanted odor, and it may be a simple matter of changing to a different soap or laundry detergent. It may be something in the person’s diet, such as an overabundance of garlic. Or, it could be a personal hygiene issue such as infrequent bathing. If necessary, remind the employee of the company’s dress code or personal grooming policy.

It is a trickier situation if it is related to a medical issue. For example, a colostomy bag or certain medical conditions, such as gastrointestinal disorders, diabetes, urinary tract infections, and kidney or liver failure, can cause offensive odors. Tread cautiously, because the condition may be a disability and fall under the Americans with Disabilities Act, which may require making an accommodation.

Some employees may not bathe or they may eat different foods during certain religious holidays. If an odor is due to a religious practice, an employer has an obligation to accommodate the employee, so long as it does not unduly interfere with other employees' rights or with the legitimate needs of the business.

Whatever the case, express the desire to simply make sure the employee is well. The key is to show respect and compassion. As embarrassing as this conversation is for a manager or HR representative, it's doubly so for the employee, so try to minimize his or her embarrassment as much as possible. It's also best to keep the discussion as confidential as possible. Simply monitor the situation or discuss it with the employee privately in a couple of weeks to see if any progress has been made.



Employees are complaining about too much perfume

A number of employees are complaining about a coworker's strong perfume. The company has no policy on this, and the employee has been talked to, but continues to wear heavy perfume. What should the company do? Repeat the prior verbal request? Ignore the issue? Is discipline an option without a policy?

The best answer is to take the next progressive disciplinary step, which usually means issuing a written warning. Even without a policy, employers can discipline an employee for behavior that is disruptive to the workplace and for refusing to correct the problem. Ignoring the problem is not an option because some people can actually develop sensitivities to strong scents, which can create medical issues and possible accommodation requests. (A woman in Michigan won a \$10 million judgment against her employer for failure to accommodate her sensitivity to a coworker's perfume.) Many companies adopt a "scent-free" policy to be on the safe side.

Smoke odors

Several employees work in a small room at a smoke-free facility, but two employees are smokers and the odor on their clothing in the morning and after lunch is bothersome to the others, even causing reports of nausea. How does an employer address this?

Sending a reminder of policies on offensive odors (if the company has one) and the smoking policy might raise awareness, but won't solve the problem. A manager should speak directly with the offenders and ask them for ideas on how to address the problem. This approach should be better received than simply dictating an outcome such as "no odors of smoke at work."

For example, if they are smoking during their morning commute and lunch breaks, ask them to consider when and where they choose to smoke, and attempt to minimize odors on their clothing to avoid disrupting other workers. This might involve adjustments to their morning routine to prevent smoke from tainting their work clothes, or adjustments during a commute or lunch break to minimize the amount of smoke that may soak into their clothing.

Remind them that even though they can smoke during non-working hours, the company can still enforce policies that are disruptive to the workplace, including odors. As noted, work with them to solve the issue, rather than simply reminding them of the policy. However, be prepared to outline any consequences for failure to address the problem, such as disciplinary warnings or ultimately termination, if that is deemed appropriate.

Finally, consider other options that might be available. Separating the employees may not be an option, but if odors are heaviest on outer clothing (such as winter coats), it may be possible to hang the coats in another area. Also, consider whether an air purifier could be placed in the room to help remove odors (perhaps one purchased by a smoker). This might help alleviate the effects on other employees.

Moonlighting

For any number of reasons, some employees will seek additional income by pursuing a second job. In fact, the Bureau of Labor Statistics reports that about 5 percent of Americans “moonlight.” In most cases, moonlighting should not be a problem for either employer. Individuals who hold more than one job may have no trouble balancing the two, particularly if one or both jobs are part-time and the schedules are compatible (e.g., a weekday job and a weekend job).

However, sometimes outside employment will become a problem. For instance, perhaps the employee is exhausted by the time he finishes his part-time job in the evening. His fatigue causes him to regularly arrive late to work at his primary job the next morning, and potentially make errors that cause injuries or cost the organization money.

Some employees may even be “daylighting,” or attempting to squeeze the responsibilities of two jobs into one shift. An employee might be taking calls for a side job while “working” at the primary job, and productivity will inevitably suffer.

Employers who have experienced the negative effects of outside employment may be tempted to implement a policy prohibiting outside employment. Though this may seem like a quick and effective solution, it may not be as perfect as it sounds.

In order to be effective, a policy must be enforced consistently and uniformly. Employers may not know whether an employee is holding another job unless he or she reports it. If moonlighting is against policy and employees are doing it anyway, they’re not likely to speak up.

What’s more, prohibiting outside employment may not even be legal. Such a policy ventures into telling employees what they can and cannot do with their free time. In some states (California, Colorado, New York, and North Dakota), it is specifically illegal to prohibit employees to engage in lawful activities during non-work time. And in all states, employers run the risk that employees will resent being told what they can and cannot do with their personal time.

For employers who have a problem with (or want to avoid a problem with) outside employment, the answer may still involve policies. Rather than trying to control what employees do on their own time, consider implementing policies (or enforcing existing ones) addressing problems that commonly result from employees holding more than one job. If an employee is repeatedly late or performance is suffering, address these issues and apply discipline where appropriate.

If outside employment may impact the employee’s ability to make ethical decisions for the primary employer, a conflict of interest policy may address the behavior. For example, an employee may not be able to work for a competitor without creating a conflict of interest.

An outside employment policy could exist, but rather than prohibiting outside employment, it might indicate that outside employment, if gained, should not infringe upon performance, attendance, or otherwise meeting the expectations of the position.

Dress code violations



Many employers implement dress codes to maintain and present a professional atmosphere. Some organizations need to restrict the type of clothing that can be worn for safety reasons (such as loose-fitting clothing that could be caught in machinery). However, safety is a legitimate concern for clothing restrictions, and generally doesn't bring up the same issues as a general dress code.

Whether or not you have a written dress code policy, you probably have expected standards for clothing and appearance. Enforcing those expectations can be more challenging, however, if the employees have never been given any notice or indication that such standards exist. If you ever need to correct an employee for wearing inappropriate clothing or displaying visible tattoos, but you don't have a formal policy, you're more likely to face resistance about whether the individual's appearance is inappropriate.

The challenge is how to create a dress code policy that will allow employees flexibility in their appearance, but still allow the company to present a professional image and determine that a particular outfit is not acceptable. It may not be possible or desirable to list every type of acceptable clothing. Fortunately, concepts such as "business casual" are fairly well understood to have general guidelines. A dress code policy might give examples, but refrain from attempting to list every possible outfit.

A few examples might include:

- Dress pants and slacks, or dresses and skirts that extend below the knee, are acceptable attire. Jeans or denim pants are only allowed on casual Fridays unless the nature of the job allows for an exception.
- Business casual shirts (such as button-down shirts for men), blouses, or similar attire are required. Employees are not allowed to wear T-shirts.

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- Shoes must be appropriate for the work environment. Footwear such as “flip-flop” sandals are an example of unacceptable footwear.

By providing examples, rather than attempting to list every possible outfit, the company provides guidelines but retains the right to determine that a particular type or style of clothing is not acceptable, even if the outfit is not specifically listed.

Dress codes have gotten more relaxed over the years, and some workers tend to interpret a “business casual” style of dress a little more informally than others. Employees who aren’t following the dress code aren’t necessarily opposed to it, but they simply don’t have the same understanding of it. In an effort not to completely stifle employees, a dress code might not go into great detail, and it’s sometimes necessary to correct employees when their idea of professional dress just isn’t measuring up.

Some cases are relatively simple to address. For instance, if an employee shows up wearing inappropriate clothing, or has visible tattoos, the individual might simply be reminded of the policy (a verbal warning) and told to follow the dress code in the future. In some cases, an employee might even be sent home to change clothing, although this response may depend on the circumstances. For instance, if loose clothing would pose a safety violation, sending the employee home to change may be necessary. For other situations, the case can be evaluated independently.

In some cases, you might revise a dress code to include new prohibitions. For example, if visible tattoos had never been addressed, but an increasing number of employees (or new hires) have been proudly displaying their tattoos, you might choose to revise the dress code. For situations like this, you should consider factors such as the image your company wishes to present, the expectations of your customers, and the social conventions for your business area. Depending on the nature of the business and clientele, the visible tattoos may even be expected as part of the environment or may add to the appeal of the establishment.

For the man who looks like he just rolled out of bed, it’s possible there could be more going on than meets the eye. Address it in private as a performance issue and reiterate the company’s expectations of professional attire. However, keep in mind that if this is a recent change, the employee could be suffering from depression or other problems.

Personal appearance can be a touchy subject, and individuals may take criticism personally. Employers have the right to correct employees, but be sensitive to employees’ feelings and avoid making them feel uncomfortable. However, if an employee’s manner of dress isn’t acceptable, correcting him or her promptly will help avoid problems in the future, and will also set the right example for other employees.

Unfortunately, just as such conversations can be uncomfortable for employees, they can be uncomfortable for employers. No one wants to hurt an employee’s feelings by telling her that the way she styles her hair seems disheveled and unprofessional.

For any potentially embarrassing topic, especially one that might result in discipline, it’s a good idea to correct the employee in private. Relay to the employee that the situation might be uncomfortable, but that his or her hair, dress, or even personal hygiene is not appropriate in the workplace. It’s a good idea to reinforce that the company has no intentions of embarrassing the individual, but needs him or her to help remedy the situation.

While most conversations should be conducted in private to avoid embarrassment, an exception might be if there’s a concern that correcting an employee’s mode of dress could be construed as sexual harassment. While it’s a rare case that asking an employee to observe a particular dress code would result in a bona fide harassment claim, take extra time to consider how to approach this situation, and consider having another individual (like an HR representative) in the room

if there is the feeling that the issue could venture into dangerous territory. For example, if a male supervisor must address complaints about a female employee's low-cut blouse, it may be a good idea to request the help of a female manager or HR representative.

There are some situations in which employers may not want to follow the dress code to the letter. For example, employers may be required to make exceptions as a religious accommodation. Religious expressions that may need to be accommodated might include beards, tattoos, or head scarves, for example.



Cross reference

For more information, see the section on **Religious accommodations** in the **Protected Rights and Actions** tab.

Most employees who aren't following the dress code won't put up a fight or feel as though they're being harassed when questioned about their dress. When possible, reference the company policy when correcting employees. If the particular issue doesn't specifically appear in the dress code, try to explain just why the issue is problematic in the workplace and that the dress code isn't meant to be all-encompassing. Most employees will agree to remedy the situation without much of a fuss.

Without getting too personal or asking for details, simply state that this change has been noticed, and that if there is anything going on in his personal life that is causing stress, he might want to consider using the Employee Assistance Program (if available) or seek counseling. Tell him the company is there to support him and can be accommodating if needed, but must still insist that he look professional at work.



Situation analysis

Consistent enforcement

Inconsistent enforcement of a dress code may create liability for an employer. In one case, a female employee felt that she received an unattractive haircut, so she wore a hat to work. She was informed that this was a violation of the dress code, and was asked to remove the hat. She responded by pointing out that many men were in violation, and they often wore hats or displayed visible tattoos.

She was threatened with termination if she did not remove the hat, and responded by talking to other women in the office about the unfair enforcement. These coworkers agreed and helped her document other violations by using a cell phone camera to take pictures of men in violation of the dress code. The woman was later terminated for taking unauthorized pictures.

She sued under the National Labor Relations Act, which protects the rights of employees to discuss their working conditions with coworkers, and won her case. In this situation, she also might have been successful in claiming gender discrimination. An employer would have a difficult time proving that an employee's dress code violation that resulted in termination was justified if other (similar) violations have been ignored. This creates an assumption that the employer must have applied another reason, such as discrimination, in making its decision.

Dealing with presenteeism

Absenteeism refers to lost productivity when employees don't report for work. A similar term, presenteeism refers to lost productivity due to illness, fatigue, or other conditions that keep employees from working at peak performance. Perhaps managers overhear employees say things like:

"I can't get ahead with this workload."

"This headache is killing me."

"I'm feeling stressed out."

The most common causes of presenteeism include allergies, migraines, asthma, and depression. Often, the symptoms aren't serious enough for an employee to stay home. However, these conditions can distract employees, reduce productivity, and lead to increased accidents. Fortunately, the company can take steps to help the afflicted employees.

Addressing the problem requires collecting data to identify the most common conditions. The intent is not to identify "slackers," but simply trying to learn how many workers suffer from things like allergies and migraines, and how often they have symptoms. This information can be gathered using anonymous questionnaires.

For instance, a company might include "distracted worker" factors during health risk assessments. The questionnaire might include a list of conditions and ask employees to estimate how many hours they were affected by each condition in the last two weeks, and how many days they were affected in the last year. Common conditions include:

- Allergies
- Asthma
- Back/neck pain
- Depression
- Fatigue/low energy
- Migraine/headache
- Sleeping disorders
- Alcohol use/substance abuse

Targeting issues with the largest impact (most hours or most days of lost productivity) will show the largest return on investment. For example, if numerous employees report migraines, the company might offer a seminar on the causes, symptoms, and treatments for migraines. Treatments and counseling are also available for conditions like sleep disorders, asthma, and depression. In addition, the employee assistance program (EAP) may have resources available.

Some employees might have been suffering for years. They may never have told their personal physician, and they might be reluctant to seek help. Bringing up the issue and making employees think about the impact on their health and work can encourage them to seek help. Letting them know that their condition is not unusual, and that confidential help is available, can give them the confidence to help themselves.

Strategies that offer self-help or self-care options allow employees some control over their treatment, which usually increases participation and helps reduce costs. An EAP or health care provider should be able to provide suggestions on what to offer.

Healthier employees are generally happier and more productive. Many will appreciate the employer's concern for their well-being. Also, these screenings can identify potentially serious conditions before they fully develop, which can reduce health insurance and medical costs. When these savings are combined with increased productivity and reduced accidents, addressing presenteeism positively affects the company's bottom line.

Dealing with employee stress

To deal with stress, the source or cause has to be identified. If the problem is external and involves personal matters, the employer might be limited to expressing empathy and making the employee aware of resources available to help (employers should not act as counselors). However, if the stress is caused by work, as is often the case, the situation might be addressed after identifying the source. Some common sources include:

Workloads too high (or low). Jobs that involve a heavy workload, don't allow time for rest breaks, require long hours, or are physically or mentally demanding can quickly result in stress from excessive challenges. At the other extreme, repetitive or routine tasks that have little

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apparent meaning or don't allow employees to exercise autonomy and control can become stressful as the employee becomes dissatisfied and desires greater challenges.

Personal issues. Stress can result from conditions outside the workplace, from any number of family relationships or problems.

Management style. A manager who provides little opportunity for workers to participate in decision making or fails to communicate can create job stress.

Coworker relationships. Stress can result from a poor social environment, lack of support from coworkers and supervisors, or from bullying.

Unclear responsibilities. Employees can feel stress in situations that involve conflicting or uncertain job expectations, or from too many responsibilities without apparent priority.

Job security. Employees who sense job insecurity and few opportunities for growth, or whose job duties are changed suddenly without sufficient notice, can become stressed.

Environmental conditions. Employees can also feel stress from unpleasant or dangerous physical conditions such as crowding, noise, temperature extremes, or ergonomic problems. Noise is a common "background stressor" that can slowly build stress over time.

Stressful working conditions may result in increased absenteeism, tardiness, and job hopping, all of which have negative effects on the bottom line. If the workplace seems stressful, options to address the problem may include ensuring that workloads are appropriate, providing meaningful tasks or autonomy, providing clearly defined goals and responsibilities, and outlining opportunities for advancement.

Options to reduce the workload may be limited, and employers can't do much about employees' personal lives. However, when employees are experiencing so much stress that they can't focus, it can be detrimental to the business in countless ways. Productivity is bound to suffer, as is morale. Remember, too, that stress is a primary risk factor for many of the leading health conditions in the U.S.



Whatever the source of the stress, there are several things an employer can do to help employees cope with stress, including:

- Offering health risk assessments to identify above-average stress levels,
- Providing access to an Employee Assistance Program to allow employees to seek coaching or support,

- Offering fitness activities (perhaps as part of a wellness program) to help combat stress, and
- Allowing flexible work schedules to ease work-life balance.

Stress is part of everyday life, but today's employees may be facing more than ever before. Employees' stress may begin as a personal issue, but if it gets out of control, it becomes a business issue, influencing daily operations. Helping employees deal with stress now will keep them physically healthier and may also leave them better able to endure stress in the future.

When stress is a good thing

When most people think of stress, they think of distress, or a negative and potentially overwhelming emotion. However, stress isn't always negative; in fact, a moderate amount of stress can actually bolster an individual's performance. Positive stress is prompted by a challenging situation that an individual feels capable of handling.

When faced with positive stress, an individual is likely to perform even better than if no stress was involved at all. Consider the comparison of athletes in a race. While they can train extremely hard, most are likely to run fastest when put up against the best competition — when the most stress is involved. Similarly, a deadline in the workplace can create stress, but if it's reasonable and an employee has the tools necessary to complete the associated project, he or she can still feel in control while being pushed to meet the end goal.

Unfortunately, when stress crosses that threshold of being manageable, it becomes dangerous. Chronic negative stress can be a contributor to high blood pressure, heart disease, exhaustion, and depression.

To determine if employees are under the right kind of stress, simply talk to them. They can explain if deadlines or responsibilities are causing them unmanageable or overwhelming stress. But before asking the question, be willing to discuss solutions to ease negative stress where possible.

Emotional stress

If an employee is demonstrating signs of emotional stress (crying at his or her desk, inability to focus or complete work), address it if the employee's work performance is suffering. Again, this may be a job for an EAP. Address the declining work performance and state that a change in the employee's demeanor has been noticed. Explain that the employee does not have to share the details, but if the employee needs some support, the EAP is available, and if the employee needs time away, the company can accommodate him or her (whether it's vacation, FMLA, etc.).

The employee might be going through a divorce, or it's possible the employee's partner is being abusive. If the latter is the case, many states have laws that require employers to grant time off to employees in domestic violence situations. If the employee mentions this, check to see if the state has such a law and act accordingly.



Cross reference

For more information, see the section on **Crime or domestic violence leave laws** in the **Protected rights and actions** tab.

Employers must draw a fine line between getting enough information to adequately give employees the help and support they need, and getting too much. Check up with employees periodically to see if things have improved and if they need any accommodation.

Dealing with depression

Depression is becoming more widely recognized as a problem in the workplace — one which employers not only can, but should deal with. According to the National Institute of Mental Health (NIMH), in any given one-year period, 9.5 percent of the population, or about 20.9 million American adults, suffer from a depressive illness. Most people do not seek treatment, even though the majority of those who suffer can be helped.

In the workplace, this translates to increased absenteeism and lost productivity. Depressed employees are more than twice as likely to take short-term disability leave, and one study found that health care expenditures were as much as 70 percent higher for depressed employees than for those without the disease.

The signs and symptoms of depression include:

- A persistent sad, anxious, or “empty” feeling;
- Feelings of pessimism or hopelessness;
- Feelings of guilt, worthlessness, helplessness;
- Loss of interest in activities that were once enjoyed;
- Decreased energy, increased fatigue;
- Difficulty concentrating, remembering, and making decisions;

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- Insomnia, early morning awakening, or oversleeping;
- Appetite and/or weight loss or overeating and weight gain;
- Thoughts of death or suicide, or suicide attempts;
- Restlessness or irritability;
- Persistent physical symptoms that do not respond to treatment, such as headaches, digestive disorders, and chronic pain.

Major depressive disorder is often associated with changes in brain structures or brain function. People who are readily overwhelmed by stress may be prone to depression. Certain medical illnesses can also cause depression. There may be a genetic component, since depression appears to run in families, though that is not always the case. A serious loss, difficult relationship, financial problem, or any stressful change in life patterns can trigger a depressive episode.

Women experience depression about twice as often as men. Men are less likely to admit to depression, and doctors are less likely to suspect it. Depression in men is often masked by alcohol or drugs, or by the socially acceptable habit of working excessively long hours. Depression typically shows up in men not as feeling hopeless and helpless, but as being irritable, angry, and discouraged. Because of this, depression may be difficult to recognize in men.

Depression is a disease that usually requires treatment. It is not generally something that an individual can “snap out of.” Getting better takes time, and progress may be slow. In the meantime, an employee’s productivity can be negatively impacted. The employee may require treatment in the form of any combination of therapy, medication, or hospitalization, depending on the severity of the disease.



Best practice

FMLA and ADA considerations

Employers may be obligated under the Family and Medical Leave Act (FMLA) to provide a leave of absence for the employee to seek treatment, particularly if a hospital stay is required. They may also be required to return the employee to his or her position upon return. The Americans with Disabilities Act (ADA) may require accommodating the employee in coping with the illness, if an accommodation that does not cause undue hardship can be found.

Forms of mental illness that may be covered under the ADA include major depression, bipolar disorder, personality disorders, and anxiety disorders such as obsessive compulsive disorder and post-traumatic stress disorder. While depression and other forms of mental illness can be impairments, they are only “disabilities” under the ADA if they substantially limit one or more major life activities. Examples of major life activities that may be affected by mental illness include thinking, learning, concentrating, interacting with others, caring for oneself, working, and sleeping. An EEOC Enforcement Guidance on the ADA gives numerous examples of work situations, some requiring accommodation and some not, and the reasons for each. It can be found at www.eeoc.gov/policy/docs/psych.html.

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According to the EEOC, an employer may make a disability-related inquiry or request a medical exam when it is job-related and consistent with business necessity, and the employer has a reasonable belief, based on objective evidence, that (1) an employee's ability to perform essential job functions is impaired by a medical condition, or (2) an employee will pose a direct threat due to a medical condition. Inquiries and medical exams may also be done in response to an employee's request for accommodation where the need is not obvious, or to address reasonable concerns about whether an individual is fit to perform the essential functions of his or her job.

Some of the problems employees with depression may face are a lack of stamina during the workday, problems concentrating, memory deficits, difficulty staying organized and meeting deadlines, difficulty handling stress, and difficulty maintaining attendance. The following are a few of the types of measures an employer may consider to accommodate an employee with depression:

- A flexible working arrangement may allow the employee time to attend therapy sessions or doctor's appointments, or to come in later in the morning to accommodate a difficulty in getting to work on time or to counter the effects of medication. Studies show that mornings can be the most difficult time of day for those suffering from depression.
- Longer or more frequent work breaks may help an employee cope.
- Consider allowing an employee to work from home a couple days a week.
- Taking some of the workload off the employee's shoulders temporarily may help the employee cope. Depression makes it difficult to cope under normal circumstances; too many demands can increase feelings of hopelessness.
- Break down large assignments into smaller tasks and goals.
- Make to-do lists, provide written instructions and checklists, and allow additional training time.
- A job coach or closer supervision on a temporary basis may help to direct the employee's efforts and keep the employee on track.
- Time off might be required for the employee to seek treatment and may need to be accommodated under the FMLA and/or ADA.

In general, performance problems should be dealt with as performance problems, regardless of the underlying basis for them. However, if an employer has reason to suspect (in the form of objective evidence) that an employee's mental condition may be the cause of the poor performance, then an employer may broach the subject with the employee. Also, if an employee indicates that performance problems are caused by a mental illness, an employer can ask for documentation to be sure a disorder is legitimate.

Train supervisors on how to recognize performance problems that may be caused by depression. If it is noticed that an employee is exhibiting some of the signs and symptoms of depression, and it is affecting the employee's work performance, suggest that the employee take advantage of the Employee Assistance Program or local resources.

Educate all employees, not just supervisors, on the signs and symptoms of depression, and indicate where employees can seek help. Depression costs employers in terms of higher absenteeism and higher health care costs. There are many ways an employer can accommodate employees who suffer from depression, to increase productivity and retain valuable employees.

Dealing with grief

It's an unfortunate truth that most everyone will deal with a loss at some point in their lives. When an employee returns to the workplace after having gone through the death of a loved one, it can be challenging to provide support without being intrusive.

The death of a loved one isn't the only reason an employee might be grieving. An employee who becomes separated from a loved one, loses a job, loses a pet, gets a divorce, or whose kids leave home also may experience some level of grief.

While employers want to help the employee get back to work, be sensitive to the fact that he or she might still be grieving. Some people have a more difficult time than others moving on with their lives while coping with grief.



The initial response

It's important to remember that there is no one-size-fits-all mold for grief. A person's response to the passing of a loved one will depend on factors such as the relationship to the deceased, spiritual beliefs, and the amount of time a person had to prepare for the death of a loved one.

When an employee experiences loss, supervisors may be one of the first people to find out, particularly if the employee will be missing work. Where this is the case, assure the employee that his or her responsibilities will be handled. The employee shouldn't feel that his or her absence is a burden for the team.

Briefly discuss how long the employee anticipates being away from work. If the company has a bereavement policy, make sure the employee knows about it. If there is paid leave available, letting the employee know about it may help ease some of the stress. Consider asking the employee what, and how much, to reveal to coworkers about the situation.

Realize that not all employees will want to have lengthy conversations during such a difficult time. If an employee would rather not speak about it, email might be an effective alternative to deliver information about benefits, and will also give the employee a written reference when they have more time and energy to focus. If an employee seems to be struggling, get just the essential information and give the employee as much space as possible.

Returning to work

When an employee returns to work after any type of loss, take a moment to discuss how he or she feels about being back. Getting back to normal life may be a relief for some people, but it may be overwhelming for others. Don't automatically assume an employee needs help, but be ready to arrange it if requested. If the organization has an Employee Assistance Program, consider reminding the employee of the services it provides.

Be aware that a grieving employee might have trouble concentrating, making decisions, or maintaining a constant demeanor. If the employee appears to be struggling, initiate a conversation, but let the employee explain what help might be needed, rather than imposing solutions. As time passes, keep the lines of communication open to avoid either under- or overtasking the individual.

While compassion will likely be appreciated, remember that the employee may simply need time to cope. Don't expect the employee to get over a loss within a certain time frame. It could take months or more for an individual to feel like himself or herself after the death of a loved one.

There may come a time when an employer become concerned about the way an employee is handling grief. It's even possible that grief can contribute to physical and mental ailments, such as depression. In extreme cases, laws such as the FMLA or the ADA may allow for time off.



Best practice

Navigating difficult conversations

The key in any difficult conversation is showing respect and compassion. The conversation may be uncomfortable and embarrassing for a manager, but is probably more so for the employee. Keep that in mind when preparing what to say.

Imagine someone else having the conversation with you. How would you want it to be handled? When planning what to say, gauge your own reaction to those words. How would you feel if someone said those words to you?

Be prepared for various reactions. The employee might get angry, begin crying, leave in the middle of the conversation, or even become violent. Consider how the person will react, then develop a few contingency plans just in case.

Practice what to say, either with a mental script or on paper, or practice role-playing with another person. Role-playing without a script is a good way to discover any unwanted reactions that could occur.

Don't place blame. Employees who feel blamed may become defensive. Approach the conversation from the mind-set of trying to understand and correct the underlying problem, not blame the employee for creating it.

Don't make assumptions. An employee's performance issues or "attitude problem" may be caused by stress due to a family situation, for example. It may not excuse the poor performance or behavior, and those issues must still be addressed, but consider referring the individual to an Employee Assistance Program after getting the whole picture.

Be clear on the purpose of the meeting. Subtlety is lost on some people, so be clear about what the problem is and what outcome is expected.

Don't project personal feelings about the issue or the individual into the conversation. For example, investigating a sexual harassment claim may bring up a time when the manager was sexually harassed, causing old feelings or anger to surface. Don't get emotionally involved in the situation. Stay objective and deal with the matter at hand.

Don't take it personally. If the person lashes out, it's a reaction to the stressful situation at hand, and not intended as an insult.

Follow up. Regardless of what the issue is, follow up with the employee some time after the difficult conversation. The employee may not be handling the conversation well, may have misunderstood, or may not understand what steps are expected. If the point was for the employee to make a change, following up will help gauge their progress in doing so.

Dealing with an employee death

Although a rare occurrence, unfortunate situations such as the death of a current employee are likely to affect the workplace at some point or another.

One of the organization's first responsibilities may be to communicate with both the workforce and the employee's family regarding the loss. Express the company's condolences and determine how much information the family wants divulged to employees. It may help the family if a company representative is willing to serve as a liaison between the family and the workforce, communicating information about funeral arrangements and how employees can help the family of the deceased.

If possible, offer all affected employees the opportunity to attend the employee's funeral. If the company has a bereavement policy, it probably addresses leave for employees after the death of a member of an individual's immediate family. Consider adjusting it to allow for paid time to attend funeral services of a coworker as well.

Efficiently processing any employee benefits paperwork can help the employee's family members move forward. Consider life insurance, 401(k) plans, and any other relevant benefit plans. If the employee had covered dependents under his or her health insurance, get COBRA paperwork in order. State laws typically dictate the logistics of final pay and any unused paid time off that the company pays out.

In the meantime, callous as it may seem, the organization needs to discuss hiring a replacement for the deceased employee. In the aftermath of an employee's death, tasks like these may seem difficult — sometimes even insensitive — but they are all necessary to help all employees and the organization move on from a tragedy.

Losing a team member

Most full-time workers spend as much time with their coworkers as they do with their families and friends, and strong bonds often form between employees. When an employee leaves the organization, it can be difficult for remaining employees to adjust. But when an employee passes away, the effects on other employees can be as grave as losing a family member.

When a loss occurs in the workplace, pay attention to how employees are coping in the days and weeks that follow. Consider the possibility of bringing in help for employees dealing with grief. This may be particularly necessary if several employees were lost or if the loss was unexpected or affected the entire workforce. An Employee Assistance Program might already offer such services.

As employees begin to resume business as usual, be sensitive to the fact that the grieving process is different for everyone. To the extent possible, be flexible with deadlines and workloads during this time. Some employees may be able to handle more than others; some may even prefer to distract themselves with work. When a death directly affects a team, expect some difficult days and weeks. With compassion and guidance, employees can move on with their jobs.

An employee wants a raise

A deserving employee asks for a raise. Since this individual excels, a raise could be warranted. The requested raise fits in his current salary range, is in line with market salary data, and funds are available. Under these circumstances, this conversation probably won't be a difficult one. Unfortunately, when employees ask for a raise, the circumstances — and the conversations themselves — won't always be so simple.

Not all employees who ask for a raise are deserving of one, and even when they are deserving, employers may not have the budget to grant one. Employees in many organizations have gone without raises — and may have even had their wages cut — during difficult economic times. In that case, employers may have more than a few individuals who feel that they aren't being paid what they are worth.

When an employee asks for a raise, listen carefully to the individual's justification. The employee should be able to explain exactly why he or she deserves the increase based on duties and achievements. Some employees will think they deserve a raise for other reasons. Be wary of reasoning that doesn't have to do with work performance. For example, an employee named Susan asks for a raise, saying she is deserving for any of the following reasons:

Mark makes more than she does. While the organization should keep an eye on internal equity, the employee asking for a raise can compare her wages to another employee's only if their jobs are equivalent. Even if the jobs themselves are the same, Mark may have more skills or may have been with the organization longer. Of course, if Susan does the same job, has the same skills, and has performed on par with Mark for the same amount of time, the company should consider her request, and might even be legally obligated to give the raise under the Equal Pay Act.

She can't pay her rent. While it might be tempting to sympathize with an employee who is short on cash, this is not a valid reason to give a raise. Focus on the employee's merits and ask her to explain her request in terms of job duties and achievements.



She's worked here for five years. Employees must understand that it is not simply length of service that determines pay, but performance. If annual reviews allow opportunities for merit increases, remind the individual of how her performance has already translated into raises in previous years.

She's considering a competitor's offer. This is a tricky situation. If the employee is a top performer, the company probably doesn't want to lose her, but still needs to consider where she is in the pay range for her current job, and whether the company would consider her request if she didn't have another job offer. If a wage increase isn't possible, consider reminding her of her total compensation. Employees considering job changes sometimes forget to consider benefits and perks when comparing salaries, or may not realize that the higher salary is offered because the new employer expects a 60-hour workweek.

Employers may have situations in which they simply can't provide raises, even to employees who deserve them. This can become a problem, particularly if top performers are beginning to look elsewhere for employment. In that case, communicate with employees and let them know how much they are valued. Increased engagement may convince them to stay until the organization can afford to reward them monetarily.

Requests for unpaid or advanced leave

Employees may occasionally request to take time off, but ask to avoid using vacation for the absence. In some cases, the employee will want to take a trip somewhere, but doesn't have enough vacation available (perhaps wanting a week off, but having only four days of vacation). In other cases, employees may request unpaid time off to "save" their vacation for a future trip. Employees might even ask for an advance of future vacation that has not yet been earned.

Whether the company chooses to allow this is entirely within the employer's discretion, but employers should be aware that granting a request for unpaid leave is likely to "get the word out" that such requests are approved. This may result in additional requests from other employees, and denying future requests may be more challenging to justify.

To be consistent, employers should explain that employees are responsible for planning the scheduling of their available vacation time. They should not expect the company to approve unpaid leave, nor should they expect the company to approve advanced leave. The company generally offers a defined amount of time off based on factors such as business needs, seniority, and other considerations. If an employee used vacation time faster than expected, the employee should try to plan better in the future.

In rare cases, there will be unusual circumstances that justify a need for additional time off. For example, a company may have a policy of granting a few days of bereavement leave for the death of a family member. It may happen that an employee suffers the loss of more than one family member in the same year, several months apart, and doesn't have any paid leave available. In these cases, the company can choose to grant unpaid leave (or advanced vacation) and still have a reasonable justification to deny other requests that do not involve such unusual circumstances.

Employees might also take time off under the Family and Medical Leave Act (FMLA), whether to care for themselves or a family member, and may be required to use paid leave during the FMLA absences. Obviously, this can quickly use up any available vacation time. Later that year, the employee may ask for advanced vacation or for additional unpaid leave. It may even happen that an employee who had planned a vacation later in the year will ask not to use vacation during the FMLA absences.

Again, whether the company chooses to grant the request is at the company's discretion. Even though the employee's use of FMLA may have resulted from an unfortunate situation, employers may have to remain firm and consistently apply their policies. Employers should not arbitrarily decide who must use vacation during FMLA and who can be excused, especially when the decision is based on something as unremarkable as an employee's desire to take a future vacation. Keep in mind that granting such requests may establish a precedent for making exceptions, and exceptions to policies should not be made lightly.

Damage to property

Through carelessness, negligence, or outright horseplay, employees sometimes cause damage to company property. Many employers wonder about the possibility of imposing discipline by fining the employee. Options that employers have considered include asking an employee re-do a project without pay, demanding that an employee pay for damages, or otherwise taking a deduction from wages as part of a disciplinary response.

In most cases, these options simply aren't legal. Employers cannot refuse to pay for work performed, even if the work didn't meet expectations. Also, nearly all states restrict or prohibit deductions from wages unless the employee signs a voluntary authorization. Asking the employee to perform the work a second time (and do it right this time) but at a lower rate of pay (such as minimum wage) is unlikely to increase the employee's future motivation.

In addition, these options won't encourage a change in behavior. They are more likely to cause feelings of anger or frustration directed at the company. Coworkers who are friendly with the punished employee may sympathize with their friends and view the employer's response as unfair, even if the damage resulted from horseplay. Employers should address the underlying conduct at issue with appropriate discipline, not the outcome of that conduct.

If necessary, and if the company can afford overtime, other employees might be asked to repair the damage or re-do the substandard work. This may result in overtime for the other workers, but the employee who caused the damage won't earn extra income (or might even be on suspension). Also, the employees who must put in the overtime will likely become aware of the

reason, and are less likely to be sympathetic to a coworker whose actions created extra work for them. This may even result in employees watching each other more carefully in the future, without being directly asked to do so.



Best practice

Carrots, not sticks

Rather than imposing negative consequences for failing to meet expectations, employers should consider offering a reward (however small) for achieving positive results. This is the concept behind commissions and incentive bonus programs, but the concept can be expanded beyond sales results and safety.

For example, employers might provide a \$250 quarterly bonus simply for meeting expectations. If the employee performs well, does not have any violations, or otherwise meets the standards for the position, the employee gets the bonus. Failing to meet objectives (having to re-do a project, having unexcused absences, getting a speeding ticket in a company vehicle, etc.) means the employee is not eligible for the reward. The employer need not impose consequences, and if the employee understood the criteria to qualify for the bonus, the employee has no one to blame but himself or herself for failing to earn the bonus.

Annoying employee habits

Employers have to make sure employees are effective, productive, and motivated. This means making sure they have all the necessary tools and skills required to do their jobs. However, it also means limiting situations which regularly frustrate, distract, or irritate employees.

Even issues that are small can affect employees. While habits such as whistling may seem trivial, a simple conversation may be all it takes to put an end to a disruption.

These conversations can be awkward, and when certain behaviors aren't specifically addressed in company policies, it can be tough to explain why they are problematic. Most often, these conversations are awkward because the individual performing an annoying behavior isn't aware of how he or she is affecting others. In many instances, a reprimand will embarrass the employee. Show respect and compassion when having any such conversation. Don't assume that the employee is aware of his or her behavior or realizes that it is disruptive. Begin by letting an employee know how the problem is perceived and ask for input, stopping the employee if he or she begins to avoid blame or make excuses.

For example: "Joan, I love your positive attitude, but sometimes your whistling gets to be distracting around the office. I'm afraid that the behavior is distracting for others and could be coming off as inconsiderate to your coworkers. What's your take?"

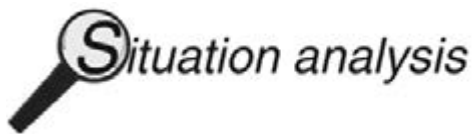
Joan may be a little embarrassed, but it's likely that she didn't mean to be inconsiderate. She may simply apologize and agree to stop whistling. However, Joan might indicate that the whistling is harmless, or say that other people are much more distracting. If she begins to make

excuses or argue, listen to what she has to say, but direct her back to the effects of her own behavior. Explain that everyone's time and space is respected, and that this discussion is about something she can control — her own conduct in the workplace, if she'll agree to stop the behavior. If Joan has concerns about other employees, she can raise those issues and they can be addressed as well.

Another example: "Eliot, it has come to my attention that you have a tendency to hold telephone conversations of a personal nature at a rather loud volume. I'm afraid these might be making your coworkers uncomfortable or might make it difficult for them to concentrate. Can you think of a way to avoid this situation in the future?"

Eliot may not have realized his behavior could be affecting others, and may come up with a solution on his own (such as limiting personal calls, lowering his volume, or taking personal calls in a more private area). Still, it's also possible that he won't understand how his calls could make other employees uncomfortable. Be prepared for either reaction, and be ready to help him understand what types of conversations might make other employees uncomfortable. While Eliot doesn't need to agree with the comments, he does need to understand the types of behavior that can no longer be tolerated.

These conversations may feel awkward or even petty, but informing an employee of the effects of his behaviors early on could save workplace relationships, encourage productivity, and keep other employees from exhibiting additional disruptive behaviors. Remember, ending an annoying behavior may be as simple as having a brief conversation, and quick action could help keep both employee morale and the standard for professional conduct high.



Employee excuses

A problem employee is unlikely to admit any shortcomings, and may react to challenges with certain defenses. These might include claims of being targeted for unfair treatment, becoming overly dramatic, or even threatening litigation. Each of these reactions stems from a similar motive of self-preservation — a refusal to accept responsibility for one's own conduct or performance.

Managers who are responsible for addressing problem employees should be prepared to respond to these defenses. If the manager backs down, the employee may be encouraged to continue that defense in the future, potentially delaying or preventing the issue from being solved. Even worse, as the problem continues, other employees may suffer in productivity as they discuss what should be done with the individual, and other employees may lose faith in management's ability or commitment to "fixing" things.

If the company has cause to address a situation, the manager must be willing to follow through, even in the face of litigation threats or other bluster. It will help if managers understand the legal criteria for a discrimination claim and are able to distinguish when an employee might have a legitimate claim, or when the employee is just being defensive. Allowing the employee to continue shirking responsibility isn't good for the company or for the team.

Personality conflicts

Conflict between employees is inevitable. When personality conflicts occur between a supervisor and employee, trouble beyond a discomfort level between individuals could be brewing. Employees who believe their supervisors don't like them may allege unfair treatment. If these employees are in a protected class, such allegations can lead to discrimination claims and possible lawsuits — something no company wants to deal with.

Even if the employee is not in a protected class, the claim can have consequences. Conflicts that are known to other employees may affect productivity and morale, and left unchecked, they can contribute to turnover. Even valued employees may leave if they sense discomfort between their supervisor and one or more of their teammates.

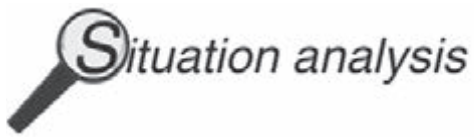
Interpersonal conflicts occur when someone has a need, a value, or a want that is threatened. Specifically, conflicts can happen when:

- An employee thinks he's not getting his share of resources — office supplies, materials, even a supervisor's time.
- An employee and supervisor have different work styles.
- An employee perceives that a supervisor places more value on other employees than on him or her.
- The supervisor and the employee have different value systems (politics, religion, diversity, and so on).

Few people like to deal with conflict, but the problem will not go away on its own. If employers sense a personality conflict, don't let it fester. Deal with it using these four steps:

1. Assess how the conflict is being manifested. Is the employee argumentative? Does he or she withhold information? Does he or she withdraw? Identify the specific behaviors that indicate conflict.
2. Determine how the conflict is affecting work. Is the employee's work not getting done? Is it being done poorly? Is the conflict affecting relationships and teamwork among the work group?
3. Arrange a private meeting with the employee. In that meeting, acknowledge, without assigning blame or being hostile, that the conflict exists. Identify the specific behaviors that indicate the conflict, or the potential impacts on productivity compared to expectations, and work toward a solution.
4. End the meeting with an action plan. The best solution is a "win-win" plan.

Conflict resolution does not guarantee that supervisors and employees will end up liking each other, but clearing the air may allow them to work together in a more productive relationship.



An employee complains about gossip

An employee has complained that coworkers are gossiping about her personal life. It's affecting her work and her working relationships. She believes she knows who is spreading the rumors. What can be done?

The best response is to investigate it by talking to all individuals involved, because it's unprofessional conduct that is disruptive to the workplace. Bringing the conflicting employees together for a resolution meeting is unlikely to be effective, however, because emotions may be running high and the employees may harbor strong negative feelings.

Although it might seem that the subject of the gossip is irrelevant, it actually can be an important consideration. For instance, gossip about an employee's suspected drinking problem could become harassment based on a perceived disability (alcoholism). Similarly, gossip about an employee's sexual orientation could violate gender discrimination laws or state laws that protect against harassment.

Employers have a duty to prevent potentially unlawful harassment before the conduct reaches that level and adversely affects employees. Even if it isn't technically harassment, it's offensive and disruptive, and can do damage whether it's true or not. By doing nothing, an employer gives the impression that this type of conduct is acceptable, which may lead to additional (and potentially unlawful) conduct.

Offensive conduct

Employers commonly have to address employees who have engaged in offensive conduct, but this is a rather broad term. However, most types of offensive conduct have a fairly similar approach — essentially communicating why the conduct is inappropriate in the workplace, explaining the expectations for future conduct, and outlining the consequences for continued inappropriate behavior.

For example, the problem might be that an employee has been swearing in the workplace (not shouting at coworkers, but simply too casual in using curse words). As noted above, the company would explain that this behavior is not appropriate for the workplace, explain that the swearing must stop immediately, and indicate the consequences for failing to control his language.

In some cases of verbal conduct or other forms of speech (including writing or advertisements on clothing), employees may argue a First Amendment free speech right. However, the First Amendment only protects individuals from government infringement on speech. It does not

prevent an employer from determining that certain speech is not appropriate for a private workplace, or from taking action to prevent such speech.

In some cases, the offensive conduct may be non-verbal, but still indicates an inappropriate form of communication. For example, a male employee might leer suggestively at certain female employees, making them uncomfortable. Once again, the employer's approach is the same. In this example, the conduct may even result in a claim of sexual harassment or hostile environment. Even for less serious conduct, however, employers should take action to address employee conduct that makes other employees uncomfortable.

Insults and slurs

While it may seem like common sense not to offend employees, some managers and supervisors don't always understand where the line is drawn. Consider these true cases as examples.

A woman was given the legal go-ahead to continue her lawsuit against her employer. She alleged that she was discriminated against because of sex and because of her pregnancy. Upon learning she was pregnant, her supervisor decided to call her "prego," which she estimated he did about 75 percent of the time. He also became increasingly hostile and abusive to her, threatened her with demotion, and changed her working conditions. When she protested against his harassment, he demoted her.

The case went before the U.S. Court of Appeals for the Tenth Circuit, which ruled that if an employee were called a racial epithet 75 percent of the time, it would certainly be deemed to constitute a hostile work environment. It is no less hostile when an employee is called a "pregnancy-related epithet" for that same amount of time, according to the court. *Zisumbo v. McLeod USA Telecom*, No. 04-4119, Tenth Circuit Court of Appeals, 11/23/05.

In another case, the supervisor's nickname for an employee (used despite the employee's protests) amounted to illegal racial and ethnic discrimination. Apparently, the CEO had a difficult time calling his Arabic employee "Mamdouh," so decided to call him "Manny" instead. He also called him "Hank," probably reflective of his last name, El-Hakem. The CEO reportedly told the employee that a "Western" name would be more acceptable to the company's clients, and that he would go farther professionally using such a name. The court found that even though the words themselves were not severe, they still constituted discriminatory harassment. *El-Hakem v. BJJ Inc.*, No. 03-35514/03-35544/4-35063, Ninth Circuit Court of Appeals, 7/21/05.

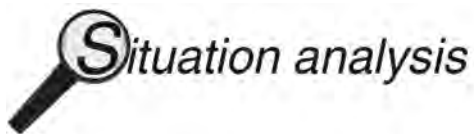
Even seemingly harmless words, if perceived in a certain context, can be considered illegal harassment or discrimination. Anthony Ash, an African-American employee at a food processing plant, was passed over for promotion despite his superior qualifications. He sued his employer, alleging that he was passed over because of his race. As evidence of racial animus, he alleged that he was called "boy" by the plant manager, which is an historically pejorative reference to African-Americans. The United States Supreme Court held that while the word "boy" by itself is not always evidence of racism, it is not always harmless, either. The meaning depends "on various factors including context, inflection, tone of voice, local custom, and historical usage." According to the court, in this particular case, it was evidence of racism. *Ash v. Tyson Foods Inc.*, U.S. Supreme Court, 126 S. Ct. 1195, 2/21/06.

While common courtesy may seem obvious to some, employers may have to train employees on what is socially acceptable when they are addressing coworkers. A comment or remark that one person regards as completely innocent may seem disrespectful to another who hears it, or to whom it is directed. In addition, supervisors should understand how this could create liability for the employer, and understand the importance of promptly addressing any such issues.

Insults are a serious concern. The conversation may not be easy, but any offensive behavior must be addressed. It may be necessary to investigate the matter, perhaps following the same process that would be used to investigate a harassment or discrimination claim. This may involve identifying and interviewing witnesses, documenting statements, and finally confronting the alleged offender for his or her side of the story.

The accused may attempt to deny the conduct, or even state that someone else “deserved it” or instigated the response. The employer should point out that unacceptable conduct cannot be justified, and that employees are expected to conduct themselves with professionalism. Explain that employees cannot control how other people behave, but they can control their own reactions to other behavior, and that is the focus of this meeting. Even if the alleged offender thinks the conduct or insult was justified, or was given in response to another insult, the response was not appropriate for the workplace.

The interview with the offender might also reveal underlying circumstances. Again, this does not excuse the offensive conduct, and might even serve as an opportunity to point out that he or she should have reported the behavior of concern. The company may need to further investigate any accusations made about others, but still needs to impress upon the employee that future outbursts or insults will not be tolerated.



An employee is being harassed outside of work

A female employee is being harassed by a male employee outside of work. He is sending vulgar text messages and emails to her personal accounts. What can be done?

The best response is to investigate the situation the same as any other harassment claim, since what happens off duty is probably affecting the workplace. Employers have an obligation to keep the workplace free from harassment, and that includes off-duty harassment that affects the workplace. It's unlikely that the harassment is stopping at the door. Once employers are made aware of it, they have a duty to investigate because the employment relationship doesn't end when employees leave the workplace.

Cultural differences

The president and CEO of a large health care system faced allegations of sexual harassment. The man (a doctor who was born, raised, and educated in the United States) was of Lebanese descent. In the Lebanese culture, it is common to hug and kiss others in greeting. In the United States, however, this can be perceived as an unwelcome invasion of personal space. That apparently was the case, as indicated by the complaints of some of the female employees who worked with him.

This brings to light a potential problem in employee relations. As the workforce becomes more diverse, an understanding of cultural differences has never been more important. Culture isn't limited to ethnicity and nationality; it also encompasses race, religion, gender, age, disability, and sexual orientation.

Older employees may stay in the workforce longer, and the number of women in the workforce continues to increase. Immigration and other changes lead to greater ethnic, racial, linguistic, and cultural diversity. Workplaces will have to make adjustments to accommodate these changes.

Cultural awareness training can help employees understand others' cultural backgrounds, and can help to explain why people behave the way they do. That said, those with cultural practices that others find offensive (as in the case above) should be counseled to refrain from offending others. It may be helpful to explain why a practice is considered offensive. If the company faces possible legal liability by such a practice, that should be explained as well. An employer has a duty to keep the workplace free of harassment.

Not all cultural practices that other employees may find offensive should be curtailed. For example, a Muslim employee may take a number of breaks during the day to pray, in keeping with his religion. Regardless if other employees find it offensive, it is a religious accommodation the employer has made for the employee, and should be left alone. In this case, an employer may have legal liability for not accommodating the employee.

Balancing the needs of all employees and finding a comfort level for all is a tricky business. Employers must do the best they can. Training employees on cultural awareness is a good beginning point. The nature of the training may depend on the cultural diversity present in the workplace, since employers cannot reasonably provide training on all cultures. In some cases, the need for training might only become evident after an incident. However, supervisors should be watching for potential problems or conflicts, and be prepared to interview employees or research cultural norms in the event that conflict arises.

Relationships in the workplace

Dealing with coworker relationships is never easy. Workplace romances can cause problems even when they are going well. And when breakups occur, the workplace can get ugly. In particular, relationships between supervisors and subordinates (which is never a good idea and should be discouraged or prohibited) may create the appearance of favoritism — or retaliation after the relationship ends.

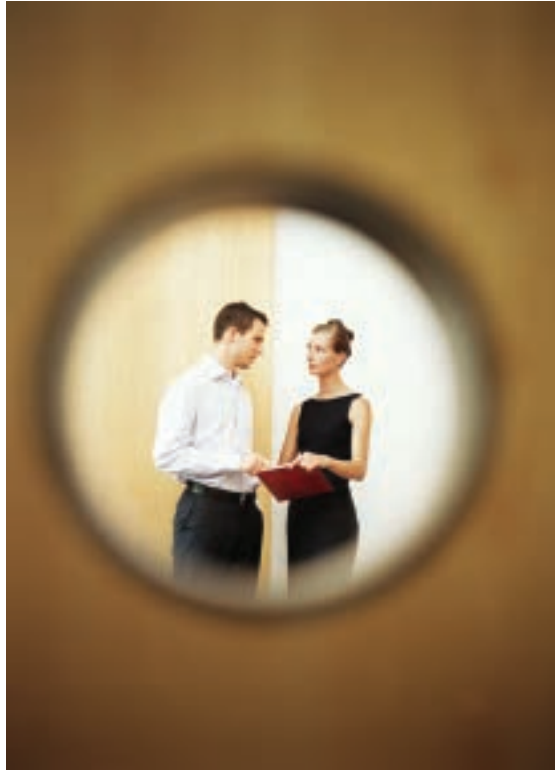
Although favoritism per se is generally not unlawful, it can still cause strife in the workplace. It is natural to want to give the object of one's affection plum assignments, but consider the effect on everyone else who is not the subject of the supervisor's affection. Lawsuits have been filed because of what is viewed as "unfair treatment" in the form of favoritism. Rumors or complaints about favoritism should be addressed before the situation begins to affect morale (and by the time that complaints surface, morale has probably been affected already).

Once a relationship is no longer consensual, any unwanted attention could be categorized as sexual harassment. It makes no difference if the relationship was consensual. Unwanted attention is unwanted attention, and must be treated like any other sexual harassment complaint. Investigate it, use discipline if needed, and separate the individuals if necessary.

Ideally, the employer can communicate expectations for these individuals to work together professionally, and explain the consequences for failing to do so. They may have some animosity toward each other, but this is not the employer's concern — only their conduct in the workplace

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is a concern. If they can agree to get along and fulfill their job obligations, the problem should be resolved (and harsh feelings should fade over time). If the problem persists, one or the other may have to be transferred in order to separate them. Selecting which employee is moved might be based on seniority, past performance, or whether one individual is making a greater effort to resolve the problem. One of the employees might even request a transfer.



In some cases, separation is not possible, and the employees will continue failing to work out their differences. In that case, termination of one or the other may be necessary. An investigation might determine that one employee is making an effort to resolve the conflict, but the other employee continues causing problems. In that case, selecting the correct person for termination shouldn't be complicated. In other cases, however, an employer will be unable to determine whether one or the other is behaving unreasonably (or might find that both are being unreasonable). The employer would still have the option to terminate them both, of course.

Situation analysis

Dating coworkers broke up badly

Two dating employees had a nasty break-up. It's disrupting their work, coworkers are complaining, and it's rumored the female employee may file a sexual harassment complaint. What can be done?

The best response is to talk with each employee and address the problem as a performance issue. Don't ignore a performance issue, especially one that is affecting others, in the hope that it will disappear. Transferring one of the employees may be an option, but an involuntary transfer of the person who complained may be construed as an adverse action for filing a complaint. Termination is always an option, but hopefully isn't required as the initial response.

Dealing with deflection and excuses

When the need arises to address a difficult employee (whether a performance or conduct issue), the employee may respond by blaming others, attempting to justify his or her own behavior, or simply refusing to talk about his or her behavior by changing the subject. Whether the problem was rude behavior or excessive tardiness, many supervisors have faced an employee who attempted to deflect the problem using responses such as "it's because I'm overworked" or "you should be talking to [coworker], since he's the problem."

Addressing deflection can be a challenge when the employee is a solid performer but needs an "attitude adjustment." (If the employee has an attitude problem and is failing to meet performance expectations, termination may be the best option.) Some managers feel that if an employee cannot work effectively with the team, the individual should be terminated. This may be a valid approach for a newly hired employee who has not yet proven himself or herself, but many supervisors are reluctant to release an employee with a long history of solid performance simply because of a change in attitude.



Cross reference

For related information, see the section titled "Avoid hiring low performers" in the **Selection and Interviewing** chapter.

If the behavior is out of character for the employee, the supervisor may need to call out the deflection reactions for what they are: expressions of the individual's unwillingness or refusal to accept responsibility for his or her actions.

Before meeting with such an employee, the supervisor should remember to keep his or her own temper under control and provide a positive example. Reacting with anger or frustration will undermine the purpose of the meeting.

When meeting with the employee, the supervisor should explain that he or she is aware of the overall situation and (if applicable) will meet with others involved, but the purpose of this meeting is to discuss the behavior of the employee. Next, the supervisor should give specific examples of the objectionable conduct or behavior, preferably backed up by documentation such as the supervisor's own notes and observations. Finally, express the expectation for the individual to take ownership of the problem and develop a plan for resolution.

If the employee continues to offer excuses, the supervisor should point out that the issue is not whether previous problems were justifiable, but what the employee is going to do to prevent problems in the future. To use the example of tardiness, the supervisor should not react by

saying something like, “I don’t care why you were late; you need to be here on time.” Instead, the supervisor might say something like this:

“We understand that circumstances beyond your control may occasionally cause delays, but your tardiness has become a problem. We expect you to account for potential delays and arrive for work on time. Do you have any suggestions for avoiding tardiness in the future?”

This response invites the employee to become part of the solution by suggesting his or her own plan of action. A similar approach can be used in the case of behavioral problems by pointing out an example and asking the employee to suggest a more acceptable response or behavior for that situation. Again, this helps the employee develop an action plan for conforming to expectations, while providing concrete examples of appropriate conduct to follow.

A supervisor might end the meeting by pointing out that if the employee can adhere to the action plan, he or she should be a valuable member of the team. However, it may also be necessary to remind the employee that there will be consequences if the problem continues. One option for ending the meeting on a positive note might be to remind the employee that he or she deserves to take ownership of success, and that resolving the problem at issue (and overcoming obstacles or external factors) would also be a success.

The importance of regularly following up with the employee cannot be overstated. The supervisor should meet with the employee to discuss progress at reasonable and appropriate intervals. All too often, a supervisor will only schedule subsequent meetings to address further problems. Setting regular follow-up meetings is equally important to offer recognition when the situation has improved or when the supervisor notices that the employee is following the action plan.

On the other hand, if the underlying problem persists and the employee continues to offer excuses and justifications, the supervisor may have to consider termination. In evaluating whether termination may be appropriate, a supervisor might consider this question: If you were facing a job candidate that you knew would react this way, would you hire that person in the first place? If the answer is no, and the individual is not someone the supervisor would want on the team, then termination may be necessary.

Negative attitudes

Employers want to ensure that the work environment is characterized by good morale and job satisfaction, resulting in high productivity. Negativity puts these goals at risk. Employers can address negativity through involvement in the performance review process, conducting exit interviews with employees who leave the organization or transfer internally, and holding new hire follow-up meetings at selected intervals.

Sometimes routine actions can trigger widespread negativity. Negativity can find its source in many day-to-day company decisions such as:

- A cut in wages or benefits;
- A layoff, or the rumor of one;
- The termination of a popular employee;
- The promotion of an employee that others may dispute;
- An organizational change;
- Annual merit increases that reward outstanding performers at nearly the same rate as marginal performers.

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Consider taking these actions to create and sustain a positive workplace:

1. Schedule listening forums so that employees can communicate what's on their minds and provide honest, straightforward answers to their questions;
2. Invite feedback via employee surveys or 360-degree feedback;
3. Be generous with recognition and rewards so that employees feel appreciated.

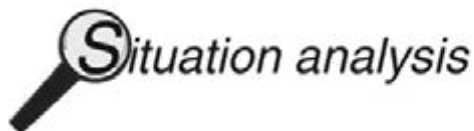
Avoiding negativity is much like preventing the flu. Taking proactive measures can limit its spread throughout the organization.

Negativity can come in many forms. It might be evidenced in behaviors such as criticizing managers or departmental changes, spreading rumors, general complaining, or decreased work productivity. It might be tempting to delay dealing with a negative employee if he or she is a good producer or holds specialized knowledge or skills. Unfortunately, negative attitudes may only get worse or spread to others if they are ignored.

To assess where an employee's workplace negativity might be coming from, think back to any events that may have triggered an attitude change, such as having been passed over for a promotion, the loss of friends due to downsizing, a disagreement over a performance evaluation, a new supervisor, or a change (or increase) in job duties.

When meeting with an employee regarding a negative attitude, discuss specific behaviors or actions observed and set goals for improvement. This will require getting to the root of the problem. Whether it's a personal situation that is impacting the employee while on the job or a situation at work that is causing headaches, there will be an underlying reason. If the employee refuses to discuss the reason, the conversation may still proceed by stating that the employee's privacy will be respected and that the company is willing to help. Point out that even if the employee refuses to participate, the attitude problem still needs to improve.

When improvement is observed, recognize it. Also, determine if there is some merit to the source of negativity. For example, the employee could be carrying a heavy workload that is justifiably causing a great deal of stress. Address the source if possible; if not, address the effect of the negativity on the workplace.



Should you ignore the behavior?

With children, bad behavior is often an attention-getting strategy, and some experts recommend that whining, complaining, and temper tantrums be ignored. The theory is that if children don't get the attention they crave, the negative actions will eventually cease.

While this strategy may sometimes work with children, it's highly unlikely to work with adults. A manager can't afford to ignore a complaining employee. The individual may simply get louder in an effort to find a willing audience, may start to drag down the morale of others, or may undermine a manager's authority by questioning each decision.

Ideally, a manager shouldn't have to deal with adults who can't act professionally, but the reality is that the only way to stop unacceptable behavior is to confront it.

Having the conversation

Schedule a time to sit down with the negative employee in private. Constant complainers often tend to think of themselves as victims, and correcting the individual publicly may only add to his or her reasons for feeling mistreated.

Explain the problem as an issue of perception, mentioning that the employee is hurting his or her own credibility and impacting productivity with the constant complaining. Point out a few examples of the employee's unacceptable behavior, and explain how it was harmful to the team or how it created adverse perceptions among others. For example, you might say:

"The way you responded when Lyle explained his idea for the new project was perceived very negatively by me and, I think, by the rest of our team. Unfortunately, I've noticed that this is becoming a bit of a pattern for you (share other examples). I'm concerned about the reputation you're creating for yourself as an individual and as a member of our team. I'd like you to take some time to consider what I'm saying and think about how you can change this perception that you've created."

Make sure the focus of your conversation stays on the employee's attitude and delivery, instead of debating the merit of any complaints. If possible, point to a policy that provides for internal complaint reporting or dispute resolution. In essence, make it clear that the employee may disagree or express other viewpoints, but should do so positively rather than negatively.

End the conversation with clear expectations for the employee. Perhaps the employee should think about how to raise any concerns constructively and through appropriate channels, and provide a plan for improving his or her behavior at a follow-up meeting. As always, be sure to document your discussion.

Dealing with procrastination

An employee's failure to meet performance expectations may arise from a simple lack of skill to a lack of motivation. A lack of skill or knowledge can often be addressed through training, but a lack of desire or motivation may be irreconcilable. Most employers will at least provide an opportunity for improvement, but an employee who lacks a desire to perform the job well may also lack the motivation to change that situation. If the issue is not resolved after reasonable efforts, you may need to either terminate the employee or accept the employee as a below-average performer.

Many people procrastinate, at least on occasion, but their reasons for doing so may differ. A worker facing a particularly stressful day may choose to focus on less critical tasks that are easier to complete, putting off tasks that the employee knows are stressful. Similarly, an employee may be feeling ill or may need a change of pace and choose to delay working on certain projects that require intense focus or concentration. As long as the decision to put off certain tasks does not result in missing deadlines or otherwise compromise the quality of the work, it may be viewed as simple discretionary scheduling, even if the employee is technically procrastinating.

However, some employees seem to procrastinate on nearly every project. These purposeful delays may even increase their stress levels because they end up rushing to complete the project at the last minute. Some employees may even "play the victim" and complain about how busy they are, even though their own failures to use their time wisely created the emergency. Often, the quality of their work will suffer as a result, or the procrastinator may demand that coworkers help out and increase frustration among the team.

While occasional procrastination may not unreasonably interfere with output, an employee who makes a habit of procrastinating may develop a history of substandard performance. This can be addressed as a performance issue, with expectations for the employee to create an action plan for addressing the problem. The solution could be as simple as taking a few minutes each morning to create a prioritized “to do” list for the day, or each afternoon before going home to prepare for the next day. Depending on circumstances, the solution may be more complex, such as having the employee work with his or her supervisor to develop a schedule and having the supervisor regularly check in to ensure adherence to the schedule.

Not to be confused with procrastination, some employees lack the willingness to take initiative. This characteristic may stem from other personality traits such as shyness. While an employee who procrastinates may be the cause of his or her own emergencies, an employee who lacks initiative may not need correction. For example, the employee might not volunteer for new projects, but may accept any assignments given — and do them well. While a supervisor might occasionally “push” the employee to greater boundaries, a supervisor should be careful not to overwhelm an employee who is otherwise doing well by insisting on more initiative.

Defusing angry employees

Employees will inevitably develop conflicts among themselves, and normally should not try to resolve the situation without assistance. Flaring tempers and high emotions are not conducive to conflict resolution, so it’s best for employees to bring their concerns to their manager or a designated employee relations representative. Communicating to employees that mediation avenues are available can help prevent them from keeping their frustrations to themselves, or worse, venting to one another. Anger can be contagious.

When employees are willing to discuss their aggravation, one of the first steps is to consider where anger might be coming from. Often, anger stems from frustration or feelings of powerlessness. Causes of anger will vary from one individual to the next, and might be influenced by the person’s culture, gender, general stress level, relationship with the stressor, and even genetics. While you can’t always tell what’s going to make a particular individual angry, you can help to defuse an angry employee.

What an angry employee wants

While angry employees might want a specific issue addressed, another thing they inevitably want is to be heard. You won’t always be able to change what is making an employee angry, but you can acknowledge the individual’s perspective and give him or her time to explain it.

Rather than trying to reason with an angry employee, practice active listening techniques and try to understand how he or she is feeling, even if you don’t agree with the employee’s perception. Explain to the employee that you understand he or she is angry, and you’d like to help. As you begin to understand the employee’s perspective, summarize it back and ask if your understanding is accurate.

Once the employee has had time to talk (and hopefully calm down a bit), consider asking how he or she would like to see the situation resolved, rather than immediately suggesting solutions. This not only shows respect for the employee’s concerns, but soliciting the employee’s input first can make the individual more receptive to your suggestions. Angry employees may become even more frustrated if the suggestions offered are things the employee has already considered. Sometimes you have to deal with anger by helping the person find a solution rather than offering options. Work together to come up with a solution both you and the employee can live with.

Where the issue cannot be immediately resolved and a finding a solution may take time, discuss ways that the employee can cope to avoid further frustration. Note that in some cases, employees may not want you to solve their problems, but only know that you understand the situation and are willing to work with them.

When managers don't make a genuine effort to listen to an employee who is frustrated or angry, they risk the employee taking out his anger in more subversive ways. Anger that goes unaddressed may morph into passive aggressive behavior or an increasingly cynical attitude, neither of which is healthy for the employee or your team. Taking the time to address an employee's anger can help defuse what might otherwise turn into a destructive situation.

Suspected theft of goods or time

Employers may have to deal with certain types of theft in the workplace. While the theft of valuable property may be dealt with in a rather straightforward manner (identifying and terminating the offender, with possible prosecution), there may be situations where the theft is less significant or the offender cannot be readily identified. For example, employers may face the theft of office supplies, or even theft of employee lunches or other belongings, but may not be able to identify the thief.

Theft in the workplace affects all employees, even if personal items are not taken, because the loss of company goods creates an expense that affects profits. Addressing an unidentified thief may require an indirect approach. A direct approach, such as surveillance or new procedures that keep basic items (like office supplies) under lock and key may be more costly than the value of the items missing. For instance, locking up office supplies and making them available only upon request may hamper productivity and frustrate the majority of employees who are trustworthy.

The first steps may be to make all employees aware of the problem, which also lets the offender know that the thefts have been noticed. Other employees may also be recruited to keep their eyes open and to report any suspected thefts.

The company may even communicate that it does not want to install surveillance cameras or restrict access to necessary supplies, but will do so if the problem continues. Ideally, this "threat" will both encourage honest employees to keep their eyes open and help identify any thieves (to avoid the possible inconveniences of the company's response) and also let the offender know that the pilfering must end now or the company will take action strong enough to make future theft impossible anyway.

If the problem involves theft of employees' personal items, all employees should understand that they have a duty to protect their possessions. They can also avoid creating temptation by not leaving valuables in plain sight. Even placing personal items in an unlocked drawer keeps them out of sight and should make theft attempts more conspicuous, since a potential thief would have to look through someone else's desk. For valuable items, employees might carry them when leaving a work area, or leave them in the car rather than bringing them into the workplace.

Employers can take some proactive measures to deter theft, perhaps having supervisors conduct random checks of work areas, but cannot prevent all theft. Employees are ultimately responsible for their own belongings, and should understand what steps they can take to protect their possessions.



Cross reference

For more examples of employee problems and how they might result in termination, see the **Example situations** section in the **Involuntary (Employer Initiated)** tab.

Employers may also face problems involving theft of time. For example, employees may falsify time cards to include additional hours, or may even have a friend punch their card to avoid recording a late arrival or early departure. This attempt to receive wages for time not worked is essentially a form of theft. Similarly, employees who use company time for personal reasons (most commonly surfing the internet while at work) are getting paid for non-productive time.

Organizations have long struggled with how to prevent false time card submissions. Catching employees may require having a supervisor check the arrival and departure times of suspected violators, or even installing a surveillance camera over the time clock to catch a time thief.

While these measures are somewhat extreme, catching a suspected time thief “in the act” may not be possible with lesser measures. Fortunately, the at-will employment doctrine allows for termination of an employee based on suspicion, even if the violation cannot be proven.

Catching employees who use computers for personal reasons can be handled much the same, since there is software available to record data such as websites visited and time spent on those sites. Since this monitoring can be tied to a specific computer, the offender is usually easier to identify. In the absence of such surveillance software, however, this kind of time theft may go unnoticed.

Ignoring theft?

Although it may at first seem senseless, many employers ignore employee theft, at least to a certain degree. For example, if employees are stealing office supplies, the organization might compare the relatively low cost of the supplies to the potential costs of monitoring for theft, imposing discipline, and training a new employee after firing an offender.

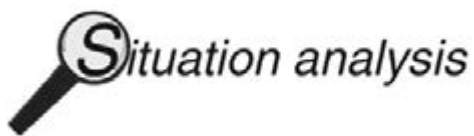
The cost analysis may suggest that ignoring the theft is far less expensive than trying to identify a thief. For significant losses or valuable items, the cost of identifying the offender is more likely justified, but for minor theft, the necessary steps may feel like using a hammer to kill a fly.

Cost isn't the only consideration. Some surveys indicate that as many as half of employees admit to stealing from their employers. An organization probably isn't going to identify, discipline, or fire half the workforce. Moreover, if the studies are correct, there may be a 50 percent chance that any replacements will eventually begin stealing as well.

Rather than trying to catch a thief, employers may instead choose to address the underlying causes or reasons that employees steal, since theft is often a symptom of other problems. Employers can't eliminate all theft, but can reduce it through positive relations. Identifying and fixing the underlying causes can help remove the motivation for theft. If theft does not occur, there is no need to spend time trying to catch a suspected thief.

Employees may steal from their employers, even taking items such as toilet paper or office supplies that they could easily afford, for a variety of reasons:

1. Employees may feel underpaid and view stealing as way to increase their “earnings.”
 2. After not getting an expected raise or promotion, employees may feel they are owed additional compensation, so stealing is just providing what they deserve.
 3. Employees who are frustrated with a manager or with a company policy may steal to “get back at the system.”
 4. Some people find a small thrill in breaking the rules, or may view their theft the same way they view driving a few miles per hour over the speed limit. Everybody does it.
-



When theft increases

Problems can arise, of course, when employees begin stealing more valuable items, perhaps progressing from stealing pens to stealing laptop computers. By the time the employee is caught, he or she may have taken thousands of dollars in property. Even for minor theft, employers should be wary of any claims that this was the first offense.

Employers should not condone or excuse theft, but should understand that an inappropriate response could make things worse. For instance, installing locks and security cameras on the office supply cabinet is likely to frustrate all employees, many of whom are trustworthy. The costs may be greater than the savings, but even worse, the employer may convey the impression that it does not trust employees. This is not the best way to address the underlying reasons for employee theft.

Employers who know why employees steal can take steps to address those reasons without ever mentioning that the intent is to reduce theft. For instance:

1. Communicating that compensation is competitive and providing total benefits statements can reduce feelings of being underpaid.
2. If an employee does not get an expected raise or promotion, outline steps to achieve the recognition in the future. If the employee completes the action plan, be sure the reward is given at the next review, if not sooner.
3. Ensure that managers communicate effectively and respectfully with employees to minimize frustration. If justified, conduct employee surveys to identify problem areas that might be addressed.

All too often, employers over-react by adopting restrictive new policies to address a few problem employees, even if the problem employees are known. For instance, if a handful of employees abuse sick leave (which is often done for the same reasons that employees steal), the answer isn't to eliminate paid sick leave for everyone. Along the same lines, treating every employee as a potential criminal is not an appropriate response to suspected theft.

Instead, take the opportunity to improve employee relations in other ways, even increasing the amount of responsibility and autonomy. Addressing the self-justifying reasons that employees steal should reduce theft, with the benefit of improving employee relations and, hopefully, employee engagement.



Best practice

Be wary of making assumptions

Although employers want to trust their employees and demonstrate that trust, they should avoid assumptions about which employees are most likely to steal. Assumptions that lower-paid or recently hired employees are the most likely culprits may not be realistic.

Even employees who are highly paid may feel undercompensated or feel they are treated unfairly. Employees who have been with the company for many years can become frustrated or begin to feel unappreciated. Managers who should be most trustworthy as representatives of the employer are also in the best position to cover up their own violations.

The point is not that employers should suspect every employee, since that path may lead to over-reactions that create new problems. Rather, employers should not dismiss the possibility that long-term, highly-paid, or managerial employees are susceptible to the same temptations as any other employee.

When the thrill is gone

In 2013, a group of psychology researchers published a study about the “cheater’s high.” Basically, the study found that despite a common belief that unethical conduct such as cheating (or stealing) will produce feelings of guilt, individuals who cheat may actually feel good about their behavior. (*The Cheater’s High: The Unexpected Affective Benefits of Unethical Behavior*)

In theory, individuals will anticipate feelings of guilt or will be afraid of getting caught, and will therefore avoid unethical behavior. In actuality, individuals may feel a thrill from “getting away with” unethical behavior. In particular, they may not feel guilty if they do not perceive an apparent victim of their conduct.

Whether individuals are downloading pirated music or stealing from their employers, they may self-justify their behavior by thinking things like “I deserve it” or “the company can afford it” or “nobody got hurt.” Essentially, people who would never stoop to stealing from a coworker’s purse may not think twice about stealing from their employer, whether walking out with office supplies or reporting overtime hours that they didn’t actually work.

The study also found that employer efforts to monitor employees can be ineffective for two reasons. First, employees view these efforts as an expression of the expectation that they will behave unethically. Second, part of the thrill behind the cheater’s high is overcoming obstacles. The researchers stated that demonstrations of trust may actually be more effective at preventing unethical conduct.

Perhaps most surprisingly, one researcher noted that after a company announced a program for employees to return missing equipment or tools without consequence, the employees actually returned the missing property.

Conventional wisdom says that if employees are challenged to excel, they will usually rise to the challenge. Perhaps this concept also applies when employees are challenged to behave ethically even when no one is watching. There will always be some individuals who continue to cheat or steal, but this research suggests that removing the “expectation” that the majority will do so (and removing the thrill of doing so) may be more effective. Additional research is in the works, but it may be that employees who justify theft because they don’t see a victim could actually start to see themselves as the “bad guy” for violating trust that was given to them.

Restoring confidence in hard times

A company may have undergone downsizing, restructuring, or some other shake-up. Or, it’s possible there have been some ethics violations or mismanagement that has either been made public, or has been broadcast around the company (either officially or by the rumor mill). Whatever the cause, employee confidence could be at an all-time low. How does a company win back employees’ trust and loyalty, or regain their confidence?

Employees don’t like being left in the dark. They don’t like not knowing what’s going on, nor do they like to “officially” find out what’s going on long after everyone else already seems to know. They don’t like being told one thing when the truth is another; and they don’t like it when everything “corporate” is done in secrecy.

When confidence is shaken, communication is crucial. Not only is the amount of communication important, but the type is important as well. Meetings in person with executives are a good way to directly hear what’s going on. Employees can judge the truthfulness of the information by judging the character of the deliverer. If an executive presents himself or herself as honest, open, earnest, and caring, employees will pick up on that, and he or she will regain some trust.

Good communication from management should consist of more than an impersonal email. Employees want to be involved and engaged and feel like they are being informed about what’s happening in the company, because they are affected. They want to feel like everyone is in it together, not like they are receiving breadcrumbs of information if and when management sees fit to throw them.

Senior management should be visible and accessible. It would help if they would walk around and talk to employees, even if they never have before. They should visit off-site locations to talk to employees there as well, who often feel left out of the loop. This should occur during good times, but is even more important when employee confidence is shaken.



Honesty is important, especially if there has been little or no disclosure to employees. Being open and honest in communications, welcoming questions and feedback, and providing information to employees is critical. Even if the news isn't good or the future outlook isn't good, employees would still rather be told the truth than be left in the dark. They also don't want to have bad news sugar-coated; that's a ruse they will see through, and is not the type of transparency they need.

If there have been problems such as "irregularities" in management practices, it's important not to downplay them or pretend they didn't occur (employees know about them anyway). Instead, inform employees what is being done to rectify the situation, and tell them what mechanisms are being put in place to ensure such things can't happen again. Creating an ethics policy may not do enough to instill confidence, but making it known that the company is also instituting ethics training shows a serious effort.

While some instincts may be to keep everything close to the vest because of the sensitive nature of the situation, if all efforts are done behind the scenes, employees will never know what is being done, or if anything is being done, and confidence won't be restored.

It's difficult to restore employee confidence after a corporate shake-up; however, with good communication, effort on the part of management, and time, confidence can be restored.

Owning up to mistakes

A recent trend for hospitals in the area of risk management may seem deceptively simple: honesty. Hospitals are finding that when doctors who make mistakes admit the errors, fewer legal claims are filed and liability costs decline. For hospitals, the benefits of honesty may also include increased patient safety, which ultimately determines the success of the hospital.

The alternative to admitting mistakes is what some in the industry call the "deny and defend" approach. With this model, a doctor's oversight or slip-up would be treated with silence, making it difficult for a hospital to learn from mistakes.

Reserved

While not every company is in the business of saving lives, any organization may still have a culture in which errors are hidden. Liability is likely different than that of a hospital, but ignoring errors still creates some very real risks.

For instance, perhaps the company errs by not paying employees correctly for overtime, by failing to grant leave for a qualifying reason under the Family and Medical Leave Act, or by failing to address a situation potentially involving sexual harassment. Pretending the errors didn't occur makes them no less real, and the fact that the company knew about these legal missteps could make it liable for penalties worthy of "willful" violations (in a courtroom, this may add up to double damages).

Being forthright with employees not only provides the opportunity to correct mistakes and learn from them, but it may even foster enough goodwill with an employee to keep the organization out of the courtroom. Even where that's not the case, a court will likely take good-faith efforts to correct the situation into consideration.

Confessing errors

One of the best things supervisors can do to inspire confidence in others is admit when they've erred. Not only does this identify them as a fellow human being to employees, but when they admit that they're not infallible, it relays that they don't expect employees to be so, either.

Insisting that errors never occur may create a high-pressure work environment, whereas making it clear that some mistakes will happen can help foster creativity among employees. Employees who don't feel free to make mistakes might not be willing to try anything new, and innovation will likely be nonexistent.

On the other hand, employees who feel free to make mistakes may feel less stress and will be better able to move on to another strategy if they can admit an error and clear their mind of it.

Supervisors can also use employees' mistakes as learning opportunities. Sharing an erroneous experience can help keep others from going down a similar, misdirected path, and the team can try to discern where an idea went wrong. Of course, take care to discuss the error in a way that doesn't embarrass the employee who made it. Focus instead on how hard the employee worked or how original his or her idea was. Praising the willingness to make mistakes also encourages other employees not to fear failure, and may inspire confidence to try new ideas.

Documenting difficult conversations

Although not all difficult conversations involve discipline, they should still be documented. Whatever the underlying reason, the company will express expectations for future performance, conduct, or other changes. Progress may have to be monitored, or the employee might not make the necessary adjustment, making another conversation necessary. In that case, documentation can serve to refresh everyone's memory about what was discussed, the date of the conversation, and what expectations were communicated or what action plan was created.

If the matter involved potential discipline, and suspension or termination becomes necessary, the documentation will also help support that decision. Keep in mind that just as employees may come and go, supervisors may as well. If a problem was addressed but never written down, a new supervisor might not be aware of the previous issues. Even a temporary replacement (for instance, when a supervisor takes FMLA) will need to know what problems have arisen and what actions were taken in response.



When documentation will fail

Paul is an employee whose religious beliefs differ widely from those of anyone else in the office, and management works hard to make sure they are respectful of Paul's beliefs. Overall, he is treated fairly and afforded any required legal protections.

Unfortunately, Paul's performance has been slipping, and despite numerous attempts to coach him, he just doesn't seem like he's willing to do what it takes to be successful in his job anymore. After almost a full year of deteriorating performance, Paul is terminated. He files a claim with the Equal Employment Opportunity Commission alleging that he was discriminated against based on his religion. It seems that Paul didn't think he was treated so fairly.

Managers wonder what they could have said or done to invite a discrimination claim, since Paul was terminated for performance, not for his religious beliefs. The company has stacks of paper-work documenting not only the reason for termination, but the counseling sessions and discipline that led up to it. So there should be no problem, right?

Even piles of documentation might not do the trick if the records themselves are flawed. The following is a list of situations in which documentation might not hold up against a charge of discrimination.

Documenting inconsistent standards: The company has documentation of Paul's performance issues, but it turns out he was held to a higher standard than his coworkers who performed the same job. Throw in a couple religious jokes in poor taste, and the company may have a problem.

The timing of documentation is suspect: Suppose a supervisor began to gather negative documentation right around the time that Paul began requesting not to work certain days because of his religion. If the company refused a reasonable accommodation and then began to rate him poorly or discipline him for things that weren't noted before, it might appear to be retaliation against him for requesting an accommodation.

Timing can also be suspicious if an employee has been rated as a high performer for years and is terminated abruptly after receiving low ratings.

Details are documented inaccurately: The record of Paul's performance stands in contrast to evidence he can present. Once a few details are proven to be inaccurate, the related document (or even all documentation) becomes suspect.

The documentation isn't objective: Documentation should consist of facts and should contain specific details as much as possible. If documentation is half opinion and half speculation, it won't be of much value.

The documentation is unclear, unfocused, or incomplete: Effective documentation is clear and concise. This is not only necessary in case the company must defend its actions later on, but also because clear documentation is needed to express clear expectations to the employee. Where possible, documentation should answer the basic questions of who, what, when, where, why, and how.

Falsified records: When an employer finds out about a claim against the company, it may scramble to create a paper trail. Of course, these documents don't contain the employee's signature and it will eventually come out that they were created after the fact. Falsifying records will only further an employee's claim, since it will appear as though the company has something to hide.

Documentation is paramount, but not just any documentation will do. Taking care to create careful, objective, and accurate records could just save the company some serious angst down the road.

Suspected abuse of leave policies

One of the most common problems employers have to address is excessive absenteeism, particularly if employees start abusing leave policies. Whether an employee takes time off under the Family and Medical Leave Act (FMLA) for a questionable reason, or simply seems to be using sick days as additional vacation days, the company will want to stop suspected abuse.

The nature of the leave taken may limit how the company addresses the situation. In the case of sick leave abuse, the employer should have more leeway as compared to leave granted under a legal entitlement, such as FMLA. In the former case, the company might only need to be concerned about enforcing a policy, while in the latter case, the company may have concerns about liability for interference with FMLA rights.

While abuse of FMLA does occur, employers must proceed with greater caution due to the protected nature of the leave. For purposes of this section, the focus will be on leave granted under company policies.



Cross reference

For more information on dealing with abuse of leave, see the section on **Attendance issues** in the **Discipline and Corrective Action** tab.

Abuse of sick leave

Unfortunately, some employees consider allowable sick days to be an entitlement, and use them as bonus vacation days. There's nothing inherently wrong with firing an employee for excessive absences. However, if a policy "allows" a certain number of sick days, this implies that employees won't be subject to termination unless they exceed that number.

Employers may have to explain the intended use of sick leave by clarifying that granted sick days (or allowable points under an attendance policy) are not intended to provide days off. Employees should refrain from using any sick leave, if possible. Consider also explaining the costs of sick leave (to the company, and the effect of those costs on raises or other benefits) and the burden which an absence places on coworkers.

Also, point out that even though the company does not normally terminate below a certain number of absences, the company may determine that absences resulted from deliberate abuse of sick leave. For example, if an employee was seen out at a local community event or in a bar, and was obviously able to engage in other activities, then he or she should have been able to report for work. Taking sick leave for fraudulent reasons may result in discipline or termination, regardless of the total number of occurrences.

Inform employees that a doctor's note is not necessarily a valid excuse for missing work (unless it relates to other job-protected leave, of course). Employees should decide for themselves if they can safely and effectively report for work.

If supervisors have reasonable grounds to question whether an employee is properly using sick leave (e.g., when sick leave is used frequently, in unusual patterns or circumstances, or when it is used as soon as it is earned), they should ask the employee to explain.

For example, if an employee is seen at public events, this creates the impression that he or she could have reported for work. In that case, explain that the employee has a perception problem — the available information creates the perception that he or she could have been working — and ask if the employee can explain the need for those absences. The employee's answer might be a deciding factor in any disciplinary action taken.

If termination might be questionable based on lack of understanding regarding a policy or other concerns, an employer can still put the employee "on notice" about the intended use of sick time, document the conversation and the perception of abuse (the employee does not have to acknowledge that she abused sick leave, but should understand the impression created), and inform the employee that any further use of sick leave will be closely scrutinized. Hopefully, this discussion will cause the employee to use greater care in the future. Then, if there are any further questionable absences, the company has a stronger justification for termination.



Best practice

Other types of leave

Organizations may grant other types of leave for reasons not protected by law. Obviously, certain types of absences must be excused, such as responding for jury duty or military training. However, employers commonly allow time off for things

like attending funerals or even taking personal leaves of absence. These policies are less likely to be abused than sick leave, but if abuse does occur, the problems can generally be handled much the same.

Addressing sick leave abuse

For many types of discipline, employers will give a probationary period of 90 days during which the conduct must improve. While this sounds reasonable at first glance, it might not be the best option for suspected abuse of sick leave. Obviously, any absences during that period could result in termination, but what if the employee calls in sick a few days after the probationary period ends? Would the company start over with another disciplinary period?

The time limit implies that once the employee gets through the probationary period, the attendance problem is solved, and this may not be the case. It may be better to explain that proper attendance is expected from this point forward, since the time limit may create the wrong impression.

Many employees seem to believe that if a doctor tells them to take time off, the employer is obligated to excuse the absences. However, this is not the case. An employee can be terminated for excessive absences (or for abuse of a leave policy) as long as those absences are not otherwise protected by FMLA (or implicitly excused, such as leave granted to accommodate a disability or religious practice).

Another concern is that when an employee who is obviously ill shows up for work, other employees tend to sympathize and believe that the individual should be allowed to stay home. The fact that the employee is prone to illness and is not able to consistently report for work is unfortunate, but it does not create an obligation on the company to excuse such absences. Employers can still enforce an attendance policy and terminate an employee who is not able to show up for work.

If an employee is obviously ill, the company could send him or her home with a message like, "We appreciate your dedication to attendance, even in your condition. However, to help prevent other employees from getting sick, we're sending you home for the day. This will not count as an unexcused absence because we (the company) are approving this day off. We hope you are feeling better when you come in tomorrow."

The other option is to discipline or terminate the employee for excessive absences. There may be extenuating circumstances, and the company can make exceptions for emergencies. However, before making an exception, the company should determine how far it is willing to go. In what other circumstances will exceptions be made? Does the fact that an employee came to work while obviously unfit indicate dedication (or at least a desire to keep the job) that should be recognized? If an exception is made, will the employee be terminated the second time, or simply be asked to go home again? How many times should an ill employee be asked to go home before the policy is enforced?

Whatever method employers choose to address an attendance problem, they should be consistent. If an employee is given a pass based on extenuating circumstances, the company may be creating an obligation to offer the same courtesy to other employees in similar circumstances.

The best option may be to simply explain that attendance is expected, and consistently enforce the policy without exceptions. There will come a time when an employee reports to work while visibly ill, and employers should decide (in advance) how to handle that eventuality.

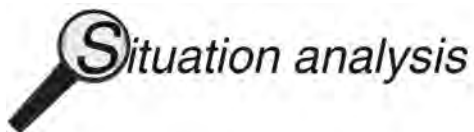
Requesting doctor's notes

Employers can ask employees to provide a doctor's note for absences due to illness. Even if the company does not normally require a doctor's note, it can impose the requirement for suspicious circumstances, such as calling in sick on the same day a request for vacation was denied. However, the note should only verify that the employee had a visit on a particular day. It should not contain medical information or a diagnosis, since requesting that information is likely to be an unlawful medical inquiry under the Americans with Disabilities Act (that is, a request that is not job-related and consistent with business necessity).

Keep in mind that employees may not visit a doctor for illnesses such as a cold, flu, or foodborne illness, even though they may legitimately be absent. The employee might even be able to obtain a note after the fact, or the doctor may simply take the employee's word regarding the illness (such as claiming to have a severe migraine).

A requirement for a doctor's note may inconvenience the employee by requiring a visit to a medical professional, but it may not solve a problem of suspected abuse. Also, a clever employee might claim that he or she was caring for a family member who was ill, which can make the verification more challenging.

Also, don't create the impression that as long as the employee provides a doctor's note, any sick time will be excused. Many employees already have the mistaken impression that their company cannot impose discipline for excessive absences as long as they have a doctor's note. In reality, only certain absences must be excused (such as FMLA absences or time off granted as an accommodation for disability). For instance, an employee might suffer from regular bouts with the flu, but even if the employee provides a doctor's note each time, the company may determine that the absences are excessive.



Problems with doctor's notes

Although employers can require a doctor's note, there are some restrictions under the Americans with Disabilities Act (ADA) because that law was written to prohibit employers from obtaining medical information that is not job-related and consistent with business necessity.

For example, it may be acceptable to request a note which says something generic like "[name of employee] visited the doctor on [date]." A doctor might not specifically tell the employee to stay home for a certain number of days, but it could still be reasonable for the employee to do so. If an employee has a severe case of the flu and is suffering from fever and dehydration, a doctor may recommend bed rest and drinking liquids. However, the doctor won't necessarily know whether the individual will recover in one day or three days (or longer).

Even a basic doctor's note might result in the unintentional acquisition of medical information. For example, suppose an employee is suffering from depression and visits a psychiatrist who prescribes a sleeping aid. If the note indicates that the employee visited a psychiatrist, the company probably gained knowledge that the employee has a mental or psychological condition, even if the nature of the condition wasn't described.

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The other issue to keep in mind is whether a doctor's note is necessary. An employee who suffers from the flu might not visit a doctor and won't be able to provide a note. However, the company may not want that person in the office, potentially spreading the condition. Allowing the person to stay home may actually be better for the team.

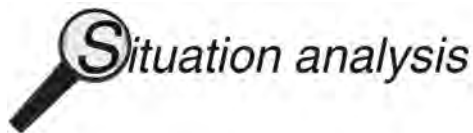
A company could simply declare that paid sick leave is not available in certain cases, and the absences will be unpaid. Many employers have a policy of denying holiday pay if an employee calls in sick on the day before or after the holiday. Similarly, it would be reasonable to deny the use of paid sick leave if the employee calls in on days when vacation requests were denied. The reduced paycheck might be more of a "discouragement" than having to visit a doctor (although a doctor's visit can also impose some "out of pocket" costs for the employee).

In addition, the company might clarify that if the circumstances of an absence are suspicious, the time off will be unpaid and the employee will be subject to discipline (under an assumption of sick leave abuse) unless the employee can verify that the sick leave was legitimate. For example, an absence might be suspicious if the employee:

- Takes the day off before or after a holiday,
- Calls in sick on the same days each year (perhaps during a state festival or opening weekend of fishing season),
- Has a vacation request denied and calls in sick on those days,
- Has an unusual number of sick days on Fridays or Mondays, or
- Otherwise creates suspicion or shows an unusual pattern of sick leave use.

In those cases, the use of paid sick leave could be denied. Further, the company might automatically determine that these suspicious absences are unexcused unless the employee can substantiate the absence. This might mean providing a doctor's note or some other verification, depending on the circumstances.

If the employee can provide verification, the absence would be excused (not subject to discipline) and the employee might even be allowed to use paid sick leave. However, if the employee cannot provide verification, or if the doctor's note is suspicious (e.g., the employee was absent on Thursday and Friday, but the doctor's note was obtained on Sunday afternoon), then a company might still determine that the time is unexcused and unpaid.



Catching fraudulent leave

An employee requests a week of vacation during the busy season, and her request is denied. Mysteriously, when the dates roll around, she calls in sick with the flu. Similar concerns might arise when an employee who has long protested being scheduled on Saturdays suddenly finds religion — one that doesn't allow him to work on Saturdays. In both circumstances, the company may wonder if the employee's requests could be a ploy.

Unfortunately, getting to the bottom of such matters can prove to be a difficult task.

Consider this situation: An employee calls in sick. Already suspicious of the validity of her excuse, more concerns arise when another employee reports that she saw the individual at the local mall over the lunch hour. While the company may be tempted to discipline the absent employee for her misuse of sick leave, consider first whether the report could have been erroneous, or whether the sick employee might have been visiting a pharmacy or doing some other perfectly reasonable task while sick.

These aren't simple situations to handle, and some employers are going so far as to hire private investigators or surveillance companies to monitor potentially fraudulent behavior by employees. While formal investigations may seem a bit extreme, employers do have the right to look into the real reasons for an employee's absence or requested accommodation.

Excessive breaks and meals

While normal break times or meal periods are not the same as an actual leave policy, employees may abuse them much the same. Some employees may take more breaks than the company intended (perhaps just "sneaking out" for a cigarette) or may extend the lunch period by a few minutes — or maybe by a half hour.

It may be possible to address these situations the same as other abuses of leave policies, but they could be more easily addressed as theft of time.

If the employee has been caught taking longer breaks, additional breaks, or extended meal periods, the situation is not the same as abuse of sick leave. There should be no confusion about whether the employee missed working time for legitimate reasons (e.g., whether the employee was actually sick). Also, the amount of time taken should be known, and the employee should already be aware of the policy for duration and frequency of breaks and meals.

In that case, the discussion is likely to center on the expectation to take no more time than the policy allows, as well as the consequences for failing to meet that expectation.



For more information, see the section on **Suspected theft of goods or time** earlier in this tab.

Tardiness and attendance problems

Employees are typically expected to be at their assigned work location and ready to begin work at the start of their shift. If they are not, they are considered tardy. Problems may involve late arrival, long lunch hours, early departure, or outright failure to show up for work. Supervisors may excuse occasional short absences where justified, but if an employee shows a consistent pattern (i.e., frequently arrives late for work, takes long lunch hours/breaks, etc.), the situation must be addressed.

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Regardless of whether the employee has an excuse (and employees will nearly always have an excuse, whether legitimate or not), these situations can become a serious problem by affecting morale among other employees, reducing productivity, or even encouraging others to report late as well. In deciding how to deal with tardiness, supervisors should keep two points in mind:

- Regardless of how many excuses an employee may have or how valid they may sound, the employee is responsible for reporting to work on time. It is up to employees to solve transportation issues, alarm clock failures, or other issues which result in failing to report for work on time.
- Supervisors have the authority to insist that employees report for work on time, and take corrective action if they fail to do so.

Tardiness can get out of control if left unaddressed. The impact of tardiness will vary depending on the department and position. Guidelines to help supervisors effectively handle excessive tardiness include:

1. Communicating expectations clearly.
2. Identifying an official time-keeping device, such as a timeclock or other specified clock.
3. Addressing each incident of tardiness immediately. Do not let it become a habit or enable it. Verbally counsel the employee when appropriate.
4. Keeping accurate records and documenting the reason for tardiness and other relevant information.
5. Monitoring attendance and consistently applying policies. For instance, supervisors may refuse to let the employee to make up the time, use paid leave, or change scheduled starting times. Emergency situations may be considered on an individual basis.
6. If tardiness continues, issue letter of warning. If this is not effective in correcting the tardiness, take progressive disciplinary action.

Employees must also use proper leave approval procedures. These procedures may describe how far in advance employees must request vacation, whether requests for leave can be verbal or written, who employees must contact for approval, and whether employees must call by a certain time on the morning that they intend to use unanticipated sick leave.

Ensure that all employees are aware of these procedures before taking action for policy violations. Sending out an annual memo of the procedures or periodically discussing them in group meets are good ways of making sure employees have this information.

In most cases, unexcused absences should be charged when an employee does not provide acceptable documentation of illness or injury when requested, is tardy or not in attendance when required, or does not follow leave approval procedures. The most important factor is consistency. Take into account how things have been done in the past or how similar situations with other employees have been handled.

Absences can be retroactively deemed “excused” if an employee later offers a reasonable explanation or brings in proper documentation.

Unacceptable excuses

Employees who miss work sometimes provide excuses that don’t seem to justify an absence. This may occur after an employee received a minor injury at work, was released to full duty by a doctor, and later called off work with an excuse such as “my injury is bothering me” or “I’m still in pain.”

Although an employer may want to show compassion for an injured employee, the organization can require a better excuse for an absence. For example, the employee might be asked exactly why he or she felt unable to work, despite the medical release. If the employee reports such discomfort that he or she was unable to sleep all night and did not want to work while potentially unsafe, this should be a legitimate reason. However, it also raises more questions, such as why this information was not initially provided, and whether the employee might need another doctor's visit for a prescription pain medication.

When employees call off work due to injuries (whether from a light duty job, or from the regular job after being released to work), the company representative taking the call should be aware of what clarifications can be requested, and should understand that employees can be expected to provide information as to why they cannot work, beyond the fact that the injury was "bothering" them.

Absence from a volunteered shift

Addressing absences from regularly scheduled shifts can be challenging enough, but sometimes employers will request volunteers for additional shifts or days (such as weekends) when the employee would not normally work. Sometimes, the employee who volunteered will fail to report for the extra time, leaving the employer to wonder if discipline should be imposed, or if the employee can be required to use vacation (even though the employee would not normally have worked that day).

An employee who fails to report for work after volunteering to do so can be held accountable to the same extent as an employee who failed to report for a "usual" shift. The absence may even create greater problems because the company had every reason to expect attendance, and the employee's failure to keep his or her word may hinder the ability to complete the extra work.

Whether the employee should be required to use vacation for that absence is at the company's discretion. Mandatory vacation use would result in the employee getting paid for a non-working day, and the larger paycheck may not seem like a deterrent. On the other hand, the employee would "lose" a vacation day that could otherwise have been saved for future use, and the employee may have preferred to save that vacation day.

Substance abuse

According to the Department of Labor, the vast majority of drug users are employed, and when they arrive for work, they don't leave their problems at the door. This means that employers have a duty to recognize and address problems that could cause danger in the workplace, and that may include an employee's potential drug use.

Most of the nation's 16.4 million current illegal drug users and approximately 15 million heavy alcohol users hold full-time jobs, according to the U.S. Department of Health and Human Service's Substance Abuse and Mental Health Services Administration (SAMHSA). The study, "Worker Substance Use and Workplace Policies and Programs," shows that substance use can pose significant risks to workers' health and productivity.

The highest rates of current illegal drug use were among food service workers (17.4 percent) and construction workers (15.1 percent). The highest rates of current heavy alcohol use were found among construction, mining, excavation, and drilling workers (17.8 percent), and installation, maintenance, and repair workers (14.7 percent).



Many states have laws governing drug testing, some with provisions that give employers discounts on workers' compensation premiums for establishing a drug-free workplace program that complies with the requirements of the state law. Many states also have a provision in their unemployment compensation laws that allow for the denial of unemployment benefits to employees who have a positive drug test or for refusal to take a test.

If the company doesn't currently have a drug testing program in place, check state law: Employers may reap some financial benefits from developing such a program. This is over and above the obvious benefits to employees of having a drug-free workplace, which makes for a safer and healthier workplace for all.

When suspicions of drug use arise, consider whether it's a crisis situation, which may consist of dangerous or threatening behavior or obvious impairment. In a situation that may put other employees in danger, taking direct action is required, and may be serious enough to require calling security or law enforcement.

In other cases, a drug situation may arise in the form of a performance problem. Where this is the case, pull the employee aside and share the concerns about the behavior noticed. It is not an employer's job to diagnose the individual or provide counseling, but employers can hold employees to a certain standard of performance.

Reserved

In the case of either a crisis situation or a performance problem, be sure to document observations and the actions taken in response to the situation. Ensure that the organization's policy about drugs in the workplace is clearly communicated, and get the employee's explanation of what is going on without making assumptions. Take care to safeguard the individual's privacy.

Testing program basics

Some organizations are required by law to have a drug testing program, while others choose to implement one voluntarily to reduce costs and ensure a safer workplace. Before embarking on a drug testing program, first identify whether any federal or state laws or regulations apply to the organization.

The Drug-Free Workplace Act requires all federal grant recipients and federal contractors (where contracts exceed \$25,000) to certify that they provide a drug-free workplace. It does not require testing, but also does not prohibit it.

The Department of Transportation (and some other agencies) require testing of applicants and employees who perform safety-sensitive functions, such as drivers who need a Commercial Driver's License to perform their jobs.

Some states have drug testing laws that regulate what an employer can and cannot do.

Some states offer a discount in workers' compensation premiums for establishing a drug testing program in accordance with state requirements.

Many states provide for denial of unemployment compensation benefits to employees who have a positive drug test or who refuse to take a drug test.

If the company doesn't have a drug testing program but wants to start one, it is important to first draft a policy and give employees prior notice. Some states require a 30-day notice period before implementing a drug testing program.

In making decisions regarding drug testing, consider the following:

- **Who will be tested?** Options may be to include all staff, only job applicants, or only employees in safety-sensitive positions.
- **What types of tests will be conducted?** Possibilities include pre-employment, reasonable suspicion, post-accident, random, and post-rehabilitation tests. Some states may allow some types of testing but not others, so check relevant state law.
- **What drugs will be tested?** See what state law will allow. Some states mirror the Department of Transportation drug testing regulations, and some go beyond it to allow testing for additional substances.
- **How will tests be conducted?** Different testing modes are available (urine, blood, saliva, hair), and many states have laws that dictate which may be used.

If the company is not regulated by state or federal drug testing laws, it may want to see what other organizations in the same industry are doing in regard to drug testing to get some ideas on how to structure the program.

Adopting a drug testing policy

If the company is not covered under a federal drug testing law (such as DOT drug testing for drivers of commercial motor vehicles), testing may be subject to state law. Many states, though not all, regulate substance abuse programs, and drug testing in particular. Some states don't

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allow for random testing, or states may only allow it for safety sensitive employees; some states limit drug testing for public employees; some states regulate the specific collection procedures and the types of labs that can be used. Know the state laws and how they impact policies and procedures when it comes to developing or revising a substance abuse policy.

A substance abuse policy should be very specific. It should clearly outline:

- Who is subject to testing;
- Types of testing;
- What drugs will be tested;
- Procedures for testing;
- Intervention procedures — not only what the employer may do, but procedures for employees to alert management to suspicious behavior that may be attributed to substance abuse;
- Prohibited conduct;
- Permissible conduct (Is the office holiday party exempt from the alcohol ban? What about business trips? Is there a limit on the number of drinks an employee should have during a business meeting?);
- Referral procedures (to EAP, if applicable, or community resources); and
- Consequences for violation.

A policy cannot cover every possible situation that might arise, but employers may not know what a policy lacks until a situation comes up that isn't covered. Here are just a few examples of situations that may not be adequately covered:

Example 1: A supervisor is showing some erratic behavior. The company suspects drugs or alcohol may be involved, but has never tested a supervisor for reasonable suspicion, and in fact, the policy doesn't say anything about it.

Example 2: A policy says that employees who are suspected to be under the influence are sent for testing. The drug test results aren't available immediately, but an employee has tested positive for alcohol by means of a breathalyzer. He tests at .04, which is under the legal limit, but he seems impaired. What happens to that employee? Can he come back to work? Does it make a difference if he works in the office or uses heavy equipment? Is he sent home? If so, should he be allowed to drive himself?

Example 3: An excellent candidate for a new position takes a pre-employment drug test and tests positive for marijuana. She explains that she was partying over the weekend, not realizing she would be interviewing (it was set up on short notice). Knowing that marijuana stays in the system for days after it is ingested, this is a plausible explanation. She's still a great candidate, and the company still wants to hire her.

Example 4: An employee gets involved in a fender bender that doesn't appear to be his fault. Company policy is to test employees who are involved in an accident, but the term "accident" isn't very well defined.

All these situations can be addressed in a substance abuse policy or related procedures. This is not necessarily the same document which appears in the employee handbook. That will be a more simplified overview of the substance abuse program, and will not contain every detail about how various situations are handled. The "handling" part is to be used as a guideline for supervisors, managers, HR, and anyone else who is involved in the administration of the program.

Example 1

In the first example, be clear on who is covered. Instead of stating “all employees,” be specific so there is no question. State whether it includes supervisors, contractors, temporary employees, part time employees, seasonal employees, or only safety sensitive employees, and list the jobs that are considered to be safety sensitive.

Clearly state the types of testing may be conducted. The types of testing that may be available include:

- Pre-employment,
- New-hire evaluation period (another test after three or six months),
- Random,
- Reasonable suspicion,
- Post-accident,
- Return-to-duty, and
- Follow-up after rehabilitation.

Example 2

In the second example, think of as many situations that could come up as possible, and have specific procedures laid out as to how they should be handled. In that example, the policy might be zero tolerance, and no employee can be at work under the influence by any amount. In that case, to avoid liability by allowing an employee under the influence to drive, establish procedures to get the employee safely home, such as a supervisor transporting the employee, or calling a cab.

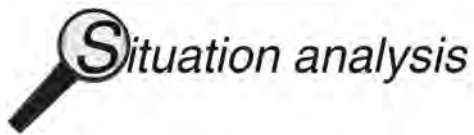
Example 3

A substance abuse program is only effective when the procedures are consistently followed. In the third example, if the policy is to refuse to hire anyone who tests positive, then it doesn't matter if the candidate is perfect; the company won't hire her. Doing so anyway could be setting a precedent, in effect telling employees the policy is flexible and doesn't need to be taken seriously, and might set the company up for liability.

Also, despite her protests, her drug use might be more than a one-time recreational event. An employee who failed a drug test will commonly have an excuse, often along the lines of “it wasn't my fault.” Unless the company has a reason to believe that claim (e.g., the employee has been with the company for many years and has passed several previous tests, with no other reason to suspect an abuse problem), then the test results should be taken for what they are — a positive drug test.

Example 4

In the last example, the lack of a concise definition is the problem. Provide specific definitions so that everyone knows exactly when an employee is covered. In the case of an accident, employers might consider any or all of the following: Accidents that involve a certain dollar amount of property damage; cases where individuals need medical treatment, either onsite or away from the scene; testing if the employee is at fault (whether by a majority percentage, or any percentage). Employers can define the parameters, then make that the policy.



Medical marijuana and drug tests

A number of states have adopted laws that allow for medical use of marijuana, but that doesn't mean employers have to allow it on the premises. There could be safety issues with an employee who is under the influence of marijuana, whether the employee is driving a forklift, operating machinery, or working as a delivery driver. The effects of marijuana include slowed reaction times and a loss of spatial perception. An employer could be liable for accidents or injuries caused by an employee under the influence, especially if the employer knew about it and allowed it.

What about the employee who works in a state that allows medical use and who works at a desk, where there are no safety-sensitive functions? In those circumstances, it is the employer's call as to how to handle it, and it may depend on whether a manager observes the effects of the drug or not.

While some states allow the medical use of marijuana, the federal government does not, and even in states which allow medical use of marijuana, courts have consistently found that such laws do not obligate employers to excuse such use in employment decisions.

Random alcohol tests are unlawful

Random alcohol tests are a violation of the Americans with Disabilities Act (ADA), according to a lawsuit filed by the Equal Employment Opportunity Commission (EEOC). According to the EEOC, the company illegally fired a probationary employee after she tested positive for alcohol in a random breathalyzer test.

According to the complaint, it was a false positive test. After getting her results, the employee indicated that she had not ingested alcohol in the last month, but that a medical condition may have caused the test to read positive. After the company nurse refused her request for an alternative test, she obtained a blood alcohol test from her doctor the same day, which was negative. Nevertheless, the company terminated her employment. The EEOC took her case, asserting that the random alcohol test was an unlawful medical exam.

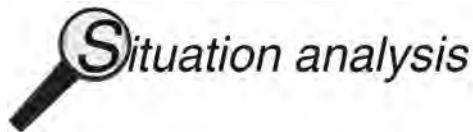
Under the ADA, if an employer has a reasonable basis to believe that an employee can't perform the job safely due to a medical condition, then the employer can require a medical exam. But according to the EEOC, the employer in this case had no cause to believe the employee was under the influence of alcohol, but chose her for the test on a random basis.

At first blush, the EEOC's position appears to conflict with the ADA, which states that drug tests are not considered medical exams under the ADA. However, the term "drug" means a controlled substance, and this does not include alcohol. So unlike drug tests, the EEOC considers alcohol tests to be medical tests, which can only be performed if the test is job-related and consistent with business necessity (in other words, on a reasonable suspicion basis), and not on a random basis.

Does this impact DOT tests?

Department of Transportation regulations allow for random alcohol tests. However, the ADA states that the law does not “encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol.”

There is no indication that the EEOC is taking the position that random alcohol tests under DOT drug testing regulations violate the ADA. But for non-DOT alcohol testing, the EEOC’s position is clear.



An employee may be under the influence

An employee reports his belief that another employee is on drugs. What should be done?

The best answer is to watch the accused employee more closely for any objective, observable signs of drug use. If the “witness” isn’t particularly credible, question his motivation. Employers should not conduct a drug test based on hearsay alone, but should independently and objectively record symptoms of drug use, which is needed for reasonable suspicion.

Even if the company doesn’t have a drug testing policy, it still has an obligation to keep workers safe. If an employee may pose a safety risk because he appears to be under the influence of drugs or alcohol, the employer has the right to remove him from his job even without a test, but document the observations thoroughly.

Supervisor training

For most companies, supervisors are on the front line when it comes to recognizing employees who may have a substance abuse problem and enforcing substance abuse policies. Ensuring that supervisors understand the substance abuse policy and know their role in enforcing it is an essential part of a strong alcohol- and drug-free workplace program.

Some of the consequences of substance abuse in the workplace are obvious, such as increased absences, errors, near-miss incidents, or accidents. Others, such as low morale or high illness rates, are harder to ascribe but no less costly.

Supervisors may be the only company representatives to have regular contact with employees. Their observation skills, knowledge of employees, and ability to handle what is a sensitive situation could make all the difference in avoiding a potentially dangerous situation.

Not every substance abuse issue will involve employees who are abusers. Many of the situations could involve an employee who is suffering side effects from prescription medication or maybe had “one too many” at a business meeting. The proper reaction to these situations, and others, should be found in the company’s substance abuse policy.

The policy should also spell out what steps may be taken when an employee is suspected of a violation and the consequences that follow if a violation is proven. These steps may include drug and/or alcohol testing, referral to an Employee Assistance Program (EAP), suspension, or termination. Having consequences, such as these, written into the company's substance abuse policy is a key to effective management.

Reasonable suspicion training

Training should focus on situations in which supervisors may have reason to believe that an employee is under the influence while on the job. This is known as "reasonable suspicion," and it could involve situations such as after a workplace accident or near-miss, when job performance becomes unacceptable, or when an employee behaves abnormally.

Supervisors should not confront an employee based on a gut feeling that he or she is under the influence, or simply on the word of another employee who claims that a coworker is impaired. To be fair to everyone involved, supervisors need to make independent observations that lead suspicion that an employee is impaired. This is what is meant by reasonable suspicion: A company representative personally witnesses unusual/uncharacteristic behavior exhibited by an employee.

Being well versed in a reasonable suspicion process can help make a difficult job easier. The basic steps are:

1. Observe
2. Confirm
3. Document
4. Confront
5. Test

Step 1: Observe

The definition of reasonable suspicion varies from state to state, and the company should take these differences into account when creating its policy. But, recognizing an impaired employee is not rocket science. Many of the signs and symptoms are well known — slurred speech, difficulty with balance, reduced productivity, changes in behavior or appearance, even odors could reasonably lead to suspicion of impairment.

If any of these signs and symptoms appear, the supervisor will have to make an important judgment call. Does the person's behavior represent an immediate or imminent danger to himself or others? If so, act immediately to remove the employee from the dangerous situation.

Some incidents may be "one time" events where an employee had an extra drink over lunch or arrived for an early shift after partying late the night before. For the safety of all employees, and to ensure consistency in policy enforcement, these incidents must be taken seriously. The employee has certainly shown a lack of good judgment, and might even admit to the situation. While hopefully not a common occurrence, employers may not want to lose an otherwise dedicated employee over such a mistake. This is one reason that some organizations avoid zero-tolerance policies that mandate termination for the first violation.

The more serious situation is one where a supervisor noticed a steady decline in an employee's performance or appearance. It's also possible that a newly hired employee is not performing as expected, but a pre-employment drug test should have screened this person out. Perhaps productivity has suffered or there's been friction between the employee and others. Perhaps the

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employee's personal grooming or other aspects of his or her appearance has deteriorated over the past few weeks or months. Maybe chronic lateness has become a problem. Observations usually take place over time, and sometimes the warning signs are subtle. It's important to get to know the employees to determine if there is a change in their mood, appearance, behavior, attitude or attendance.

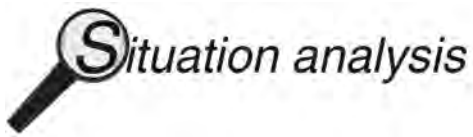


Step 2: Confirm

After personally observing the employee, confirm that the employee's appearance, behavior, speech, and/or body odors are consistent with the signs and symptoms of drug or alcohol use. It's often a good practice to ask another supervisor to also observe the employee and document their observations independently. Remember that reasonable suspicion doesn't mean beyond a reasonable doubt.

Step 3: Document

This is usually done using a checklist of behaviors, such as slurred speech or odor of alcohol, which can indicate impairment. Documented observations should be specific. This is where a checklist can be especially helpful. Don't document something like "Jason appeared drunk," since this is an opinion and Jason's behavior might be caused by legitimate medication. Instead, support the observations with something like "Jason was slurring his speech and had an odor of alcohol on his breath."



What to document

Ben is a good employee, and a hard worker, but lately he seems distracted. He also appears to be clumsier than usual, dropping tools and papers on a daily basis. Two weeks ago, he was late for work and could not explain his tardiness. Today, his breath smelled like beer.

The supervisor might document observations as follows:

Ben appears to be distracted lately. We had a staff meeting on (date), and any time he was asked a question, he had to have the question repeated because he was obviously not paying attention. I have seen him dropping tools and papers several times per day. On (month/day/year), he was late for work and could not provide a reason for it. On (month/day/year), his breath smelled of beer.

Step 4: Confront

If the documented observations reasonably suggest impairment, it's time to confront the employee. Confronting an employee who has a suspected substance abuse problem is not easy, but for the safety and productivity of the department, it must be done.

Planning for the meeting with the employee is crucial. The following are a few techniques to help ease the situation:

Spend some time before the meeting evaluating the observations and reviewing the company's substance abuse policy. Remember, the goal is problem-solving, not punishment. There may be a reasonable explanation for the employee's behavior.

Approach the employee, or arrange to meet with the employee, in a private setting. This preserves confidentiality, avoids a scene, and spares the employee public embarrassment. The meeting room should provide for confidentiality and may require a telephone and perhaps a box of tissues.

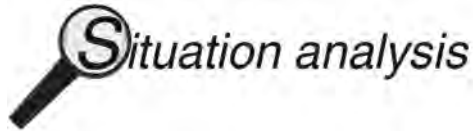
During the meeting, stick to the facts and be specific. Communicate to the employee exactly what was observed. Offer the employee a chance to explain the observations (e.g., "Is anything going on?"). However, don't allow the employee's explanation to sidetrack the conversation.

Maintain composure, avoid conflict, and speak in a calm voice. Listen respectfully and ignore inflammatory remarks or combative acts. If an employee becomes defensive or issues denials, listen to what he or she has to say, but use the company's substance abuse policy to stay on point. It may be helpful to have an extra copy of the policy available for the employee.

Remember, some medical conditions can mimic the symptoms of drug or alcohol use. Don't accuse the employee. Simply state the observations and the need to follow the company's substance abuse policy.

Show concern for the employee, but do not attempt to provide counseling or a diagnosis.

Be prepared to call upon the next level of management or security, if necessary. Depending on the situation or the employee, consider alerting security about the meeting beforehand.



Confronting the employee

If an employee is defensive or denies the observation, listen respectfully and repeat the observations and reason for concern. Emphasize the company's substance abuse policy and point out that the situation requires action, which may include drug and/or alcohol testing. A statement like the following might be used:

I know this is upsetting, but based on the way you are acting and my specific observations, I am obligated by our substance abuse policy to have you evaluated.

If an employee cries when confronted, listen and respond with kindness and respect. Allow a few moments for the employee to regain composure, and make it clear that the intent is not to place blame. Emphasize the company's substance abuse policy and the need to follow through on observed behaviors. A statement like the following might be used:

I'm really worried about you and I'm obligated to have you evaluated under company policy. I just can't ignore what I've seen.

There are also certain statements that should be avoided when confronting an employee. A supervisor may feel the need to empathize, especially if the employee is crying, but must be wary of doing so. For instance, statements such as "I hope I'm wrong about this" or "I'm sorry that I have to do this" may suggest that there isn't enough reasonable suspicion to have the employee tested. Such responses may also backfire by generating questions such as, "Then why are you doing this?" The supervisor does not want to be placed on the defensive, and must remain neutral. A better response to an employee's objections would be something like the following:

This isn't about what I want; this is about what the company policy requires. We're both obligated to follow the policy.

If an employee is belligerent or uncooperative, maintain composure and use a calm tone of voice. Avoid accusations because it could escalate aggressive behavior and may only make matters worse. Ignore inflammatory remarks or insults from the employee. Focus on the policy requirements, stick to the facts, and repeat them if necessary. A statement like the following might be used:

I know you're upset, but I'm simply following our substance abuse policy. And you should know that it's part of our substance abuse policy that if you refuse to take this test, it's the same as testing positive. Based on my observations, I cannot let you continue working today. I'll take you to HR so you can be transported to the testing facility, and you don't have to worry about me being involved. We can discuss the results later if you want.

Step 5: Test

Do not attempt to diagnose an employee's condition, nor simply accept an employee's explanation (e.g., "I took a strong cold medicine this morning."). Employees will usually have an excuse, and this is not the time to determine if that excuse is valid. The company may point out that

if there is a reasonable explanation, the test results will take that into account. But if an employee may be under the influence of drugs or alcohol, the next step is to follow the company's policy for directing the employee to drug and/or alcohol testing. Exactly how drug and alcohol testing is handled, and by whom, should be laid out in the substance abuse policy.

Substance abuse symptoms

The following performance and behavior problems are common to many employed individuals who abuse alcohol and/or other drugs. It is important to note that if an employee displays these symptoms, it does not necessarily mean he or she has a substance abuse problem.

Performance-related symptoms can include the following:

- Inconsistent work quality,
- Poor concentration,
- Lowered productivity,
- Increased absenteeism,
- Unexplained disappearances from the workplace,
- Carelessness,
- Mistakes or errors in judgment,
- Needless risk taking,
- Disregard for safety, and
- Extended lunch periods and early departures.

Behavior-related symptoms often include the following:

- Frequent financial problems,
- Avoidance of friends and colleagues,
- Blaming others for own problems and shortcomings,
- Complaints about problems at home,
- Deterioration in personal appearance, and
- Complaints and excuses of vaguely defined illnesses.

When an employee's performance deteriorates for whatever reason, the supervisor has an obligation to intervene. The supervisor does not need to be an expert on alcohol and drug abuse to do so, because the intervention should be focused on the employee's performance problem.

The following three principles of intervention may be followed by supervisors who need to confront a staff member about a performance problem that may be related to substance abuse.

Maintain control. Stick to the facts as they affect work performance. Do not rely on memory; have all supporting documents and records available.

Be clear and firm. Explain company policy concerning performance. Explain the company's drug-free workplace policy and the consequences if expectations are not met.

Be supportive, but avoid emotional involvement. Offer help in resolving performance problems. Identify resources for help in addressing personal problems.



Reasonable suspicion testing

Most drug or alcohol policies allow testing for reasonable suspicion. If the program falls under federal or state law, the company must follow those legal requirements, but here are some general guidelines to follow (if any of these guidelines depart from company policies or procedures, follow those):

- 1. Get a second opinion.** If an employee may be under the influence of drugs or alcohol based on observations, get a second opinion from another manager, supervisor, or someone from Human Resources.
- 2. Investigate.** If suspicions are based on an anonymous tip or from a coworker of the employee, don't automatically take that person's word for it (there may be an ulterior motive). Don't disregard the information, but conduct an investigation.
- 3. Recognize the signs.** Provide training on the signs and symptoms of drug or alcohol use before making any judgments, and include in training those who provide a second opinion.
- 4. Document objectively.** Document observations as objectively as possible. For example, "employee smelled of alcohol and was observed walking unsteadily, eyes were bloodshot and speech was slurred" — not "employee appeared drunk," which is a subjective statement or opinion.

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Here are some of the signs that might indicate that an employee is under the influence of drugs or alcohol:

Walking: Unsteady gait, stumbling, swaying, holding on to objects.

Speech: Slurred, shouting, whispering, slow, rambling, confused.

Actions: Using profanity, indifferent, hostile, emotional, hyperactive, drowsy, irritable, nervous, insubordinate.

Eyes: Bloodshot, glassy, dilated pupils, watery, heavy eyelids.

Face: Flushed, pale, or sweaty.

Breath: Odor of alcohol, odor of marijuana.

Appearance: Unkempt or disheveled appearance, stained or dirty clothes.

Other: The use of chewing gum, mints, or cough drops to mask the smell of alcohol or drugs such as marijuana.

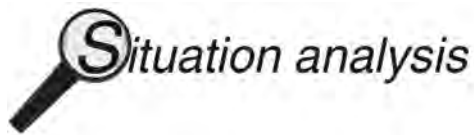
Accusing an employee of being under the influence is a highly sensitive thing to do. Employers need not have definitive proof, but should be reasonably certain of an adequate basis to send an employee for a drug test.

If an employee is sent off site to be drug tested, do not let the employee drive himself. The company could incur liability if he was in an accident and the company knew he was impaired. Instead, it's a good idea to either have a supervisor drive the employee to the site, or arrange for some kind of transportation service, but it is best to have someone from the company present who has a vested interest in making sure an accurate drug test is conducted (and that the employee actually goes to the site to take the test).

Some employees may want to drink large amounts of water to dilute a urine sample if they think they will test positive for alcohol or drugs. Don't allow this to happen. Employees may also want to make stops along the way or otherwise delay the taking of the test. Don't allow this to happen, either.

Be on the lookout for adulteration products. There are products readily available over the Internet that employees can use to adulterate a urine sample. Most testing facilities are wise to these products and have adjusted their tests accordingly, but new adulteration techniques are constantly being developed. If an employee is caught attempting to adulterate a sample, the employee's actions can be taken into account when determining discipline or termination, according to company policy.

Finally, if employers have reasonable suspicion that an employee is working under the influence, don't ignore it. The company has a responsibility to keep the workplace safe for all.



Employee arrested for drug possession

While reading the local newspaper, you notice that a current employee (a good performer) was arrested for possession of drugs over the weekend. What can be done?

The best response, at least initially, is to simply watch his work performance more closely; do not jump to termination for a simple arrest. Our legal system is designed so that people are considered innocent until proven guilty, and the employee may not be guilty. While some states allow employers to consider a pending arrest, generally the arrest has to be substantially related to the job.

In this case, the arrest happened while off work, and there is no evidence that his work performance has been impacted. It may be illegal to administer a drug test based on an arrest that had nothing to do with work. However, the company may have grounds to watch him more closely for any signs or symptoms of drug use while on the job. If any are detected, as with anyone, proceed with reasonable suspicion drug testing.

Even where state laws restrict the extent to which employers may consider an arrest, the laws don't generally require employers to excuse time off. For example, if an employee is arrested and will miss work for several days (or weeks) while sitting in jail, the company may decide to terminate for excessive absences.

Employee Assistance Program (EAP)

Many problems that arise in the workplace may be easier to resolve with an EAP referral. If the situation involves personal issues such as stress, depression, grief, financial difficulty, family problems, or similar issues, the underlying issue may be beyond the employer's ability to resolve. While employers may want to be compassionate and show concern, they should not act as personal counselors.

An EAP provides a confidential counseling and referral service to employees and their families for dealing with personal problems. These problems may include alcohol and drug abuse, marital and family difficulties, financial or legal problems, emotional and stress difficulties, and so on. The EAP represents an alternative to will help both the employee and the supervisor in addressing personal problems which may affect job performance.

The company's primary obligation is to address matters of performance, attendance, productivity, and other legitimate business concerns. However much the organization may care about its employees and desire to help them, certain matters need to be addressed outside of the business relationship. This is where the EAP comes in.

Referrals to an EAP (or to community resources, if an EAP is not available) may be formal or informal. An informal referral may not involve much more than letting the employee know that assistance is available, and that taking advantage of the program may help the employee resolve personal problems — which not only helps the employee, but should help address the impacts on the workplace.

A formal referral might require the employee to attend counseling sessions, perhaps even as a condition of continued employment. For example, if an employee has regular conflict with coworkers, the employee might be required to attend anger management counseling or conflict resolution courses as part of the disciplinary process.

Keep in mind that if an employee is told to attend counseling as a condition of employment, that time may have to be considered paid working time. The reason is that “hours worked” under the Fair Labor Standards Act generally includes all time spent acting under the direction or control of the company. Courts have found that employer-mandated attendance at counseling sessions must be considered paid working time.

Making a referral

Deciding when to make a referral can be a challenge. In the case of a formal referral, the company likely has evidence of some issue that justifies the referral, such as a failed drug test. Obvious conflict in the workplace or severe negativity that disrupts a team may also result in a formal referral. A formal referral is not actually part of a disciplinary process. In other words, the employee should not be told to attend counseling or face discipline. Rather, the referral might be a last chance to resolve a problem, with discipline in the future if the problem persists.

Essentially, the employee is called to a meeting to discuss the workplace concern and the expectations for future conduct, and is told that he or she is being referred to the EAP. The employee might be expected to contact the EAP within a specified time, such as one week, and the assigned counselor might even inform the company whether the contact was made. The employee can be asked to provide feedback, but even if not, there should be a follow-up meeting which focuses not on the counseling, but on whether the workplace situation seems to be improving.

An informal referral might be made when there is no reason to suspect a specific underlying cause. For example, if an employee’s performance or attendance has uncharacteristically declined, or the employee just seems distracted lately, the supervisor might suggest that EAP services are available.

Supervisors may informally refer an employee to the EAP when job performance or conduct seriously deteriorates. This deterioration may or may not be related to a drug or alcohol abuse problem. In an informal referral, the supervisor discusses with the employee that there has been a decline in conduct or performance and offers specific examples of the job-related problems, then makes sure the employee knows that he or she may seek assistance from the EAP. Supervisors should not speculate on what the potential personal problem might be.

The employee is not required to utilize the EAP and cannot be disciplined for refusal to utilize the program. However, after making the referral, supervisors can continue taking disciplinary or performance action based on the employee’s work and conduct on the job. Improvements in work and/or conduct should be considered prior to taking any action.

Essentially, the supervisor can point out the problems noticed, and after stating that the employee does not need to explain the underlying reasons, point out that the EAP might help resolve any personal issues the employee might be facing.

When making an informal referral, the supervisor should be clear that attendance is only a suggestion, not a requirement. The employee’s decision to utilize the EAP services is completely voluntary and would remain confidential (no one in the company would even know if the employee used the service). Stress that the company’s only concern is performance and conduct

on the job, not to dig into the employee's personal life. However, also point out that many personal issues can impact the ability to focus on the job, and getting professional assistance may be helpful.

Depending on the employee's performance in the weeks or months after the referral, the supervisor may have to follow up with the employee. If the problem has not improved (or has gotten worse), then another reminder may be necessary. In some cases, this may mean giving a disciplinary warning for performance or attendance issues. Again, the company may want to be compassionate, but should not substitute amateur counseling for the obligation to maintain a productive workforce.

If the situation does start to improve, the supervisor should not assume that the employee attended counseling. However, it may be appropriate to give a bit more positive feedback than usual, even if simply pointing out that the attendance problems seem to be improving.

Reduce turnover and other costs with an EAP

Turnover is expensive. The Hay Group estimates that replacing an hourly worker costs the equivalent of six months of that worker's wages, while replacing a professional employee can cost up to 18 months in salary. With costs so high, it makes good business sense to try to keep good employees. That's likely one of the reasons that approximately 65 percent of employers provide some type of EAP, according to the Alfred P. Sloan Foundation's 2008 National Study of Employers.

Reducing turnover is only one reason to implement an EAP. Consider other factors that affect productivity:

- As many as one-fifth of employees will be responsible for aging parents over the next decade, potentially resulting in increased absenteeism, extended leaves of absence, voluntary termination, or early retirement.
- About a third of the workforce have children under age 18 living at home who may have childcare issues;
- Approximately 1 million workers are absent from work each day because of stress-related problems, according to the American Institute of Stress;
- About 70 percent of illegal drug users are employed, according the Center for Substance Abuse Treatment.

An EAP can help. A seminal study conducted by McDonnell Douglas Corporation in 1989 found that its EAP reduced overall health care costs by 35 percent, including 28 percent savings on mental health benefits, 35 percent reduced turnover, and 14 percent higher productivity. Other studies have affirmed the cost-savings benefits of EAPs.

EAPs can be provided in-house or by an external organization. The Employee Assistance Professionals Association (EAPA) recommends that an EAP have:

- A 24-hour crisis telephone line;
- Confidential assessment and counseling services delivered by licensed, professional counselors;
- Referral support, tracking, and follow-up. The EAP should help with referrals for long-term or specialized care, based on the counselor's assessment and recommended treatment, client preferences, and financial and other resources.

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- Emergency intervention. The EAP should be able to provide timely onsite assistance for emergencies, including critical incident stress management defusing and debriefing;
- Substance abuse expertise. Since substance abuse constitutes a significant portion of EAP referrals, the provider should have specific knowledge, training, and experience in assessing and treating chemical and alcohol dependency;
- Dependent and domestic partner coverage. Because problems are not confined to employees alone, EAP coverage should extend to dependents;
- Guaranteed confidential recordkeeping. Employers, insurance companies, and health care entities should have no access to EAP records.

Be wary of providers that offer a low-cost toll-free telephone line or internal counseling but no other support. Though the cost may be attractive, EAPA warns that this type of service is not a true Employee Assistance Program.

An EAP should also be able to provide orientation for all employees, train supervisors on how to identify troubled employees and make referrals, provide a variety of communication tools, and provide program evaluation. When looking for an EAP, don't be afraid to ask pointed questions about the extent to which it can provide these services as well as those listed above. The quality of the EAP selected can make a big difference in the lives of employees.



Introduction

Employee relations involves not only maximizing performance and minimizing problems, it also requires respecting employee's rights — many of which are legal rights and protections.

Employees may have a right to time off under various laws, such as the Family and Medical Leave Act or equivalent state laws. In fact, states may allow (or require) time off for things like voting, attending jury service, or answering a call as a volunteer firefighter or other emergency responder.

Of course, employers also have an obligation to provide a work environment that is free from discrimination or harassment. While many such issues involve coworker or supervisor harassment, an employer may have a seemingly neutral policy that creates a disparate impact on protected individuals. As an example, the Equal Employment Opportunity Commission (EEOC) has found that a policy which precludes hiring anyone with an arrest or conviction may have a disparate impact on certain minorities, who, the EEOC has said, are more likely to be arrested.

In recent years, the protections of the National Labor Relations Act (NLRA) have become more commonly (and publicly) enforced. The NLRA grants employees the right to discuss wages, hours, and working conditions, and it prohibits employers from discriminating against employees who exercise those rights. Many employers still have policies that prohibit employees from discussing their wages, but these policies violate the NLRA. Employees may talk to each other (or even complain about management) in person or on social media sites like Facebook, and this activity can also be protected.

Upon request, employees may have the right to accommodation, most commonly for a disability or for a religious practice. However, employers may need to make adjustments in other cases as well. For instance, an employee who takes a few hours of intermittent FMLA leave each week may have difficulty meeting objectives. If the company gives a negative performance review, it will likely be viewed as retaliation for taking FMLA. Therefore, some workplace changes may be required so the employee can take the legally entitled leave without adverse consequences.

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Employees also have a common law right to privacy. Very few laws actually regulate privacy between individuals (or between an employer and employee). However, there are some laws restricting access to private accounts on computers, such as personal email accounts.

Also, courts have recognized that individuals have certain privacy expectations, and these court decisions create this common law right. This means that employers may be limited in how they can restrict an employee's off-duty conduct. In some cases, states may also have laws to this effect. For example, Wisconsin law prohibits discrimination against an individual based on lawful use of a product during non-working time (such as tobacco).

Finally, employees have certain rights regarding medical privacy. Most of these issues fall under the Americans with Disabilities Act (ADA), despite a common misconception that the Health Insurance Portability and Accountability Act (HIPAA) would apply.

While employers have some limited ability to request medical information or require an evaluation, the purpose must be job-related and consistent with business necessity. For example, asking all employees to report any prescription medications they are taking will not pass this test, and will be deemed a violation of the ADA.

Protected activity

The term "protected activity" encompasses a fairly large category. Essentially, it means that an employee has engaged in some activity for which the company cannot take adverse action. Engaging in protected activity does not prevent an employer from imposing discipline or from terminating an employee for other legitimate reasons.

However, if the employer's action is challenged, it will need to show that some other legitimate reason (other than the protected activity) provided the justification for that action.

For instance, employees have the right to take time off from work for various reasons. This may include taking job protected leave under the Family and Medical Leave Act (FMLA) or other reasons such as voting or attending jury duty. Not only is the actual time off protected, but the requests for time off are as well.

As an example, an employer who is contemplating layoffs cannot consider an employee's recent request for future FMLA leave when selecting employees for layoff.

Employees also have a right to oppose unlawful actions by the employer or by coworkers. For instance, an employee may complain of discrimination, harassment, or retaliation. That complaint constitutes protected activity, and cannot become the basis for adverse action.

Employees also have the right to engage in protected "concerted activity" under the National Labor Relations Act (NLRA). In short, this means that all employees (whether or not they work for a unionized facility) have the right to discuss their wages, hours, and working conditions, and to engage in other activity for mutual aid or protection.

Requests for leave or time off

Employers should know the basics of the FMLA, leave for military reservists, and similar laws, and should be able to recognize when an employee asks for leave that may be covered under those laws. However, many other types of leave are available that could mistakenly be denied simply because the employer was not aware that they were valid leave requests protected by law. Consider the following scenarios:

First responder leave: An employee recently announced that he joined his community volunteer fire department, and he's been proudly showing off his pager. A few days later, he shows up late for work because he was responding to an emergency call in the morning. In almost 20 states, the law may require approving this type of absence.

Leave for school functions: Another employee says she needs an afternoon off to attend her son's disciplinary meeting at school. Does that have to be approved? It might. Eight states have laws that would require allowing time off for certain school functions.

Domestic violence leave laws: A female employee comes to work with a black eye and asks for time off, but isn't specific as to the reason. Several states have laws that require employers to grant time off for victims of domestic abuse to attend counseling, to seek a safe place to live, appear in court, obtain a temporary restraining order, and so on. Be sure to handle these leave requests appropriately.



Cross reference

For related information, see the section titled **When domestic violence infiltrates the workplace** in the **Discipline and Corrective Action** tab.

Crime victim leave laws: An employee says he needs time off to testify in a court proceeding. He explains that he was the victim of an assault and robbery, and he is helping in the criminal prosecution. Many states have laws that allow time off for victims of crime (and in some cases, when their family members are victims) to attend court hearings, testify, and so on.

Donating blood or organs: A handful of states have laws allowing employees to take time off to donate blood, plasma, organs, or bone marrow. If faced with such a request, check into it before automatically denying a request for leave for this purpose.

Voting leave: On election day, an employee requests a couple of hours off in the middle of the day. Can the employee leave work? Maybe. While all states have some provision allowing for leave to vote or to attend jury duty, in most cases, the need for leave can be foreseen, and the employee can be held to company procedures for requesting leave in advance.

For instance, employers might be required to honor requests of time off for voting, but the request usually has to be made at least one or two days in advance. If a request for leave isn't made until the day of the election, state law may allow for denying the request.

When different types of leave are protected by state law, the law doesn't necessarily require that employees be paid for the time they are gone. In fact, most laws don't require the time to be paid; they just require the time to be given.

Most laws not only require employers to provide the leave, but they also prohibit employers from discriminating or retaliating against an individual for taking the leave. There should be no negative repercussions to an employee who takes legally protected leave.

If an employee is disciplined or terminated for excessive absences, and those absences should have been excused for any of the above reasons, the company could face legal action for violating the employee's rights.



First responder leave

Eighteen states have laws that require employers to allow absences for emergency responders such as volunteer firefighters, reserve police officers, or emergency medical technicians. They are: California, Colorado, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, Ohio, Tennessee, Washington, West Virginia, and Wisconsin.

In some cases, the law is limited to protections for employees who arrive late, but won't actually allow the employee to "walk off" the job in order to respond. Most states also do not require employers to pay employees for these absences, although salaried employees may still be entitled to their full salary for a partial day's work (but they can usually be required to make up the time).

Generally, the employee can be required to provide a statement from the agency's representative (such as a fire chief) to verify that the individual was actually responding to a call.

Leave for school functions

Only eight states have laws that require employers to allow time off for parents to attend a child's school function. They are: California, Colorado, Illinois, Louisiana, Massachusetts, Minnesota, Nevada, and North Carolina.

While these laws differ somewhat, they are generally intended to cover things like parent/teacher conferences or disciplinary hearings regarding a child. In other words, the laws are usually for educational or behavioral conferences, not merely to attend a child's recital or play.

Generally, these absences do not have to be paid, although the employee might be able to use paid vacation or similar leave. Employees may also be required to give advanced notice, and may be limited to a specified number of hours per year.

Crime or domestic violence leave laws

Nineteen states and one district have laws that require employers to provide time off for victims of crimes or domestic violence. They are: Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kansas, Maine, Massachusetts, Minnesota, New Hampshire, New Mexico, New York, North Carolina, Virginia, and Washington.

Some state laws may also apply to “household members” such as a parent or child. The intent is to allow employees time off to attend court hearings, find shelter, or otherwise address the situation. Advanced notice is usually required, and the time off does not normally have to be paid.

Donating blood or organs

Only seven states and one district require employers to provide time off for employees who donate blood, organs, or bone marrow. They are: District of Columbia, Hawaii, Illinois, Louisiana, Massachusetts, Minnesota, New York, and Oregon.

The employee should be able to provide advanced notice, and the time off does not normally have to be paid. Of course, time off for something that requires surgery (such as organs) may also be covered under the FMLA or other laws since it is likely to require an overnight stay in a hospital.

Voting leave laws

Thirty states have laws which allow employees to take time off for voting. They are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, West Virginia, Wisconsin, and Wyoming.

These state laws differ quite a bit. Some states specify the amount of leave that must be granted, while others require “reasonable” time. Most require employees to give advanced notice, and most do not require paying wages for the missed working time. Also, employers usually have the right to decide when the time can be taken (morning or afternoon, for example) and can usually require make-up time for any absence.

As an example, Texas does not require a specific amount of time off to vote, but refusing to allow time off is a misdemeanor. However, employers do not have to provide time off if the polls will be open for two consecutive hours outside of scheduled working hours. Similarly, Ohio law does not specify a number of hours for leave, but employers cannot threaten to discharge an employee who takes a “reasonable” amount of time off to vote.

Other state laws are more specific. Wisconsin allows up to three hours off, if the employee gives notice at least one day in advance. The employee does not have to be paid for the absence, and the employer can designate the time of day taken. California requires employers to post a notice of the right to take paid leave for voting at least 10 days before the election. Employees can take as much time as they need, but the employer is only obligated to pay for a maximum of two hours. Paid time off is not available to employees who have sufficient time outside of working hours to vote.

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Allowing time off for voting may affect operations if a large number of employees make requests. To minimize absences, encourage employees to consider voting by absentee ballot. Although voting by absentee ballot is often believed to be limited to those in the military or others who cannot physically report to a polling location, many states allow any resident to vote by requesting an absentee ballot from the local county clerk prior to the scheduled voting date. The ballot can be returned by mail, which can not only minimize absences on election day, but can also help employees avoid the need to stand in line at the polls. Employees can request information about absentee ballots from their town or county clerks.



USERRA employee protections

Under the Uniformed Services Employment and Reemployment Rights Act (USERRA), employees who serve in the Army, Navy, Marine Corps, Air Force, or Coast Guard cannot be disciplined for absences due to active service, attendance at military training, weekend drills, summer camps, fitness-for-duty examinations, or military funeral honors duty.

If employees fall under the protections of USERRA, the company cannot discriminate against them based on their past or current military obligations. An employer must also take care not to discriminate against an individual who *intends* to join one of the uniformed services.

When employees return from service, the employer is obligated to reinstate them and must preserve the individuals' seniority status and benefits as they would be had the employees not been absent due to military service.

Employers sometimes wonder if the employee has any obligation to consider any hardships on the company for taking leave, particularly when an employee of the National Guard or Reserves is not actually called for duty, but rather volunteers for duty (perhaps simply volunteering for additional training). While the employee does not have to consider hardship, employers can contact military authorities regarding the timing or duration of the expected absence. The USERRA regulations include the following:

20 CFR §1002.104 Is the employee required to accommodate his or her employer's needs as to the timing, frequency or duration of service?

No. The employee is not required to accommodate his or her employer's interests or concerns regarding the timing, frequency, or duration of uniformed service. The employer cannot refuse to reemploy the employee because it believes that the timing, frequency or duration of the service is unreasonable. However, the employer is permitted to bring its concerns over the timing, frequency, or duration of the employee's service to the attention of the appropriate military authority. Regulations issued by the Department of Defense at 32 CFR 104.4 direct military authorities to provide assistance to an employer in addressing these types of employment issues. The military authorities are required to consider requests from employers of National Guard and Reserve members to adjust scheduled absences from civilian employment to perform service.

This provision is reflected in the National Defense regulations at 32 CFR 104.4, paragraph (o) as follows:

A designated Reserve component representative shall consider, and accommodate when it does not conflict with military requirements, a request from a civilian employer of a National Guard and Reserve member to adjust a Service member's absence from civilian employment due to uniformed service when such service has an adverse impact on the employer. The representative may make arrangements other than adjusting the period of absence to accommodate such a request when it serves the best interest of the military and is reasonable to do so.

As an example, if an employee requests time off for training, but the employer has another individual on FMLA and the additional absence would cause hardship, the military representative may be able to schedule the training at another time.

The above clearly shows that USERRA covers National Guard and Reserve members, but it primarily applies to federal service. However, nearly all states have similar laws to protect employees who are called up for state service, such as localized natural disasters.

When an employee returns after being gone for a long time, it can be difficult for other employees to adjust to having the individual back in the workforce, especially if they have been enjoying better shifts, more responsibilities, or more overtime in the employee's absence.

Even if other employees resent the return of the protected individual, don't fall into a trap of treating a returning veteran differently. A company can't give the returning employee undesirable shifts to appease other employees or create the impression that the returning employee is "making up" for where other employees had to cover for him or her. It also shouldn't stand by if other employees are treating the returning employee poorly upon his or her return. Reinforce with coworkers that the law requires the employee be treated as if he or she never left, and that such treatment is expected from the employee's peers as well as from the company.

Discrimination/harassment claims

Though it may seem simple, the first challenge in handling an employee complaint is recognizing when a complaint has been made. An employee who is uncomfortable with ethnic jokes made by coworkers, or a female who believes that her supervisor is "overly friendly," is probably not going to make statements like, "I find those jokes to be racially offensive," or "My supervisor is sexually harassing me."

A complaint is more likely to involve indirect phrases like, "He's making me uncomfortable" or "Steve told a joke that I didn't think was funny." When the company doesn't know the whole story, and these comments are made without any context, they might not be recognized as discrimination complaints. They may even be accompanied by qualifiers like, "Don't make a big deal out of this," or "I don't want to get anyone in trouble."

Employee Relations Essentials

Make absolutely certain that supervisors (and anyone else who might receive a complaint) know how to recognize a complaint, and know what to do. Courts have found that when a supervisor knows (or should have known) about discrimination, the company is assumed to know. This means that if supervisors don't recognize a complaint, or fail to do anything about it, the company may find itself talking to the EEOC, trying to explain why the company failed to respond.



Receiving a complaint

Whoever receives the complaint must know what to do at that point, and what not to do. Some employees will make complaints after poor evaluations because they think doing so will protect their job. In other cases, personal disagreements can result in complaints that are unfounded, especially if the people involved have a history of some kind.

Regardless of the nature of the complaint, reassure the person that coming forward was the right thing and that the company is taking the complaint seriously. Do not dismiss a complaint based on assumptions that it's unfounded. Employers should also provide assurance that any retaliation will not be tolerated, and remind the person that the company needs to know about any future discriminatory acts so it can take further discipline or address the retaliation.

Document the complaint, even if the person complaining doesn't want to make a written statement. Inform the employee that the company has a legal obligation to prevent and correct discrimination. If the employee refuses to write anything down, the person taking the complaint should take notes and document the statement. The complainant can later be asked to review the notes and provide a signature to verify their accuracy.

Most likely, an investigation will follow, even if it only involves talking to the alleged offender. If a formal investigation is needed, certain steps must be taken to prepare for the investigation. Identify who made the offensive action or comment, who else might have witnessed it or otherwise been aware of it, and how to handle the situation until the investigation is completed.

Sometimes a full investigation isn't necessary. For example, if the issue was an off-color joke or single incident that's relatively minor, and the person responsible admits the action and didn't realize it was offensive, a simple talk with the person may resolve the issue. Even so, follow-up might be needed to ensure that the behavior doesn't continue and that no retaliatory actions were taken against the person making the complaint.

Complaints from a victim or witness

When a victim or witness reports unwanted conduct by another employee or by a supervisor, the situation needs to be handled delicately.

First, provide reassurance that coming forward was proper, that the company wants to address the issue, and that the company will monitor the situation to ensure that no retaliatory action is taken. Also, provide reassurance that the investigation will be kept as confidential as possible. However, there are also some things employers should not do.

Avoid making dismissive comments such as, "That's not a big deal," or "I think you're over-reacting." Just as bad is going the other way and attempting to empathize by making comments such as, "That was a horrible thing for him to say," or "You must feel terrible." These types of comments tend to create expectations about the outcome of the investigation, and the company doesn't have all the facts yet. Even if it seems the complainant is over-reacting, or the person who made the alleged comment has been warned in the past, do not make comments that characterize the behavior.

Also, do not guarantee complete confidentiality, since a company may not be able to investigate without revealing certain information to those involved. For example, when questioning the alleged offender, it will likely be necessary to reveal what was said or done (and to whom) so the individual can defend himself or offer an explanation. However, the information should only be shared with those who need to know, and the parties should be informed that they are not to discuss the situation with anyone.

Try to obtain as much information and detail as possible, including the name(s) of the people involved, the date and time of the incident(s), and the exact action taken or comments made. The more detail, the better. Since the complaining employee may have come forward reluctantly, getting these facts may require some coaxing.

The statement should also be documented. If the complainant simply refuses to write down the information, conduct the interview, write up notes, and later ask the person to verify the accuracy, make any corrections, and sign the statement.

Ideally, the employee will allow the company an opportunity to address the issue. However, the employee should be informed of his or her right to file a complaint with the EEOC or state agency. In most cases, a complaint must be filed within 180 days of the alleged event. However, this time limit is extended to 300 days if the charge is also covered by a state or local anti-discrimination law — and most states have laws that cover the same categories as the federal laws.

Complaints from an enforcement agency

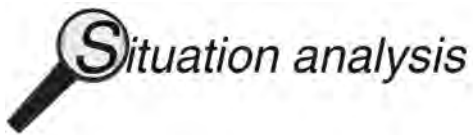
Sometimes, a company only learns of a complaint when it gets a notice from a state or federal enforcement agency. In this case, it should still immediately launch an internal investigation to determine the facts. Starting sooner usually provides better information, since people's memories tend to fade over time. Also, if the conduct is ongoing, the company can take interim actions to stop the behavior. Finally, if a government investigator shows up, the company wants to be able to show that it didn't ignore the complaint.

Employees might bypass the internal complaint process for any number of reasons:

- They didn't know about it or didn't understand the process (like who to contact).
- The supervisor was the harasser, and the victim was afraid that the supervisor's version of the events would be believed.
- The person didn't have faith in the internal process (believing it was not effective, not confidential, etc.).

It's even possible that the complaint is baseless, and the complainant thought that a government investigation would "punish" the company for some reason. In similar cases of safety issues, employees have been known to make false OSHA complaints to retaliate against their company for perceived mistreatment.

Any time a company receives a serious complaint, it may want to contact an attorney for guidance on how to proceed, especially if the EEOC or another enforcement agency is involved.



A harassed employee does not want action

A long-time female employee reports some harassing things one of her male coworkers has been doing over the last few months. She didn't say anything before because she figured he'd stop, but he hasn't, and it's obviously been wearing on her.

The incidents aren't severe, but are troubling enough to be bothersome. He has made some comments to her that are sexual in nature. The company needs to get involved, but she doesn't want to get her coworker in trouble, and has specifically asked the company **not** to do anything about it.

This is a difficult situation, but the company needs to act, even if the alleged victim doesn't request a response. Sexual harassment is illegal, and failure to act doesn't cut it in the eyes of the law. In fact, taking prompt action is an affirmative defense if an employee decides to sue the company for *not* taking action to stem the harassment. To win this type of sexual harassment case, the harassed employee would have to show that:

1. The conduct rose to the level of sexual harassment,
2. The employee used the proper channels to report the harassment to no avail, and
3. The company didn't act quickly or reasonably enough to stop the harassment.

Once an employer knows about harassment, it must take immediate action to investigate it and stop it. Otherwise, the company can be held liable for the conduct. Legally, it doesn't matter if the alleged victim doesn't want action — an employer can't allow harassment to continue once aware of it.

Inform her there may be others who have been harassed by this person in the past, are currently being harassed, or will be harassed in the future if this isn't addressed. Tell her the situation is unacceptable and the company has an obligation to provide a workplace free from harassment for her and for others. Assure her that this kind of behavior can't be allowed to continue.

She may be concerned about confidentiality and repercussions. Employers can't guarantee confidentiality because they must tell the alleged offender where the

complaint came from so he can properly defend himself. It may also be necessary to reveal her identity when questioning witnesses. However, make all efforts to keep this matter as confidential as possible, and require the other employees interviewed to keep it confidential as well. Tell her they may be disciplined if they don't, and also that if she suffers any repercussions or retaliation from *anyone*, that she should report it immediately.

Retaliation may even come from coworkers who are on his side. Check in with the victim periodically to see if there are any problems — don't expect her to come forward, as she is likely a reluctant participant in the investigation.

Interim actions

Depending on the number of people affected or accused and the length of time that the behavior has been going on, an investigation may take a few days (or longer) to complete. There will be witnesses to interview, records to create, statements to collect, and so on.

During the investigation process, it may be necessary to take some interim actions to prevent further problems. The most common issues to address involve making sure that the behavior stops immediately, ensuring that the people who complain or assist in the investigation are not retaliated against (directly by the accused, by other employees, or inadvertently by the company), and taking other actions as appropriate.

As soon as management learns about alleged discrimination, it should determine if a detailed investigation is necessary. If so, the investigation should begin immediately. The time required to complete the investigation will depend on the circumstances.

It may be necessary to take intermediate measures to ensure that further discrimination does not occur. This might include scheduling changes to avoid contact between the parties, transferring the alleged harasser, or placing the alleged harasser on non-disciplinary leave with pay during the investigation. The complainant should not be involuntarily transferred or otherwise burdened, since such measures could constitute unlawful retaliation.

Preventing continued discrimination

The steps necessary to prevent future incidents could be complicated. As noted above, the employer may need to separate the parties, and should not burden the complainant. So, what happens if a woman complains that five men have been harassing her? Does the company have to transfer or suspend all of them?

Each case can be unique, and the employer should establish some general procedures on what options are available to handle these issues so it won't be making things up as it goes along. That way, it's less likely to take the wrong action — one that could be viewed as unintentional (but still unlawful) retaliation.

Preventing retaliation

The alleged offender should be notified that retaliation against the complainant or witnesses is unlawful, whether or not the discrimination is proven true. It should be clearly noted that retaliation can be overt or subtle, including increased productivity requirements, negative evaluations that aren't justified by performance, undesirable assignments, and closer scrutiny of time and attendance.

Employee Relations Essentials

After an investigation has been completed and the complaint has been resolved, it may be necessary to monitor any actions taken against the employee who complained, and anyone else who participated in the process, to ensure that no retaliation is occurring.

Credibility

Nearly every complaint, regardless of how minor, may involve credibility issues. Supervisors may know employees better than those in Human Resources because supervisors have daily contact with employees. Therefore, they may be better able to evaluate credibility — assuming they don't have any personal bias on the issue.

The person taking the complaint may need to be skilled in “reading” people in order to assess whether the person is reporting factual information or appears to be hiding something. This may not be easy to determine because an employee being interviewed may be nervous, and nervous employees could exhibit body language that could easily be mistaken for dishonesty.

Also, be wary when taking notes about credibility. A dismissive note such as “he seems to be over-reacting” might sound like an opinion about the outcome of the investigation, and these conclusions should not be made until all the facts are collected. Credibility determinations should not be finalized until the investigation is complete.



Making sense of a he-said/she-said situation

A situation *may* have occurred, but details are unclear. The incident allegedly involved sexual harassment of a female employee (Amber) by a male employee (Ralph). Amber reported that Ralph repeatedly made sexual advances toward her, even though she told him that he was making her uncomfortable. She also indicated that she clearly asked him to stop. When asked if anyone witnessed these advances, Amber says that she and Ralph were always alone when the incidents occurred.

When questioning Ralph about the allegations, he indicates that he and Amber used to date, but he broke up with her about a month ago. According to Ralph, Amber was pretty torn up over the breakup. However, he denies making any sexual advances toward her.

Both Ralph and Amber are long-time, well-regarded employees, and neither has caused any trouble in the past. Without any witnesses to the alleged incident, management is not sure who to believe, and wonders what to do about the situation.

Don't consider the case closed just yet. While this kind of limited and conflicting information does make it difficult to ascertain the true circumstances, it will not justify inaction after a claim of sexual harassment has been made.

Since the information is limited, it will be important to examine the credibility of both Amber and Ralph. First, be sure to make notes immediately after the conversations with both individuals, including observations about both verbal and non-verbal communication received from the two employees. Make a conscious effort to stick to the facts. For instance, make a note if Ralph failed to make eye contact when talking about the situation, but don't write down that he "looked guilty."

Pay attention to the demeanor of both individuals. Consider whether both stories are believable, given each individual's history. Does the person have motivation to lie? Was he or she cooperative in sharing information? Do the details of each employee's story seem consistent over multiple interviews? In this case, what would Amber say if asked about Ralph's explanation that the two employees dated and then broke up?

Another thing to consider is that even though no one was actually present when the alleged incidents took place, there may still be witnesses to some degree. For instance, ask Amber if she spoke to anyone after the situation allegedly occurred. If possible, interview any such witnesses without giving Amber a chance to coach them on what to say.

There also might be individuals who could confirm Ralph's claims of his and Amber's prior relationship. Along with witnesses, consider other sources that could corroborate either side of the story. For example, if the two employees did amiably date for a time, there may be email exchanges to corroborate the story.

Even if other employees can't provide insight on the exact situation, they might be able to talk about Ralph and Amber's general interactions. Pay particular attention to whether anyone noticed a change in the way the two employees related to one another around the time of the alleged incident. Learning that their relationship *didn't* seem to change around that time also gives valuable information.

Situations like this can be labor intensive to investigate, but employers have a duty to look into such claims, even when it seems that information will be scarce. Unfortunately, there will probably be times when considerable effort won't provide a clear conclusion about what happened. Even if this is the case, a sincere investigation will demonstrate to all employees that the company respects them and their rights. If the company is taken to court over the matter, it can at least prove that it took the situation seriously by showing the steps it took to investigate the issue.

Responding to stop the conduct

In many cases of minor misconduct, interviewing the complainant and the harasser will be sufficient to address the issue. Any process that identifies all relevant information and effectively addresses the situation is sufficient. Sometimes, the extent of the behavior, the number of people involved, the status of those involved (like supervisors), or the degree of action taken (like constructive discharge) will require a more extensive investigation. However, the steps taken in receiving a complaint can set the groundwork for an investigation.

The dangers of retaliation

When an employee complains that he or she is the victim of harassment or discrimination, it triggers a right for that employee to be protected from retaliation for making the complaint. Where such cases have gone to court, juries have awarded thousands or even millions of dollars to individuals who were retaliated against by their employers for making such a complaint.

Employee Relations Essentials

Anti-retaliation provisions are found in a number of statutes, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), the Equal Pay Act (EPA), the Fair Labor Standards Act (FLSA), and the Family and Medical Leave Act (FMLA).

Retaliation consists of a negative employment action against an employee because he or she engaged in a legally protected activity. This activity can include such things as:

- Complaining about discrimination,
- Filing an OSHA complaint,
- Filing a workers' compensation claim,
- Complaining about unequal pay, or
- Alerting authorities to unethical business practices.

Even where retaliation may not be specifically prohibited by law, it is generally held to be against public policy to take a negative employment action against an employee who, for example, files for workers' compensation or takes time off from work to serve on a jury.

Retaliation can take a number of forms. It can be a direct employment action such as termination, demotion, undesirable transfer, or a material change in job duties or conditions of employment.



Retaliation can also take the form of harassment by coworkers, creating a hostile work environment that makes it more difficult for an employee to do his or her work. It is not uncommon for coworkers to harass an employee for, as they see it, “getting another employee into trouble.” However, companies have been found liable for not preventing this type of retaliation as well.

When an employee formally complains of discrimination, sexual harassment, or unethical business practices, it can create tension in the workplace. Supervisors must not treat the employee differently than they did before he or she complained.

Be wary of making any substantial change in the employee's job (especially when the change affects **ONLY** that employee and no others), so that it doesn't look like retaliation. This isn't to say that a company can't discipline the employee if he or she does something that warrants it, but be sure the reason for the discipline is well documented.

What is retaliation?

The U.S. Supreme Court expanded the definition of retaliation when it comes to employment actions. In the case of *Burlington Northern & Santa Fe Railway v. White* (2006), the court held that the employer retaliated against a female employee for complaining of sexual harassment. The employer did two things: transferred her to a less desirable job assignment; and suspended her without pay for 37 days, although she was later reinstated and paid back wages for that time.

The woman was the only female forklift operator in a rail yard. After she complained about a supervisor's sexual harassment, she was transferred to a job as a track worker, which was more physically demanding and did not take into account her forklift experience. She also was suspended for insubordination. Those charges were later dropped, and she was paid back wages for the time she was on suspension.

While the lower court had held there was no economic damage done to her because she received all wages, the Supreme Court disagreed, stating that it was no small thing for her to live without a paycheck for 37 days, not knowing if or when she would be returning to work. When she did return, she was reinstated to the less desirable position.

The court created a new standard for defining retaliation: It is any materially adverse action taken by an employer that would "dissuade a reasonable worker from making or supporting a charge of discrimination."

Employers must be extra cautious about how employees who file complaints are treated. Here are ways to avoid a transfer that may look like retaliation:

1. Have procedures in place so that Human Resources is notified whenever a supervisor decides to transfer or reassign an employee who has registered a complaint. If the reassignment is to a less desirable position or job task, it may look like retaliation.
2. Have procedures in place to review any changes to the job of an employee who has filed a complaint before those changes are made. Train supervisors to avoid taking any action that looks like retaliation.
3. If there are clearly objective business reasons for the transfer or reassignment, those should be well documented.
4. If other employees who did *not* file a complaint are similarly transferred to a less desirable job, that should be documented as well. It may be proof that the transfer has nothing to do with the complaint.

Verbal complaints are protected

The United States Supreme Court ruled on March 22, 2011, that termination of an employee for making a verbal complaint about wage issues is unlawful. In *Kasten v. Saint-Gobain*, the employee (Kasten) claimed he was discharged because he complained about the location of time clocks.

Employee Relations Essentials

Generally, employees must be paid for time spent donning and doffing protective equipment, so they are usually instructed to “punch in” before putting on that equipment, and “punch out” after removing it at the end of the day. Kasten complained that the time clock location required employees to don their gear before punching in, and to remove their gear after punching out, which denied wages for the time. After he repeatedly raised this concern, he was terminated.

When the claim went to court, the trial court effectively dismissed the case. The issue was that the Fair Labor Standards Act (FLSA) forbids employers from discharging an employee for having “filed any complaint,” and the court did not feel that a verbal complaint could be “filed.” Kasten appealed to the Seventh Circuit, which affirmed the ruling.

Kasten then appealed to the U.S. Supreme Court, which found that the termination was unlawful retaliation. While awaiting this decision, several attorneys noted that if an employee could be fired for making an oral complaint, this might create an incentive to fire the employee before the individual could put the complaint in writing.

In the ruling, the Supreme Court indicated that Congress had not intended to mandate a written complaint, since the FLSA (written in 1938) was intended to protect illiterate and less educated workers. Limiting the scope to written complaints could even prevent government agencies from using hotlines, interviews, and other oral methods to receive complaints. It would also discourage using informal workplace grievance procedures to address compliance issues.

Employers should be aware that a verbal complaint made by an employee should be treated seriously, and that adverse action taken against the employee because of such a complaint can be unlawful.

NLRA rights

Non-union employers often make the common mistake of ignoring all things union, because they don’t believe such things apply to them. However, as a dental organization found out, that can be a costly mistake.

In 2006, a group of dental association employees met to discuss poor management and unfair treatment. The meeting resulted in a petition to delegates of the organization asking for an outside investigation of management and working conditions at a headquarters office.

The director of the association began an investigation and found a fragment of the petition on an employee’s computer, and fired him. A supervisor who refused to divulge the names of the employees who signed the petition (they used aliases) was also fired.

The two employees went before an administrative law judge, who found that both were fired unlawfully — the first employee for engaging in legally protected activity, and the second for refusing to engage in unlawful activity by giving the names of the employees who signed the petition.

Section 7 of the National Labor Relations Act (NLRA) states, in part, that “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection...”

Correspondingly, Section 8 of the NLRA states that “It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7...”

Nothing in the NLRA states this only pertains to union employers, and indeed, it is not limited to them.

Employee Relations Essentials

The employer then appealed to the National Labor Relations Board (NLRB), which upheld the ruling in favor of the former employees. Then the employer appealed to the Fifth Circuit Court of Appeals, but settled the case while it was pending.

In the settlement, the employer agreed to pay \$900,000 to the former employees (jointly) and provide them with neutral references. The employer also agreed to post a notice to employees informing them that they can't be fired for acting together for mutual aid and protection.



Talking about wages

Employers should know that prohibiting or even discouraging employees from comparing their wages with each other is a violation of the NLRA.

The NLRA provides employees with the right to discuss the terms and conditions of their employment with their coworkers. This is called “protected concerted activity.” The Act also prohibits employers from interfering with this right.

One company learned just how demanding the NLRB is about these things. The company had a confidentiality provision in its handbook stating that the company management “...recognize and protect the confidentiality of any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters.” (The company refers to its employees as “partners.”)

In this case, there was a union, and it filed a complaint alleging that the language in the handbook unlawfully restricted employees from exercising their rights to discuss terms and conditions of employment with each other. The company argued that the union’s interpretation of the provision was too broad, and that there was no evidence the language restricted such rights. The company even pointed out that it did not, in practice, restrict discussion about terms and conditions of employment, including discussion of wages.

The administrative law judge (ALJ) nevertheless held that the mere existence of such a rule violated the NLRA. On appeal, the NLRB agreed with the decision, indicating that the provision could reasonably be construed to restrict discussion of wages and other terms and conditions of employment with coworkers and with the union (*Cintas Corp. v. NLRB*, March 16, 2007).

Employee Relations Essentials

Unfortunately, it is still common for employers to discourage or prohibit employees from discussing their wages and benefits with each other. What is troubling is that many policies state this in plain language. If the language of the policy above, which is quite vague, was interpreted as being a violation, then any language that more clearly discourages employees from discussing their wages would certainly have a tough time withstanding legal scrutiny.

Despite the seeming inflexibility of the NLRB's position regarding policies against pay and benefit discussions, there are some limits.

One limit involves the manner in which employees exercise their rights. The law entitles employees to have such discussions, but does not require employers to allow them when employees should be working. However, singling pay discussions out for prohibition, while allowing other types of conversations unrelated to work, might be evidence of intent to violate employees' Section 7 rights, so be careful in that regard.

Also, it makes a difference how employees obtain the salary and benefit information. Employees discussing their own information are protected, as are employees discussing the pay and benefits of others if they obtained that information through ordinary conversations. However, if employees access files or offices that are off-limits in order to get the pay and benefit information, or cause others to break access restrictions to provide confidential information, and the company has clearly taken steps to restrict the information and uphold its confidentiality, the employees may find themselves unprotected by the NLRA if they are disciplined, or even discharged, for participating in the access violation.



Best practice

Practical tips

As an alternative to flatly prohibiting employees from discussing their pay and benefits, consider the following:

In the context of a general discussion about the importance of devoting time to work during work hours, counsel employees that it is all right to discuss various things at work (keep it general — do not single out pay and benefits), but as in most things, moderation usually works best. There is a fine line between being conversational and being a time-waster. Take care not to hold this discussion in a threatening manner, such as implying that anyone who talks too much about their job conditions will be subject to discipline. That could easily be perceived as promoting a chilling effect on employees exercising their Section 7 rights.

Do not be afraid to promote what is right for the company. Inform employees that pay and benefit practices are competitive with other companies, and promote the company's practices regarding advancement, merit increases, and open-door policies. The more that employees know where they stand, and the more they feel that they have a stake in the company and its success, the less need they will feel to spend time talking about their pay and benefits.

Many employers use sample policies found on the Internet or questionable sources, and some employers draft their own policies. Concerning pay and benefit discussion policies, this is not a good idea. This area of the law is so little-known by most employers and so fraught with

potential problems that any employer considering writing or enforcing a policy restricting discussions of pay and benefits should consult an employment law specialist who is knowledgeable about NLRA issues before taking any actions.

Employee use of social media

Since 2011, the National Labor Relations Board (NLRB) has been actively involved in an ongoing conversation about the extent to which employees can use social media to discuss their employers. The NLRB says that the right to discuss wages, hours, and working conditions, as well as the right to engage in other protected concerted activity, includes the right to hold these discussions on social media sites.

In a memorandum dated April 12, 2011, NLRB Acting General Counsel Lafe Solomon stated that Board cases involving social media issues must be submitted to Board General Counsel for decision. Specifically, the memorandum stated that “cases involving employer rules prohibiting, or discipline of employees for engaging in, protected concerted activity using social media, such as Facebook or Twitter” must be submitted because “there is no governing precedent.”

Employers may face situations in which employees who publicly criticize the organization will be exercising their Section 7 rights and cannot be disciplined or retaliated against because of such criticism. Still, the fact that some employee behavior is protected doesn’t mean that *any* derogatory posting has to be allowed.

Most of the cases that make headlines involve situations in which the employer violated an employee’s NLRA rights. However, guidance from the NLRB includes a discussion of cases in which employees were *not* protected under the NLRA because their actions did not qualify as “concerted activities for the purpose of collective bargaining or other mutual aid or protection.”



In order to be engaged in protected “concerted activity,” employees must discuss the terms and conditions of their employment *with other employees*, not merely with friends or family members. Also, the employee should be discussing a protected topic, not merely making complaints.

In one case, a bartender was fired for a Facebook post that insulted his employer’s customers. In the post, which the employee made in reply to a relative’s inquiry about his night at work, the employee also complained that he hadn’t had a raise in five years and that he was doing the work of the waitresses without tips.

While the employee did discuss terms and conditions of his employment (his complaints regarding the tipping policy and his lack of a raise), he did not do so with coworkers, and no coworkers responded to his post. Because the employee's actions did not qualify as "concerted activity," the NLRB found the employer's decision to terminate acceptable.

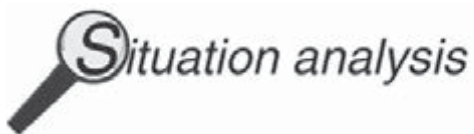
In another case, a newspaper reporter used his Twitter account (which identified him as a newspaper employee) to criticize the employer's copy editors. In response, the employer instructed the individual to refrain from airing his grievances or commenting about the newspaper in any public forum. While the employee did not tweet further about the newspaper, he did post inappropriate tweets relating to homicides in the city as well as several containing sexual content. Later, he posted a tweet criticizing a local television station, though he later apologized to the station via email for his comment.

Eventually, the employee was terminated for disregarding instructions to refrain from using social media to make derogatory comments that could damage the newspaper's reputation. In this case, the NLRB also found the employer's decision to terminate acceptable, because the employee's conduct did not relate to the terms and conditions of his employment or seek to involve other employees in issues related to employment.

These examples should help employers understand that there *are* situations in which employees may be disciplined for disparaging remarks made on social media sites. However, be aware that what begins as an individual gripe could turn into protected concerted activity *if* the complaining employee's coworkers join in on the conversation. For instance, if — in the case above involving the bartender — other employees had joined in and complained about employment conditions, the NLRB may not have found the employer's decision to terminate to be acceptable.

So, the guidance received from these cases is that:

1. Employees should not be told they will be terminated or disciplined for posting disparaging comments about the employer on social media sites because such comments may be activity protected by Section 7 of the NLRA.
2. This prohibition applies to both union and non-union employees alike.
3. Employees who make comments that are unprofessional or inappropriate that DO NOT discuss terms and conditions of employment can probably be disciplined.



Not everything is protected

In 2013, the NLRB released two reports concerning employee use of social media, whether in or outside the workplace. Many of the cases pertained to "protected concerted activity" under the NLRA. However, the NLRB also cited cases in which employees' social media activity was not protected.

In one case, an employee reported to his supervisor that he was feeling ill and asked to go home. The supervisor reminded the employee that the absence would cost him an attendance point, but indicated the employee should go home if he wasn't feeling well. The employee didn't want to accrue the attendance point, so he finished his shift.

After work, the employee used his Facebook account to complain about his supervisor's apparent lack of concern for his health. His Facebook friends (but no coworkers) responded to the post. The online conversation included his opinion that the company was trying to fire him and that he was "a hair away from setting it off." After he called in sick the next two days, the HR manager told him that the company was aware of his posts and interpreted his comment about "setting it off" to be a threat. He was eventually discharged for the perceived threat.

The NLRB ruled that even though the employee's post discussed terms and conditions of employment, he didn't seek to engage coworkers in the conversation. His comments weren't an outgrowth of prior employee meetings or attempts to initiate group action regarding the absenteeism policy. As such, he was just venting rather than participating in protected concerted activity under the NLRA, and the NLRB determined that his termination did not violate the Act.

It may seem like employees have a lot of freedom to criticize their employers on social media, but there are limits to the NLRA's protections. If a social media post does not seek to initiate or induce coworkers to engage in group action, or does not include discussion among employees regarding terms and conditions of employment, it likely will not meet the definition of concerted activity and will not be protected.

Be wary of employees "acting alone"

Employers must be wary, however, when taking action after a single employee has made such comments. There is a legal concept known as a "pre-emptive strike" which says that an employer who disciplines an employee for discussing protected topics, but does so before the employee has spoken to coworkers, might still be in violation. For example, employers cannot prevent a protected discussion by firing an employee before he has a chance to raise the issues with coworkers.

Similarly, evidence such as Facebook postings might suggest that an employee was acting alone. However, if the postings arose from previous verbal discussions, the postings can still be protected. The NLRB has found that activity can be protected if it is a continuation of previous protected activity or arose from a protected discussion.

Finally, while an employee might seem to be acting alone in some cases, or acting in his or her own self-interests, it is possible for the protections to apply. The NLRB does not require that other employees elect or approve of a specific individual as their spokesperson. For example, if an employee is protesting something that would benefit all employees (such as unfair enforcement of a dress code), his actions may be protected "concerted activity" even if he is not acting on the authority of other employees.

Requests for accommodation

Of all the protected classes covered by state and federal discrimination laws (from age to sexual orientation), two categories are unique. They are disability and religion, and what makes them unique is that employers have a duty to provide accommodations — or at least attempt to find a reasonable accommodation.

An accommodation is "reasonable" if it does not create undue hardship on the company or other employees. However, while the term is the same for both laws, the definition is different.

For employees (or applicants) with a disability, a reasonable accommodation is one that does not impose a significant difficulty or expense. This standard varies because each employer has different resources, and even the department in which the employee works may have variable

ability to make adjustments. The average cost of such accommodations is around \$170. An example might be providing a tall stool for an employee who cannot stand for long periods of time, allowing her to continue working while sitting.

For employees who wish to exercise a religious belief or practice, a reasonable accommodation is one that will not incur more than a *de minimis* cost, which typically means more than ordinary administrative costs. A typical example would involve a request for a day off to make a religious observance, which might require another employee to work overtime on that day. Occasional overtime is not normally evidence of hardship, but if an employee cannot work on Saturdays or Sundays because of his religion, and this would result in overtime every week, the requested time off would likely result in more than a *de minimis* cost.

Disability accommodations

Finding an accommodation for an employee with a disability does not have to be complicated. It mostly involves sitting down with the employee to discuss the situation and the employee's needs. This is known as the interactive process. Technically, there is no law or regulation which references the interactive process. However, courts have found that a failure to accommodate claim often involves a failure to engage in the interactive process. Also, the EEOC has ordered employers (who were in violation) to provide training on the process. It basically involves six steps:

1. Recognize an accommodation request.
2. Gather information.
3. Explore accommodation options.
4. Choose an accommodation.
5. Implement the accommodation.
6. Monitor the accommodation.

Recognizing a request may not be as easy as it appears. An employee does not have to use the word "accommodation" nor mention the Americans with Disabilities Act. The employee only needs to make the company aware that he or she needs a change in the workplace related to a medical condition or disability. For example, an employee who provides a doctor's note listing work restrictions may be asking for accommodation. Similarly, an employee who reports that his wheelchair doesn't fit under his desk is asking for an accommodation.

When a request is recognized, many employers want to start gathering medical information. However, this might only be necessary when the need for accommodation is obvious. From the wheelchair example, it should not be necessary to gather medical information to accommodate the employee whose wheelchair does not fit under his desk. However, if the need for accommodation is not obvious (e.g., an employee claims to have bipolar disorder) or if the company needs more information to determine the extent of the employee's abilities and limitations, then medical information might be needed.

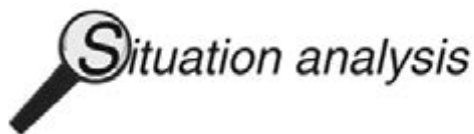
Remember that a request for medical information must be job related and consistent with business necessity. For example, a company may need to know how much weight an employee can push or pull, but will not need details about diagnosis or treatment (although the company may ask for an estimate of how long the accommodation might be needed, if temporary, since that may be relevant to determinations of undue hardship).

Exploring options is where the company sits down with the employee. Both parties may suggest options, but the company is ultimately responsible for choosing an accommodation. It does not have to be the option suggested by the employee, as long as it would be effective. For example,

if an employee requests time off because he cannot walk around the facility without pain, the employer might suggest that he use a golf cart to travel around the facility, and this may allow him to continue working.

After implementing the accommodation, the situation will have to be monitored to ensure that the accommodation is effective. If not, another option may have to be selected. In some cases, an employee's condition may improve (or get worse), or other changes to work procedures or staffing levels may necessitate a change in the accommodation.

Note that there is no time limit beyond which accommodations can be stopped. The duty to accommodate continues as long as the employee has a need.



But I have a disability!

During a discussion of performance issues, an employee may point out that he or she has a medical condition or disability. The supervisor may be uncertain how to respond, and may even worry that moving forward with the performance discussion will somehow be viewed as disability discrimination.

In such cases, the best response is for the supervisor to ask the employee whether he or she needs an accommodation for the condition. If the answer is yes, the interactive process of identifying possible accommodations may begin. However, if the answer is no, the supervisor may clarify that the medical condition or disability therefore does not appear to be relevant to the employee's performance, and may continue with the discussion.

The supervisor may also remind the employee that if he or she needs an accommodation at some point in the future, the company will be ready to discuss possibilities. Otherwise, the employee is required to meet expectations.

Pregnancy accommodations

The federal Pregnancy Discrimination Act does not actually require employers to offer accommodations. However, it does require employers to extend the same considerations to pregnant employees as would be given to any similar situated employee who is similarly restricted in his or her ability to work (but for reasons other than pregnancy). For example, if you offer modified work or adjusted hours to employees experiencing other medical conditions, you should extend the same offers to employees who are pregnant.

Some state laws may actually require accommodations, similar to those offered for employees with disabilities. Minnesota and New Jersey were among the first states to adopt such laws, both in 2014. However, employers should check for state requirements that may be added or revised.

Religious accommodations

Requests for religious accommodations can follow a similar interactive process, although the request should be easier to recognize (the employee will most likely mention a religious practice as the underlying reason) and the step for gathering information would not be relevant. Some

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employers have asked if they can request documentation supporting a request for religious accommodation, but this isn't usually feasible. Part of the problem is that an employee may have beliefs that are not shared by his or her church, so no documentation can be obtained, but they can still be considered valid religious beliefs or practices.

Recognizing a request can sometimes be a challenge, typically in determining whether the request is protected. For example, one case involved an employee who requested time off to help his church prepare for a Christmas play to be put on by children of the congregation. The court found that helping to set up the stage was not a "religious" practice, but was merely a community activity.

Employers might also question the sincerity of the belief, but cannot question the validity. For example, an employee who has recently "found religion" might make a request that has never been made in the past. The employer cannot question whether the practice or belief is valid (or whether it is shared by the church, which ties in with the problem of requesting documentation).

However, the employer can question the employee about the sincerity with which a belief is held, particularly when it is not a conventional religious belief (since the term "religion" includes moral and ethical beliefs that are held with the strength of traditional religious views).

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For example, if an employee says he cannot work with meat products because he is a vegetarian, the company might question him about the strength of his views and the nature of his objection.

Remember that the standard for hardship is much lower for these accommodations, so employers have more leeway to deny a requested accommodation.



Religious expression in the workplace

An employee says she's offended by a cross displayed in a coworker's office. The company doesn't have a policy that covers religious displays, so should the person be asked to remove the cross?

Employees probably display personal items at work, such as family photos and knickknacks. The display of religious items should be allowed to the same extent that the company allows other (non-religious) items. Employers are required to reasonably accommodate the religious beliefs or practices of employees unless doing so creates an undue hardship.

The Equal Employment Opportunity Commission has a policy guidance which states: "Religious observances or practices include, for example, attending worship services, praying, wearing religious garb or symbols, displaying religious objects, adhering to certain dietary rules, proselytizing or other forms of religious expression, or refraining from certain activities."

The guide also notes that "workplace displays of religious artifacts or posters that do not demean other religious views generally would not constitute religious harassment." This means that even though another employee might be offended, the cross does not constitute unlawful harassment based on religion.

Of course, employers do not have to allow material that a reasonable person would find offensive. For example, if an employee displayed a graphic abortion poster with a religious message, the company could require the employee to remove it on the grounds that a reasonable person would find it offensive.

Some employees feel it is their religious duty to proselytize to their coworkers or try to convert them. They may talk to others one-on-one, distribute literature, or habitually use a religious phrase such as "God bless" or "Have a blessed day."

Other employees may want to engage in prayer at their work stations or use other areas of the workplace for individual or group prayer or study. An employee might request accommodation in advance, or the company may not find out until getting a complaint from an employee or customer.

In determining whether permitting an employee to pray, proselytize, or engage in other forms of religiously oriented expression would pose an undue hardship, employers must consider the effect the activity has on coworkers, customers, and/or business operations.

If an employee's proselytizing interferes with work, the employer doesn't have to allow it. For example, if an employee complained about a coworker proselytizing to her, the company can require that the proselytizing stop. If an employee is proselytizing to customers or clients and causing complaints, or if the employee's message could be mistaken as being the company's message, the company could prohibit it.

Privacy and off-duty conduct

From time to time, employers may encounter situations that require a search of an employee's workspace, or even personal items such as a purse or briefcase. For instance, an employer may be looking for stolen property or attempting to ascertain the presence of drugs.

An employee is suspected of taking small items from the business and, in fact, it appears that she has something in her pockets right now. Can the company search her? If she refuses to empty her pockets, can the company hold her until the police arrive?

An employee reports that a coworker is keeping alcohol in his locker. Can the company search it?

Privacy issues like these tend to arise unexpectedly, but they need to be understood and handled appropriately.

Though potentially allowed, a search is still an invasion of employee privacy. This means that the employer must engage in a balancing act between legitimate business concerns and the employee's common law right to privacy, as recognized by courts. Establishing and communicating a search policy informs employees that searches may be conducted, and removes the expectation of privacy. Even with a policy, supervisors should not poke through someone's office without a good reason. Employees tend to regard their workstations as "personal space" even if they know that such areas are subject to a search.

Searching an employee

The difference between searching property (such as a locker) and searching a person is vast in terms of privacy rights. Employers have no authority to physically touch an employee as part of a search; even if the employee consents, it's not advised.

If the company suspects an employee has something that belongs to the company on her person, employers can ask the employee to empty her pockets and her purse. She doesn't have a legal obligation to comply, but refusal can result in discharge from employment. However, frisking or patting down an employee, even with witnesses present and with her consent, could result in charges of assault and battery, or even sexual harassment or sexual assault.

If she is uncooperative and refuses to wait until police arrive, the company can't physically hold her against her will. The employee could allege unlawful restraint or false imprisonment. Again, an employer can tell her that her job may depend on waiting. However, if she insists on leaving, it's best to let her go and let the police handle it.



Best practice

Tips on searches

It may not occur often, but there will come a day when a supervisor might have reason to conduct a search of an employee's desk, locker, or personal belongings. It's imperative that supervisors are trained to properly conduct such a search, because in so doing, they may encroach on real or perceived privacy rights.

Before any search is conducted (or even contemplated), it's important that employees know they have little right to privacy in the workplace. Their desk, computer, and phone are all company property — as are the messages kept on them.

If the company doesn't have a formal privacy policy, let employees know in some other way that they lose their privacy rights at work. Removing the expectation or illusion of privacy is important for preserving the right to search.

Searching company property

When it comes to searching an employee's locker or desk, employers have more rights because it is company property. Be wary, however, if employees are allowed to use their own locks on their lockers: Courts have held that employees have a greater expectation of privacy when they are in full control of their lockers.

Instead, it is recommended that an employer issue locks for the lockers and let all employees know the employer has a master key. This greatly diminishes the expectation of privacy on the part of the employees.

In a search involving a locker suspected of housing alcohol, have more than one member of management conduct the search to ensure the presence of impartial witnesses. The employee need not be present, but if he or she isn't there, it's easier for the employee to allege that management "planted" evidence in the locker. If the employee witnesses the search, he can protest, but can't stop a search of company property.

In a union environment, it's advisable to conduct a search with a union representative as a witness (and may in fact be required in the collective bargaining agreement). A union rep can also witness that management didn't "plant" anything in the desk or locker.



Best practice

Manner of searching

A search should be a last resort after all other options have been exhausted. First, attempt to identify and interview any witnesses, or check computer records and

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video surveillance to determine if the accused was in the area at the time of the alleged violation. If a search is still deemed necessary, follow these best practices:

- **Include a second, impartial person (such as someone from HR) to observe the search.** If possible, the employee should be present to refute any accusations that evidence was planted. In a union setting, a union steward should be present.
 - **Choose the least invasive method of searching.** Rather than taking an employee's purse and dumping it out, ask the employee to remove all items and demonstrate that the purse is empty. Never touch an employee or search his or her clothing. Unwelcome physical contact may result in accusations of assault. Instead, ask the employee to empty his or her pockets.
 - **Do not prevent an employee from leaving.** Even standing between the employee and the exit may result in claims of false imprisonment if the employee does not feel free to leave.
-

As far as searching an employee's personal property such as a purse, briefcase, or lunch box, that should be done in the employee's presence, and in fact, it's best to have the employee empty out the contents, though not required. It's even more important in this situation that employees know in advance that they don't have a right to privacy in the workplace, and that the employer may subject their personal property to a search if there is good cause to suspect they have company property in their possession that they should not have.

The best way to protect the company is to notify employees of their lack of privacy rights. Make sure they know not to expect any right to privacy on company-issued equipment including computers, phones, email, voicemail, desks, lockers, and whatever else they use that belongs to the company. Ideally, they should sign a form indicating they have read and understood the policy, and this should be in their employee file. That way they can't argue (at least not very successfully) that they weren't aware of their lack of privacy.



Elements of a policy

The best way to ensure that employees don't have any expectation of privacy in the workplace is to inform them they shouldn't expect it. The company should have a policy stating that

employees should not have an expectation of privacy in regard to company property, since it is owned by the company and only provided to them for their use. Have them sign a form indicating they have read and understood the policy, and put the document in their personnel file.

A policy addressing workplace searches should give examples of when searches might be conducted, such as when the company is looking for drugs or stolen property, without suggesting an exhaustive list. Random searches are difficult to justify, and should be used only when no lesser invasion of privacy would suffice, such as in cases involving employee safety. The policy should also give examples of locations or items that could be subject to a search.

A search policy may cover personal items such as handbags, lunch coolers, briefcases, or even personal vehicles. If an employee refuses to allow a search, compliance can be made a condition of continued employment. Informing an employee that he can be terminated for refusal is essentially reminding the employee of the organization's policy. However, if the employee's refusal persists in the face of possible termination, the employer must balance its needs against the employee's rights.

For example, if a vehicle search is intended to verify the presence of drugs, but the employee refuses to allow it, terminating employment may solve the problem without a search. However, if the employee is suspected of possessing trade secrets which could be financially damaging if those secrets left the premises, the employer might be more insistent about conducting the search.

The right to search personal vehicles may depend on where vehicles are parked. If the vehicle is in a common or public lot, or on a public street, showing a business justification for a search can be more challenging. For instance, if the employee was observed placing company property into his vehicle, a search may be justified. Conversely, searching for weapons may be challenging to justify if the weapons are legally possessed and not on the employer's property (some state laws prohibit searching for lawfully possessed weapons, even on company property).

Firearms in personal vehicles

Over the last few years, a number of states have adopted laws which allow employees to store a firearm in a personal vehicle, even if the vehicle is parked on company property. These laws often do not allow policies that prohibit weapons in personal vehicles.

As of March, 2014, states with such laws include Alabama, Alaska, Arizona, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Oklahoma, Tennessee, Texas, Utah, and Wisconsin.

Quite a few of these laws prevent employers from asking whether an applicant or employee has a permit to carry a concealed weapon, or prohibit making hiring or firing decisions based on such information. A few states also prohibit employers from searching an employee's vehicle for weapons, although searches may be conducted for other legitimate reasons (such as stolen property or drugs).

Although these laws appear under state concealed carry statutes, they apply only to weapons in personal vehicles. They do not prevent employers from restricting weapons in company vehicles. In addition, employers may still prohibit weapons anywhere else on company property, including outdoor areas and buildings. Essentially, employers may prohibit weapons anywhere on company property, with the sole exception of the employee's own personal vehicle that is parked in a company lot. Generally, the vehicle must be locked and the firearm should not be visible from outside the vehicle.

While employers may prohibit weapons in company vehicles, the provision for storing a firearm in a personal vehicle may extend to an employee's use of that vehicle for business. However, a prohibition against carrying weapons during work time can still be enforced. For example, a

pizza delivery driver who uses a personal vehicle could not be prohibited from keeping a firearm in the vehicle while making deliveries, but could still be prohibited from carrying the weapon on his or her person while making those deliveries.

If the business is open to the public (such as a retail outlet), the employer may post a sign which informs the public that weapons are not permitted on the premises. State laws may have guidelines for the size of the sign, the size of the letters used, or even require that specific language be used. If members of the public enter the premises in violation of the sign, they can be asked to leave, and refusal to do so is typically considered unlawful trespassing.

In most states, employers are not required to post signs for the purpose of notifying employees about any restrictions, since employees who are familiar with company policies should already be aware of any restrictions. However, employers can certainly choose to post signs, and a few state laws (Illinois in particular) may require posting even if employees are made aware of the policy through other means. Acceptable signs in Illinois are available on the Illinois State Police website at www.isp.state.il.us.

Some employers have asked if the company may prohibit weapons in general, but still allow specified individuals (such as company owners or members of management) to possess firearms on the premises. State laws do not actually require employers to prohibit weapons, and organizations that choose to do so should be able to create exceptions, as long as the policy is not discriminatory (e.g., based on gender, age, race, national origin, or other protected classes).

Employers commonly establish different policies or benefits for groups of employees such as differences in bonus eligibility, vacation accrual rates, flexible working hours, and so on. Therefore, an employer could establish a general weapons prohibition for most employees, but choose to allow exceptions for specified groups based on employment status or classification, such as management.

Do you have a permit for that?

Since most of these laws apply only to employees who have a permit to carry a concealed weapon, some employers have begun to wonder if they can ask applicants whether they possess a permit, or poll current employees regarding permit possession.

Employers should review their state laws before asking such questions. Some laws may prohibit the inquiry, whether explicitly or implicitly. For example, a law may not specifically prohibit such questions, but might prohibit an employer from conditioning employment on the answer. This may raise questions about why the employer asked in the first place.

As an illustration, employers usually avoid asking for age because of concerns about age discrimination claims, even though the Age Discrimination in Employment Act does not prohibit such questions. However, asking for the information may raise questions about how the employer will use the information.

Attempting to assert a business reason for asking about concealed carry permits might result in the need to make additional inquiries. For example, Alabama law allows employees to store a firearm in a personal vehicle during hunting season if the employee has a hunting license. An employer who claims a business need to know about firearms in the parking lot might therefore need to make annual inquiries on whether employees purchased a hunting license.

Another consideration is whether employees would answer the question. They might feel that the information is “none of your business” and refuse to answer, or provide a false answer. If state law prohibits adverse action based on possession of a permit, any disciplinary action taken

for that refusal or dishonesty might be seen as improper. That assumes the employer could uncover evidence of dishonesty, since lists of permit holders are not normally available to the public.

While some employers may be uncomfortable with these laws, asking about information that is not related to the job duties, or that is speculative, should generally be avoided.

This is not to say, however, that employers can never ask such questions, but should have a legitimate business reason for doing so. For example, most state laws which allow firearms in personal vehicles will require that the weapon remain out of sight, and should not be removed from the vehicle. If another employee reports seeing a weapon (or reports that someone was handling a weapon in the parking lot), the employer's investigation can certainly include questions about whether the individual has a permit.

Similarly, if a particular employee loses his temper and begins shouting or making threats toward others, the company may choose to ask whether that employee has a permit for a concealed weapon. The possibility that an aggressive or potentially violent employee may have a weapon on the premises can be the basis for a legitimate inquiry. If adverse employment action is taken, the employer should still be able to show that the underlying conduct (not merely the possession of a permit) was the foundation for that decision.



Video surveillance

In some cases, employers will want to install surveillance cameras. There are many legitimate reasons for doing so, such as discouraging theft or helping to catch perpetrators, monitoring for accidents or other problems, or any other legitimate business purpose. When it comes to surveillance cameras in the workplace, there are a few general rules:

Never install the cameras in areas where employees have a reasonable expectation of privacy. Such areas include restrooms, locker rooms, changing areas, breastfeeding rooms, and so on. Also, singling out a particular employee by installing the camera to view only his or her workstation is likely to be considered as crossing the line into an invasion of privacy. However, installing a camera to view an area where a number of employees have access to expensive company tools would be acceptable.

Notify employees (and the public where applicable) that they may be monitored. A simple sign posted on a wall indicating “This area may be subject to monitoring” may be sufficient. It provides notice to employees (and to the public) that they should have no expectations of privacy in that area. Giving employees clear prior notice that they should not expect privacy is a large part of an employer’s defense against a right to privacy claim.

In a unionized environment, cameras can’t be unilaterally installed without notifying the union and bargaining the issue with them. The union doesn’t necessarily have to be informed of the exact location of every camera, but it must be informed that cameras will be installed.

Giving prior notice is a key element when it comes to issues of privacy. An employee is hard pressed to claim invasion of privacy where he or she had prior notice that none was to be expected.

Employees may be recording conversations

The Houston office of the Equal Employment Opportunity Commission (EEOC) reported that about one-third of employees who contact them have recorded a conversation at work, presumably without the other party’s knowledge. While this may sound like illegal activity, in the most states, it is not. In 38 states, only one party to a conversation needs to give consent for the recording, and the person giving the consent can be the person doing the recording. The other party (or parties) to the conversation do not even need to be made aware that the conversation is being recorded.

In the other 12 states, called “two party” or “all party” consent states, everyone in the conversation must give consent to the recording. These 12 states are California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania, and Washington.

Although recording conversations might be legal, employers can still generally prohibit employees from doing so. The fact that an activity is legal does not prevent prohibiting that activity on company property. Even before many states banned smoking in places of employment, employers could restrict or prohibit smoking on company premises, though smoking is a legal activity. So it is with the recording of conversations.

Although employers can have a policy prohibiting the recording of conversations without other parties’ permission, be careful about disciplining employees who, despite the policy, record a conversation to assert a legal claim or similar legal rights. For example, suppose an employee complains of race discrimination, but the facts of the matter are unclear. Later, the employee secretly records a conversation with his supervisor in which the supervisor uses racial epithets directed toward the employee. If the employee brings this recording to the company, and suffers discipline for making the recording, it may look like retaliation for complaining about racial harassment.

Of course, employers can ask if the employee is recording a conversation. The employee might lie about it, but asking the question serves two purposes. First, it reminds everyone to keep the conversation on a professional level. Second, if the employee did lie and later produces a recording, this can negatively impact his or her credibility about other statements made.

Computer privacy

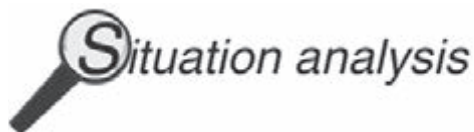
When employees use computers provided by the company (whether at the office, or using a laptop that can be removed from the workplace), the company generally has the right to search the information on that computer. Essentially, the computer belongs to the employer, and employees should understand that they have no expectation of privacy when using company equipment.

Searches of the computer might include looking at what websites were visited, reading any documents stored on the computer (even personal documents that the employee saved), or checking emails sent through a company account.

There are limits to an employer's access, however. Information stored on the computer might be fair game, but information accessed from the computer (but stored elsewhere) may be off-limits. For example, an employee might use a company computer to access a personal website such as a private email account or social media page. While the company can still search which sites were visited (and how much time was spent on those sites), the actual content of the emails or postings is stored in another server.

This content is off-limits because of a law known as the Electronic Communications Privacy Act. In short, it says that an individual (or employer) may not access information stored on a third party server (such as a Hotmail email account or Facebook page) without the voluntary permission of the content's owner.

In most cases, employers would not need the actual content to take action. For instance, if a review of the computer shows that the employee has been spending two hours per day on Facebook during working hours, the company can take action for wasting productive working time. The content of any posts made would not be relevant.



Personal computers

Employees might also use personally owned computers for business reasons. For instance, they might access email accounts remotely, or work on projects at home. Since the company does not actually own these computers, the organization does not have absolute rights to access them.

Access might be granted voluntarily, or might be obtained in response to a subpoena, but otherwise an employee's personal computer should remain private. Note that access would not be granted "voluntarily" if the employee was told that granting access was a condition of continued employment.

Although an employee's personal electronic accounts can only be accessed with voluntary permission, there may be individuals in the workplace who have such permission. For example, if an employee sends an email to a coworker (where the sending and receiving addresses are both personal, non-business accounts), the recipient could print the email and share it with anyone else.

Similarly, while an employee's postings on Facebook might be private, anyone who is "friends" with that employee could print out the posts and share them with others. In essence, anyone who has been granted access to the account can voluntarily provide access to another person.

The information provided can be helpful to the company in certain investigations. For example, if an employee complains of sexual harassment by a coworker, she might provide copies of emails sent by the alleged offender to support her claim.

In other cases, employers must use caution when taking action. For instance, if several employees have been complaining about working conditions on Facebook, any party to the discussion might share it with the company — but the discussion may be protected under the National Labor Relations Act (NLRA).



Cross reference

For more information, see the section on **NLRA rights** in this tab.

A social media policy

Even a business that doesn't make use of social media for recruiting or branding purposes can be affected by what *others* post about it, including its own employees. And unless employees have clear guidance to tell them what type of social media posting is acceptable and what is not, they may (and often do) think they have free rein to post whatever they want, including information about the company. This could pose liability for the company, so here are five reasons to adopt a social media policy.

1. Employees don't realize they owe a duty of loyalty when they're off the clock.

Employees owe a common law duty of loyalty to their employer, and this duty doesn't end at the end of their shift — it goes with them when they head out the door. The problem is, most employees don't know this. This means that an employee who makes a derogatory Facebook post about the company or its customers can potentially be terminated. If an employee's conduct puts the organization in a negative light, he may face discipline or termination, even though the post occurred on the employee's own time, on the employee's own computer.

Here's an example: A waitress at a pizza place had to work an hour longer than her scheduled shift to take care of a table that sat for hours. At the end of the night, and for all her trouble, they left her a very small tip. She was upset and complained about the customers on her Facebook page. Her employer had a policy prohibiting employees from disparaging the restaurant or its patrons on social media sites, and her employment was terminated. Even if the restaurant hadn't had a policy, her employment could have been terminated because of the common law duty of loyalty, but the policy put her on notice of what constituted unacceptable conduct and made the restaurant's position clear.

Employees must use caution in this area, however, so as not to run afoul of the National Labor Relations Act (NLRA). Under this law, employers cannot restrict employees from discussing the terms and conditions of their employment with each other. This means that social media

policies should not forbid employees from using the company name outside the course of business without permission. Since the NLRA gives employees the right to use their employers' name or logo in conjunction with protected concerted activity, such a provision would violate the law.

Social media policies also may not forbid employees from discussing opinions with non-employees. Since the NLRA specifically gives employees the right to discuss terms and conditions of employment with a third party (a union, for example), this provision would be considered overbroad.

2. Employees don't understand the nature of social media. Many employees don't understand that Facebook is not necessarily private, or the fact that the great majority of what they post on social media is in the public domain, there for anyone to read. Many don't know that even anonymous posts can be traced. Employees may think that if they post something, and later delete it, it's gone. But that is not necessarily the case.

Example: A single mother who worked for a nonprofit by day ran an anonymous sex blog by night. Her employer never knew until she opened a Twitter account and logged in using her real name, thinking it wouldn't show. When she realized it did, she quickly deleted it and changed her account name. However, Twitter posts are still searchable, even after being deleted. Her employer checked on her and found her Twitter account, which linked to her blog. She was terminated from her job for putting her employer in a negative light.

Employees must know that they lose control over whatever they post as soon as it's posted. Anything can "go viral" or be re-posted by anyone who reads it — even a posting from a private chat room could be copied and pasted on someone's Facebook page and begin to spread.

3. Employees need guidelines on what is acceptable and what is not. Employees *probably* know that they shouldn't use the company logo on their personal website, mention trade secrets in a chat room, or blog about information that is considered confidential (another employee's medical condition, perhaps). They probably know they shouldn't use LinkedIn to lure employees away to a competitive business, make a disparaging video at work, or make racially offensive social media posts about coworkers. But these things still happen.

Disciplinary action is easier to justify under a clear policy that forbids this type of conduct, instead of disciplining an employee for conduct she didn't realize was prohibited. Employees may think that if there is not a policy against it, then it is fair game. They may not always use common sense when it comes to social media.

Employers should also consider that the National Labor Relations Board (NLRB) states that employers' social media policies that contain vague language will likely violate the NLRA.

For example, in several cases cited by the NLRB, policy missteps hinged on the use of phrases like "inappropriate communication" and "unprofessional behavior." Both phrases were used without context or examples of what would be considered "inappropriate" or "unprofessional." When employers used these phrases to identify unacceptable conduct in the workplace, the NLRB stated that employees would likely believe that activities protected under the NLRA would not be allowed under the employer's policy. As such, such policies were deemed overbroad by the NLRB.

The NLRB has indicated that employers must take great care to provide context and examples of unacceptable behavior in their policies. For instance, a policy should not forbid employees from discussing "confidential information," since employees might believe that their wages and other terms and conditions of employment could be considered "confidential." If an employer wanted to protect trade secrets or confidential customer information, these specifics should be

identified in the policy. That way, employees wouldn't (even mistakenly) assume that they were precluded from discussing terms and conditions of employment.

One employer's policy stated that employees were to avoid "inflammatory subjects like politics and religion" in the workplace. The NLRB stated that since wages, working conditions, and unions could be all considered inflammatory subjects, the provision would likely discourage employees from discussing those as well, and the policy was considered overbroad. Other ambiguous words, such as "disparaging," "derogatory," and "defamatory" are often used by employers to describe prohibited activity with regard to social media and are likely to be considered problematic without specific context.

The more specific a social media policy is, the less likely it is to be considered overbroad and a violation of the NLRA. Employers must tailor social media policies around legitimate business interests and take care to ensure that they can't be interpreted more broadly than they were intended. For an extra level of legal protection, it's a good idea to have policies reviewed by an employment lawyer, who can advise employers about the levels of risk invoked by specific policy language.

4. The Federal Trade Commission has a requirement. The Federal Trade Commission (FTC) issued revised endorsement guides. These guides have to do with truth in advertising online. In brief, they state that if an individual is affiliated with a company and endorses its products or services online, the individual must disclose his or her relationship to the company.

For example, if an employee gets involved in an online discussion about power drills and recommends one by his employer, then another individual in the chat room relies on this discussion, buys the drill, and gets injured because of a design flaw, that individual could try to hold the company liable because an employee recommended the product. Be sure employees are aware that if they recommend their employer's products or services online, they must disclose their relationship to the organization.

5. Employers need guidelines, too. Many questions are raised when employers use social media for employment purposes, and there are few guidelines available.

Many employers "vet" candidates on the Internet, usually checking the information that is publicly available. If the company is looking at public sites, they are in the public domain and fair game under privacy laws. However, this can still be a risky practice.

The employer might discover that an applicant is a member of a particular religion, or a cancer survivor, or a union member. If an applicant knows that the company obtained this information and he or she was not hired, the applicant could assume that the reason he or she wasn't hired is because the employer used the applicant's religion, past disability, or union affiliation in its hiring decision. If the applicant sues, the employer is now tasked with proving in court that it didn't use that information in its hiring decision.

To reduce its liability, an employer might have someone at the organization who is not the hiring party review the applicant's or employee's social media page. Some groups have even recommended that employers get a third party to review social media profiles on the employer's behalf.



Cross reference

For more information on this topic, see the **Background checks and the Fair Credit Reporting Act** section of the **Selection and Interviewing** tab.

If managers are trying to look at private sites that employees or applicants have specifically limited public access to, however, the line is further blurred. Authorization to view such sites must be freely given. If the authorization is necessary for an employee to get or keep a job, the word “freely” may no longer apply.

Consider this example: Two restaurant employees started a password-protected, invitation-only chat room on Myspace to vent about work. One of their coworkers, the hostess, happened to mention the chat room at a party to one of the managers. She was asked for the password, and felt her job was in jeopardy if she didn't give it, so she did. The manager then gave the password to other managers, and the site was accessed repeatedly, resulting in the termination of the two employees. They sued their employer and won because the court held that the employer's access went too far. In fact, the court awarded punitive damages to the former employees to punish the employer.

Some employers ask applicants and employees for passwords or URLs to their private Facebook page or require that information. This can violate state laws and the site's terms of service. What's more, it can cause public relations issues, should the practice be publicized by frustrated applicants and employees.

Employers may also have to deal with supervisors using Facebook to investigate employees; supervisors “friending” employees (and trying to maintain a professional relationship at work while fostering a personal relationship outside of work); and writing recommendations for former employees on LinkedIn that may be perceived as a recommendation from the company, or that may not be consistent with information given out as a reference.

Should you even have a social media policy?

You should be familiar with the National Labor Relations Board's (NLRB's) findings that employee activity on social media can be protected activity under the National Labor Relations Act (NLRA). The NLRB has often found that policies which restrict employee use of social media are overly broad and constitute an unfair labor practice by chilling employees' rights to discuss wages, hours, and working conditions.

For example, you may not instruct employees to refrain from discussing any company matters on social media. While you can expect employees to refrain from simply badmouthing the company online, a policy must leave room for employees to engage in protected activity. Employees could use social media as a platform to discuss their terms and conditions of employment, a right afforded to them by the NLRA, just as they could discuss those matters face-to-face.

With the constantly changing interpretations as new cases appear, keeping a social media policy up to date may require regular monitoring of NLRB activity and perhaps more frequent updates than you care to make. This has caused some employers (and attorneys) to wonder if such policies are worth the effort.

Given previous enforcement efforts and the likelihood of future interpretations, you might consider forgoing a social media policy altogether, especially if the prohibited conduct is covered in other policies. For example, your company might have applicable language in policies on professional conduct, off-duty conduct, or email and internet use.

Alternatively, a social media policy might be pared down to the bare bones. It might simply clarify that the employment relationship continues to exist when employees are away from work, and that policies on discrimination, harassment, threats of violence, or other conduct remain enforceable when employees are not on the premises. This still allows you to address conduct violations and protect other employees, but may avoid the potential pitfalls of imposing limitations that are later deemed to be overly broad.

Given the level of NLRB activity, social media policies can be difficult to craft. If you do not have access to legal counsel for a review of your policy, you may want to consider forgoing a policy that is specific to social media and instead rely on other conduct policies (assuming, of course, that those policies do not violate the NLRA).

Should supervisors “friend” employees?

On the surface, it would seem that “friending” an employee is a benign activity. It might help a manager get to know employees better on a more personal, caring level. But before hitting the “accept” button to make an employee a friend, consider these risks:

Allegations of discrimination. Not all employment situations are positive. When supervisors have access to employees’ personal information on Facebook (and similar sites), they may inadvertently access protected information. If an employee who has shared protected personal information is fired, denied a promotion or training, or disciplined, he or she may try to use the online connection to prove that employment actions were based on discriminatory motives. Of course, this is not a good situation for the company.

Unlawful termination. Suppose a new employee performs quite well during her first days on the job. She joins LinkedIn and asks a supervisor for a recommendation. He writes a good recommendation, but after several months, her performance deteriorates, and the supervisor fires her. That recommendation can become evidence if she decides to sue for unlawful termination, since the courts may view that recommendation as a performance review.

Be leery of giving a recommendation after an employee leaves, too. This type of recommendation actually falls under the company’s post-employment reference policy. If the company doesn’t want supervisors to give references verbally or on paper, it may explain that this covers recommendations on LinkedIn as well.



Cross reference

For more information, see the section on **Responding to reference checks** in the **Related Matters** tab.

Potential harassment. What if a supervisor wants to friend an employee? This situation is even riskier. If a subordinate accepts the invitation, the supervisor gains access to personal information, which puts the company at risk as described above. Worse, the subordinate may

be intimidated by the invitation and wonder if the supervisors would be offended if he or she did not accept, or if there would be negative career consequences for turning the invitation down. Under some circumstances, this could be considered harassment.

Being leery about friending employees shouldn't stop employers from harnessing social media. Sites such as Facebook and Twitter can be very effective in engaging customers. LinkedIn, along with Facebook and Twitter, can help employers find talent that it might not find through traditional recruitment methods.

Remember that there are other forms of social media that can allow employers to connect with others without sharing much personal information at all. For example, blogs and wikis can allow collaboration with individuals and tap into their expertise to solve problems, while webinars and web chats can often provide instant access to training when employees need it, instead of waiting until it is convenient to conduct a class.

Using social media appropriately is critical to keeping a professional reputation intact and representing the organization in a manner that is appropriate. Make sure all employees are familiar with policies concerning social media, and don't be afraid to use social media to its full potential within those parameters.

Avoiding other privacy-related lawsuits

Most employers are well aware that discharging an employee for engaging in protected activity (such as asserting labor rights or filing a discrimination claim) can result in lawsuits. However, other forms of litigation may be less familiar, but can still form the basis of lawsuits. One way to avoid lawsuits is to be honest, fair, and respectful when dealing with employees and their personal information.

Invasion of privacy

Invasion of privacy includes the disclosure of private facts or information about a person. Lawsuits can result if the information contains intimate or embarrassing facts so that its release would be highly objectionable to a reasonable person, and if the information is of no legitimate concern to the parties to whom it was released. For example, investigations of sexual harassment often reveal intimate or embarrassing facts, so the information is kept as confidential as possible.

Defamation

Defamation involves verbal or written false information, disseminated with intent to harm a person's reputation, or with reckless disregard for the consequences. An employer can be liable if it knowingly or negligently allows false information to be released to a third party. This includes so-called "compelled self-publication." For example, if an employee was falsely terminated for sexual harassment, a prospective employer may ask why he left his former company, causing the employee to reveal the charge. Employers must be cautious when telling an employee that a discharge is for a particular reason. Managers should never say or write anything about an employee that cannot be proven with reliable documentation or firsthand testimony.



For more information on defamation, see the section on **Responding to reference checks** in the **Related Matters** tab.

Maintaining confidentiality

Identity theft. Special care should be taken to secure information that could be used to commit identity theft. Personally identifying information such as a person's full name combined with other identifying information such as a social security number, date of birth, driver's license number, or financial account number should be kept secure. Most states have a data breach notification law that requires an employer to notify individuals when information that is in the employer's keeping has been compromised. There could also be some liability associated with the breach of information.

Confidentiality of knowledge. Confidentiality of knowledge involves two aspects: those pieces of information that relate to employees, and those that relate to the company. Whatever information employers possess about an employee that is confidential (medical, genetic, etc.) should not be discussed within earshot of others who could overhear the conversation. This is an often-violated component of confidentiality because people simply forget or are careless with confidential information. Supervisors are often privy to confidential information and should be reminded often exactly which information is confidential and shouldn't be discussed with anyone except specific people who have a need to know.

Company confidentiality. When it comes to company confidentiality, it goes without saying that trade secrets, copyrights, patents, business strategies, product development strategies, and other competitive information should stay private, even without a formal nondisclosure or confidentiality agreement. Nor should such things be discussed outside of the company in casual conversation, in public or otherwise. Showing a duty of loyalty to an employer is a common law obligation by an employee. Even after leaving employment, the duty of loyalty may not end. Nondisclosure and non-compete agreements can restrict where and with whom an employee can do business in subsequent employment.



For more information, see the section on **Non-competes and restrictive covenants** in the **Onboarding and Training** tab.

Intentional infliction of emotional distress

Successful lawsuits in this area may not be common, but they can happen. A case must involve several elements:

1. The employer acted intentionally or recklessly,
2. The conduct was extreme or outrageous, and
3. The employer's actions caused severe emotional distress.

For example, cases involving a bullying supervisor could result in claims if the employee suffered a sufficient degree of distress. There is no valid reason for a manager to shout at an employee or humiliate an employee in front of others. Such actions have been the basis for these lawsuits.

While these other types of claims are unusual, employees can (and have) successfully sued employers for each of these areas. Maintaining positive employee relations and treating employees with respect can go a long way toward preventing such lawsuits.

Off-duty activities

While employees may have a certain duty of loyalty to their employer, and must refrain from engaging in conduct outside of work that would not be acceptable in the workplace (such as harassing other employees), they can otherwise spend their personal time however they choose. Employers sometimes wonder to what extent an employee's off-duty activities can be restricted. The short answer is that unless the company has a compelling business reason for the restriction, it should be avoided.

For example, a company could reasonably expect employees to refrain from going to bars or partying while wearing a uniform or other clothing that identifies the company, but cannot simply prohibit an employee from engaging in lawful activity such as going to a bar in the first place.

Medical evaluations and requests

A number of situations may require employers to become aware of an employee's medical information, such as determining the reason for an employee's absence. While some people mistakenly believe that the Health Insurance Portability and Accountability Act (HIPAA) privacy rules make it illegal for employers to ask for employees' medical information, these rules typically apply to health plans and health care providers — not directly to employers.

Instead, the confidentiality provisions of the Americans with Disabilities Act (ADA) are more likely to apply to employers (and to supervisors). However, even the ADA provisions do not prohibit employers from asking the reason for an employee's absence.

In fact, if an employee calls in sick, the company actually should gather enough basic information to determine whether the Family and Medical Leave Act (FMLA) may apply to the absence. That doesn't mean, however, that a supervisor should ask for details about the employee's condition.

Once an employer obtains employee medical information, it has a duty to keep the information confidential, except when the information *must* be shared. For example, another supervisor may need to know if the information relates to job assignments or accommodations. If a supervisor receives medical information directly from the employee, he or she may need to pass it on

to HR for guidance with FMLA. There is rarely a situation, however, in which an employee's coworkers need to know the details of his or her medical condition.

Silence is golden when it comes to medical privacy

Employee's medical privacy is protected by several different laws, including the Americans with Disabilities Act (ADA), the Occupational Safety and Health Act (OSH Act), the Genetic Information Nondiscrimination Act (GINA), and the Family and Medical Leave Act (FMLA). It's important to understand how these laws apply to employee privacy in everyday situations.

Here are some situations that might catch an employer off-guard:

Jealous employee. When Paul was hired, he asked for an accommodation to see his therapist during normal working hours, since he could not arrange any other time to see the doctor. However, he arranged the session during his lunch hour, and worked longer on the days he had therapy to make up for the lost time. He did not want coworkers to know he was seeing a therapist, and he never talked about his appointments with others at work.

However, one day when a coworker complained that Paul "got away with taking long lunches," the supervisor blurted out, "He's not taking long lunches; he's seeing a therapist."

Paul's privacy was breached. His need for an accommodation was protected under the ADA. A better response would have been, "I am aware of Paul's schedule, and his time off has been approved for legal reasons that must remain confidential."

Hereditary disease. In a casual conversation, Mary discloses to her supervisor that she has found out she has a 75 percent chance of developing a fatal hereditary disease within the next five years. She is taking the news well, however, and continues to do exemplary work.

A few months later, Mary's name is mentioned as a candidate for a promotion. Mary's supervisor says, "I don't think that would be wise. She told me she has a good chance of becoming completely disabled within a few years because of a disease."

Under GINA, discrimination based on genetic information (such as the case above) will be prohibited. Although Mary shared information with her supervisor in a casual conversation, it would be considered protected information and should not be used to influence an employment decision.

Sick spouse. Pete has been out on FMLA leave for a while to care for his wife, who has suffered a stroke. When coworkers ask, "Where's Pete?" the supervisor tells them of Pete's wife's condition to explain why he's been gone.

The circumstances under which Pete has taken FMLA are confidential and should not be disclosed to curious coworkers. The supervisor should have said, "He's out on leave for a while." If Pete wishes to discuss his reasons with his coworkers, that's his business, but the information should *not* come from the supervisor.



Specific injuries. Sharon dropped a glass bottle on a hard floor and cut herself picking up the pieces of glass. When Steve went to help her, he was cut by some of the glass that had Sharon's blood on it. Potentially infected with a bloodborne pathogen, Steve undergoes preventative hepatitis shots. The company allows him to get the shots on work time, but one day when a coworker asks where Steve is, the supervisor says, "He's getting a hepatitis shot because he's been exposed to a bloodborne pathogen."

The supervisor not only breached confidentiality, he spread harmful misinformation. He incorrectly said the employee *had been* exposed, which could lead to unnecessary fear among Steve's coworkers. In fact, he was *potentially* exposed, and the series of shots is merely preventative to ensure he does *not* contract a disease.

The legality of requiring a doctor's note

Many companies have a policy whereby employees must provide a doctor's note if they are out sick for more than two days due to illness or injury. Some even have a policy where a doctor's note is required if an employee calls in sick the day after a certain holiday, such as Thanksgiving, or a major event, such as the Super Bowl. Notwithstanding the effect this has on health insurance claims experience, there are other aspects of this practice to be concerned about.

Although employers can require a doctor's note, use caution. The Americans with Disabilities Act (ADA) includes provisions prohibiting employers from requesting and obtaining medical information from employees that isn't related to employment. The ADA regulations say that any medical exam or inquiry must be job related and consistent with business necessity.

To avoid this issue, consider accepting notes that provide generic information such as "[name of employee] visited the doctor on [date]." A doctor might not specifically tell the employee to stay home for a certain number of days, but it could still be reasonable for the employee to do so. For example, if an employee has a severe case of the flu and is suffering from fever and dehydration, a doctor may recommend bed rest and drinking liquids. However, the doctor won't necessarily know whether the individual will recover in 24 hours or 72 hours (or longer).

Even a basic doctor's note might result in the unintentional acquisition of private medical information. For example, suppose an employee is suffering from depression and visits a psychiatrist who prescribes medication. If the note indicates that the employee visited a psychiatrist, the company has learned that the employee may have a mental or psychological condition, even though the nature of the condition is unknown.

Occasionally, an employee may refuse to provide a note (especially if the employee visited a mental health professional and doesn't want that information known). In this case, further discussion may be necessary before imposing discipline for an unexcused absence. Although an employer's right to obtain medical information is limited, a company does have a right to raise the issue with the employee.



Best practice

Should employers require a doctor's note?

Many employers have a policy of requiring employees to supply a doctor's note to account for their use of sick leave. Of course, this type of policy is intended to discourage the abuse of paid time off, and it is legal, but if enforcing such a policy, consider the following:

1. **Employees may be sick enough to stay home, but not to see a doctor.** This may be because of cost or because it simply isn't necessary. An employee with a migraine, the flu, or even a bad cold may not need to see a doctor to know that he shouldn't be at work.
2. **Employees who don't intend to see a doctor may be more likely to come to work ill.** The policy was probably not intended to encourage presenteeism, but if employees are coming to work ill, the company may soon have more than one sick employee in the workplace.
3. **Employees who needlessly visit the doctor may drive up health care costs.** Should an employee with a cold really go to the doctor to justify his absence? Both employer- and employee-paid premiums could suffer at the hands of this policy.
4. **Policies must be enforced consistently.** If a policy requires a doctor's note after so many days of absence, require one from *every* employee who is gone for the requisite number of days. Failing to do so could set up a discrimination claim.

Essentially, the stricter the policy, the more problematic it could be. If the company requires a doctor's note for a single sick day, it may find the policy difficult to enforce. On the other hand, it may be more reasonable to indicate that such a note may be required for extended absences (perhaps of three days or more). The key is to strike a balance between not encouraging employees to work sick but also making sure they're not abusing the system.

The role of FMLA

One reason many companies require a note for an absence of more than two days is that an FMLA "serious health condition" includes situations that involve three or more days of incapacity. Asking for a doctor's note may help determine if the absence could qualify for FMLA leave.

Another obvious reason companies require a doctor's note is when the employee is suspected of abusing sick leave. This suspicion may arise especially where absences are frequently taken on a Monday or a Friday.

If an employee has been granted FMLA leave for a health condition and has already provided a doctor's note for it, the employee shouldn't be asked to recertify again for that condition for 30 days. If the certification indicates how long a condition should endure, don't ask for recertification until the duration has expired.

Request for accommodation

Despite the ADA restrictions on medical inquiries, employers have a responsibility to provide reasonable accommodation. The ADA also makes the employee responsible for initiating the request for accommodation or to otherwise make the company aware of the need for time off. Ideally, the employee should do this *before* his or her performance or attendance begins to suffer. The employer cannot ask if the employee has a disability, nor ask about the nature or severity of a condition. However, it can:

1. Inform the employee that regular and reliable attendance is expected — focus on job performance, not on the condition;
2. Indicate that the company may designate absences as “unexcused” if the time off is not protected, and clarify that these absences can result in discipline or termination; and
3. Remind the employee that the company has a duty to provide accommodations or grant time off for certain conditions, but the employee is responsible for making the company aware of these conditions (but once aware of a condition, act accordingly).

By following this process, an employer should be able to avoid making inappropriate medical inquiries. This also clearly communicates expectations and the employee's responsibilities. Then, if the absences lead to discipline or termination, the responsibility for this outcome should be on the employee rather than on the company.

Any documentation about the accommodation request, or the reason for it, must be kept confidential as a medical record. Employers can share limited information, such as informing the employee's supervisor of the need for accommodation, but otherwise cannot share that information.

Fitness for duty tests should not be medical exams

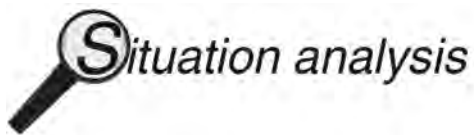
Persistence paid off for a woman who was terminated after she failed a physical capacity test. Kris Indergard had knee surgery and was required to undergo a physical capacity test to determine her fitness to return to her job as a machine operator, even though she had a doctor's note releasing her to return without restrictions.

The test was performed by a licensed occupational therapist, and included medical history and vital statistics. The therapist tested her posture, balance, and range of motion. She put her through various strength tests, including lifting and carrying varying amounts of weights. She also had her walk on a treadmill for 20 minutes, after which she measured her heart rate and breathing pattern. In addition, Indergard was asked to perform work that simulated her job.

When the occupational therapist reported that Indergard was incapable of performing the physical requirements of her job, her employment was terminated because no other positions were available, and because the company had a policy of terminating employees who were on leave for more than two years.

She filed a grievance with the union, but the union denied it. She filed a charge with the EEOC, but the EEOC dismissed it. Not to be deterred, she filed a lawsuit against her employer, alleging violation of the ADA in having her undergo a medical examination that wasn't job-related or consistent with business necessity. The trial court ruled against her.

On appeal, however, she finally found an ally — the Ninth Circuit Court of Appeals. The court agreed with her, holding that the test could be considered medical in nature because it elicited information that could reveal a physical or mental impairment. *Indergard v. Georgia-Pacific Corp.*, Ninth Circuit, No. 08-35278, Sept. 28, 2009.



Doctor says employee can't work

A doctor (especially an employee's personal doctor) should not normally provide a note saying that an employee "cannot work." Obviously, there will be situations where this conclusion is inevitable (e.g., the employee is hospitalized or needs complete bed rest). In most cases, however, the doctor should describe the limitations and perhaps indicate which job duties should not be performed based on a job description (e.g., no lifting more than 20 pounds, or no reaching above shoulder height).

The company must then decide if those restrictions can be accommodated, or if light duty is available. Since a doctor cannot know what accommodations the company is able to make or what other positions might be available, a doctor cannot normally conclude that an employee is "unable" to work (again, unless the employee has a temporary total disability). If an employee provides such a note, the company may request further information about why the employee is unable to work and what limitations are in place that might be accommodated.

The side effects of prescription drug policies

Prescription medication, when used improperly, can be just as dangerous in the workplace as illicit drug use. According to the Substance Abuse and Mental Health Services Administration, prescription drug abuse is on the rise. In fact, non-medical use of prescription pain relievers was second only to marijuana use among the nation's most prevalent illicit drug behaviors in 2008. Even if an individual is using prescription drugs in accordance with a doctor's orders, certain substances can cause side effects that may make the individual a safety liability.

In response to these issues, some employers have attempted to institute policies requiring employees to disclose which prescription drugs they are using. But such actions are likely violations of the Americans with Disabilities Act (ADA).

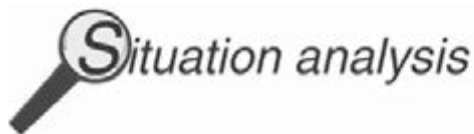
Under the ADA, employers are prohibited from making a "disability-related inquiry" of an employee unless it is job-related and consistent with business necessity. A disability-related inquiry can include:

Employee Relations Essentials

- Asking an employee whether he or she currently is taking any prescription drugs or medications;
- Asking whether he or she has taken any such drugs or medications in the past; and
- Monitoring an employee's taking of prescription medications.

According to the Equal Employment Opportunity Commission (EEOC), asking all employees about their use of prescription medications is not job-related and consistent with business necessity. With a blanket request, an employer would likely obtain information it does not need to know. If an employee reports taking medication for epilepsy or another condition that may qualify as a disability, the employer has obtained medical information that may not relate to job performance. In addition, the employer might not gain usable information about the potential impacts on job performance, since the effects of medications differ from one person to the next.

However, employers can ask employees to voluntarily report any conditions (medical or otherwise) that might affect their ability to perform their jobs. Employers should be careful to communicate the reason for this request (e.g., to ensure everyone's safety) and avoid creating the impression that employees must report **any** medications they are taking. Essentially, employees may be asked to self-evaluate whether a medication might cause drowsiness or other hazards, and consider requesting an accommodation. Employers should also inform employees that if they have a medical condition which requires a change or adjustment to the workplace, the employer is obligated to evaluate reasonable accommodations.



May cause drowsiness

If an employee reports that he or she is taking medication, it is usually reasonable to ask if she feels she can safely perform the job. However, warning labels such as “may cause drowsiness” are included at the recommendation of attorneys. Anyone who has seen a commercial for a prescription medication has heard a listing of possible side effects. A warning on a bottle of pills is just that — a *possible* side effect.

Any decisions affecting employment must be based on objective medical evidence, not merely opinion or speculation. The warning label should not be treated as objective medical information on which to base an employment decision.

However, if an employee reports concerns that his or her medication may affect the ability to safely perform the job, the employer may discuss the situation to identify reasonable accommodations. Conversely, if the employee feels that he or she can perform the job duties without problems, the employer should accept that conclusion, unless some objective evidence suggests otherwise (such as observing the employee having difficulty on the job).

There are limited circumstances under which an employer may ask about employees' prescription drug use.

First, an employer can make such a disability-related inquiry if it has a reasonable belief, based on objective evidence, that a *particular* employee is unable to perform an essential function or will pose a direct threat to the employee or to others because of a medical condition.

For example, an employee suddenly begins failing to meet production standards. When her supervisor asks about her poor performance, the employee states that her prescription medication for lupus makes her lethargic and unable to concentrate. In this situation, the supervisor has a reasonable belief that the employee's ability to perform the essential functions of her job might be impaired because of a medical condition.

Note that this exception is not an "all-access pass" to an employee's medical information. An inquiry must be limited to information necessary to determine whether the employee is able to perform the essential functions of the job or can work without posing a direct threat. So in the above example, the supervisor would be able to make inquiries related to the medication (e.g., ask the employee whether she is taking a new medication and how long the side effects are expected to last), but may not ask if the employee has a history of cancer or other unrelated medical questions.

| Second, certain employers may require employees in positions affecting public safety to report when they are taking medication that may affect their ability to perform the essential functions of their jobs and thereby result in a direct threat. A police department, for example, could require officers to report when they are taking medications that may affect their ability to use a firearm.

The EEOC has a very narrow definition of what positions qualify as those affecting public safety. In a guidance document on disability-related inquiries and medical examinations, the commission recognizes police officers, firefighters, airline pilots, and armed private security officers as positions affecting public safety. An administrative clerk who works at the police department, however, would not qualify.

Although prescription drug abuse can be potentially as dangerous as illegal drug use in the workplace, employers should use caution when asking employees about prescription drug use.

Maintain confidentiality

When an employer obtains medical information — whether requested, voluntarily provided, or inadvertently obtained — it has a legal obligation to keep that information confidential. Any documentation, such as requests for accommodation or medical leave, must be maintained in confidential files, separate from the personnel file.

Supervisors and managers may be informed of necessary restrictions or accommodations, but they may not need to know the underlying condition which necessitated the change. Similarly, first aid and safety personnel may be informed, when appropriate, if the condition might require emergency treatment. Otherwise, medical information about employees and applicants may not be shared.

Introduction

Sooner or later, everyone who works for an employer will leave that company. The employee might quit, might get fired, or might retire after years of service. Whatever the reason, employee departures are simply a fact of employment. Separations may be voluntary (initiated by the employee) or they may be involuntary (initiated by the employer).

The first section of the Separations area covers involuntary separations. A work separation is involuntary if initiated by the employer, where the employer has more control than the employee over the fact and the timing of leaving the work. There are many ways in which a work separation can be involuntary:

- Layoff, reduction in force, or downsizing due to economic inability to keep the employee on the payroll.
- Temporary job comes to an end due to work no longer being available.
- Discharge or termination for misconduct or “cause” that the employer views as somehow being the employee’s fault.
- Resignation in lieu of discharge, where the employer gives the option of resigning.
- Early retirement where the employee is allowed to qualify under a retirement plan.
- “Mutual agreement” is usually viewed as involuntary since it is usually initiated or encouraged by the employer. For example, employers may ask for volunteers to accept a temporary layoff, or might agree to let an employee resign rather than face termination.

The nature of a work separation may determine several important things following the decision to sever the employment relationship.

In an unemployment claim, a person who voluntarily left faces the burden of proving good cause connected with the work for leaving the job. If the employer initiated the separation, it has the burden of proving misconduct connected with the work as the reason for discharge.

Also, in many companies, employees who leave voluntarily receive different benefits than those who are involuntarily separated, depending upon the terms of the company’s benefit plans or policies. For example, an employee who voluntarily quits with proper notice may be given payout for earned vacation time, whereas an employee who is terminated for cause might be denied such payout (if state law allows for this).

The second tab of this section covers voluntary separations. A work separation is voluntary if initiated by the employee, where the employee has more control than the employer over the fact and the timing of leaving the job. That can happen several different ways:

- Resignation with advance notice, where the employee gives oral or written notice of leaving in advance.
- Retirement, which is simply a resignation with notice that may involve satisfying some condition for leaving with one form or another of continued benefits.
- Resignation with notice given at the time of separation, where the employee lets the employer know somehow that he or she will not be returning to work.
- Resignation without notice, which can include walking off the job, job abandonment, and failure to return to work after a period of leave.
- “Constructive discharge” based on discrimination or other laws, where an employee

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who quits may be considered to have been discharged if working conditions were so intolerable that a reasonable employee would feel forced to resign. However, for purposes of unemployment compensation, such a separation is often considered to be voluntary.

As long as the employer did not pressure the employee into resigning, work separations that occur under those circumstances may be considered voluntary.

The third tab in this section covers related matters. Employers must address a number of issues related to an employee's departure, whether voluntary or involuntary.

In cases of retirement or expected retirement, the organization may need to find a replacement or otherwise address succession planning.

Employees who leave the company might be given severance pay. This is most commonly used in conjunction with a waiver of age discrimination claims or other claims, but many employers offer severance pay in cases of layoffs, or even to all employees who are involuntarily terminated, because doing so can help maintain a positive relationship.

Employees who are involuntarily separated are usually eligible for unemployment benefits, while employees who quit are usually not eligible. In the interests of controlling costs, organizations may challenge claims for unemployment.

Departing employees will also want to know the disposition of various benefits, such as unused vacation time or continuation of health care coverage. The employee may also have a pension or 401(k) plan, a flexible spending account, life insurance that could be continued, or disability insurance that could be continued.

Many employers offer exit interviews to departing employees, particularly in cases of voluntary separations, to gain information about potential problems in the workplace — in other words, to learn why the employee decided to leave. Exit interviews need not be limited to employees who quit, but could even be offered to employees who transfer from one department to another.

In cases of layoffs, the company may intend to rehire the former employees at some point. Even employees who quit under amicable terms may be eligible for rehire, and may want to rejoin the organization. Determining who is eligible for rehire may depend on the circumstances of the departure.

Finally, employees who leave the company will likely seek other work, and the company may have to respond to reference checks about the individual. Giving too much information, or giving false information, can lead to liability and lawsuits. In some cases, however, giving too little information can also lead to liability.



Introduction

Terminating an employee is a difficult task, and the process is extremely sensitive. When done with tact and dignity, the result can be satisfactory (at least from the employer's perspective). When done poorly, a termination can become a security concern or cause legal liability.

Terminating an employee smoothly requires careful planning ahead of time. In terms of security, employers want to decrease the risk of disruption or violence during the termination meeting and afterward. With regard to liability, employers want to decrease the risk of the former employee filing a lawsuit for wrongful termination.

This first section in this chapter covers terminations, where the employee's departure is involuntary. Terminations can be necessary because an employee simply isn't able to perform the job, or because of performance or conduct issues that could not be resolved through discipline. In some cases, an employee is given the option to resign rather than having a termination on his or her record. However, since the employee usually doesn't have a choice in the matter, these are still considered involuntary separations.

The most common problem with terminations is simply a lack of documentation, but employers still have options to minimize potential liability or negative feelings, such as offering a severance package. Security issues can also be a significant concern, especially if the employee is being terminated for workplace violence.

The next section in this chapter covers layoffs, but also applies to downsizing. Employers most commonly face layoffs due to reductions in workloads or economic downturns. Even the loss of a major customer can generate a need for layoffs. Layoffs may affect an entire company, or only a single department. While layoffs may be temporary during a slow period, the term "downsizing" generally means a permanent or long-term reduction in the workforce. From an employer's perspective, however, many of the issues are the same. Even if a layoff is expected to be temporary, an employer may not know for certain that former employees will be rehired.

The most common problem with layoffs is deciding who will be affected, and justifying that decision — in other words, selecting who will stay and who will go. Despite a common misconception, employers are not required to rely on seniority (unless a union contract or similar

agreement requires doing so). Employers may use any criteria they choose in selecting individuals for layoff, as long as that system avoids discriminatory intent or disparate impact.

The last section of this chapter covers outplacement services. For employees who are involuntarily separated, but a positive relationship can be maintained (e.g., a layoff rather than a termination for misconduct), employers may choose to help the former employees find future employment.

Terminations

Terminations might be necessary for a variety of reasons. Perhaps the employee engaged in misconduct, whether a single egregious event or a series of small events, that justifies dismissal. Perhaps the employee's performance was not satisfactory, and the individual simply has to be let go.

In the case of unsatisfactory performance, or the inability to meet the job expectations, the separation will likely be emotional for the employee. In some cases, an individual simply isn't able to meet the demands of the position. This may be due to a lack of training, or even a physical impairment (disability) that cannot be overcome with a reasonable accommodation. Whatever the reason, the performance expectations (and failure to meet them) should have been well documented.

In other cases, the termination is justified by conduct problems, whether based on attendance or conflict with coworkers. Again, the conduct issue should have been well documented, and the employee should have understood the consequences for failing to improve.

Whether the termination is imposed because the employee simply couldn't meet the job demands (perhaps due to a lack of knowledge, skills, or ability) or whether the termination is for specific conduct issues (such as creating conflicts with fellow employees), the documentation should ideally show that the employee was given an opportunity to improve.

Obviously, there will be situations where employees are not given a "second chance," especially in cases involving threats or violence, harassment, drug use, theft, or similarly serious misconduct. For most other performance or conduct issues, however, the company should have documentation showing that the problem was discussed with the employee, that follow-up meetings were held to discuss improvement (or lack of improvement), and that the employee was ultimately terminated after being given a chance to succeed.

Essentially, a termination should not come as a surprise to the employee, since that potential consequence should have been communicated. Regardless of the reason, all terminations have some similarities in how they should be handled.

In rare cases, employees will even try to get fired. They won't actually engage in serious misconduct, but their performance may be below expectations — and even after being told of the consequences for failing to improve, they may not seem to care. While a company may be justifiably concerned about minimizing unemployment claims, there really isn't any advantage to dragging out these situations.

An employment relationship is a two-way street, and if the employee shows no signs of even attempting to improve, the company may have to cut its losses and let the person go. The potential cost of an unemployment claim may be small compared to the costs of continuing to pay someone who could be replaced by a new employee — someone who may even do twice the work of the slacker.

Also, an employee who has given up on the job may be causing morale problems, either because of extra work needed to cover for that person or simply frustration that someone is “getting away with” doing less work. Others on the team are likely to complain about that person, perhaps not realizing that they are now wasting productive working time in these conversations.

Employers can take some comfort in the fact that if other staff members are complaining about a lazy coworker, this may indicate that those staff members are dedicated employees who want to perform well. Burdening these valuable employees with someone who does not contribute, or who causes frustration, can damage both morale and productivity. In that case, granting the lazy employee’s wish for termination may be better for everyone.



Best practice

Should employers “encourage” terminations?

Most employers have concerns about reducing employee turnover because of the high costs involved in recruiting and training new hires. In some cases, employers hold supervisors responsible for keeping turnover low, even to the point that supervisors receive negative performance evaluations if turnover is higher than expected.

While this concept may be founded in good intentions (such as encouraging supervisors to develop and maintain positive employee relations), it can have the side effect of discouraging them from terminating employees who should be let go and replaced with a more productive or reliable employee.

Even if no formal low-turnover standard exists, supervisors may be unwilling to terminate employees; doing so is one of the most uncomfortable tasks a supervisor must perform. However, they should be aware that an under-performing employee can drag down an entire team and will offer little, if any, contribution to the success of the company.

At the other extreme, some organizations adopt policies for releasing the lowest performing employees on a regular basis (such as cutting and replacing 10 percent of staff per year). While the intent of these initiatives may be good, such a measure may be unreasonable for positions that require extensive training or specialized knowledge.

Finding a balance is critical for any company to maximize the productivity of the workforce. While employers need not encourage terminations, they must be careful to avoid discouraging the removal of employees who might be “coasting” in the job when a replacement could provide far greater contributions to the company.

Minimize the humiliation factor

Even if the employee was a chronic problem, it is in the best interest of the organization to terminate with as much dignity as possible. The termination meeting should be brief and conducted away from other employees. If possible, it should be conducted in a room near a door to the outside, so the employee does not have to face the stares of other employees as he or she is escorted to the door.

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The termination shouldn't be advertised to other employees in advance (which increases the humiliation factor if the former employee is the last to know). Other employees should be informed after the fact on a need-to-know basis, and it is not necessary to broadcast all the reasons for the termination.

Some employees may need to be notified, either to address potential security concerns (if others may unwittingly allow the former employee into the building) or to help prevent breakdowns in communication (if others were expecting to work with the terminated employee on a project). However, minimizing the humiliation factor is an important element in preserving the former employee's dignity.

It may not be necessary to have the employee return to a workstation to pack personal belongings. Consider having the employee's items already boxed, offer to have them delivered to the employee's home, or make arrangements to have the employee come in after hours to retrieve them (under supervision). The last thing the employee needs is to suffer additional humiliation in front of coworkers.

If possible, and if warranted, offer assistance in the form of a severance package, outplacement services, or even counseling. Getting fired is a life-altering experience for most people. Showing the individual that the company cares will help him or her feel more valued as a person, and may help to lessen the sting. People who feel they were treated well despite the circumstances might be less likely to seek revenge against their former employer.

Contrary to popular practice, the best time to terminate someone may be early in the morning and early in the week, rather than late on a Friday afternoon. This gives the employee time to meet with employment counselors during the week rather than worry about the future all weekend, when unemployment offices and other resources are closed.



Cross reference

For more information, see the **Severance Pay** section of the **Related Matters** tab.

Consider security issues

Employees who are let go may feel frustrated or angry at the company. Some employees even have the mistaken belief that an employer cannot fire them without specific justification, or that the termination was otherwise wrongful. These employees may attempt to lash out against the employer, so the company must take steps to protect its resources.

If the termination could be potentially volatile, have extra security on hand or even call law enforcement personnel to give them a heads-up, especially if the employee has a history of physical violence at the workplace. Also, lay out the room so that the employee cannot get between the exit and the manager delivering the news.

Establish a heightened level of security on the premises for a while after the termination if it seems warranted. If necessary, inform other employees that they are not to let that individual into the facility or on the premises. If the terminated individual "had it in" for someone at work, the company may want to take extra precautions with regard to that individual's safety.

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Along those lines, if the person doing the terminating feels the employee may resort to violence or some form of revenge, be extra cautious in public, especially in the company parking lot, where a former employee may lie in wait for retribution.

Make sure the employee's electronic access is disabled to prevent access to the company's network or information from a home computer. There's no telling what kind of damage a disgruntled former employee might do. At the termination meeting, be sure to obtain all identification cards, access cards, corporate credit cards, phone cards, keys, or anything else that could give the former employee continued access to facilities or accounts. While holding the termination meeting, the employee's workstation can be secured, such as changing the computer password or locking sensitive files.

Taking these measures does not guarantee there won't be problems either at the termination meeting or down the road. But by taking certain precautions, employers may be able to minimize the potential risk that is involved in terminating an employee.



Avoiding liability

There is little that has greater potential for employment liability than a termination. If supervisors handle or recommend terminations, it's a good idea not only to train them well, but also not to "rubber stamp" terminations without investigating them first.

To ensure a justified and legal termination, here are some things to keep in mind as part of a termination checklist:

- Does the company have consistent procedures for terminations, and are supervisors aware of them?

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- Has HR reviewed the documentation to be sure that it supports the termination and doesn't contradict the decision or open it to question?
- Has an adequate investigation taken place?
- If the employee has violated a policy, is the policy arbitrary or capricious? Is it based on business necessity? Has the policy been applied and enforced consistently?
- Are there any mitigating factors that might suggest that a less drastic course of action would be more appropriate?
- Are there any legal considerations that must be taken into account before termination? (For example, is the employee a member of a protected class? Has the employee recently filed a complaint or taken legally protected leave?) A termination should not look like retaliation for the employee engaging in protected conduct or exercising a legal right.

Having each termination carefully reviewed helps reduce risk of conducting an illegal (or at the least, ill-advised) termination.

One of the most common problems is the inconsistent application or enforcement of a policy. Courts will generally find that a company must do more than merely point out employee misconduct. The company must actually show that the employee would have been terminated for that misconduct.

If other employees were not terminated for similar infractions, a court or jury may assume that the employer is giving a false reason for termination — because it never terminated anyone else for that reason. If the employee was a member of a protected class, or recently engaged in protected activity, the termination can appear to be unlawful retaliation.

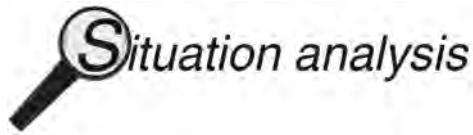
Consistency in the reasons given for a termination can also help avoid liability. For example, if a termination letter informs the employee that she was terminated for performance issues, whereas a challenge to her unemployment claim informs the agency that she was terminated for excessive absences, the shifting reasons given for the termination may harm the employer's credibility.

If the former employee files a wrongful termination claim (claiming discrimination, retaliation, or similar reasons), the employer will need to show that a legitimate (non-discriminatory) reason was used to justify the termination. Prior inconsistencies in the stated reason can cast doubts on the employer's actual motivation for termination.

For example, if an employee is given a termination letter which says that he was fired for failing to meet performance expectations, and the company later responds to his unemployment claim by stating that he was fired for excessive absences, the change in justification might raise questions about the actual reason for termination. In a wrongful termination claim, this can harm the employer's credibility, especially if one of those reasons has to be withdrawn.

Similarly, a supervisor might tell an employee that he is being fired "at will" or perhaps simply because it "isn't working out." The supervisor might do this to avoid a potential argument over the actual reason (or worse, because the supervisor doesn't have sufficient documentation of performance problems).

If the company is later sued for discrimination and claims the employee was fired for unsatisfactory performance, but cannot produce documentation, the stated justification may appear to have been manufactured or created after the fact. This can seriously harm an employer's credibility in subsequent litigation.



Unlawful motive for termination

A 2006 court case demonstrates how an employer could be responsible for a wrongful termination. In this case, HR signed off on a supervisor's recommendation to terminate a minority employee, not realizing the termination was actually a pretext for discrimination (*EEOC v. BCI Coca-Cola Bottling*, 10th Circuit).

The HR employee, who was in a different city and didn't know the race of the individual, gave final approval for the termination by relying completely on information provided by the supervisor, who was allegedly known to harbor racial animus. If HR had investigated, the discriminatory motive might have been discovered, and saved the company from a lawsuit.

Justifying a termination

While the at-will doctrine allows an employer to terminate an employee for any legal reason, a fired employee could still file a wrongful termination claim. In that case, the employee will need to show some reason that the termination was wrongful — that it violated some law or public policy — and if so, the company will need documentation to defend its decision.

Employees have legal protection for engaging in certain protected activity, including filing an injury claim or a claim for unpaid wages, filing a discrimination complaint, taking FMLA leave, and complaining about unsafe working conditions. If an employee is terminated shortly after engaging in this type of activity, the company will need to show that the termination was justified by other valid reasons. Otherwise, the proximity in time may create the impression that the protected activity was the motivation for the termination.

Lack of documentation can hinder efforts to show that a termination was justified. For example, if an employee's performance has been lacking but the supervisor gave an "average" performance rating and only verbally discussed the problem, the documentation may indicate no performance concerns. If the employee is fired shortly after engaging in protected activity, this inconsistency may create the impression that the claimed reason for termination is a pretext (false reason) given to cover the real reason, which may be discriminatory in nature.

Lack of communication is another common problem. Employers should not hold an employee accountable for expectations which were not communicated. Where possible, those expectations should be given as measurable objectives. Instead of saying, "We expect your productivity to improve," the company might say (and document), "We expect you to produce (x) number of units per day."



Employees can't simply file a generic wrongful termination claim and expect to win. They must show that the company violated a law, public policy, or other right to which the employee was entitled. Even in such cases, the company can prevail by showing that the employee was fired for legitimate reasons, whether or not the employee engaged in protected activity.

Engaging in protected activity does not protect an employee from termination for other valid reasons. For example, requesting or taking FMLA does not prevent an employer from firing that individual for theft or other misconduct. However, the company must show that a valid (non-discriminatory) reason was the actual justification for the decision.

Even though most employees work at-will and can be terminated for no reason, it's still best to have a valid reason, and to have documentation backing it up. Most employers do not fire employees for no reason at all, and will usually have a reason (even if that reason is simply that the employee wasn't a good "fit" for the organization). Claiming that an employee was terminated simply because the at-will doctrine allowed for termination without a reason will not be an effective defense against a wrongful termination claim.



Best practice

Communication before termination

Sooner or later, an employer will have to terminate an employee for performance or conduct issues. The following seven questions can help determine if a termination would be justified.

1. Was the problem thoroughly investigated and objectively evaluated before taking action?
2. Did the company clearly communicate its expectations?
3. Did the company warn the employee of the consequences for failing to meet requirements?
4. Does the company have documentation of the problem, expectations, and the warning(s)?

5. Did the employee have an opportunity to give his or her side of the story?
6. Is termination appropriate for the performance or conduct issue, considering the employee's record of service?
7. Is the level of discipline consistent with the level given for similar infractions or performance issues?

There may be other issues to consider, especially if the employee is a member of a protected class (minority, over age 40, etc.). However, if an employer can answer "yes" to all of these questions, it should have the foundation for a justifiable termination.

Documentation and justification

If a termination is for poor performance, poor attitude, or other conduct issues, be sure to have documentation of the issues, as well as documentation of progressive discipline where appropriate. Many organizations don't make a record of verbal warnings, but it's a good idea to do so.

A record of a verbal warning is not the same as a written warning. A written warning is generally a formal document, usually with a copy in the employee's file in HR as well as the supervisor's file, with a copy to the employee. It typically outlines an issue the organization has with the employee and lists steps for remediation as well as consequences for failure to do so.

A record of a verbal warning, on the other hand, is an informal notation made by the supervisor, sometimes shared with HR but sometimes not (depending on company policy), that makes a simple record of a verbal warning to an employee. An example might be the notation: "On June 6, 2011, I talked to Jane Doe about over-socializing and gossiping. She apologized and said she would stop disrupting coworkers and focus on her job."

Although records of verbal warnings are somewhat informal, supervisors should be aware that such warnings may be needed to refute later claims of wrongful termination. For example, a typewritten note that includes a date and the supervisor's signature, placed in the employee's file, would be preferable to a hastily scrawled note on a coffee-stained notebook page. Also, each verbal warning should be documented on a separate page, and supervisors should consider saving the electronic document. Although an electronic document cannot include a signature, there will be a record of the date on which the document was created, which is just as useful.

Compare that type of documentation to a brief, handwritten note on a single page of notebook paper — where that page might include several verbal warnings over a period of months. The former shows a meticulous effort to document problems, while the latter appears haphazard, and may even raise questions about when the notes were created (including accusations that the supervisor sat down and created them all in one day to "manufacture" documentation as needed).

Think of a verbal warning as a record of a potential disciplinary issue, because if the problem keeps occurring, it could turn into a written warning or other further discipline. For example, if the time the employee spends away from her workstation becomes a problem, or the gossiping turns malicious to the point of being harassment, the company has bigger issues that warrant formal discipline.

Another reason to record verbal warnings is that an issue might warrant many verbal warnings, and if they aren't recorded, the employee's file may only have one written warning before it's time for the employee to go. If verbal warnings aren't written down, the documentation

won't show everything that's been going on over the last few months, and that might not be enough documentation to defend against a wrongful termination claim.

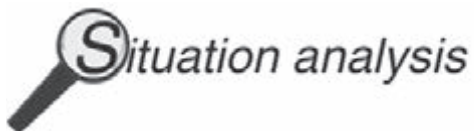
In contrast, if documentation shows repeated attempts to correct a conduct issue (and the employee was given an opportunity to improve the situation, but failed to do so), that will go further in justifying a decision to terminate.

Be consistent and fair

If a termination is used as the final step in discipline (as opposed to terminating an individual for a single incident of gross misconduct), the decision should be consistent with the level of discipline used with other employees for similar infractions. In other words, it should not be a harsher form of discipline for one employee when other employees who disregarded rules in the same way have gotten off with more lenient discipline. If challenged, the inconsistency of discipline could make it look like the termination was actually for some other reason.

Consistency is another reason to document all disciplinary actions, including verbal warnings. Complete documentation allows for a better comparison between employees, and can help an employer demonstrate the specific reasons that resulted in termination.

For example, if an employee is terminated for excessive absences, he might claim a discriminatory motive on the grounds that other employees had similar absence patterns. However, if the company can show that the fired employee had more absences than similarly situated employees (or that absences by other employees had been approved for legitimate reasons), then the fired employee will have a greater burden in showing a discriminatory motive.



Failure to show remorse

Even small differences in documentation can help justify a termination. In one case, an employer was contemplating the termination of two employees who had been involved in a workplace conflict, although no violence had occurred. Both employees were placed on suspension. They were each asked to write a letter of apology to the company, and to explain why they should be allowed to keep their jobs.

One employee wrote a sincere apology, accepted fault for his role in the conflict, demonstrated his remorse, and asserted his desire to prevent such problems in the future by thinking before acting. He was allowed to keep his job.

The other employee's letter failed to acknowledge his role in the conflict, and showed no indication that he accepted responsibility. The employer felt that his letter was essentially blaming his coworker for the problem, and did not demonstrate his intent to prevent such problems in the future. He was terminated.

The fired employee filed a wrongful termination claim, asserting that either both of them should have been fired, or both of them should have kept their jobs. The employer defeated the claim by using the letters to show that the retained employee appeared willing to prevent future problems, while the fired employee had not demonstrated his willingness to avoid future problems.

Investigations, discrimination, and retaliation

A court decision from California (*Mendoza v. Western Medical Center*, 2014) illustrated the importance of conducting an effective and thorough investigation of harassment complaints. An employee complained about his supervisor's inappropriate sexual behavior. Upon questioning, the supervisor admitted to improper conduct, but then accused the employee of being the instigator. Since no one witnessed the incidents, the employer chose to believe the supervisor's account and fired both the employee and the supervisor.

The employee sued for retaliation, claiming he would not have been terminated if not for his complaint. He won, but the employer appealed. The appeals court ordered a new trial (based on improper jury instructions) to determine if the employee was justifiably terminated, or if he was fired in retaliation.

The appeals court noted that the decision to fire a long-term employee with an exemplary record shortly after his complaint about a recently hired supervisor could cause a jury to find retaliation. In particular, the appeals court noted that the "lack of a rigorous investigation" might suggest the employer wanted the whole situation to go away. The court noted that a more extensive and thorough investigation might not have turned up additional facts, but could have changed the employer's evaluation of credibility.

Employers should know that claiming an "at will" termination is not a valid defense to a discrimination or retaliation claim. This case serves as a reminder that even claiming a "for cause" termination could result in liability if the employer cannot clearly establish that the decision was made for reasons other than a discriminatory or retaliatory motive. The court even warned that employers could not avoid liability by simply firing everyone involved.

In another case from Connecticut (*Castelluccio v. International Business Machines*, 2013), the court found that an investigation conducted by human resources may have treated the employee unfairly. The employee in this situation was claiming age discrimination, and the company looked into the accusation. However, the court noted that there was "reason to suspect that the purpose of the investigation was more to exonerate [the employer] than to determine if [the employee] was treated fairly."

It may not always be necessary to contact outside counsel for assistance with an investigation, particularly for minor incidents such as complaints about occasional jokes. However, if an adverse action such as termination results in claims of discrimination or retaliation, the employer should address the matter with a full understanding of the potential liability.

There is no clear answer to how much investigation is enough, or when outside counsel should be involved. However, employers should investigate sufficiently to establish a reasonable belief that its decision was justified, and should investigate impartially to refute claims that the decision was based on incomplete information or the employer's desire to "wash its hand" of the affair. A prompt, thorough, and impartial investigation should support the employer's decision and show that it was neither discriminatory nor retaliatory.

Reserved

Don't terminate "on the spot"

Employees should not be terminated "on the spot," regardless of the circumstances. There are several reasons for this. First, the decision maker may not be aware that an employee recently filed a discrimination claim, or complained of safety violations, or asked for medical leave. These are all activities protected by law. If something like this just occurred, it might look like the employee was fired because of the protected activity, and the employee could have a legal claim against the organization.

Also, in some states, final paychecks are due on the last day of employment. If an employee is fired on the spot without any warning, it may be impossible to get that employee's final paycheck prepared in time. There might also be company property to recover, arrangements to be made for repayment of a loan or other monies that are due to the employer, and so on.

If it's imperative to get the employee out of the workplace, suspend the employee pending an investigation and final disposition. This gives everyone time to cool off, makes sure that no rash decisions are made, and provides time to make sure there are no mitigating circumstances that would make a termination unwise.

Even in cases where immediate termination seems clearly justified, such as workplace violence, a suspension and investigation would be the best option. In fact, a delay before delivering a termination notice might be even more necessary in these cases, since the alternative might involve firing an employee whose emotions and temper are not under control.



Building a file

The documentation used to justify a termination should be developed in the normal course of employment. If the employee has engaged in misconduct, or has problems with performance, and each incident was properly documented, the company should have reasonable and valid documentation to justify a decision.

In some cases, however, a supervisor is less than diligent about documenting all problems, perhaps giving multiple verbal warnings before writing anything down. When the supervisor is finally ready to fire the employee, there may not be sufficient documentation available. In these instances, a supervisor may begin building a file.

All too often, a supervisor who has already “had enough” with the employee will pounce on every incident and record it, hoping to quickly create a file that justifies a termination decision. Unfortunately, these efforts can have the opposite effect than intended, since the records may show that the employee was treated harshly compared to other employees.

Such problems can actually strengthen an employee’s wrongful termination claim. Suppose a supervisor was ready to terminate, but had not yet delivered the news, and then learns the employee filed a discrimination claim, requested FMLA leave, or otherwise engaged in protected activity. The efforts to build a file will show that an employee with no previously documented discipline was suddenly subjected to continual warnings. Since the dates will likely show that these records began appearing shortly after the protected activity, the employee may have an apparently valid retaliation claim in addition to the underlying discrimination claim.

This scenario also supports the need for regular performance evaluations, whether positive or negative. Employees who are doing well should be given positive (and documented) feedback to recognize their accomplishments. These records also help demonstrate that all employees undergo regular performance evaluations.

If your company does not have a formal process for meeting with employees to discuss performance, or perhaps offers only verbal praise for accomplishments, supervisors might only be creating documentation when problems arise. While such documentation is certainly advisable, it may create the impression that the employee was targeted for termination.

If the employee files a wrongful termination claim, his or her disciplinary records should support the termination decision. However, the employee’s attorney may ask to see the performance reviews for other employees. If no documentation exists, the terminated employee’s lawyer may claim that the terminated employee was singled out, possibly for a discriminatory or unlawful reason, and the file was created to hide that unlawful reason.

The best way to avoid these problems is to ensure that supervisors are diligent about recording everything. If it wasn’t written down and documented, then it essentially never happened — or at least, that is how a court may see it.

Managers should take regular notes about the performance of their employees, whether positive or negative, even if only jotting down a few words. Verbal reminders should be provided immediately to recognize an accomplishment or point out a problem, but the manager should also meet regularly with employees (more than once per year) to review each employee’s performance.

Problems that arise need to be documented in a timely manner. Otherwise, if an employee was given a positive review in April, then was terminated for poor performance in October, the manager may not have any documentation supporting the termination decision. A court may assume that the company had some other reason for firing the employee, and overcoming an accusation of a wrongful termination can be a challenge without documentation.



Best practice

Termination checklist

While there is no single checklist that applies in all cases, employers should generally do the following as part of the termination process:

- Have one more person present; don't meet with the employee alone.
- Get right to the point, and explain the purpose of the meeting.
- Give the reason for termination, but don't go through a step-by-step analysis, and don't be drawn into arguments about the reasons.
- Explain that the decision is final and cannot be reversed. Emphasize that all relevant factors were reviewed, and that everyone in management agreed to the decision.
- Outline the entire termination process, and review with the employee all of the benefits and rights to which he or she is entitled.
- Prepare in advance a written summary of benefits, including any severance pay, compensation for vacation and sick time, continuation of health and life insurance benefits, other benefits and re-employment assistance.
- Explain the company's job reference policy, such as what the company will say to someone calling for a reference on that employee.
- If the employee is to leave the premises immediately, have any final checks, benefits, or vacation payments prepared and inform the employee how to collect his or her personal belongings and leave the premises.
- Explain the disposition of other outstanding payments such as travel expense reimbursements, commissions that have not yet been calculated, or bonus payments that might be due.
- Recover any company property or identification from the employee.
- During the meeting (but not before), disable the employee's computer passwords or otherwise lock out the employee from re-entering the computer system or from accessing emails.
- Watch the employee for signs of anger or hostility; stay calm and listen to the employee, but be prepared to summon help or have an escort ready to lead the person off the premises, if needed.

Terminations should not be a surprise

Unless clearly justified for an outrageous incident, a termination should never be a surprise to the employee — especially if it's for ongoing performance or conduct issues. Be sure the employee was made aware of expectations, given time to correct the issue, and told the consequences for failure to correct the problem. If this has been done (and documented) and if there are no mitigating circumstances, the company has done its due diligence in preparing a case for termination.

Employee Relations Essentials

In cases where a single incident is severe enough to justify termination, such as harassment or threats of violence, the employee shouldn't really be surprised that a termination decision was made. This is especially true if the termination was not done "on the spot," but rather was delivered after the employee had been suspended pending an investigation of the incident. An employee might attempt to argue that termination wasn't justified (or that his inappropriate actions were justified) but at least understands the underlying action that resulted in the decision.

Another reason that terminations should not be a surprise is that employees should be given an opportunity to tell their side of a story. Even if the company feels that there is no possible justification for the employee's actions (for example, in cases of sexual harassment), the employee should be given an opportunity to explain himself or herself.

Conducting an investigation of a suspected problem is not only part of due diligence and creating documentation, but it can reveal information that may be relevant. The investigation might even find that the termination isn't justified, or should be withdrawn.

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In one case, an employer fired a male employee who was accused of sexual harassment, based on a complaint. The company later discovered that the complaint was false, and the male employee should not have been fired. While these types of incidents may be rare, it does happen that employees who make complaints will exaggerate an incident.

Similarly, an employee might call in sick on a number of days and inform his supervisor that he needs time off to care for a family member. If the supervisor doesn't recognize this as a possible request for FMLA leave, he may recommend terminating the employee for excessive absences. Getting the employee's side of the story may help prevent a lawsuit for interference with FMLA rights.

However unlikely, an interview with the problem employee might even reveal that other employees engaged in similar misconduct or participated in some impropriety. For example, if an employee is being terminated for theft of trade secrets (such as taking customer lists to start a competing business), an interview might uncover that he was working with another employee to obtain that information. In such cases, the company may have a second employee who should be fired.



Best practice

Checklist for avoiding retaliation claims

If there is not enough documentation to justify the termination, if the documentation is contradictory, or if the termination comes at a suspicious time (for example, right after an employee files a discrimination complaint), it may look like retaliation. Before deciding to finalize a termination, consider the following:

- Be sure documentation shows justification. For example, if an employee is being fired for poor performance but all performance reviews are positive, the company will need some other documentation as evidence of the poor performance.
 - Investigate the matter thoroughly and look at all disciplinary options. Don't look only at how this employee was treated, but consider how other similarly situated employees were treated. Treating employees differently for similar infractions is often a weak point in an employer's case.
 - Provide evidence the employee received adequate notice that termination might occur and was given reasonable time to improve. (Note: This may not apply if a single act of misconduct, such as workplace violence, warrants termination.)
 - Have supervisors or other decision makers check with HR before terminating an employee. They may be aware of reasons why a termination is inappropriate. For example, if the employee just filed a complaint about safety violations, a termination might look like unlawful retaliation for filing the complaint. Similarly, if a female employee just informed HR she's pregnant and inquired about leave benefits, terminating her may look like pregnancy discrimination.
-

Delivering the news

Employers may communicate a termination however they choose, whether verbally or in writing, although most legal experts recommend that notice be put in writing to document the date and reason for termination. Many states even require that notice be given in writing, typically under the state unemployment compensation laws. The intent is usually to document the date of separation for purposes of determining benefit eligibility. Employers can provide more information than required in these notices, and giving written notice that includes the basics (such as the effective date of separation) should satisfy these state laws.

Even though a termination should be documented, the news will often be delivered verbally to the employee in a meeting. Having a copy of the termination letter in this meeting may help keep the news delivery on track. The manager who delivers the news might even find it helpful to review the letter before the meeting to keep the reasons fresh in his or her mind.

Written notice

A termination letter should be as objective as possible. It doesn't have to be lengthy, and might only state that the employee is being terminated for violating a particular company policy. However, many employers mistakenly believe that "shorter is better" when crafting termination letters, and this is not necessarily true.

The notice should spell out the reasons for the termination because providing the justification can help the company. If the employee attempts to file a discrimination claim, for example, the termination letter may discourage an attorney or government agency from following up on a complaint (since they can see that the discharge was clearly justified).

Some law firms offer sample termination letters that run several pages, listing specific dates of incidents and actions taken by the company to address the problems. When looking over such a document, a court or enforcement agency is more likely to conclude that the company had valid reasons for termination. For example, a letter might have a number of items which look something like this:

On March 3, 2010, Karen arrived two hours late and stated that her car wouldn't start. When asked why she did not call in to explain that she'd be late, Karen did not respond. She was warned that the tardiness was her second unexcused absence, and that a third incident may result in termination.

On March 18, 2010, Karen turned in a timesheet indicating that her shift ended at 5:00 p.m., but coworkers saw her leave at 4:30. Karen later admitted that she had left early. This was a falsification of the timecard in violation of company policy, and she was warned that the company considers this to be theft, with termination for any subsequent occurrence.

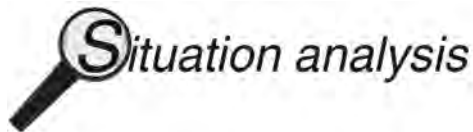
If an employee has a history of problems, providing information like this is acceptable. This may result in a long termination letter, but laying out the history can help the employee understand why a termination decision was made.

On the other hand, a termination letter should not include statements such as "we were disappointed in your performance" or other subjective statements. The letter should only include relevant information, not personal opinions.

The company can document all legitimate issues (avoiding any speculation), and also document the opportunities provided for correcting those issues, such as the discussions with the employee. Writing an extensive termination letter may be even more desirable in cases where the termination may be challenged. If the letter spells out all of the problems, along with

disciplinary discussions and meetings in which the company described its expectations, the former employee will normally have a more difficult time establishing a claim.

Conversely, if a former employee makes a retaliation claim, and the company then starts listing reasons for the termination that were not initially communicated, this may create the impression that those reasons were fabricated. Quite a few employers have attempted to “soften the blow” of a termination by not listing all of the legitimate reasons. Then, if a discrimination claim is filed, the employer starts to explain the actual reasons. Employers should remember that a termination letter may become evidence in court, and should be written with an appropriate level of care.



Understanding liability

A discrimination or retaliation claim commonly follows what is known as the shifting burden framework. First, the employee must first present a *prima facie* case (literally “on its face”). For example, an employee might show that he engaged in protected activity (filed an injury claim, made discrimination claim, took job-protected leave, etc.) and was fired shortly thereafter.

If the individual meets this burden and gains the interest of an enforcement agency, the company then is given an opportunity to provide a legitimate, non-discriminatory reason for its decision. The employer now has the burden of showing that the action was not discriminatory.

Finally, the employee may attempt to show that the offered reason is a pretext (false motive) given to cover the actual (unlawful) reason.

An employer will have a lesser burden in showing legitimate reasons if the information given to the enforcement agency is the same information provided to the employee. This helps avoid the impression that the company is changing its story.

Spelling out the justification in a termination letter can help avoid claims in the first place because the agency may request that the former employee provide a copy of the termination letter. The agency may decide that even if the employee did engage in protected activity, the company had sufficient cause for termination. Engaging in protected activity does not shield an employee from termination for legitimate reasons such as performance, conduct, or attendance.

Verbal notice

When an employee is called to a termination meeting, the employee is not normally given advanced warning about the reason for the meeting. In situations that involve a long history of disciplinary problems, the employee may be expecting the termination — and might even be waiting for it, based on a desire to leave the company without actually quitting. In other cases, the employee may believe that things are going well (despite previous disciplinary meetings) and may not be expecting the news. Employers should be prepared for possible emotional responses in that case.

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In many cases, two company representatives will deliver the news, such as a supervisor and representative from Human Resources. Often, a supervisor will deliver the news alone, especially in cases of layoffs or other separations that were not under the employee's ability to control. In cases involving conflict between an employee and supervisor, the news might be delivered only by an HR representative.

The individual's dignity should be maintained as much as possible. The news should be delivered respectfully and with compassion, but should still be given directly. There is no advantage to dancing around the issue, but blurting out "You're fired!" isn't appropriate either. Simply begin by stating something like, "We've called you into this meeting because we have to let you go. Your employment is terminated as of today."

The company may explain the reasons for termination, but should be brief. An employee may argue with the decision or request another chance, but employers should not be drawn into this type of discussion. Simply point out that the decision has already been made, and if necessary, point out that previous disciplinary warnings have already provided additional chances. The termination letter may spell out these reasons in detail, as noted previously.

If it seems appropriate, or in cases of layoffs, the supervisor might consider discussing the employee's strong points and suggest the type of job he or she might consider seeking. This is more likely to be appropriate in cases where the termination is not for performance or conduct issues, but for something outside the employee's control (such as downsizing).

Once the news has been delivered, the discussion may turn to related matters such as return of company property, disposition of benefits, and so on. Lastly, ask if the employee has any questions, and remind her that she can contact HR if any questions arise later.



Cross reference

For more information, see the **Related Matters** tab.

In some cases, security concerns may arise (for example, if the employee might become violent) in which case additional security measures should be taken. This might range from immediately notifying receptionists and other employees so they understand that this person is not allowed back in the building, or it might even involve contacting the police for an escort.

Depending on the reason for the termination and the employee's emotional state, the company may allow the employee to pack up personal belongings — under supervision, if necessary. The potential for some problems can be eliminated through other means, such as having someone disable the employee's computer access during the termination meeting.

The employee will then have to be escorted out of the building. Whether the supervision and escort involves someone standing over the employee's shoulder or simply keeping a watch from a respectful distance while he or she says goodbye to coworkers may depend on the employee's emotional state. If an escort is necessary, consider allowing the employee to choose the escort (e.g., he or she may prefer the HR representative to the former supervisor).

Finally, other employees may also have to be notified that the terminated individual is no longer employed by the company. Coworkers will certainly notice that someone is gone, but may not notice right away. Attempts to correspond with the discharged employee (leaving messages or

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emails) can waste their time, and at worst, coworkers might allow the person back in the building (which can be a security concern). While employers generally avoid formal announcements, the members of the terminated employee's team may have to be informed of the separation — even though they won't be told the reason for the separation.



Example situations

The following examples are provided to illustrate how some common (and potentially challenging) terminations might be handled.

Steven seems unhappy in his current job. His performance is acceptable, but he puts in only the minimal amount of effort required. Also, his attitude is quite negative and brings down his team members. The company would like to terminate and find someone who is a better fit for the job and the team. What should a termination letter say?

Essentially, this is an “at-will” termination where the company does not need to provide a specific level of legal justification, but simply feels that finding another employee would better serve the company's needs. However, describing the issue as an “attitude problem” is too vague, since it could mean anything from rolling the eyes to grumbling about workloads. Consider that these issues could also be described as conduct problems.

For example, instead of referring to his attitude toward the job, list examples of conduct to illustrate these problems. This does not have to be an exhaustive list, but should be sufficient to justify a conclusion that Steven does not appear satisfied with his position. If his displays of dissatisfaction are manifesting as conduct that affects the productivity of coworkers, the company has a legitimate business reason for taking action.

Note that attitude is entirely within an employee's ability to control; a company can suggest that a change is needed, but Steven must be willing to implement those changes. If he has been counseled on what changes are needed, then he should be aware of what steps are required to maintain his employment. A lack of willingness to improve and become a contributing team member can be a legitimate reason for termination.

The company might also document its impression that he is only doing the minimum work required by using examples, such as refusing to assist team members. While meeting basic job demands might result in a “satisfactory” rating on performance reviews, the conduct issues suggest that he could be doing more, but he is directing his energy into non-productive areas — to the point of bringing down the team.

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If it seems appropriate (depending on whether the employment relationship is still cordial or has started to become confrontational), the company might recognize that Steven appears to have more to contribute, but seems to be holding back because of his unhappiness with the position. Therefore, the company is letting him go in order to find someone who will put in greater effort.

This type of situation may also be a good candidate for offering severance pay and, since this is not a termination “for cause” that would justify a denial of unemployment benefits, informing Steven that the company does not intend to challenge his claims for such benefits.

Kathy has been causing ongoing problems for some time, including issues with attendance, attitude, and productivity. Prior discussions resulted in improved attendance, and limited changes in attitude, but not to the extent that we’d prefer. Her supervisor is tired of dealing with Kathy and would like to let her go. How should we proceed?

In this case, the company might prepare a termination letter listing the problems experienced, the company’s efforts to encourage improvement, and to what extent those issues were resolved or unresolved (which could be an extensive list).

For example, Kathy’s attendance may have improved from five incidents of tardiness per month down to three per month, but this still isn’t acceptable. Also, the company might be able to clarify the attitude with specific examples such as rolling the eyes, refusing to accept work assignments, or making sarcastic remarks to coworkers.

The separation letter may conclude by stating that because these recurring problems have not been satisfactorily resolved, the company has decided to terminate her employment.

When delivering the news verbally, the company representative might indicate the impression that Kathy is not happy in this job. Be cautious, however, because the reasons for a termination should be largely objective, and this impression would be subjective (it should not be written into the termination letter). Subjective information can still be legitimate, but documentation should stick to the objective issues.

Karl shows unprofessional behavior and poor attitude, so we have decided to fire him. Documenting performance or attendance is fairly easy, but how should we document that Karl is being terminated for attitude and failure to accept responsibility?

As with performance or attendance problems, the documentation should provide examples of the reasons for termination. These examples should be as explicit as possible — and hopefully, they were already documented in verbal or written warnings.

For example, the term “poor attitude” is vague and subjective, and so is the term “unprofessional behavior.” It would be better to describe the exact action or statement at issue (such as “making sarcastic remarks to coworkers”) and even including the statements made. Managers may feel uncomfortable writing down curse words or offensive remarks, but those statements are equally shocking when viewed by a neutral party (such as an enforcement agency) who reads the termination letter.

As an example, a manager might document something like this: *On February 16, 2011, Karl refused a job assignment by saying it “was not worth his time” and said he was “too busy to accept unnecessary tasks.”*

Along the same lines, the unwillingness to accept responsibility is also vague, and might be written out as something like this: *After a discussion on March 3, 2011, regarding the need to accept assignments, Karl has continued to refuse assignments while making disrespectful comments such as “I work harder than everyone else already.”*

If existing documentation is limited, but Karl has been causing problems among coworkers, it may be possible to obtain documentation through feedback from his coworkers, or by investigating the situation and interviewing coworkers, or even simply documenting any complaints that coworkers have voluntarily brought forward. While some incidents might not have been previously documented, they could still be included in the termination letter to create a record.



Cross reference

For more information, see the section on **360-degree feedback** in the **Rewards and Advancement** tab.

Termination letters should also describe actions taken by the company that provided an opportunity for the employee to improve. These letters lay out the warnings or other disciplinary actions to correct the behavior, specific language used, specific assignments refused, and so on.

Essentially, the termination letter can briefly summarize all of the events which lead to the termination decision. Faced with this evidence, Karl should understand why he is being fired, especially if these matters were previously discussed with him.

Last year, Mark was suspected of using a company credit card for personal reasons, so we removed his access but did not terminate. Recently, another employee has accused Mark of theft. Can we fire Mark even though we cannot prove that he stole anything?

First, the company should have a statement from the employee who made the accusation. The accuser might even be encouraged to report the theft to the police, if this wasn't done already. Mark should also be given an opportunity to respond to the accusation and provide a statement.

Obviously, these two statements are likely to be in conflict, suggesting either a good-faith error by the accuser or dishonesty by the accused. This is not unusual (e.g., accusations of harassment are often "his word against mine" cases). However, employers can evaluate the credibility of each statement and make a determination.

For example, consider whether one party has a reason to lie, whether there is any history of conflict between them that might bear on the accusation, whether the Mark engaged in such conduct before (such as the previous suspicion of theft), and a simple evaluation of whether one employee or the other appears to be lying (perhaps through body language such as crossing the arms and avoiding eye contact during the interview).

If the investigation and credibility evaluation leads to a reasonable suspicion that Mark did engage in theft, he can be terminated. The company does not have to prove theft beyond all doubt, nor conclude that Mark definitely engaged in theft. Rather, an unproven suspicion based on a credible accusation and investigation, combined with a history of similar misconduct, may result in a loss of confidence and a desire to avoid problems in the future.

The investigation notes should indicate a reasonable belief that Mark may have engaged in theft (again, this need not meet the legal standard of "beyond a reasonable doubt"). Even if Mark later proves that this belief was incorrect, a company will usually be protected if it exercised due diligence and acted in good faith when making a termination decision.



Last day of work

When an employee is terminated, the individual's last day of work (for purposes of payroll, benefits, and so on) can usually be recorded as the last day that the employee actually performed his or her duties. In some cases, however, the last day of work may be the day that the employee was informed of the termination, even if the employee did not actually work that day.

For example, suppose an employee is placed on administrative leave pending an investigation of allegations that he harassed a coworker based on race. The investigation might require a couple of days and discover that the offender should be terminated. After a few days, the offending employee is called in for a termination meeting. What should the company record as the last day of work?

In this case, recording the date of termination as the last day would be best. In starting the investigation, the company may not have known whether termination would be justified, and should not back-date a termination to an earlier date. The suspension time might have been unpaid, and the employee might not have worked during that time, but the actual decision wasn't made (and the employee might have been considered an active employee) right until the actual notice was given.

Using the actual date that notice was provided as the last day of work will help ensure consistency in all situations, even if the employee hasn't been working for some time. As an example, an employee might be placed on administrative leave on a Thursday, but the investigation is delayed because of the weekend (which might even be a three-day holiday weekend). If the employee is called back on Wednesday for a termination meeting, there's usually no real advantage to back-dating the termination to Thursday of the previous week.



Cross reference

For more information, see the section on **Administrative leave** in the **Discipline and Corrective Action** tab.

Similarly, employees may be terminated for job abandonment after three or more days of failing to call in or show up for work. However, the company should not back-date the termination to the first day of absence. After all, the policy on job abandonment would not even have applied until the third day of absence.

If attempts to contact the employee have failed, the company may send a letter stating that unless the employee contacts the company by a specified date to substantiate the reason for the absence, the individual will be assumed to have abandoned the job, with an effective date of the third day of absence. This would still be consistent with the policy, and would record the third day of absence as the last day of work (even though the employee didn't actually work on that date).

“Encouraged” resignations

Technically, employees cannot be forced to resign or retire if they don't want to. However, they can be encouraged to accept a resignation or retirement under threat of termination or layoff. Essentially, an employee's decision to leave is classified as “voluntary” by the company, even though the employee may not have had much choice in the matter.

Employees may be encouraged to resign for a variety of reasons, including:

1. An employee facing a termination for minor misconduct, performance, or other issues may be allowed to resign so that during future reference checks, the company will report that the employee resigned (rather than stating that the employee was fired).
2. The employee may be nearing retirement, and the company needs to either reduce staff (by offering incentives for early retirement rather than laying employees off) or the company feels that a particular individual's performance is declining, but would prefer to offer an amicable separation rather than actually firing the employee.
3. The employee may have a contract for a specified project or other condition of employment, and rather than argue over the contract or terms, the employee will “agree” to resign.
4. In some cases, employers may not have sufficient cause for termination (perhaps the employee was reasonably suspected of stealing trade secrets, but this cannot be proven), so the employee is allowed to resign rather than facing a full investigation with an inevitable result.

Whatever the underlying reason, these situations are somewhat similar in execution. Typically, the employee is offered some form of consideration (severance pay, continued health coverage at the company's expense, etc.) in exchange for making some concession (waiving certain discrimination claims, agreeing to sign a non-compete agreement, or otherwise avoiding some type of legal challenge).

If an employee's resignation or retirement will be encouraged, employers should have the separation agreement drafted by an attorney who specializes in this area of law. Since the employee will usually be asked to waive some rights or otherwise sign an agreement, that agreement may be later challenged in court. Employers should not attempt to create such agreements without a full understanding of applicable federal and state laws. Otherwise, the agreement may be deemed invalid by a court.

While separations under these conditions often imply that the relationship with the employee was less than ideal, using an encouraged resignation can still be preferable (and potentially reduce liability) as compared to an actual termination. At the very least, both parties (the company and the employee) should get something desirable, which can make the separation less confrontational.



For related information, see the section on **Layoff alternatives: Offering early retirement** later in this chapter.

Terminations for medical reasons

Employees may take time off from work for various medical reasons. Their absences may be protected under the Family and Medical Leave Act (FMLA). They may suffer a workplace injury and file a workers' compensation claim (where the absence can run concurrently with FMLA). Even employees who do not qualify for FMLA may have to be granted time off as a reasonable accommodation under the Americans with Disabilities Act (ADA).

The intent of these laws is to help the employee recover and, ideally, continue in employment. In some cases, however, an employee is medically unable to return. This creates a challenging situation for employers, since the company may have to terminate. In cases where an employee is unable to perform the essential functions of the job (with or without accommodation), or the amount of leave needed is either unknown or so extensive as to cause undue hardship, the employee may have to be let go.

Employers are rightfully concerned about claims of disability discrimination in such cases. However, discrimination is primarily an issue where an employer took action "because of" the medical condition. If the company can show that employment is being terminated because the individual is not qualified for the position (e.g., cannot perform the essential functions of the job, and no accommodation is possible), then the separation is not "because of" the condition.

In rare cases, an employee will realize that he or she cannot return to work in the foreseeable future, and will submit a notice of resignation. Once the FMLA runs out (or if it never applied) and the employee indicates that he or she has no desire to return, or cannot even provide an estimated date of return, the separation would be easier to defend against possible claims.

More commonly, however, an employee will expect the company to hold the former position (or be prepared to rehire the employee in another position) once the individual is able to return. One option is to keep the individual listed as an "inactive" employee and wait for the employee to quit or abandon the job.

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If the employee expresses a desire to return and indicates that he or she can do so within a specified time period (whether six weeks, six months, one year, or longer) the company must evaluate whether providing this much leave would cause undue hardship. This determination depends on the situation (resources available to the company, number of employees available to “cover” for the absence, whether the employee performed a unique or critical function, and so on).

While the ADA requires employers to consider reasonable accommodations, this does not automatically mean holding the same job. It can include a transfer to an alternative position (for which the employee is qualified) if the original position must be filled.

For these reasons, employers can face considerable challenges in proving that an employee’s need for extended leave causes undue hardship. This is particularly true because an employee on extended leave need not be paid, and might even be given a COBRA notice for health benefits (a reduction in hours that would result in a loss of coverage is a COBRA-qualifying event). The EEOC feels that if the absence is not costing the company, then offering such leave as an accommodation should not cause undue hardship.



Rather than terminating employment and potentially having to prove that granting the time off would cause undue hardship, employers can consider granting extended unpaid leave. Essentially, the effects on the employee are the same as a termination (no work performed, no pay received, and no company benefits), but the individual is still deemed an “employee” by the company. When offering extended unpaid leave, there are several possible outcomes for the company:

1. The company may receive additional information about the nature of the condition (possibly weeks or months later) that helps evaluate the situation. For example, if an employee requested six weeks of leave, but later reports that she will require at least a full year, the company may have an easier burden of showing undue hardship for the

amount of leave requested. Termination may be an option based on the new information. Conversely, an employee may recover sooner than expected (if the need for leave was a “worst-case scenario”) and a return to work may be possible.

2. The employee may be asked to keep the company informed, perhaps being asked to report monthly on whether the need for leave is continuing. If the employee fails to report or maintain communication after being told that doing so was a condition of the leave, the individual might be assumed to have abandoned the job. This avoids the need to make an undue hardship determination because the separation was based on the employee’s failure to communicate.
3. At some point, the employee will recover and announce an intent to return. The company can then evaluate whether a return is possible. Although leave may have been provided as an accommodation, the company might still have hired a permanent replacement for the former position. The company can look at other possible accommodations (such as restoration to a different position that is available and for which the employee is qualified). If nothing suitable is available, the company might determine that no accommodation is possible and employment must end at this point.

Any of these options can be preferable because they reduce the need to prove undue hardship based on information available at the time an employee requests extended leave. Essentially, the company is attempting to show that it took every reasonable effort to allow continued employment in some capacity, but despite these good-faith efforts, the relationship had to be terminated.

Example situation

Jennifer was in a car accident and eventually returned to work with restrictions, but she cannot perform the essential functions of the job. We offered her a transfer, but it would require moving to another state, which she declined. We have no other positions available. Can we terminate, and if so, what should we say?

The assertion that she cannot perform the essential functions of the job assumes that the company already engaged in the interactive process to evaluate potential accommodations, and determined that no accommodations can be made without causing undue hardship. Having documentation of this process is critical to avoid claims of disability discrimination.

Under the Americans with Disabilities Act (ADA), an employee who is unable to perform the essential functions of the job (with or without accommodation) can be deemed “not qualified” for that position. If she cannot remain in the current position, the next step is to consider a possible transfer. The ADA does not require creating a new position. It also does not require offering the accommodation the employee prefers, as long as the employer’s chosen offer would be effective in eliminating the conflict between her job duties and her limitations.

In drafting the termination letter, focus on the fact that the company made every reasonable effort to accommodate, but determined that no accommodation can be made without causing undue hardship. Since Jennifer is not qualified to perform the essential functions of her current position, and she is unwilling to accept a transfer to the only other position available, the company is unable to continue her employment. In other words, Jennifer is not being fired “because of” her medical restrictions (which could be an ADA violation) but only because she is unable (or unwilling) to perform the duties of any available positions.

If Jennifer later attempts to file a disability discrimination claim, the termination letter should explain the reasoning, and will hopefully deter an enforcement agency (or private attorney) from accepting the claim. Equally important, if an agency does accept her claim, the information the company provides to the agency should match the information given to the employee.

Many employers get into legal trouble by trying to downplay a termination (such as telling the employee that she just isn't working out) and then giving a different justification to an agency. This creates the impression that the employer changed its story.

In short, explain that despite the company's best efforts to accommodate, it is unable to continue her employment. If she was a good performer, the company might include a letter of recommendation as a gesture of good will, or even consider offering a severance package. Also, be aware that since the transfer would have required moving to another state, she may be eligible for unemployment benefits, even though she rejected a job offer.

Fired or laid off?

Handling situations where an employee voluntarily chooses to leave is relatively straightforward. However, when an employee must be involuntarily separated, is this a layoff or a termination?

From a legal perspective, there isn't much difference, other than the employer's justification for the action. A layoff will normally affect more than one person, and is initiated for reasons such as cost reduction. Employees might be selected for layoff based on a number of factors, including seniority or performance. In a small company, or a single department within a larger company, a layoff might only affect a single individual. Normally, however, a layoff affects two or more employees.

In most cases, a termination normally affects only one person. It can affect more than one if, for example, two employees got in a fight and both are fired. However, these situations are unlikely to be confused with layoffs, and the affected employees should know the underlying reason for the termination (even if they don't agree with the decision).

Employers are often afraid of unlawful termination lawsuits, and may be reluctant to actually say to an employee, "You're fired!" Instead, they might tell an employee that he's "laid off," hoping to avoid confrontation and hurt feelings.

In one sense, there's not much difference between the two terms, and whether an employer uses "laid off" or "fired" to describe the employment action can be just a matter of semantics. Both involve an involuntary separation from the job. However, the choice of words may affect how the employee views his chances of being recalled to work at some future point.

A firing or termination usually has a negative connotation, and it typically means the action is permanent. While the employee's feelings may be hurt, there's little chance he'll believe that the company is planning to call him back.

However, if an employee is told he's being laid off, he may believe the action is based on restructuring, a reduction in force, or simply a lack of work. Employers sometimes take the easy way out and label a separation a layoff when they are really terminating an employee for poor performance. They may do this to avoid confrontation, documentation, discipline, and hurt feelings. In an employment-at-will state (which includes all states except Montana), employers who use this strategy aren't necessarily breaking the law.

Still, using the term "layoff" when that term isn't accurate may be risky, because the so-called layoff may give the impression that the employee will be returning when the economy recovers or when revenues rise. In fact, the employer may have no intention of ever reinstating the person. When this worker — who was never counseled about performance issues — learns that a replacement worker has taken his place, he quickly figures out that he was fired, and he may assume that the employer had a discriminatory motive.

Employee Relations Essentials

On the other hand, if an employee is told flat out that his employment is terminated, he suffers no illusions about his need to find another job.

If the employee is let go in a reduction in force (RIF) or downsizing, that typically means that the position itself was eliminated, leading to no possibility of recall. The terms RIF and layoff are often used interchangeably, but they do not necessarily mean the same thing.

There are also a few legal distinctions between layoffs and terminations. An employee who is laid off for lack of work will often be eligible for unemployment benefits, but a state unemployment agency may deny benefits if it determines that an employee was discharged for willful misconduct.



No right to recall

When employers have to initiate layoffs, they often wonder about the legal rules when selecting individuals for layoff. Also, does a company have to recall a laid-off employee, or could it hire someone else instead?

It's up to the company to determine how it selects workers for layoff. A company may base its decisions on seniority, attendance, performance, production rate, job description, or some combination thereof.

There really aren't any state or federal laws that speak to layoff or recall criteria other than the general prohibitions on discrimination and retaliation. A union might negotiate recall rights in a collective bargaining agreement, but this is a contract issue, not a law or regulation.

In the absence of a collective bargaining agreement or other contract, an employer could bring in a new employee rather than recalling a laid-off worker. However, a company that does this should maintain good documentation of its criteria to show that it was not discriminating. That is, the company should be able to document why certain employees were selected for layoff, based on non-discriminatory criteria, and show why those individuals were not rehired.



Cross reference

For more information, see the section on **Rehiring former employees** in the **Related Matters** tab.

Time frame for rehiring

In some cases, employers may have to downsize, or impose layoffs of indefinite duration, but find that they need to fill the eliminated positions sooner than expected. Perhaps a new project or customer was acquired, or perhaps the company eliminated too many positions. It may even happen that other employees quit and the company suddenly needs to fill an opening.

These situations may raise questions about how much time must pass between a layoff and a rehire, especially if the company does not recall a former employee. In actuality, there is no minimum time frame. In theory, an organization could impose a “permanent” layoff of several employees, then replace some of them only a few weeks later.

Even in these cases, there is no obligation to rehire the same employees. An employer might have selected low-performing employees for layoff, and may not want to rehire those individuals. The fact that someone else is hired for a recently eliminated position does not automatically create liability for a wrongful termination lawsuit by a former employee.

As noted, however, a former employee who is likely looking for work may see his old job posted and wonder whether he was actually terminated. As long as the employee was selected for layoff based on legitimate factors, and there were no promises to rehire, the company can look for other applicants. The former employee might even submit an application for his old job, but the company is not obligated to hire that individual, regardless of how much (or how little) time has passed since the layoff.



Situation analysis

Rehiring laid-off employees

Some employees feel that the term “layoff” implies a right to recall. If the company is simply closing a department or section, it may be better to call it a reduction in force or other term that indicates finality, rather than calling it a layoff.

Perceived recall rights can be confusing, but states are often reluctant to accept an employee’s claim that such rights were offered. Even states that give employees considerable leeway (such as California) have demonstrated this reluctance. An opinion letter from the California Division of Labor Standards Enforcement (dated May 30, 1996) addresses an employer who asked about the right to recall. The letter includes the following:

A right to recall which required the employer (regardless of economic conditions) to recall all (or even some) of the employees would be unique to say the least. Experience teaches that no employer could afford to contract away its right to hire or not hire depending upon need; and absent any unconditional right to return to full time employment on a certain date regardless of economic conditions, the “right to recall” would be nothing more than a conditional promise by the employer unenforceable by the employee. In addition, of course, absent a specific agreement to the contrary, the employee would have the right to seek employment elsewhere and not return to the employer so there would exist no mutual promises to support a contract for continued employment.

In other words, even if an employee got the impression that he or she would be recalled, the perceived “promise” would be a difficult verbal contract to enforce because it isn’t a two-way street. The employee would be asserting that the company had an obligation to restore employment, even though the employee was free to seek other work.

Layoffs

The sad fact of business is that sometimes perfectly good employees are let go through no fault of their own. When the economy goes sour, businesses often have to downsize to remain competitive. Employers may have heard stories about employees being given the choice of training their replacements or getting terminated without severance pay. There are also stories about how employees were divided into two groups: one group told to attend a meeting in Room A, while another group was to attend a meeting in Room B, with one group scheduled for termination.

Handing employees their walking papers doesn’t have to be done with insensitivity. Instead, this is a time to be *extra* sensitive. There is no good way to deliver layoff news, but there are measures employers can take to lessen the blow.

1. Treat them with respect. This would appear to be common sense, but it doesn’t always work that way. Try to keep dignity and respect as part of the process.

2. Give as much advance notice as possible. Warning employees ahead of time that the company’s financial situation is difficult (but not explicitly stating that layoffs may be coming) gives them time to adjust to the idea and makes the eventual news less of a surprise. Of course, advanced notice must be tempered by business realities. Informing the entire workforce that the company is considering layoffs in a few weeks may do more harm than good. Given these considerations, there’s nothing wrong with informing affected employees on the day that the layoff becomes effective.

3. Provide severance or outplacement benefits. If feasible, severance benefits can help lessen the monetary blow of a layoff. Providing outplacement assistance shows the company is concerned about employees and wants to help them get back on their feet as soon as possible.

4. Communicate, communicate, communicate. When employees are left in the dark, they tend to fear and presume the worst, and the rumors may fly. Keep them informed as events unfold so they know what to expect. If employers are honest and up front with them from the start, they will appreciate that, even if the news isn’t good.

5. Don’t forget those who remain. Employees who remain can be on edge, bracing themselves in case they might be next. They can be stressed from greater job responsibilities. They can even suffer from survivor’s guilt for *not* being laid off. Once the layoffs are complete, all is not necessarily rosy with the rest of the workforce. They will need attention as well.

Temporary or permanent layoffs

A temporary layoff can be any amount of time defined by the company, but it implies that employees will be called back. For example, bridge tenders in a city (who raise and lower bridges for ships) might be temporarily laid off once the rivers freeze during the winter, with the understanding that they will be rehired in the spring. Similarly, a factory might lay off employees during the holiday season (mid-December through mid-January) because of business slowdown, again with the understanding that those employees will be called back.

In many cases, employees on temporary layoff are not removed from the payroll system, but they are allowed to collect unemployment and even seek other work until they are called back. It may help to think of a temporary layoff as similar to a leave of absence.

A permanent layoff implies that the employees should begin looking for other jobs because they won't be called back. A layoff may be permanent because a number of positions are being eliminated during restructuring, or because a department is being closed for economic reasons (or any number of other reasons).

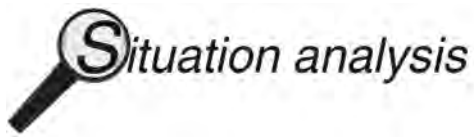
The law does not establish any amount of time during which employers must grant recall rights (although a collective bargaining agreement may address recall rights). If the company has no intention of rehiring for the affected positions in the foreseeable future, it should clearly communicate this. Otherwise, the laid-off employees may try to live on unemployment (without looking for work) because they expect to get their old jobs back.

In other words, the recall rights of a laid-off employee are not based on law, but are only based on whatever promises the company makes. If a department is being closed and is not expected to reopen, do not make promises about recall.

Finally, if a company expects a temporary layoff, it is not legally obligated to call back the same employees. However, if the same positions become available again, employees may wonder why new employees were hired instead, especially if the company created the impression that the same employees would be called back. Hiring new workers creates the impression that the former employees were not laid off, but were actually fired for some reason (which they may assume was an unlawful reason).

Employers commonly use layoffs as a means of removing low performers or employees with attendance problems, and there's nothing wrong with doing so. The selection criteria used, however, should be well documented. Then, if an employee who was laid off notices that his former position has been filled and files a discrimination claim, the company can show that it applied legitimate criteria in selecting the employee for layoff and used those same criteria to determine that the employee was not eligible for rehire.

While an employer must be cautious about making promises of possible future recalls, it can inform affected employees that they are not eligible for rehire, or at least that they will not be given preferential treatment. As an example, if a company selects a dozen low performers for layoff, it can let the affected employees know that they should have no expectation of being recalled, and that if the company decides to fill those positions in the future, they will have to submit an application and compete for the position along with other applicants.



Discrimination claims

Generally, an employee must establish a “prima facie” case to sustain a discrimination claim (literally, the claim appears to be legitimate “on its face”). Typically, this involves showing several factors: (1) The employee is a member of a protected class (e.g., female, minority, over age 40, etc.); (2) was clearly qualified for the position; and (3) was rejected or terminated in favor of an someone who was not a member of the protected class (possibly a less-qualified person). If the complaining employee can show this, the burden shifts to the company to show a non-discriminatory reason for the hiring decision.

A discrimination complaint must be based on (or “because of”) membership in a protected class. For instance, if a female over age 40 was fired and replaced with a 33-year-old male employee, the company may need to show that the decision was justified by non-discriminatory factors (i.e., the younger male was more qualified, or the older female was terminated for legitimate factors, such as poor performance).

On the other hand, if a company is replacing former employees with individuals in the same protected classes, it should be more difficult to sustain a discrimination claim. There would not appear to be a prima facie case of discrimination.

Selection and documentation

Some of the primary legal considerations regarding layoffs or downsizing relate to basing the selection on non-discriminatory factors. There are also a few best practices to consider, including the day of the week on which the notification is made and trying to maintain the affected employees’ dignity.

General considerations include the criteria that will be used to select individuals for layoff, identifying the decision-maker, and communicating the information. Unusual or special circumstances may involve employees on FMLA or workers’ compensation leave (these laws don’t protect employees from layoff, but the standard for justifying the decision may be higher to avoid the appearance of retaliation).

Costs to consider include the effects on morale and productivity, possible damage to public image and the impact on attracting future employees, unemployment compensation, and potential legal liability (if employees believe they were selected for an unlawful reason such as age discrimination).

Other considerations include the notification laws (such as WARN or state equivalents, if more than a specified number of employees are affected), the COBRA obligations, and the existence of a collective bargaining agreement. Older workers might even be offered early retirement or severance pay in exchange for a waiver of discrimination claims.

Position, not person

When a company determines that staff reduction is necessary, the first step is to identify which positions can be eliminated. Obviously, specific individuals will have to be selected eventually, but the initial focus is on the type of position. For instance, if a company has a sales team of 60 employees, a reduction in sales volume may dictate a need to eliminate some of those positions. Other types of positions may not be under consideration, based on the nature of the work or anticipated future needs.

The business justification for eliminating certain positions will normally be based on objective factors. Whatever factors caused the need for staff reduction (economic issues, loss of customers, merger with another company, natural disaster, etc.) might be tied to specific departments or positions that will be impacted.

In some cases, only one person in a particular position might need to be eliminated. For instance, if the company has three recruiters but does not expect to hire many new employees for quite some time, it might eliminate one of the recruiters. In other cases, as with the earlier sales team example, several employees holding similar positions will need to be eliminated. In either situation, the company will have to determine which individuals will be affected.



Layoff selection criteria

Many organizations rely on seniority in choosing who will be affected by a layoff, but employers aren't actually required to use seniority (assuming the company does not have a contract or union agreement to do so). Seniority is commonly used because it's easy to measure, but it isn't always useful. For example, a company may have employees with less seniority who are better trained, better performers, show more versatility, or will otherwise offer more value to the company.

Employers can use any legitimate factor, as long as it is not discriminatory. Obviously, a company cannot select employees based on gender, race, age, or other protected characteristics. In most cases, employers can use any of the factors that would normally be considered when conducting performance evaluations, such as attendance (but not FMLA absences), teamwork, job knowledge, skills, safety, and so on.

In short, if a particular employee's skills, education, and experience are better suited to the company's future needs, the company can make selections on that basis. An employer can even retain "temp" employees while releasing "regular" employees if the temps are better suited to expected future needs (based on cost, elimination of other positions, etc.).

Employers should use criteria that are primarily objective and well documented. In some cases, employers who used performance evaluations had problems with the accuracy of their records. For instance, supervisors may give a positive (or at least neutral) evaluation to an employee with performance problems and verbally address the issues of concern.

If the employee (especially a minority, female, or member of a protected class) is chosen for layoff based on verbal reports of misconduct, or is not rehired at the time when other affected employees are recalled, but the documentation does not reflect any problems, the company can find itself facing a discrimination complaint. Courts and juries are much more impressed by documentation than by verbal assurances that the employee was given good reviews even though he or she had problems.

Many attorneys advise the creation of a matrix for comparing employees. For example, the company might create a table which includes each employee's name, as well as the factors being evaluated. Typically, this includes job performance, versatility within the department, flexibility within the organization, and performance issues such as initiative and teamwork. Then, each factor is rated 1 through 5 (or some other scale) with ratings such as "does not meet" to "marginal" to "meets expectations" to "exceeds" to "exceptional." A three-point scale may work, but a five-point scale reduces the number of "ties" between employees. In case of ties, factors like seniority may be considered.

Even after the comparison identifies potential individuals for layoff, the company should evaluate the selections for disparate impact. For instance, suppose a department of 15 employees must be reduced by three positions. The team includes 11 Caucasians and four minorities, but three of the minorities were selected for layoff. This result is likely to create the impression that the minorities were specifically targeted. The selection criteria may have to be evaluated to ensure that they are based on business necessity, or other factors may have to be considered.

Creating documentation of the selection criteria (and evaluating the outcome) can be a time-consuming process. However, good documentation can help protect the company from future lawsuits that would likely be even more expensive and time-consuming (even if the company wins the case).

Selecting employees for layoff based on legitimate business concerns and solid documentation not only protects the company from discrimination claims. It also ensures that the best employees are retained and that the layoff only affects employees who are not essential to the company's continued operations.

Who should stay and who should go?

To help avoid potential discrimination claims, employers may be tempted to look primarily at length of service as an objective criterion for laying off. However, relying only on seniority may not be best for the long term. For one thing, employees who have been there the longest probably command the highest salaries. In addition, the most experienced employees may not have all the skill sets needed for future growth. Finally, if a company had recently started a diversity initiative, the newest employees may include a disproportionate number of minorities or other protected groups. Relying on seniority would not be a defense in such cases.

Employee Relations Essentials

Of course, if some experienced employees are close to retirement, it may make more sense to offer them incentives to retire. Length of service can be used as a *determining* factor, particularly when choosing between two otherwise equally matched employees, but it need not be the *primary* factor.

Here are some factors to consider when choosing employees for layoff:

- The needs of the affected departments;
- The knowledge, experience, and skill sets of the employees;
- Employee length of service/seniority;
- Performance reviews; and
- Any factors that make up a protected class (e.g., age, race, disability, etc.).

The needs of the department and the knowledge and skill sets of the employees are going to be a critical match at this point, especially if the department will be operating with fewer people. The company will need to make sure the essential operations are covered by people who are competent to handle them. It will help make for a smoother transition.

Performance reviews are an objective factor that can be taken into account, and could be used as a determining factor when all other factors are relatively equal between employees. If all of the employees in a particular department are excellent performers, but the workloads in that department still justify a need for staff reduction, the company might even consider laying off a different employee in another department, then offering a transfer to the high performer.

Be extra careful if the majority of those chosen for layoff are members of a protected class, either due to age, race, religion, national origin, gender, and so on. This is where the documentation of objective criteria will be most critical. Employers must be able to show that objective factors were used to choose these people for layoff and that there was no discriminatory intent involved in the decision. Obviously, the actual numbers may not be a reliable indicator of discrimination if they are proportional to the workforce. For example, if 80 percent of the employees in a particular department are female, then the affected employees might reasonably include that percentage of women without being discriminatory.

The Older Workers Benefit Protection Act allows a company to offer early retirement incentives to older workers. In exchange, they sign an agreement waiving their rights to sue for age discrimination. There are specific provisions that must be included in this type of agreement, but it is a way to eliminate positions through attrition without fear of an age discrimination lawsuit.

Laying off workers is never easy, but using objective criteria to make the determination, and carefully documenting the reasons, goes a long way toward providing justification for the decisions and avoiding wrongful termination lawsuits.

Notifications

If only a few individuals will be affected, the notification should be handled in person, and the company may want to explain the reason for the layoff (e.g., due to economic conditions). Employers aren't required to give a reason, but showing that the layoff was necessary for business reasons (rather than performance or something else that could have been addressed) may help the employees understand that this was a difficult decision for the company.

Employee Relations Essentials

Severance pay can also “soften the blow” of a layoff. Another idea is to provide a written letter of recommendation (assuming it would be positive) to indicate that the company is sorry to lose a good employee, and show that the company wants to help the employee find other employment. A positive letter of reference helps remind the employee that he or she was a valued employee and that the company is still dedicated to helping the employee even though the employment relationship has ended.



Employers might also conduct exit interviews to get feedback on employees’ experiences at the company. This can give employees a chance to vent any frustrations, and also helps show that the company still values their input.

The notification should also discuss any relevant terms of the separation. For example, will the employee receive payout for unused vacation? Will the person be eligible for COBRA? How does the person file for unemployment benefits? Is this a permanent layoff, or will the employee be eligible for recall? This can be crucial because an expectation for recall may “encourage” a delay in seeking other employment. However, be careful not to make promises of preferential treatment in hiring for future openings since this person may not be the most qualified candidate for the next job opening.



Cross reference

For more information on discussing benefits, see the **Related Matters** tab.

Finally, some experts have suggested that the “best” day to inform someone of a termination may actually be on Monday or Tuesday, and not Friday as is commonly believed. The problem is that if an employee is terminated on Friday, he or she has all weekend to worry about the future. However, a layoff earlier in the week usually allows the person to file for unemployment sooner and (more importantly) start looking for other work.

The bottom line is that employers are generally allowed to make layoff decisions based on legitimate business needs (which may be specific to the company and the situation) as long as the company can show that it did not consider unlawful factors.

Managing employees after a layoff

If the company is contemplating, or has recently completed, a reduction in force (RIF), it may find that it is dealing with unexpected challenges. For example, it may be dealing with some or all of the following:

- Employees who feel betrayed because they were laid off;
- Employees who feel survivors' guilt because they weren't;
- A general air of uncertainty about the future;
- A lack of trust in management;
- Pessimism and poor morale;
- Overworked and overstressed employees who now have to do the jobs of those who were laid off in addition to their own.

How should a company deal with all of the above?

Contrary to what some believe, honest communication can go a long way toward maintaining employee morale, even in the face of dire economic circumstances. Even when delivering bad news, it makes a huge difference if employees know they are not being lied to or that the information isn't being sugar-coated. Honest communication helps maintain a level of trust.

On the other hand, if the company leads employees to believe there will be no layoff, and then surprises a hundred workers with pink slips, employees will not only feel betrayed, but they won't trust anything from management after that point, leading to a bigger morale issue.

While supervisors have little control over the communication that comes from top management or from HR, they can still do their part to quash rumors known to be untrue and provide employees with accurate information. They should be available to answer questions to the extent possible, and keep lines of communication open.

Combating the “Am I next?” mentality

It's only natural for the employees who remain to wonder if they will be next to fall to the axe. They may not give 100 percent, or may feel that they are simply putting in their time until they get a layoff notice. Unfortunately, the company may not be in a position to reassure specific employees. Many employees have an intrinsic desire to do a good job despite external influences, and so a temporary lapse may be no more than a period of adjustment.

While an employer must be cautious about making promises that it cannot keep, it may be reasonable to reassure the remaining employees that the company has carefully evaluated the current economic situation, as well as the projected future situation, and has taken every effort to bring the staffing levels in line with expected needs. Based on this evaluation, the company does not expect a need for a “second round” of layoffs in the foreseeable future, and expects that the steps already taken will allow for continued profitability.

Letting employees know how members of management have been affected (e.g., pay cuts, eliminated bonuses, etc.) helps foster the feeling that everyone is in the same situation. Otherwise, employees may have the impression that management isn't hurting, only the rest of the workforce is.

Employee Relations Essentials

Keep in mind that employees may not feel a sense of shared sacrifices if they hear that upper management has taken a pay cut that is larger than the annual wages of most employees, which only shows how much more the managers normally earn. This type of communication has created negative impacts for some employers. However, expressing the reduction as a percentage should normally be acceptable (e.g., everyone in the workforce, including the CEO, have taken a 10 percent pay cut).

On the other hand, more than one company has reported that upper management agreed to accept a pay cut to the minimum required salary (\$455 per week under federal law) for the duration of the financial hardship. Although an extreme option, it shows that management is willing to go the extra mile.

As a less drastic measure, upper management might communicate that they have accepted a larger pay cut than most of the workforce (e.g., most employees experienced 10 percent pay cuts, while the CEO accepted a 20 percent pay cut). Either way, communicating that management is not exempt from the sacrifices being made can help morale.



Get them back in the game

Asking employees for their input in how to reach team or department goals with fewer people will get them thinking about the process and the task at hand. It will give them an opportunity to be problem solvers, which is a step toward getting their heads back in the game. It's not a bad idea to let them vent a little too, within reason. It will help them let off steam and give them a chance to be heard, even if it doesn't change the circumstances.

While employees might naturally vent to one another, consider asking employees to set aside a time for commiserating that won't interfere with productive time. For example, if a team doesn't normally take lunch together, they might do so in order to talk (in confidence) without disrupting productive working time.

When part of the workforce is let go, the amount of work may not change much, so remaining employees must perform not only their jobs, but also the jobs of their former coworkers. It can be extremely stressful having to do more with less. In combination with poor morale, organizations may see a spike in performance problems and absenteeism.

Again, this could be a temporary adjustment period, and a little empathy will go a long way. However, if performance issues persist, the company will have to address them. While threats of being selected for the next round of layoffs should be avoided, employees who experience the “Am I next?” mentality are generally more receptive to even gentle reminders about staying focused on productive tasks.

Managing under normal circumstances is difficult. Managing in a RIF environment presents even greater challenges. The company can’t push too hard, and yet can’t let up too much, either. Finding the right balance is essential.

Voluntary layoffs

In some cases, employers facing a need to reduce staff will ask for volunteers to accept a layoff, rather than making selection. The individuals who volunteer will be eligible for unemployment because there is a presumption that if no volunteers stepped forward, the employer would make a selection. In that sense, the departure was not initiated by the employees, even though employees did volunteer.

Before asking for volunteers, employers have some considerations to evaluate. For example, if too many volunteers step forward (however unlikely), the company would then have to select a sub-set based on objective criteria. Similarly, if the company does not receive enough volunteers, it will still have to make some selections. These selections may have the normal concerns of avoiding discriminatory impacts.

Another concern is that some of the best or most senior employees may volunteer, potentially leaving a department a bit short on knowledge or experience. Of course, there is also the potential (or even a “hope” on the company’s part) that employees who are unsatisfied with the job and perform below expectations will volunteer for the layoff. In that situation, the company may prefer to select individuals rather than asking for volunteers.

If the company is prepared to address these potential concerns, then asking employees to volunteer for layoffs can be a reasonable alternative to making the selections. Even if most of the volunteers are members of a protected class (minorities, females, over age 40, etc.), there should not be a discrimination concern as long as the employees were true volunteers, and were not coerced into accepting a layoff.

Know the WARN laws

WARN stands for Worker Adjustment and Retraining Notification Act. This is a federal law, but some states have their own WARN laws as well. Because state laws often have stricter requirements, employers must be aware if a state law applies to their organization.

Federal WARN applies to employers that have 100 or more employees, not counting employees who have worked less than six months in the last twelve months, and not counting employees who work an average of less than 20 hours a week. All private employers are covered, as are public and quasi-public entities that operate in a commercial context and are separately organized from the regular government. Government entities that provide public services are not covered. Employers may have to provide at least 60 days notice to affected employees if a layoff involves 50 or more employees at a single site of employment.

Where state and federal law differ, employers must follow the law with the greater requirements. As an example, the New York law applies to businesses with 50 or more employees, and may require 90 days notice for layoffs that affect as few as 25 employees.

Employee Relations Essentials

Notice to employees is required in the following circumstances:

Plant closing: An employment site (or one or more facilities or operating units within an employment site) will be shut down, resulting in an employment loss (see definition below) for 50 or more employees during any thirty-day period.

Mass layoff: A mass layoff which does **not** result from a plant closing but which will result in an employment loss at a single site of employment during any thirty-day period for 500 or more employees, or for 50-499 employees if they make up at least 33 percent of the employer's active workforce.

Neither instance includes employees who have worked less than six months in the last twelve months or employees who work an average of less than 20 hours a week for that employer.

Notice must also be provided if the cumulative number of employment losses which occur during a 90-day period reaches the threshold level of either a plant closing or mass layoff, unless the employer demonstrates that the employment losses during the 90-day period are the result of separate and distinct actions and causes (and are not an attempt to evade WARN).

The term "employment loss" means:

- An employment termination, other than a discharge for cause, voluntary departure, or retirement;
- A layoff exceeding six months; or
- A reduction in an employee's hours of work of more than 50 percent in each month of any six-month period.

As an example, an employer that lays off the entire workforce for two or three weeks over the holiday season would not have to provide a WARN notice because the employment loss will not exceed six months.

Employment loss does not occur when an employee refuses a transfer to a different employment site within reasonable commuting distance. It also does not occur when an employee accepts a transfer within 30 days after it is offered or within 30 days after the plant closing or mass layoff, whichever is later. In both cases, the transfer offer must be made before the closing or layoff, there must be no more than a six-month break in employment, and the new job must not be deemed a constructive discharge.

Employees who are hourly, salaried, managerial, and supervisory are all entitled to notice of a plant closing or mass layoff. Only business partners do not need to receive a formal notice. Those employees who are not counted when determining the trigger levels (those who worked less than six months in the last twelve months and those who work an average of less than 20 hours a week) are still entitled to notice. The employer must also provide notice to union representatives (if applicable), to the state dislocated worker unit, and to the chief elected official of the unit of local government in which the employment site is located.

Notice must reach affected employees or their representatives at least 60 days before a closing or layoff, regardless of whether it will be a single event or a series of events. Notice is due to the state dislocated worker unit and local government at least 60 days before *each separation*. If the workers are not represented, each worker's notice is due at least 60 days before that worker's separation.

The exceptions to the 60-day notice requirement include the following situations:

1) Faltering company — applies only to plant closings. This covers companies seeking new capital or business in order to stay open, where the company reasonably believes that advance notice would ruin the opportunity.

2) Unforeseeable business circumstances — applies to closings and layoffs that are caused by business circumstances that were not reasonably foreseeable at the time notice would otherwise have been required (e.g., the sudden, unexpected loss of a major customer).

3) Natural disaster — applies where a closing or layoff is the direct result of a natural disaster, such as a flood, earthquake, hurricane, or tornado.



Retention bonuses

Since the federal WARN law requires employers to provide 60 days notice of a mass layoff or plant closing (and this can be longer under state laws), an organization may have legitimate concerns that some employees will find other jobs before the actual layoff date. This could leave the company short-handed, which can be a problem if the layoff was announced to coincide with the end of a major project that isn't finished yet.

To address this concern, employers may offer retention bonuses to encourage employees to stay until the announced layoff date. In some cases, the bonuses are not offered to all employees, but only to key employees or those in critical positions. Of course, depending on the resources available to the company, they could be offered to everyone affected by the layoff.

There are no concrete guidelines for how much to offer or how to select key employees. Each situation will be unique, and the resources of the company must be evaluated. If resources are low, an offer of \$50 to delay accepting other employment is unlikely to be persuasive. However, if key employees are offered \$2,000 to remain through a specified date, they may be willing to delay accepting another position to receive the bonus with the final paycheck.

Retention bonuses can also be used when employees are nervous about the possibility of losing their jobs. For example, during a merger or acquisition, employees may realize that certain positions may be redundant, or that the acquired company already has someone performing the same job. Even if the number of employees to be affected does not trigger the WARN notice requirements (so the employees don't get advanced notice), employees may speculate about who will be eliminated. While employers may not be able to offer reassurance that a specific employee's job will be "safe" during or after the merger, the company may at least offer a retention bonus to remain until the merger is complete.

Layoff alternatives: Furloughs and reduced hours

Layoffs come with many downsides, including a negative impacts on employee morale and the potential for lawsuits if there is a perception that employees were selected for layoff in a discriminatory manner. Layoffs can affect unemployment insurance rates, and severance packages can be costly. Finally, the loss of valued employees means the company may be hiring and training new employees when the need arises. Fortunately, there are alternatives to layoffs.

Imposing mandatory furloughs can be an effective means of cutting payroll costs while maintaining staff. Furloughs are essentially a forced, unpaid vacation of a specified duration. The primary advantages are that experienced workers don't lose their jobs, and the company doesn't lose their talent.

Each employee in a department might be required to take a week (or longer) furlough, so only one person is gone at a time. Scheduling around these absences is really no different than scheduling around employees' vacations. Since the time off is unpaid, employees could even file for unemployment, depending on state law and the duration of the furlough (employees won't normally be eligible for unemployment if the furlough is less than a week, or perhaps less than two weeks).

A reduction in hours is another option to reduce payroll costs without losing employees. In theory, reducing everyone's working time (and wages) by 10 percent would save the equivalent payroll costs of eliminating 10 percent of the workforce. This isn't a perfect comparison because the employer's cost per employee for benefits (such as health insurance) won't change, but the point is that reductions in staff might be avoided through reductions in hours.

Non-exempt vs. exempt

Managing a furlough for non-exempt (hourly) employees is simple because they are only entitled to wages for hours worked. Exempt employees must be paid for a full week if any time is worked during that week. However, if an exempt employee is on furlough for a full workweek, the company is not obligated to pay a salary for that week.

Whether employees are exempt or non-exempt, make sure they do not work from home while on furlough. In addition to creating an obligation to pay for their time, it may also interfere with their eligibility for unemployment compensation.

If the company needs to reduce the working hours for exempt employees for several weeks or months, it can reduce the base salary. For instance, a 10 percent reduction in expected working hours could result in a 10 percent reduction in salary for a period of three months. However, the reduction cannot result in a salary that goes below the minimum salary necessary to retain the exemption. If that happens, the employees would have to be reclassified as non-exempt. This may not be a problem since the reduction in hours may eliminate the potential for overtime anyway.

Non-exempt employees are paid in relation to the hours they work, so a reduction in hours will automatically mean a reduction in pay. The primary consideration may be their eligibility for benefits — a reduction in hours to part-time status may render them ineligible for health plan benefits or affect the amount of the premium they must pay to the point where it is too expensive. Reduced working hours may also affect vacation accrual rates or other benefits that are based on full-time working hours.

However, if the reduction in hours is temporary, the company might still consider the employees to be full time based on the expected working schedule for the year. Under that interpretation, the employees' benefits might not be affected. Employers should check their plan documents for eligibility criteria and definitions of terms such as "full time."

As long as employers understand the pay and benefits consequences of furloughs and reduced hours, these alternatives can help the company avoid layoffs while reducing expenditures.



Layoff alternatives: Job sharing

Job sharing is a flexible work arrangement in which the responsibilities of one job are shared by two employees. While layoffs may offer immediate cost savings, they put companies at risk of losing valuable talent. The employees who are let go when business is bad may not be available to return when business picks up.

Many jobs are conducive to a job share arrangement, but the jobs easiest to divide have clearly defined tasks, projects, or customers. Harder to share (but not impossible) are jobs that have unpredictable hours or regular travel obligations.

Job sharing is usually defined as allowing two employees to share the responsibility for a single job. That job can be at *any* level — from executive to janitorial. This traditional approach provides significant benefits to workers who no longer can or want to work full time. These are often individuals who are nearing retirement and want to transition to it gradually, or younger employees who seek more family time.

Companies often look upon traditional job sharing as a “perk.” However, in a business downturn, job sharing can actually reduce FTE (full time equivalent) headcount, as well as reduce the number of employees who draw full-time benefits. If the company offers benefits on a prorated basis to part-time employees, employees will pick up more of the cost that the company would otherwise have to bear. Other key benefits to the company include:

- Retention of skilled employees;
- Reduced absenteeism;
- Built-in substitutes for vacation and sick coverage;
- Reduced overtime costs; and
- Improved branding as an employer of choice.

Cross-departmental job sharing

Cross-departmental job sharing has two goals: to balance workloads and to avoid layoffs. In this arrangement, a full-time job in one department is shared internally by two employees, one of whom works outside of the department, using skills and abilities outside of his or her regular job. As an example, a recruiter in the HR department might work as a marketing specialist.

Employees benefit in two ways: They remain employed, and they are able to develop skills and abilities in new ways. Key benefits to the company include:

- Cost sharing of employees;
- Employee retention; and
- Talent development.

Outside job sharing

A nontraditional approach to job sharing is to collaborate with another company. It works like this: Two companies share one employee who works two jobs (for example, 20 hours for one employer and 20 hours for the other). This can be a win-win situation for all involved: The two companies reduce their full-time employee roster but still get their work done, and the employee continues to work the equivalent of full time.

With any of these job-sharing alternatives, the company needs to have a policy that specifies eligibility as well as treatment of items such as compensation and benefits.

Job sharing agreement

Employees who want to job share should sign a written agreement outlining their responsibilities, schedule, performance expectations, and methods of communication (to each other and to their supervisor). Additionally, the agreement should contain a clause that protects the company in the event one of the job sharers decides to quit or to go full time.

The clause may state, for example, that if one team member leaves the job sharing position, the position would revert to full time with the expectation that the remaining job sharing team member would assume full responsibility for the job, including working the regular workweek. The job sharing arrangement could continue, however, if a compatible partner could be found and the company was still agreeable to the arrangement.



Best practice

Get the most out of job sharing

The biggest challenge most employers face in job sharing is how to oversee the shared position effectively. Below are some actions to help make the process flow more easily:

1. Write a good job description. The description should set out clearly defined duties and responsibilities of the job to be shared so they can easily be divided. Everyone needs to know *who* is responsible for *what*.

2. Set specific performance expectations. Check the status of each individual's performance frequently. Make sure each member is carrying an equal share of the workload.

3. Set up a work schedule. Some job sharing teams work half days; others divide the workweek into allotted working days. Find out what works best for the job, taking into account what works best for the individuals involved.

4. Distribute the team's work schedule. Employees and customers who have contact with the job sharing team need to know when each person is available and how to contact them.

5. Develop a method of communication. Most job sharers work some type of overlapping schedule so they can share status and problems and coordinate activities. Other teams use a log book; some use both methods.

6. Determine who will sit in on meetings. Generally, only one of the individuals needs to be in meetings, but this responsibility may be shared.

The fact that supervisors will have two employees instead of one to perform a single job requires a little more coordination. Companies that have an active job-sharing program report that incumbents are highly motivated to make job sharing work because of the benefits they receive from this type of arrangement.

Layoff alternatives: Offering early retirement

Many companies find it prudent to offer an employee or group of employees an incentive to retire early. Such an incentive must be done in accordance with the restrictions of the Age Discrimination in Employment Act (ADEA) as modified by the Older Workers Benefit Protection Act (OWBPA).

Employers may offer early retirement incentives to employees as long as participation is voluntary and the plan is otherwise non-discriminatory. However, employers may not force older workers to retire.

In exchange for offering the incentives, employers will usually ask employees to waive rights or claims under the ADEA. This is where the restrictions come into play. For a waiver of rights to be valid, the employees must:

- Receive something of value over and above what they would have already received (something greater than a normal severance or retirement package, or beyond whatever payments would be made to any departing employee, in consideration for signing the contract and waiving their rights);
- For an individual, be given 21 days to consider signing the waiver of rights; if a group is being offered early retirement, then give 45 days;
- Be given seven days to revoke the waiver of rights;
- Be advised to consult with an attorney before signing the agreement; and
- Receive a disclosure of the job titles and ages of all individuals selected for the program, and of those in the same job classification or work unit who were *not* selected (where a group of employees is offered the early retirement incentive).

In addition to these requirements, the release must be written in plain English. Courts have found waivers to be invalid if they were not "written in a manner calculated to be understood" by the average employee.

These are the basics, not an inclusive list of the restrictions. Be sure to understand all the requirements of offering early retirement incentives to employees. Such waivers are best drafted by an attorney since the waiver might be challenged in court. In many states, if a contract includes a single provision that is not valid, the entire agreement can become void.

Outplacement services

When employees are facing a layoff, whether announced in advance or if notice was given without warning, their first thought is likely to be, “What am I going to do now?” If resources allow for it, employers may consider offering outplacement services to departing employees, particularly in cases of layoffs or downsizing. Essentially, the employer (or more properly, the former employer) contracts with professional services to help the former employees find new jobs.

Employees who have been with the same company for many years probably don’t have an updated resume, nor any recent experience interviewing for a job. Other employees may have worked in specialized roles, or may have worked primarily with equipment and programs that are unique to the company. While they may have been valuable in their positions, their specialized skills may not be applicable for other jobs.

An employer is unlikely to have the required business contacts, training ability, or other resources needed to provide an effective outplacement program. Most commonly, an organization will contract with another firm that specializes in providing these services. These services may offer job training, business contacts, assistance with creating resumes or developing interviewing skills, and similar guidance.

Whether the company can afford to offer outplacement services will depend on the resources available. There may be little return on the investment since the company is literally helping employees find jobs with other companies. However, there can be some advantages because the sooner those employees find other work, the sooner they will stop collecting unemployment benefits — which the company pays for through taxes.

If this option is selected, employers should carefully research and evaluate possible outplacement firms. As with any other business sector, some offer quality services while others may not be as satisfactory. Some outplacement firms may also specialize in certain fields (such as management) and may not have the resources to help a group of factory workers who will soon be unemployed.

If resources allow, or if the organization feels a sense of dedication to employees, it may want to consider helping employees answer that question, “What am I going to do now?” The goodwill created may benefit the company in public relations, and may encourage valued former employees to apply for future openings.



Introduction

Employees have many reasons for leaving a company voluntarily. They may choose to retire or move on to a new job. Perhaps a spouse received a transfer that requires the employee to relocate. Employees may have to quit because of a medical condition or family obligations (whether having to care for a new child or an elderly parent). In some cases, employees simply get “fed up” with some aspect of the workplace and decide to quit.

The first section of this chapter covers employees who voluntarily quit, for whatever reason. One of the most common problems is showing that the employee actually decided to quit. For example, if an employee gives verbal notice of intent to quit in three weeks, but never puts anything in writing, and a week later announces his or her intent to withdraw that notice, how should the company respond? What if the company has already made an offer to a potential replacement?

This chapter also covers job abandonment, which will often qualify as a voluntary quit, as long as the employee was aware of the potential consequences. For example, if an employee knows that failing to report or call in for three consecutive days will result in a finding of job abandonment, and unreasonably fails to report for work or provide a reason for the absence, the individual might be assumed to have voluntarily quit, or abandoned the job. In such cases, an employee might be deemed ineligible for unemployment benefits.

The concept of job abandonment is founded in the theory that an employee knowingly engaged in conduct that reasonably could have resulted in termination. It is essentially considered voluntary if the employee was aware of the consequences. In some cases, however, an employee has legitimate reasons for failing to call in, and the abandonment issue may have to be retracted.

The next section of this chapter covers retirement, which is typically a well-planned separation. In most cases, a retirement will not create problems. However, it does happen that an employee will announce his or her retirement and communicate an effective date (and the company will hire and begin training a replacement), then the employee decides to change retirement plans and continue working. These can be difficult situations to address.

Voluntary quit

When employees choose to quit for reasons beyond their control, such as following a spouse who accepted employment in another state, there may not be much that a company can do to convince them to stay. Offering the option to telecommute may be feasible for some types of work, but if not, the individual will simply be moving on and the employer can only ensure that the individual leaves under positive terms.

However, when employees choose to quit because of some condition or situation in the workplace, employers may have experienced a failure in employee relations. It's been said that employees don't leave a company, they leave a manager. Conflict with supervisors, or simply poor leadership, is a major factor in why employees decide to move on.

The **Management and Development** section of this manual is dedicated to topics such as communication and other employee relations. If these efforts have been effective, then employees who leave voluntarily are (hopefully) not doing so because of conflict with management or lack of opportunity. Of course, any organization has limits on job growth, since not every employee who desires to move up the ladder can do so. There will be situations where, despite an employer's best efforts, an employee chooses to look elsewhere for career growth.

In some cases, employees may quit because the job wasn't a good fit, even if the individual performed well. In such cases, an employer who wants to retain a dedicated worker might look for opportunities to transfer or advance that person within the company. Unfortunately, by the time a resignation has been submitted, the employee's mind may already be made up, or the individual may have already accepted another offer.

In some cases, the employer's only possible response to an employee's resignation notice might be to ensure that the individual leaves under positive circumstances, and perhaps understands that if the new career path doesn't work out, he or she would be welcomed back. Since an employee will likely submit a resignation to his or her supervisor, they should know how to properly handle the pending departure.

Why employees quit

A common belief among employers and managers is that employees quit because of money. Obviously, some employees do quit because of money, or to take a job with better pay. However, a 2012 survey by ManpowerGroup found that most employees quit for reasons other than money. Sadly, many of these reasons involve poor employee relations.

In responding to the survey, one-third of employees gave reasons for quitting that directly involved their supervisors. These included lack of respect or support, lack of leadership, poor employee relations, favoritism, and lack of recognition.

Another third of the employees gave reasons for quitting that involved the company or the job itself. These included lack of career opportunities, work that wasn't interesting or challenging, and poor working hours.

The remaining reasons given included money (only 12 percent of employees gave this answer) and simply unavoidable reasons.

While employers might not be saddened when a problem employee submits a resignation, most employees are not "problem employees." The fact that a third of employees quit because they wanted more interesting work or more opportunity suggests that these are individuals the

employers would have preferred to keep. Another third quit for reasons that resulted from poor relations with a supervisor. Potentially, a full two-thirds of voluntary employee departures were preventable.

Since the cost of turnover can be as much as twice the annual wages for the position, and since the loss of a valued employee also means the loss of an experienced employee, organizations should consider taking steps to minimize voluntary quits. If employees in a particular department have a turnover rate that exceeds the norm for the type of work, there is probably a reason. Organizations should identify and address that reason, whether the problem is lack of recognition, leadership, support, or career opportunity.

If the supervisor is causing employees to quit, the department likely has other employees who are thinking about quitting. Employers are often reluctant to admit that a supervisor may not be providing effective leadership. However, few supervisors receive formal training on how to be effective leaders, and might not realize what they're doing wrong. If the problem cannot be improved through training, however, the organization may have to remove the supervisor.

The cost of hiring and training an effective supervisor may be more than the cost of hiring and training a direct report for that supervisor. However, if the supervisor's poor leadership or communication is causing employees to quit, it is likely having a negative impact on the productivity of other employees as well. In that sense, the cost of retaining an ineffective supervisor may far exceed the cost of replacing the supervisor.

How to treat departing employees

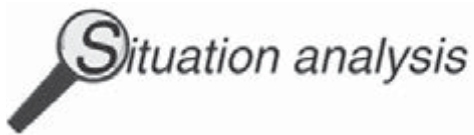
It's never easy when an employee leaves the organization. Managers or coworkers might be angry because he or she is leaving everyone shorthanded at a busy time. If the individual was a problem employee or an under-performer, some might even feel relieved.

Whether emotions are positive or negative, it's best to treat a resigning employee with respect and courtesy. How the departing employee is treated affects the attitudes of the remaining employees. A lack of civility toward the departing employee could result in other employees following that person out the door, or could result in a loss of customers who regularly dealt with that individual.

If the resigning employee has responsibilities that involve relationships with customers, he or she can facilitate the transfer of these relationships to other employees. If treated ungraciously, however, the employee is in a position to sabotage the company's future relationship with clients. Some customers may feel more loyalty to an individual than to the organization. When the employee informs customers about a resignation, a solid introduction to the replacement employee is far preferable to an expression of irritation regarding your company.

The individual also may be extremely valuable to onboarding efforts after giving notice. The departing employee can help train a replacement and facilitate the work transfer, which may reduce the time needed for the replacement to fully assume the duties of the position.

If the relationship with a resigning employee is particularly positive, you may even be able to contact this individual with questions about former duties after the departure. On the other hand, if the employee was treated poorly, he or she could make the transition difficult by refusing to pass on the knowledge and tools that other employees will need to pick up those responsibilities.



Can you prevent the loss of a key employee?

If the resigning individual is a valuable employee, the company might be able to address the reason for leaving and convince the employee to stay. The potential success of these efforts will depend on the reason for the departure. Some employers assume that the reason must be financial and think that offering more income or benefits may convince the employee to stay. However, this is not always the case.

If the employee is leaving to follow a spouse to another state, and telecommuting is not an option, efforts to keep the employee are likely to fail. There are many other reasons for departure, discussed later in this chapter, and many of them cannot be overcome.

For example, if the employee is leaving because of dissatisfaction with the job (poor working relationships, lack of growth opportunities, etc.), then an offer of greater pay probably won't convince the employee to stay. The underlying issues might have resulted in a firm determination to leave, and compensation might be the least of the employee's concerns.

Even if the employee is set on leaving, it pays to be nice. Sometimes, employees find that the grass isn't greener with another employer. A positive atmosphere during the exit process might inspire valuable employees to return to the organization down the road. Negativity during this time might cement an individual's decision to stay away, and it might even cause the person to encourage other potential hires to avoid your company.

Conducting an exit interview may provide valuable information to help prevent future turnover, and can also remind supervisors and managers to pay attention to how they treat a departing employee. Knowing that their behavior in the final days of an individual's employment may be scrutinized might help managers stay on their best behavior.

Turnover is stressful for any organization, but the employer's actions can go a long way toward easing the transition for everyone involved. When an employee resigns, be gracious, wish him or her success, and remember that the organization could lose more than a single employee if it doesn't treat the departing employee respectfully on the way out the door.

Get it in writing

Even if the company is sad to see an employee quit, it should request that the employee provide a written notice of resignation that includes the last day of employment, preferably with the employee's signature. An employee who gives ambiguous notice and refuses to put anything in writing may be trying to force the company to terminate, thus making the individual eligible for unemployment benefits.

While having a supervisor document that verbal notice was provided may seem sufficient, the fact that nothing was provided in writing (with the employee's signature) may create later disputes about whether the notice was withdrawn. The employee might claim that he simply

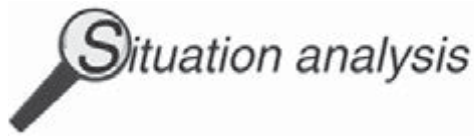
lost his temper for a moment and said that he quit, but asked to withdraw the resignation on the same day it was given. This may look like an involuntary termination.

It does sometimes happen that employees will give notice of intent to quit, then later attempt to withdraw the resignation or extend the final date of employment. Perhaps an expected offer from a prospective employer was delayed or withdrawn. Whatever the reason, this can put the current employer in a bind — especially if the company has already made an offer to a replacement, or actually hired and started training a replacement.

If the resignation notice was not provided in writing, the employee might later claim that he or she never provided a definitive date, or even claim that employment was terminated.

Once a written notice of resignation has been submitted, however, the company can hold the employee accountable for that departure date. Even if the employee says that he changed his mind, the company can state that the resignation has already been accepted, and cannot be withdrawn. A former employee will have a greater burden in attempting to claim unemployment benefits if the company can produce a written notice of resignation.

In some cases, an employee will give notice, but the company will choose to accept the notice early. Whether this affects the individual's eligibility for unemployment benefits depends on the circumstances, and particularly on how early the notice is accepted.



Pay during notice periods

Employees often give advanced notice of intent to quit. Most employers have accepted the two-week notice period as standard, although there is no state or federal law which requires employees to give such notice.

Since employees only have to be paid for time actually worked, there is no obligation to pay employees during a notice period, regardless of how much (or little) notice is given. If this were not the case, employees could give months of notice and thereby obligate the employer to continue paying wages, even if the employee was asked to depart early.

However, employers may be able to avoid some unemployment claims by continuing to pay an employee for all or part of a notice period. For example, if an employee gives three weeks notice, and the company wants to accept the resignation immediately, offering to continue wage payments for an additional week or two may help retain the “voluntary” status of the separation and prevent the employee from becoming eligible for unemployment.



Cross reference

For more information, see the section on **Unemployment benefits** in the **Related Matters** tab.

If an employee is reluctant to provide written notice, one possible response is to inform him or her that the company cannot accept verbal notice. Let the employee know that employment will continue (and he or she will be expected to perform the job) until a written notice of resignation is provided with the last expected date of work included. This lets the employee know that his or her choices are limited to either giving proper notice in writing, or potentially facing termination for failing to meet job expectations.

Asking to be fired

If a supervisor faces a situation where an employee seems to be “asking for” a termination (that is, wants to quit but refuses to give notice), the situation can become quite delicate. For instance, the employee may not be performing to expectations, possibly creating more work for other team members.

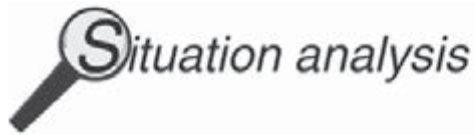
While there are some advantages to waiting for the employee to provide a resignation in writing, employers should be aware that a “waiting game” may cause harm. In particular, damage to the morale and productivity of the team may outweigh the benefits of avoiding a single unemployment compensation claim.

Terminating an employee is never an easy task. Employers may also have concerns about the potential liability in firing someone. While this concern can be legitimate, it is often unfounded. If relations with other employees appear to be suffering because of one employee’s obstinance or laziness, terminating the offender may be the best option.

The primary obligation is to ensure overall profitability of the organization, and everyone should be working toward that goal. Mainlining positive employee relations is part of this goal. Recruiting and training new employees is expensive, but employers should also consider the impact that a single employee’s attitude can have on the productivity of a team (not to mention the cost of paying wages to someone who doesn’t want to keep the job).

Employers are naturally reluctant to fire someone who may have been contributing for some time before problems arose. The disciplinary process is intended to give these individuals a chance to improve, and typically provides this opportunity over a defined period (often ranging from 30 to 90 days). If the individual has not improved within that time frame, it should become obvious that the individual is not interested in taking responsibility. In that case, providing even more improvement opportunity may simply drag out the process and delay the inevitable, possibly at the expense of other team members.

Removing a disgruntled employee who is not committed to the success of the organization, or who is creating frustration among the team, is the first step to getting back on track toward the goal of productivity and profitability.



Handling employee resignations

Martha, who has been employed by the company for 10 years, informs her supervisor that she will be leaving the organization, and gives the two weeks notice requested by company policy. Of the scenarios below, which is more likely to follow in your organization?

Scenario 1: Martha's supervisor indicates that he is sad to lose her, but he appreciates what she has done for the organization. He wishes her well, and immediately begins formulating a plan to transfer her responsibilities or hire a replacement. The appropriate HR representative will get a copy of the resignation and start processing paperwork to make sure Martha's transition will be smooth.

Reserved

Scenario 2: Martha's supervisor accepts her written notice, but makes it clear that her resignation is a serious inconvenience to him. In the days that follow, he makes repeated comments to other employees about Martha's inconsiderate timing. Within a week, the supervisor has grown so spiteful that he decides to fire Martha before her notice period is up. Human Resources learns of this only after he's sent Martha packing.

While considering the likelihood of either Scenario 1 or 2 occurring, remember that the aftermath of either situation will have a substantial impact on the organization. In Scenario 1, Martha is happy to help train other employees to take over her duties and works hard for her final two weeks to make sure the company isn't left short-handed. Martha's positive experience also causes her to recommend the organization to her sister Layla, who subsequently is hired and becomes an extremely valuable employee.

In Scenario 2, the supervisor took Martha's resignation personally, though it wasn't meant that way. Martha was shocked and upset by the way her supervisor treated her and didn't do much to help her coworkers learn her responsibilities. Since HR wasn't informed of what was happening, Martha's position is left open for weeks after she is fired.

To make matters worse, Martha had never seriously considered filing a charge for times she felt she was owed overtime pay, but her anger prompted her to do just that. The organization faces a wage claim that not only involves Martha, but many other employees as well.

Employers should be able to depend on supervisors to maintain a courteous and professional relationship with their employees at all times, and that requirement doesn't end when an employee decides to leave the organization. Make sure supervisors know how to keep a cool head when an employee resigns, and insist that they keep HR informed of what's going on. Training supervisors is the best defense against situations like Scenario 2.

Quitting for another job

One of the most common reasons employees leave a company is simply to accept another job. Departures for this reason are not normally hostile, and the employee usually leaves on relatively good terms. The employee likely provides written notice (usually giving at least two weeks of warning) and may even be welcomed back if he or she decides to later rejoin the company.

If the employee was a valued and dedicated member of the team, the company is likely unhappy to lose a good employee. Depending on how much notice was given, the resources available, and the actual value of the employee, steps might be taken to encourage the employee to stay.

One reason employers try to minimize turnover is that the cost of recruiting and training a replacement can be as much as twice the annual salary for the position. Combined with a loss of knowledge and experience, the company may be motivated to offer something extra for retention.

Whether the company will offer incentives to stay depends on the situation. For example, if a stellar sales employee has made millions of dollars for the company, the organization may be willing to offer quite a few concessions to encourage retention. Conversely, if an assembly line worker has always been a valued member of the team (shows up on time, works hard, and

maintains a positive attitude) but the job could be performed effectively by a new hire with a reasonable amount of training, the company might not offer incentives to stay.

The timing of the employee's departure can also be a consideration in whether to offer incentives. For example, if the last date of employment occurs in the middle of a significant project, and the company cannot convince the employee to stay for an indefinite period, perhaps an offer of a retention bonus will convince the employee to delay the departure until the project is complete.



For more information, see the section on **Retention bonuses** in the **Involuntary (Employer Initiated)** tab.

A discussion with the employee about the reasons for leaving may reveal that the individual is willing to stay, but has concerns that could be addressed. Perhaps the employee felt that the work wasn't challenging enough, or maybe the job was too demanding. Perhaps the relationship with a supervisor was hostile, or the employee simply wanted a different career path and the overall job wasn't what he or she expected.

If the problem was a poor relationship with a supervisor or with a particular employee, that situation should be addressed even if the departing employee cannot be convinced to stay. Otherwise, the organization may lose another valued employee in the future.

If the job wasn't a good fit, the company might be willing to discuss other potential career paths to convince the employee to stay, perhaps working to develop the person for eventual transfer to a more desirable position. However, if the employee is leaving because the job was completely different from what employee wanted (e.g., working in sales was okay, but he always wanted to work as a personal trainer at a fitness club), there may not be anything the company can do to convince the employee to stay.

In many cases, the loss of a valued employee is painful but not especially damaging to the company. However, the departure can create quite a gap in the team. Others who worked directly with that employee will be most affected; they may have to cover the workloads of the former employee, and may also have to help train a replacement.

Managing the departure of someone who left for another job may end with the last date of employment (as far as the former employee is concerned), but may require quite a bit of work to maintain morale and production priorities of the former employee's team.

Quitting in frustration

Some employees quit their jobs in anger or frustration, even if they don't have another job lined up. The cause of frustration can range from conflict with a supervisor or team member to a simple realization that "This isn't what I want to do for the rest of my career." Employers can take proactive steps to prevent employees from quitting, whether the employee's motivation is anger at others, a feeling of unfairness, or simply a desire for a career change.



These separations may not be as amicable as when employees leave to accept another job. An employee who feels anger toward a supervisor, coworker, customer, or the company as a whole may quit without notice, or give minimal notice, which puts a strain on the company and the other team members. Depending on the situation, the company may decide to accept the resignation immediately and escort the employee out.

In these cases, employers may want to conduct exit interviews to determine the reason for the departure. If the employee is quitting because of a micromanaging supervisor, for example, the company may need to take steps to address the situation — or risk losing other employees.

In other cases, an employee who is quitting because of conflict may actually have been the source of the conflict, and others in his former department may be happy to see him leave.

Whatever the underlying reason, an employer won't know without asking. When conflict arises in the workplace, there is always the potential that other employees are thinking of quitting as well. They may already be seeking other jobs.



Cross reference

For more information, see the section on **Exit interviews** in the **Related Matters** tab.

Employers should remember that many employees are passive job seekers. In fact, a 2011 survey indicated that nearly three-quarters of employees are passive job seekers. They are not seriously looking for other work, but they would be happy to accept something that comes along. For these employees, a bad day at work or an ill-considered remark by a supervisor can change them from passive job seekers to active job seekers.

Maintaining positive employee relations, and taking steps to ensure that employees treat each other with civility and respect, helps prevent employees from quitting in frustration.

Constructive discharge

Some employees who quit in frustration may be doing so because of harassment or discrimination. When working conditions become so intolerable that a reasonable person would feel compelled to quit, the separation can become a constructive discharge. Essentially, even though the employee initiated the departure, the individual is deemed to have been terminated under a discriminatory motive.

These situations have the potential for significant costs. Even if the company doesn't face a serious risk of legal responsibility, the expense and negative publicity of defending against a claim can be substantial.



Cross reference

For more information, see the section on **Discrimination/Harassment claims** in the **Protected Rights and Actions** tab.

Employees generally do not have a strong grasp of the discrimination laws, and do not understand the legal burdens of proving unlawful discrimination. For instance, a minority employee who was subjected to off-color or insensitive racial jokes may quit in frustration, then file a discrimination claim for constructive discharge. Courts have consistently found that while such jokes are not appropriate in the workplace, they usually do not rise to a level that would compel a reasonable person to quit, and may reject a finding of constructive discharge. Even so, the employer may incur legal fees for going to court, as well as negative media coverage if the accusation becomes public.

Also, the outcome of whether a "quit" was a constructive discharge can change quickly if the "jokes" actually involved threats against the employee, or if a supervisor joined in the conduct (or even if a supervisor was aware of the conduct and failed to take action). Employers who are facing a constructive discharge claim should seek legal advice from an attorney who specializes in this area of employment law.

Career motivation

In cases where the employee announces that she simply wants a change in career, but has been valuable to the organization, the company may want to consider offering career development to encourage her to stay. Whether this approach will be successful depends on the employee's ultimate goals and whether those goals can be achieved with the company.

For example, an employee may have entered the workforce at a young age, or after a divorce, and may not possess the educational requirements needed to achieve the desired position. If the company is willing to offer a flexible schedule and/or tuition reimbursement to help the employee obtain the desired degree, the individual might be encouraged to stay and grow with the company.



Cross reference

For more information, see the **Employee development** section in the **Rewards and Advancement** tab.

In other cases, the demands of obtaining a degree may have to be balanced with personal or family obligations, and the employee simply cannot continue working. Similarly, the employee may not see a potential future at the company based on the desired career (e.g., an individual who wants to become a nurse may not want to develop a career in a warehousing operation).

When the employee leaves for a desire to change careers, the company may simply have to accept the loss, even if the employee was a valued member of the organization.

Quitting for family obligations

Even if an employee finds a job to be rewarding and fulfilling, the individual may have to leave because of family obligations. The underlying reasons can range from following a spouse who accepted a job in another state, to adopting a child or having a baby and deciding to leave the workforce in order to raise the child, or having to quit in order to care for an elderly parent.

Employees who quit due to family obligations may not be doing so by choice (except in the case of raising a family), even though the employee is initiating the departure. Depending on the requirements of the position and the employee's value to the organization, a company might be willing to make adjustments to continue employment. For example, the employee may be able to work part time (possibly under a job sharing arrangement with another employee) or telecommute from home, even if living in another state.

If these options are not available, the employee's departure should at least be amicable. The individual would likely be deemed eligible for rehire, if a return is possible at some point. Others in the department may be sorry to lose a valued member, resulting in many of the same issues discussed in the earlier section on **Quitting for another job**.



Cross reference

In some cases, employees quit for personal medical reasons, and the issues are similar to those discussed above. In other cases, an employee who is unable to work due to a medical condition will express a desire to remain with the company but must be let go. For more information, see the section on **Terminations for medical conditions** in the **Involuntary (Employer Initiated)** tab.

Job abandonment

A special type of voluntary separation is job abandonment. This most commonly occurs under a policy which says that if an employee fails to report for work or call in for a specified time (typically three consecutive days), the employee will be assumed to have quit. In extreme cases, an employee might disappear for several weeks, then show up again expecting to have a job.

These situations are not technically involuntary terminations, even though the employee has expressed a desire to continue working. The key is making all employees aware of the policy. If employees know that failing to show up or call in for a certain time frame will result in a finding of job abandonment (or should have known because the policy was distributed), then the separation can be deemed to have been initiated by the employee.

In some cases, however, a job abandonment finding can be challenged. For example, if an employee was hospitalized after a serious car accident, the individual may have been unable to contact the company. However, the absence may still qualify for FMLA or other job-protected leave. The FMLA regulations say that employers can expect the employee to follow the usual and customary procedures for requesting time off — unless circumstances prevent the employee from doing so.

For example, an employee who was found to have abandoned the job might later report that the reason for the failure to call in would have qualified for job-protected leave (even if weeks later). If the circumstances reasonably prevented the employee from calling in, a finding of job abandonment may not be appropriate. Upon learning that the employee's absence would have qualified under the FMLA, the finding of job abandonment may have to be withdrawn.

Employers should be aware that the FMLA is somewhat unique in this regard, based on the entitlement to job-protected leave and the somewhat vague regulatory requirement for employees to provide notice "as soon as practicable." However, this would normally be limited to cases where the need for leave was not foreseeable (e.g., the employee was hospitalized after an accident) and not for cases where notice could have been provided.

While other laws such as the Americans with Disabilities Act (ADA) may offer limited protection, an employee is generally required to make the company aware of a need for accommodation. Guidance from the EEOC says that employees should make this request before the need affects performance, and clarifies that employers need not rescind discipline or termination imposed before being made aware of the employee's needs.

For example, if an employee disappeared for several weeks without notice, and later reports for work claiming that he had checked into a treatment center for alcoholics, the company might explain that he should have expressed his need for an accommodation (leave to attend treatment) before disappearing. If the employee had been sent a notice of job abandonment, the company may not be obligated to retract that notice. Of course, such treatment could also be protected under the FMLA, but even then, the need for leave should have been foreseeable, and it should have been practicable for the employee to provide notice before taking leave.

The point is that if an employee is potentially facing a job abandonment finding, the company should make reasonable efforts to determine why the employee has not been reporting for work. If attempts to contact the employee by phone have failed, consider sending a letter to the employee's home address that explains the consequences for failing to contact the company regarding the need for leave. If these efforts go unanswered, a finding of job abandonment should be easier to uphold.



A finding of job abandonment can also occur if an employee was injured, then later released to light duty. If the company can accommodate the work restrictions and offers light duty, the employee can usually be expected to accept the position, even if offered a lower rate of pay for that work. The employee may be informed that refusing to accept a light duty assignment will be treated the same as refusing to work any other scheduled shift, and may result in a finding of job abandonment.

However, employees who are protected by the FMLA cannot be subjected to a finding of job abandonment. The FMLA protects an employee's right to take leave until he or she can return to the former position. Therefore, the employee may refuse to accept a light duty offer and remain at home under the FMLA protections. There can still be consequences, of course, since refusing a light duty offer may result in a loss of workers' compensation benefits. The insurer will not normally pay benefits to someone who could be working but simply refuses to do so. Since the FMLA only provides for unpaid leave, these provisions are not in conflict. Also, an employee who realizes that staying home means that he won't have an income may be encouraged to accept the light duty assignment.

Retirement

Retirements are generally easier to handle than other separations because the company has advance notice of the employee's pending departure. Although an employee's retirement may result in the loss of a good worker, it is usually cause for celebration.

Some employees, however, do not want to make a big deal out of their retirement. Therefore, the company may want to discuss whether the employee would like an official announcement or celebration party.

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Not so many years ago, a retirement was a big deal because an employee may have worked for the same company throughout most of his career. After many years of dedicated service, an employer would be willing to host a party and provide a memento for the service (such as the classic gold watch).

In the more modern workforce, however, employees may change jobs several times over their working lives, and might have only been with the company for a few years before retirement. If the employee had a long career but only the last few years occurred at the company, the individual may not desire quite as big a production to celebrate.

Of course, when an employee gives notice of intent to retire, there will certainly be planning required for a transition.



Best practice

Strategies for knowledge-sharing

The Baby Boomer generation, those individuals born between 1946 and 1964, make up a large segment of the workforce, and they are beginning to retire. When they do, they will take with them a wealth of knowledge and experience that can't be replaced. There are a number of ways employers can capture this knowledge.

1. Mentoring. Have younger employees work side-by-side with experienced employees to learn from them. Have the older workers teach them the history of the department and of the company. It is important to understand how things were done in the past because it may explain why things are done the way they are now. It may prevent someone from going down the same road again, if the organization already found that it didn't work. Someone, somewhere, will remember why it didn't work. The organization needs that knowledge to avoid repeating mistakes.

2. Phased retirement. Develop a phased retirement plan. Have the worker who is planning to retire work part of the time, and teach what they know to other employees the rest of the time. Gradually, have them work only part time, phasing them out slowly. This ensures the transfer of knowledge for a period of time, and also readies the older worker to make the transition from working full time to retired full time.

3. Consulting. Consider having older workers come back as consultants on a part-time basis (rather than as employees) or on a project basis. The organization will still have the benefit of their knowledge and experience, and they will have the benefit of easing into retirement slowly. Unlike previous generations, Boomers don't necessarily want to be retired full time. They still want the socialization of work and still want to use their brains, without being obligated to a full-time position.

Some employees may request a partial retirement, where they continue working part time or get called back for specific projects, but otherwise start enjoying their extra free time. An employer may even prefer these arrangements, whether to assist with knowledge transition or to continue enjoying the benefits of an employee whose experience may allow him or her to complete a job faster than other employees.

If either the company or the employee is not ready for full retirement, it may be possible to work out an arrangement for part-time employment. The terms and conditions of these agreements are entirely at the discretion of the company. It may even be necessary to create an employment

contract that exempts the employee from the usual policies and procedures in the company handbook, and establishes separate agreements for benefits, vacations, holiday pay, and so on.

The employee should also understand the impacts of continued employment on government benefits. For example, if an employee is eligible for Social Security benefits, but has not yet reached full retirement age, there will be limits to how much income the employee can earn before those benefits get reduced.

In some cases, employers will agree to let an employee retire, then have the person continue working as an independent contractor. While these arrangements can be possible, they must be carefully evaluated. If the former employee does not actually have his own business and advertise those services in an open market, and only works for the former employer doing the same type of work that was performed as an employee, the independent contractor classification may be subject to legal challenge. Essentially, the worker is still an employee, and calling the individual an independent contractor (when the relationship does not qualify) can result in liability for failure to pay employment taxes.



For more information, see the section on **Contract employees vs. contractors** in the **Planning and Advertising** tab.

Asking about retirement

The Baby Boomer generation is reaching the traditional retirement age of 65, but many are choosing to stay in the workforce. For many organizations, a question begs to be asked: Are you planning to retire soon? Some employers are hesitant to ask this question, and may fear an age discrimination claim for trying to force someone out the door.

Employers can ask about retirement plans, however. The issue is not in the asking, but in how the question is presented. Asking about retirement plans for legitimate reasons, such as planning for a transfer of knowledge, is not problematic if done correctly.

For example, explain to the employee that you understand that a decision to retire requires considerable thought, and the company also needs time to plan a transition, so you're asking simply to evaluate future staffing needs. Avoid referring to the employee's age or the age of other employees. Even a seemingly harmless comment or explanation can give the impression that you are looking to eliminate older employees.

For instance, don't say, "Since you're 66 now, and the oldest employee on the team, we're wondering when you're planning to retire."

Instead, you might say something like, "You've given many years of service to the company and accumulated a lot of knowledge that we'll be sorry to lose when you eventually retire. We'd like to plan for that transition, so we'd like to get as much notice as possible. Have you started thinking about when you might retire?"

If a supervisor, manager, or HR professional asks an employee about retirement plans repeatedly or somehow makes an employee feel as though “no” is not the answer being sought, the risk for an age discrimination claim increases. If an employee answers the question with “no,” that should be the end of the conversation, at least for a while (perhaps six months or so).

There’s nothing wrong with asking whether an individual has any plans for retirement, but be aware of the risks well before raising the topic with employees. While asking occasionally shouldn’t be a problem, repeated questions might create the impression that you are trying to push an employee out the door, which could form the basis of an age discrimination claim.

Withdrawing or delaying notice

Occasionally, an employee will give notice of intent to retire, and the planning for departure will be well under way. The company may have even hired a replacement and started training the new employee. Then, the retiring employee announces that he would like to withdraw his notice and continue working, or perhaps delay the retirement for several additional months.

This announcement can place the company in an awkward position, especially if the employee seems to have a good reason for the delay. Perhaps he experienced a financial loss and can no longer afford to retire. Perhaps the employee’s spouse became seriously ill and is hospitalized so the employee needs to maintain an income. Or perhaps the employee was expecting to sell his home and move to another state, but the buyer had to withdraw an offer.

Whether the employer accepts the withdrawal or delay is at the company’s discretion. The notice of retirement should have been provided in writing, and if the company has already invested resources in hiring a replacement, it may not want to terminate the new employee in order to accommodate the extension. Similarly, the company may not have need for both employees. If so, the retiring employee can be held to his notice, the same as holding an employee to any other notice of voluntary separation.

There really isn’t a good way to handle these situations, and they will be uncomfortable. In particular, if the retiring employee has been with the company for many years, the employer may feel guilty about having to “force” the individual to stand by his notice. In some cases, the individual might be transferred to another position that is available, and for which the retiring employee is qualified. If this is not possible, however, the needs of the company may still have to be placed above the needs of the individual, even if this results in hard feelings after a long career.



Introduction

Whether an employee's departure is voluntary or involuntary, there are many related issues that employers may need to address. Even in cases where the employee's departure was known well in advance (such as a retirement), the company may need to consider succession plans, which is the first section of this chapter. Succession planning requires some advanced legwork to identify high potential employees or to begin cross-training employees.

The second section in this chapter covers severance pay. Employers are not required to offer severance pay to departing employees, but many choose to do so. It may be offered in conjunction with a waiver of discrimination claims, or it may simply be offered to any departing employee who was unable to successfully navigate a performance improvement plan (which would not include someone fired for gross misconduct). When it becomes obvious that an employee's performance is unlikely to meet expectations within the required time frame, offering severance along with the opportunity to resign can help ease the transition while minimizing hard feelings — which also helps reduce liability.

Of course, employees who leave the company may be eligible for unemployment benefits, which are addressed in the third section. Benefits are not typically available to employees who quit or to employees who were fired for gross misconduct (where the employee engaged in conduct that he knew would result in termination). In some cases, however, there is uncertainty about whether the company or the employee initiated the separation. Many employers are also confused about whether an employee would be eligible for benefits, especially in cases of temporary or seasonal employment.

When an employee departs, the company must also consider the disposition of various benefits. These issues are covered in the fourth section of this chapter. Some benefits, such as vacation pay, might be denied depending on the circumstances of the departure — although some state laws require payout of earned time, regardless of the reason for the departure. Other benefits, such as COBRA continuation of health insurance, are mandatory. In fact, employers can face substantial liability for failing to send proper COBRA notices.

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The fifth section addresses exit interviews, which can be an effective means of maintaining employee relations. While the departing individual is no longer an employee, he or she might consider rejoining the company at a future time (if eligible for rehire) or may identify problems that caused the individual to quit. Addressing those problems can help maintain good relations (or improve relations) with other employees.

The next section covers rehiring former employees. In cases of termination, an employee might be deemed ineligible for rehire. However, in cases of amicable departures or involuntary layoffs, the company might welcome the opportunity to rehire a solid performer who already knows the job. Even in cases of layoff, employers are not obligated to rehire the former workers (unless a union contract or other agreement specifies doing so). In rare cases, an employer who was found to have wrongfully terminated an employee may even be ordered to offer reinstatement.

Finally, most former employees will seek other work, and may even do so after retirement. The company may be contacted for reference checks, which is the final section of this chapter. Responding improperly can create liability. For this reason, some employers will only verify dates of employment, position held, and other basic information.

In some cases, however, failing to provide more information can also create liability. For example, a school district faced a charge of negligent referral for failing to inform another school that an employee was a known child predator.

The key to responding to reference checks is being objective rather than speculative, and providing only facts rather than opinions.



Succession planning

Succession planning is a tool companies use to provide for the future by investing in current employees to take over key positions in the event of retirement, death, or other departure of management personnel. This is becoming increasingly important as the Baby Boomer generation retires.

The goal of succession planning is to identify key management positions within the organization and identify employees who can be “groomed” to fill those positions if there are no designated successors already in place. In other words, it is a long-term investment in human capital to prepare the future leaders of the organization for positions they may hold some time down the road.

To develop a succession plan, employers must first perform an assessment to determine:

- Which positions are strategically “key” positions in the organization;
- What is currently available in their workforce in terms of high potential employees who might be able to step into these positions with training and development;
- What gaps there are, if any, between employee potential and future needs.

This assessment must take into account the vision of the future of the company — where it wants to be five or 10 years down the road — in terms of what areas will be expanding and what skills will be necessary for future growth and viability.

With this information, a plan can be developed. The current required skills of key employees can be identified, and training and development plans can be set up to develop potential individuals. Development may include special assignments, training in-house, taking outside courses, or working in another department to learn its functions. Development should include frequent performance appraisals to track how the individual is meeting stated goals, including what additional training, experience, or education has been accomplished, and an ongoing assessment of the individual’s readiness and potential.

Some employers feel it necessary to keep employee development plans for succession a secret, even from the employees who are being groomed. The reason is to avoid potential discord in the workplace. When all employees know who is being groomed and who is not, it may cause those who are not being developed to look for opportunities elsewhere if they feel they have no future with the company.

However, there may be pitfalls with this approach. Perhaps a particular employee has no desire to move up for whatever reason. It would be beneficial for the employer to know this before committing time and expense into developing that individual.

There may also be other individuals who may not have been identified for development, but who desire to climb up the ranks and would welcome such an opportunity. These individuals, if identified, could be included in the program. Also, if the succession plans are not known, key people might leave the organization for other opportunities, not knowing they were being developed for future positions. Each organization must determine this issue for itself.

No company wants to find itself in the position of suddenly having to replace a key individual and having no one ready for the job. With a succession plan in place, the prospect of this occurring can be minimized.

Determining who is “high potential”

The most important part of a succession plan is determining which employees will be developed. The goal is to develop a pool of employees for a range of executive or management positions. If the company targets a certain few employees for specific positions, the plan runs the risk of being derailed in any number of ways. For instance, an employee slated for a specific position could decide to leave for another opportunity, leaving the company without a “Plan B.” Steadily developing a pool of employees helps eliminate the risk of having no one ready to step up when the time comes.

When determining which employees to develop, remember that just because an employee is a high performer in his current position, it does not automatically mean he will be a high performer in an upper-level position. The level of complexity increases the higher up the ladder. Different positions require different attributes. The attributes that are necessary to be a successful executive are different from those necessary to be a successful manager.

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For example, while one position requires the individual to be a visionary and see the big picture, the other requires a skill at implementation of policies and procedures, and paying attention to detail. An individual may not be capable of shifting gears from one set of traits to the other.

Generally, 3 to 5 percent of the total employee population will have high-potential traits. This is the group to target for development in a succession planning process.



See the sections on **High potential employees** and **Employee development** in the **Rewards and Advancement** tab.

The assessment process

Identifying high potential people requires an assessment process. First, the upper-level positions to be filled must be analyzed to determine what is necessary in terms of knowledge, skills, abilities, traits, experience, education, certifications or professional licensing, and core competencies.

After this is done, look at the pool of employees and decide who may have the foundation to fill one or more of these positions. Identify what education, experience, and other qualifications they have, and what they are lacking.

Also, determine what their interests are in terms of future career direction. They may have a different idea of where they want to go. By identifying what position or positions they have their eye on, their training and development can be geared in that direction if it is consistent with the overall succession plan.

Assessment factors to consider

In making an assessment of each individual, consider a number of factors:

- The employee's work history, both internal and external. Look for a history of progressively responsible experience. In addition, some previous experience may not bear on the employee's current position, but may prove helpful in a future position.
 - The employee's current and past performance. Look at performance reviews.
 - Core competencies. In addition to the standard performance review, a list of core competencies for the upper-level positions should be developed, and the employee evaluated with respect to each competency.
 - 360-degree feedback. Consider implementing 360-degree feedback evaluations to determine any weak points in the employee's armor. For instance, an employee might meet deadlines ahead of schedule and churn out consistently good work, but treat vendors poorly or have a history of not returning phone calls. This could show a lack of respect for others, which may not otherwise be apparent.
 - The training the employee has received and how well the new information was integrated into the current job. If the employee had trouble implementing or adapting to
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new procedures, that could be significant. A capacity to learn and the willingness to adapt are important attributes.

- The employee's initiative in taking on new projects and coming up with new ideas. This may indicate a propensity to look at the big picture and a desire to steer the course of work projects and take responsibility for them.
- The employee's own interests and career goals. A given employee may not be interested in another position, or may not want the stress of additional responsibilities.
- Personality profile. Conduct a personality profile to assess an individual's inclination toward a leadership role. Other desirable traits can be assessed in this process as well. Also consider implementing a series of assessment centers. Assessment centers put employees in real-life work situations and evaluate how they handle them. This gives an idea of how well an employee "thinks on his feet," handles multiple interruptions, juggles priorities, handles irate people, and so on.
- Increasing responsibilities. Give higher level responsibilities to employees in their current positions and see how they handle the situation. This might be a special project or an ongoing responsibility. Have a mentor available to help. Learning by doing is the best teacher, and may be the best way to judge how an employee will perform at a higher level.
- New relationships. Determine what new relationships need development. If someone's experience is weak in a certain area, see that the employee spends some time in that department and learns the process. Cross-functional training is highly valuable in understanding how different facets of the organization are interconnected. Determine how well that information is integrated by the employee. An employee's learning agility will be an important component of the assessment.

Other factors should be taken into account, such as a demonstrated willingness to take risks, the capacity to think outside the box, receptivity to criticism, the employee's dedication to the development process, the ability to think globally, and an understanding that the decisions he or she makes will have far-reaching impact.

EQ, or emotional intelligence, should be considered as well. EQ is manifested by the degree the employee motivates others, treats others with respect, demonstrates team-building and relationship-building skills, is aware of his or her own faults (and seeks to correct or minimize them), and so on. It considers traits such as empathy, self-awareness, and social skills.



Cross reference

For more information, see the section on **Emotional intelligence in employee relations** in the **Communication** tab.

Taking the next step

After identifying needs and availability, develop those resources to meet future needs. Make a determination, based on the employee's background and interests, which positions in the company the employee might be a good fit for, and the degree of suitability for each position for

which he or she might be considered. The employee's training and development should be geared toward these positions, or a particular position, if appropriate. Ideally, the employee will receive the education and training necessary to be qualified to perform in the new job before actually being called upon to do so.

Determine on an individual basis what hurdles an employee must overcome to move up one to two levels in the organization within a relatively short period of time, generally 36 months or so. This is a commonly used measurement for determining a high potential employee. If the employee can overcome the obstacles (obtain the required training, knowledge, and experience), he or she should be considered as having potential. If not, it doesn't mean the employee can't be developed and moved into a higher-level position, but the employee probably won't be a contributor at the high level needed.

In determining the employees to develop, take into account which positions may need to be filled sooner, then determine which employees might be put on the "fast track" to fill these positions. These positions will be more specifically geared to certain people because of the time frame involved. This is more along the lines of "replacement planning" than "succession planning" because the need is more immediate.

When to look outside

It is important to note that it is not necessarily desirable to fill all upper level positions from within. While the company must maintain some continuity, it also wants to bring in fresh ideas and experiences. When determining which employees to develop for future positions, consider bringing in new employees, especially where a knowledge or experience gap exists in the talent from the employee pool.

Choose wisely

In the course of the employee development process, make wise decisions. Some employees may only be competent up to a certain level. It is not wise to assume that all employees who appear to have potential will actually thrive in an executive or upper management capacity. Don't take a great manager and place him or her in a position that is beyond the employee's capabilities, thereby creating an ineffective executive.

Putting sufficient time and effort into the process of developing the right employees for the most suitable positions for them helps avoid situations like this. By taking great care in the process, it can be a win-win situation for everyone.

Creating a succession plan

Many companies have a formal succession planning program. In those companies, the Human Resources department typically provides tools (such as a policy, formal training and mentoring programs, and documentation forms), but identifying and developing high-potential employees usually remains the responsibility of individual managers and supervisors.

In some organizations, succession planning is confidential, done entirely without the knowledge of the employees tagged for development. In other companies, the employees who are being considered for advancement know it and actively participate in the process. Regardless of which position the company takes, remember that the company is developing employees for additional responsibilities — but not making promises for promotions or changes in job responsibilities.



Organizations develop succession plans for a variety of reasons. Among those reasons are:

- To ensure there are people available to fill key positions at all times;
- To ensure ongoing business success and continuity;
- To transfer business knowledge and values;
- To prepare the future leadership of the company;
- To contribute to the longevity and success of the organization;
- To maintain the organization's value to shareholders;
- To ensure an orderly transfer of power; and
- To provide a continuous pipeline of employee talent to meet the organization's needs in key management positions.

Before creating a succession plan, first lay the groundwork. Define exactly what the organization is trying to accomplish with this process. In a smaller organization, it may involve no more than finding successors for a few key positions in the organization. In a larger organization, it may involve developing multiple succession plans for different management tiers involving hundreds of people.

Steps for creating a succession plan

Although all positions are important, some are more critical than others. Critical positions tend to have long learning curves, specialized (or institutionalized) knowledge, or essential relationships — all based upon achieving the organization's long-term goals.

Once the company has identified critical positions, build an understanding of what it takes to be successful in each of them. List the knowledge, skills, abilities, and experiences (competencies) needed to do the job — now and in the future. Keep in mind that as the future unfolds, these criteria may change.

Determine what the organization's strategic plan is for the next three, five, and 10 years down the road. This will help identify the direction the organization plans to go in, and dictate what future needs the organization will have.

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Identify and describe each critical position that is key to the organization's success, at whatever level that may be. Identify the current incumbent in each position, and any immediate successor, if already identified.

List the attributes and competencies that are required (and desired) for each position — not necessarily those possessed by the current incumbent. Remember to think of it as filling a position, not replacing a specific individual.

Develop an accurate assessment of the current workforce to know what the development needs are. Perform individual assessments to determine the current level of skills, education, and readiness of employees who can potentially take on future positions. Individual assessment approaches include using 360-degree feedback, executive/management assessments, performance data, assessment centers, and instrumentation (test results).

Identify high-potential employees, then determine who the best candidates are for each position. Do this for more than one potential position to see where an employee would best fit the organizational needs as well as the employee's individual needs. One individual may be chosen for development for more than one position at an early stage of the process.

Ask employees what they want for themselves concerning their career path. This helps avoid spending time and money developing employees who have no interest in moving up the ladder or who have other plans for their careers, or a complete career change in mind.

Develop high-potential employees with specific goals in mind. At the early stages, they can receive general leadership development training, but at later stages of their development when a particular position has been identified for which they are being groomed, concentrate on developing that individual for the needs of that position. For example, if that position requires knowledge of international operations, part of the employee's development may include a year spent abroad at an international location.

Working with employees, develop an action plan to develop competencies, reduce weaknesses, and improve strengths. The plan may include such action items as enrolling in formal classroom training, participating in a mentoring program, taking on temporary assignments, providing project leadership opportunities, rotating jobs within the department, and, of course, receiving coaching.

Document developmental accomplishments, and if the company has a formal succession plan policy, report to the succession committee.



Best practice

Tips for succession planning

- Succession planning requires commitment and input from the top. After all, that's where the future business direction comes from. The plan must be consistent with the overall business strategy.
- The plan must be anchored to the corporate culture. A plan that runs counter to the corporate culture is likely to meet resistance and fail.

- Succession planning is not just for the top of the organizational hierarchy; it is for any and all positions that are key to an organization's success.
 - Look at the position, not the person. Don't get hung up on the traits of the incumbent and try to replicate him or her. Be open to other possibilities.
 - It is the organization's job to identify high potential employees, not the employees' job to identify themselves. Limiting the plan only to those who self-identify might result in missing talent that is not readily apparent.
 - Obtain buy-in from managers at all levels to identify and develop talent.
 - Don't limit the plan to thinking vertically. Consider lateral transfers as part of the training and development program to broaden employees' skills, knowledge, and perspective.
 - If the company can't fill most of the top positions from within, it may suggest a need to improve the internal development system.
 - When hiring employees from outside the organization, be aware that hiring quality candidates for lower-level positions can allow for later development into future leaders through the employee development program.
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Severance pay

When laying off or terminating employees, employers may consider having a severance agreement. Severance agreements give employees something extra in exchange for agreeing to waive their rights to sue under certain laws. A well-drafted severance agreement, along with severance pay, can reduce the risk of wrongful termination claims.

In cases of layoffs, severance pay might help soften the blow of the departure. Even in cases of termination for inability to adequately perform the job, an employee might be offered severance pay (and the opportunity to resign) rather than going through a termination under a performance improvement plan. This can help make the departure more agreeable, since employees who are angry about the circumstances of their termination may be more likely to attempt legal challenges. Of course, these resignations are typically still considered involuntary for purposes of unemployment benefits.

The amount of severance pay offered differs considerably, but a common practice is one or two weeks' wages for each year of employment, perhaps with a "cap" based on a maximum number of years (such as 10 or 20 years) or based on a maximum number of weeks (such as 12 weeks equivalent wages). Severance pay could also be a flat amount, but employees with many years of service may expect more than employees who only joined the company recently. A flat amount could still be based on duration of service, such as \$500 for each year of employment.

The question of how much severance pay to offer does not have an easy answer. Although some amounts or percentages are commonly used, there is no standard based on geographic region or type of employment. Obviously, the payments are sometimes quite large, and can even generate negative publicity for employers (as has happened to some organizations offering "golden parachutes" to former CEOs).

When considering how much severance pay to offer, employers should evaluate the purpose of the severance pay. Some employers offer severance pay as a gesture of goodwill, in hopes of encouraging the former employee to feel better and refrain from filing a lawsuit. However, most employers include a waiver of certain claims, such as discrimination claims. Therefore, employers might ask themselves, how much is needed to encourage the employee to sign the agreement and feel that it was just compensation in exchange for the waiver?

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The answer to this question might depend on factors such as whether the employee had a fairly good relationship with the organization, or whether the relationship had been confrontational. Employers might also evaluate whether the employee has sued previous employers, or threatened to sue the current employer. Even the duration of employment is a consideration, since offering one week of pay for each year of employment may not mean much to an employee who is terminated within the first year. Since the waiver should be drafted by an attorney, the organization should seek the attorney's advice on how much to offer.

Of course, cash payments are not the only form of severance pay. An employer may agree to continue paying its share of health insurance under COBRA (or even pay the full monthly premium) for a defined period of time. While a departing employee might be eligible for 18 months of COBRA continuation, the company could offer to cover only the first few months, or use a phased approach (e.g., full premium coverage for three months, then 50 percent for another three months).



Since severance pay is not required by law and is generally “over and above” any final wages owed to the employee, a company will typically request a waiver of certain claims in exchange for the severance package. Any such waivers should be drafted by an attorney, since the agreement could be challenged in court. In many states, if a waiver contains an invalid provision, the entire agreement can become void. Also, employees cannot waive certain types of claims — and including such provisions may void the agreement.

However, a severance agreement might be able to include a provision that the former employee is obligated to refund the severance pay if certain claims are filed. Also, if an employee had never signed a non-compete agreement or other restrictive covenant, the severance package might be offered in exchange for such an agreement.



Cross reference

For more information, see the section on **Non-competes and other restrictive covenants** in the **Onboarding and Training** tab.

In some cases, employees will attempt to negotiate a higher severance package than the company offered. If this happens, the employer has a decision to make. Effectively, the employee has rejected the offer and could be terminated without any severance package. However, depending on how badly the company wants the employee to sign a waiver of claims, the organization may be willing to negotiate.

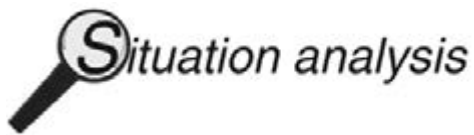
Here are some things employers should do when offering a severance agreement:

- Offer consideration — something extra in exchange for signing the severance agreement. A contract isn't valid unless something of value is given for signing. The receipt of severance pay can be conditioned on signing the agreement.
- Give adequate time to consider the agreement.
- Suggest the employee have an attorney review it before signing.
- Mention specific rights they are waiving. For a waiver of age claims, employers *must* specifically mention the Age Discrimination in Employment Act.
- Make it understandable, and not in “legalese”; if an HR representative doesn't understand it, chances are employees won't either.
- Indicate that the company won't contest the employee's claim to unemployment.
- Be specific about severance pay (for example, six weeks at the regular rate of pay, to be paid in one lump sum).
- Specify how benefits, retirement, and COBRA will be handled.

Here are some things employers should *not* do in relation to a severance agreement:

- Don't ask employees to waive rights to file a charge with the EEOC — that right cannot be waived.
- Don't ask them to waive any rights under the FLSA — those rights cannot be waived either.
- Don't ask employees to waive rights to file workers' compensation claims or for unemployment benefits.
- Don't try to trick employees into signing the agreement, or into signing something they don't understand.
- Don't ask employees to waive future claims under the FMLA; however, employees can agree to waive *past* FMLA rights.

Understand that all the legal protections in the world can't stop a determined former employee from trying to sue, even after signing a severance agreement and accepting severance pay. However, a well-crafted agreement combined with an employee-friendly process for signing it helps give the best legal position possible.



Impact on unemployment

The manner in which severance pay is provided may affect an employee's eligibility for unemployment benefits. For example, if the payment is a lump sum, the employee should be immediately eligible for unemployment. However, if the payments are essentially a continuation of wages (paid out on regular pay periods for several weeks or months), the former employee may not be eligible for unemployment during that period.

Navigating severance agreements

Like any contract, severance agreements must be supported by “consideration,” which can be money or something else of value *over and above the employee's existing entitlements*. The employee receives consideration in exchange for waiving his or her rights to sue the employer.

A waiver is generally valid when an employee *knowingly and voluntarily* consents to the waiver. To determine whether a waiver met these requirements, courts will consider whether a waiver:

- Was written in clear and specific language equal to the education and business experience of the employee who was asked to sign it;
- Was induced by fraud, duress, or undue influence by the employer;
- Provides the employee with enough time to read and think about the advantages and disadvantages of the agreement before signing it; and
- Encourages or discourages review by an attorney.

It can be tempting to use a form document and simply fill in the blanks, but this is a dangerous practice, as one size does not fit all. Severance agreements should be drafted by an attorney, since they may be challenged in court.

There are several variables that must be considered in deciding what a particular severance agreement should contain. Among them, when terminating someone over the age of 40, employers must abide by the requirements of the Older Workers Benefit Protection Act, which has very specific requirements such as a mandatory 21-day review period, seven-day revocation period, and a requirement that the employer encourage the employee to have an attorney review the agreement before signing it. If terminating two or more over-40 employees, there are additional requirements.

Risks and benefits

Even if an employee signed a waiver, he or she can still file a charge with the EEOC if the employee believes he or she was discriminated against during employment or wrongfully terminated. In addition, an employee is not required to return any pay received for signing a severance agreement if the employee later files a charge with the EEOC.

Another potential risk is unique to employees who had a confrontational relationship with the company. If the employee had threatened a lawsuit (even if the employee did not understand the legal standards to meet, and probably doesn't have a valid claim), then an offer of severance pay might be rejected. Essentially, the employee might assume that the company must be trying to "buy his silence" and the offer may encourage the employee to seek litigation. The former employee might even attempt to offer up the proffered severance agreement as "evidence" that the employer had something to hide. In such cases, offering a severance agreement may have the opposite of the desired effect.

Despite the risks, severance agreements have benefits for both employers and employees. The employer (usually) benefits by reducing the likelihood of litigation over the termination, and the employee benefits by receiving a severance payment which will help sustain him or her financially while looking for new employment.

Unemployment benefits

Concerns and conflicts about unemployment benefits primarily relate to employee eligibility. An employee can be deemed ineligible either because the individual does not have the necessary earnings, or because the individual left employment voluntarily (or was fired for a reason that he or she knew could have resulted in termination).

In most states, an employee will become eligible for unemployment after working a certain number of hours, or reaching a specified earnings limit, during four of the previous five calendar quarters (the period before filing a claim). An employee can meet this standard by working for more than one company. For instance, an individual might have held a job for nine months, then quit for another job and be fired after six months. The total hours and earnings from both positions may qualify for benefits.

Employers are commonly under the mistaken impression that if a position will only exist for a defined period of time, or has a known ending date (such as seasonal employment, or until a project is completed on a known date), the individual in that position will not be eligible for unemployment. However, any hours or earnings may still be applied to that person's benefit eligibility.

For example, if an employee loses a job, and shortly thereafter takes a seasonal position for a known duration, the individual can still be eligible for unemployment benefits once the job ends — even though the employee knew that the job would end on a particular date.

Some of this misconception may arise from employers who hire high school or college students during the summer months. Because of the education obligations, these students commonly fail to meet the hours and earnings criteria during the required period (again, usually four of the previous five calendar quarters). Thus, when a student's position is eliminated at the end of the summer, he or she does not get unemployment benefits. However, this outcome is a result of the total hours or earnings, not because of the known ending date for the job.

Another source for this misconception may arise from the fact that some state laws do actually allow for denial of unemployment benefits when the job involved only seasonal work. However, this typically applies only when the business itself is operated seasonally and is closed for part of the year.

Reserved

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For example, an amusement park that operates only during the summer months (and hires seasonal workers) might be exempt from providing unemployment benefits when employees are laid off in the fall, when the park closes. In contrast, an employer who operates year-round, but hires extra employees during the summer months, may still have to provide unemployment benefits to qualified individuals.

Another common challenge is whether the employee left the company voluntarily or involuntarily. Employees who voluntarily quit are not normally eligible, unless they can show that any continued employment would have created certain hardships. For example, an employee whose position is eliminated but who is offered another job in a different state (which would require relocating) might still be eligible for benefits after turning down the job offer.



Quit or discharge: Close cases

The question of whether an employee quit or was fired is very important. It determines who has the burden of proof in an unemployment claim. If an employee quit, he or she has the burden of proving good cause to resign. If the employee was fired, the employer has the burden of proving that the discharge resulted from misconduct that happened shortly before discharge, and that the employee knew or should have known that he or she could be fired for such a reason.

Sometimes the circumstances are murky and it is unclear exactly what happened. Here are some hints to help define a separation:

- Whoever first brought up the subject of a work separation might be held to be the one who initiated the separation. “Mutual agreement” work separations are usually considered to be discharges.
- A resignation under pressure is a form of discharge. If the employee had no choice but to leave, it was an involuntary separation, even if the employee “agreed” to quit. Some employers will allow an employee to resign rather than having a termination on the employee’s record.

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- If an employee expresses a vague desire to look for other work, and the employer tells him to consider that day to be his final workday, it will usually be considered a termination because no definite date was given for the final day of work.

If the encounter starts out as a counseling session or a reprimand and the employee gets discouraged and offers to quit, use caution. An employer who “accepts the resignation” may find that it was considered a discharge. A better option is to remind the employee that the meeting is only to talk about the problem, not let the individual go, then ask if he or she really wants to resign. If so, ask how much notice the employee is giving. If he or she gives two weeks’ notice or less, and the company accepts the notice early within the two weeks, it will still be a quit, not a discharge. An employer does not have to pay an employee for the portion of a notice period that is not worked.

Having an employee sign a prepared, fill-in-the-blank resignation form will look suspicious. The employee might claim that he or she was forced to sign it or was tricked into signing it, and claim it was involuntary. Have the employee provide a resignation letter in his or her own words, preferably in the employee’s own handwriting, if the employee can be persuaded to do so.

If an employee offers to resign, but the company convinces the person to stay, then later changes its mind and “accepts the resignation,” the company will likely be deemed to have discharged the employee. Persuading an employee to withdraw a resignation amounts to a rejection of the resignation. The offer to resign is effectively no longer valid, and the employee would have to submit a new resignation.

If an employee asks to be laid off, be careful. It would probably be best to answer any layoff requests by stating that the request is denied and reminding the employee that he or she is still needed. If the employee persists, follow that up by saying that if the employee no longer wishes to work there, he or she needs to submit a resignation in writing. Do not prepare a letter for the employee to sign, and be sure that any exit paperwork reflects that he or she resigned.

While counseling an employee about a matter of concern, the employee may start asking questions or making comments like, “Are you telling me I’m fired?” The employee may be trying to maneuver the employer into a discharge in the hope of claiming unemployment benefits. The best response is something like, “No, I am telling you that you need to follow the policy and do your job.” Make it clear that the focus is on improving performance or on getting them to comply with policies. This lets them know, indirectly, that if they want to leave, they have to take the initiative.

Two-week notice rule

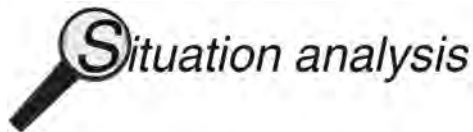
The amount of notice given can be important in an unemployment compensation case. Most states recognize that two weeks’ notice is fairly standard. If the employee gives notice of intent to resign on a date two weeks or less in the future, but the company accepts the notice early, it will usually be regarded as a resignation, not a discharge.

If more than two weeks’ notice is given, but the company waits until two weeks or less before the effective date of the resignation to accept the notice early, there’s a good chance it will be regarded as a resignation, although this is not guaranteed.

Also, if the employee gives more than two weeks’ notice, and the company accepts it more than two weeks in advance, but pays wages for the rest of the notice period, the situation will usually be judged a quit, not a discharge (payment for a notice period not worked is not required unless such a payment is promised in writing).

However, if an employee gives more than two weeks' notice, and the company accepts the notice immediately, the situation may be considered a discharge. The outcome depends upon the individual facts in the case.

Along the same lines, an employer might give advance notice of a layoff or termination. If the notice is two weeks or less, and the employee leaves within that period, the separation should still be considered involuntary. However, if the notice is longer than two weeks, and the employee leaves ahead of the final two-week period, the separation might be considered voluntary. To collect unemployment, the employee may have the burden of proving good cause for resigning.



Ambiguous notice

Sometimes employees give murky resignation notices (open-ended, or giving multiple options). If the company needs the employee to stay (or doesn't want to risk a finding of involuntary termination), consider responding with a memo rejecting the resignation notice. Explain that it does not look like a resignation letter, since there is no definite date given for the last day of work, and ask the employee not to submit it again until they actually want to stop working on a specified date.

The intent is to get a resignation letter with a definite date of resignation. Adopt a policy informing employees that open-ended notices of resignation will not be accepted, and that any notice of resignation must include the final date of work. The policy should remind employees to use caution in submitting a letter of resignation, because once the employer takes action on it, it may be too late to rescind the notice.

Resignation without notice

It can be difficult for a company to "prove" that an employee quit if the employee refuses to give a written notice of resignation, or leaves under circumstances that make it unlikely that the employee will cooperate and give the company a letter of resignation after the fact. In many such cases, the former employee later alleges that he or she was fired. A common situation involves a resigning employee quitting without notice, informing only a coworker of that fact, and leaving the employer with no resignation letter.

To document that the employee resigned, have the coworker write a memo to the employer explaining the call or contact, such as: "Dear [supervisor], The reason I [came into work] [came in early] [worked late] today was because [employee] called me and said she was quitting and I needed to cover for her. I didn't want you to think that I was trying to work outside my schedule. Please let me know if you need me to continue covering for [employee]."

Such a memo serves two purposes: it explains why the coworker worked outside the schedule, and more importantly, it documents that another employee quit, if a dispute arises in an unemployment claim. Ideally, the coworker would be available to give testimony confirming what he or she wrote in the memo.

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Of course, such a memo will not cover every possible resignation-without-notice situation, but it is an example of how an employer can think outside the box to give itself a little more protection in resignation cases.

In close cases, most administrative agencies decide that the work separation was involuntary. Employers should be prepared with both documentation and witnesses to prove their cases either way in the event of a dispute over the nature of the work separation.



Company benefits (COBRA, vacation, etc.)

Whether leaving a company voluntarily or involuntarily, departing employees may have a number of questions about the disposition of various benefits. A few examples follow:

Unused vacation: In most states, whether an employee will be paid out for unused vacation time depends solely on company policy. About a dozen states consider earned vacation time to be a “wage” that must be paid out, even in cases of termination for cause.

Employers should be aware that even if state law does not require payout of the earned time, a state labor agency may accept a wage claim for unpaid vacation if the company policy indicates that such time will be paid out — or even if the policy is unclear. There is a legal doctrine which says that where a contract (or policy) contains ambiguous language that could be misinterpreted, that language should be interpreted in favor of the person signing the agreement (the employee) rather than the entity who created the agreement (the company).

There can also be disputes about what qualifies as “vacation” since employers may use terms such as paid time off (PTO) or may offer floating holidays. In general, a state agency will consider earned time off to be vacation if the time can be used at the employee’s discretion

(subject to approval for scheduling, of course) without other preconditions. Thus, floating holidays or PTO that can be used whenever the employee chooses may qualify as vacation under state law. However, paid sick leave that is intended for use only under defined circumstances will not generally qualify.

Employers should check their state laws when crafting a vacation policy, and should clearly spell out how vacation will be handled in cases of employee separations. For example, a policy might indicate that unused time will be paid out if employees are laid off or if they quit after providing at least two weeks' notice, but will not be paid out if employees are fired for cause (such as misconduct) or if they fail to provide the required notice.

Medical and dental coverage: Employers are not required to offer group health insurance or similar coverage, but many do so. Where offered, these plans may be subject to COBRA, where the employee must be given the opportunity to continue coverage for a specified period of time after a "qualifying event" (which includes separation from employment).

Some employers have made the mistake of simply handing a COBRA notice to the departing employee. However, notice must be given to all participants, which includes spouses.

Once the notice is provided, qualified beneficiaries will have 60 days to elect coverage. Note that COBRA may not apply to all plans, such as standalone vision or dental coverage.

Life insurance: Some employers provide life insurance benefits to employees, and may offer the opportunity to continue coverage after the employee terminates. In the case of individual coverage, the former employee may have to contact an insurance representative for information. In the case of group coverage, the former employee may have the opportunity to convert to individual coverage, which would also typically require contacting an insurance representative. Employees should be informed of who to contact and any deadlines for doing so.

Disability insurance: Employees who are eligible for long-term disability insurance may have the option to convert the coverage to another plan, or continue coverage by making payments directly to the carrier. Employees should be informed of who to contact for this option and any deadlines for doing so.

Flexible spending accounts: Employees who contributed to a flexible spending account should be able to continue making claims for eligible expenses against the balance until the end of the plan year. They should be informed of when the plan year ends.

401(k) or other retirement plans: For certain retirement plans, such as 401(k) accounts, employees may have the option to close the account and receive the money (subject to a tax penalty) or roll over the balance to a new employer's account. Other plans, such as pensions, may have to just "sit" until the employee reaches retirement age. There are a variety of plans that employers may offer, and the information communicated to the departing employee will depend on what the company offers.

Final wages, commissions, or bonuses: While not technically a benefit, employees may have questions about final paychecks, commission earnings, or other bonus programs and when (or if) they will be paid out.

Some state laws require paying all final wages on the last day of work (in cases of involuntary termination, or even voluntary separations if the employee provided a specified amount of notice). However, even these states recognize that certain payments, such as commissions, might have to be delayed until the conditions for earning the commission have been satisfied (such as receipt of payment from a customer).

The federal regulations do not actually require employers to pay out commissions, as long as the employee received at least the minimum wage (plus overtime) for all hours worked during the final pay period. However, many states define the term "wages" to include commissions earned

under an agreement. In that case, final commission checks will have to be calculated and provided based on any sales made during the final pay period. The fact that an employee did not work until the usual payout date (such as the end of the month) would not justify denying the payout.

Employees may also have questions about bonus payments, such as attendance or safety awards, or even profit sharing. The conditions for payout should be specified in the policy or plan documents, and would normally include a requirement to remain employed through a specified date (e.g., December 31 for an annual plan). If an employee quits on January 2, he or she may be eligible for the bonus, even if the payout is not calculated until several weeks or months later.

Understanding COBRA responsibilities

Employee organizations, state or local governments, and private-sector employers with 20 or more employees are required to offer COBRA coverage for up to 18 months (and longer in some cases) at a cost of not more than 102 percent of the employer's cost for the insurance. Coverage must be offered to a qualified beneficiary (generally an individual who is covered by a group health plan on the day before a qualifying event and is an employee, an employee's spouse, or an employee's dependent child) as a result of a qualifying event such as termination of employment.

An employer has 30 days after a qualifying event occurs to provide notice to the health plan. The health plan must then provide an election notice to the qualified beneficiaries within 14 days after the plan administrator receives the notice of a qualifying event. This election notice includes items such as information identifying the plan, the qualifying event, the date coverage will terminate, how to elect COBRA, the length of time it is available, and payment requirements, including due dates.

Failure of a plan sponsor or plan administrator to provide the proper notice of continuing coverage to a beneficiary can result in a penalty of up to \$100 per day from the date of the failure to give notice.

Most companies are aware of their COBRA notification responsibilities and are very conscientious about performing them. Yet once in a while, something happens that may be beyond their control.

One particular court case offers both sides of the story, resulting in an interesting court decision. A disgruntled employee submitted a letter of resignation after she was placed on probation for rude behavior. In addition to several charges of discrimination and retaliation, she also submitted a COBRA claim against her employer, alleging that she never received a required COBRA notice, which deprived her of medical benefits.

The company had mailed a required COBRA notice to the employee, but to an incorrect address. The question in this case was whether the statute required an employer to confirm that a beneficiary actually received the required notice.

Under COBRA law, it is not necessary for a plan sponsor to confirm that the former employee received the notice. Instead, it is acceptable for the notice to be sent by first class mail to the employee's last known address or to use means that are reasonably calculated to reach plan participants. Proof that the mail was properly addressed, stamped, and deposited in an appropriate receptacle is considered to be evidence of good-faith compliance.

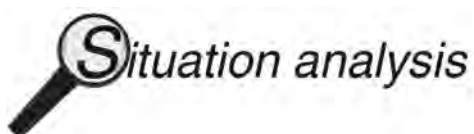
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This court case was pretty cut and dried since the real issue was not whether the employee actually received the COBRA notice. The greatest area of contention in this case was whether the company provided the correct address to its plan administrator that mailed the notice. The employee asserted that the company used an address without her apartment number.



Indeed it did; however, this was a result of the employee's own error. On her original health insurance enrollment form, she had failed to include the apartment number. She agreed that she had completed her own enrollment form in its entirety. Therefore, the court determined that the employee should not benefit from her own error.

Although the employer in this case did win the COBRA claim, it may not always be quite that simple. It is always a good idea for companies to check a little further to verify that a more recent address has not been filed for some other purpose. Often, an employee may provide a forwarding address during an exit interview which would supersede the address on the enrollment form. Using common sense and being thorough may save a company from hefty fines if it is found guilty of failure to properly provide a required COBRA notice.



An employee who quit six weeks ago turned down COBRA coverage. Now he wants to change his mind. Can he do this after submitting paperwork declining coverage?

Each qualified beneficiary must be given at least 60 days to choose whether or not to elect COBRA coverage. This coverage extends from the later of the date the election notice is provided or the date on which the qualified beneficiary would otherwise lose coverage due to the qualifying event. In this case, since the 60 days is not yet up, the former employee has the option to elect COBRA prior to the expiration date and the company must honor his request.

In addition, the qualified beneficiary must be given at least 45 days after the election is made before the initial premium payment is due.

COBRA and gross misconduct

Termination for gross misconduct is not a qualifying event. This means that the employee and dependents are not entitled to elect COBRA coverage. The dilemma occurs when employers face situations that they consider to be gross misconduct but cannot find a legal definition to support it. Just because the employer believes an action to be gross misconduct (typically fraud or dishonesty) does not mean that a court of law will agree.

Even states that have taken a stance and defined the term have been proven wrong in the courts. Using the same definition that is used in state unemployment law does not always work either, since the definition can vary depending upon the state in which the federal court in a COBRA case is located.

Although conduct may be inappropriate, it doesn't always rise to the gross misconduct level according to some courts.

For example, in one case, an employee gave his resignation and was subsequently fired. Despite the fact that he failed in his job as controller, allegedly plotted to start up a new competing company, and lured certain employees and customers away to the new company while still employed, the court found that his termination constituted a qualifying event since he was not fired for gross misconduct. In addition, the gross misconduct defense was found not to have been made in good faith and was not justified.

In another case, an employee working as a sales consultant was fired after she failed to secure proper deposits from clients by manipulating the credit-verification system. She had breached several company policies, including one prohibiting the falsification or malicious alteration of reports and records of interest to the company. The court found that the company was justified in terminating her for gross misconduct and not offering COBRA.

Even though an employer may think there is no doubt that an employee's actions fall into the category of gross misconduct, companies should be very careful about denying employees COBRA rights, since doing so may cost more if the court rules against them. Companies may

end up paying for retroactive medical claims of the employee, attorney and court costs, as well as the monetary penalties. Thus far, the courts' determination of what is considered "gross misconduct" has set a relatively high standard.

Exit interviews

Employees leaving a position may have valuable information about ways in which an organization can improve. Conducting exit interviews can help employers capture this information.

Exit interviews are conducted with those leaving the company, or simply leaving a particular department. The interview gathers information that can provide insight on such things as organizational management that may not always be accessible or gathered during employment tenure.

Exit interviews can identify areas of concern or opportunity. This can involve anything from the organization's culture to the physical environment.

These interviews can also identify trends that indicate opportunities for improvement. Exiting employees may indicate that the compensation is better elsewhere, and thus, the organization may want to look into its compensation structure.

If an employee who is leaving is disgruntled, an exit interview may help to diffuse the conflict. The interview may provide an opportunity to vent frustrations with the company. If the employee believes that discrimination or disparate treatment has occurred, dealing with the issue before the employee turns to legal assistance is in the organization's best interest.

Take the time to meet with each exiting employee regardless of why they are leaving. Employers can uncover valuable information when asking in-depth questions. Use an exit interview as a learning opportunity to make the company a better place to work.



Deciding whom to interview

Exit interviews do not have to be restricted to those who leave the company voluntarily, nor do they have to be restricted to employees who leave the organization — they can be applied to employees who transfer from one area to another.

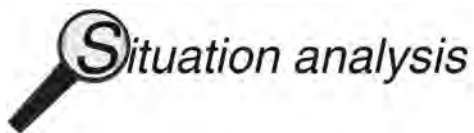
Organizations may include employees involved in a restructuring or layoff to capture their views, as well as employees who are leaving on a voluntary basis. Exit interviews may be voluntary or compulsory; the decision is up to the organization.

Deciding who conducts the interview

Ideally, a neutral party should conduct the interview, such as a human resources representative. The departing employee's supervisor is not the best candidate, as the employee may not feel comfortable expressing his or her views. The interviewer should be someone who was not involved in the daily supervision or guidance of the employee.

A third party may also be involved in the interview, as long as the person is neutral. Exit interviews are not opportunities to change the employee's mind about leaving or to discuss past employment performance.

The person conducting the interview should understand the purpose of the interview and how the information may be used. The person should also be able to conduct the interview professionally, which means he or she should be someone who can listen and make the interviewee comfortable. If the interviewee is not comfortable, he or she may withhold information.



A valued employee quits

The time will come when a star employee decides to resign. If the company can't convince the employee to stay, it can at least find out what drove the employee to leave by conducting an exit interview.

The company may find that the employee felt unappreciated and that his or her hard work went unrecognized. This would suggest an employee recognition issue and that others might be feeling the same way. While this should have been fixed sooner, the phrase "better late than never" still applies. Consider employee satisfaction surveys, department meetings, or suggestion forms to prevent another employee from leaving.

During an exit interview, a company may learn about issues that it had no idea even existed. Ideally, employees will be honest with and provide good information that can be used later to deter other employees from leaving. Unfortunately, the information received will most likely be too late for to act on. However, once made aware of the issues, the company can start working on them.

Where and when to conduct exit interviews

Exit interviews, like performance reviews, should be conducted in a neutral place — not in the employee's work area or the supervisor's office. The goal is to make the employees feel comfortable in an impartial environment.

Conducting the interview in a makeshift room may make interviewees think the interview is not important. If done in the CEO's office, interviewees may feel that the employer is trying to put on a false front.

Some organizations conduct exit interviews before the employee leaves, including it with other administrative procedures, such as discussing severance, COBRA, final pay, references, and return of company property.

Others conduct them soon after the employee has left. Waiting too long can risk having the employee's focus shift to other things and losing information. However, waiting a bit may diffuse any fears of retribution the employee may have had, allowing for more open discussion.

Gathering information

The reasons for departure are a good place to start the exit interview. From there, employees should be guided to indicate what they liked during their tenure and what they disliked, and why. This may be company specific, but some ideas to consider include the following:

- Selection/hiring process
- Compensation/benefits
- Job duties and expectations
- Training/development opportunities
- Advancement
- Management and supervision
- Organizational culture
- Policies/procedures

Ask general questions regarding what the employee might miss or what the organization can do to make the position better for future employees. The conversation may extend to general input on improvements for the department or the organization as a whole. Perhaps the employee would refer colleagues, or perhaps not. Finding out why may shed some light on good points the organization may want to highlight, and negative points the organization may want to work on.

Employees may also be asked to provide input on the exit interview itself.

Again, the setting should be conducive to making the departing employees comfortable. They should be treated with respect and consideration. Rushing through the process may make them feel that their views are unimportant.

Exit interviews are best done face-to-face, and not with a survey or questionnaire. The latter may be used as a secondary method if a face-to-face interview is not possible. However, employees may not bother to return the questionnaire.

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Conducting the interview in person also provides the interviewer with more opportunity to gather in-depth information by watching for body language and other non-verbal cues, encouraging the employees to talk, or guiding the conversation to areas that may be only touched on in a survey.

The person conducting the interviews should listen carefully, allow the employees to talk, and refrain from defending the organization's stance. The interviewer should also take notes.

Using the information

Simply collecting information does little to improve an organization. HR should review the information and put it to use. It may be compared to employee attitude surveys, consolidated with information gathered from other employees, or evaluated against current employment trends.

The information may be used in coordination with an audit of the organization's HR practices, if elements of employee relations are identified as issues. It may be communicated to specific current employees, including supervisors or managers, who may benefit. If this is done, HR should respect the anonymity of the departing employees.

The organization need not respond to every comment made during exit interviews, however. Some comments may be subjective and may not represent an actual problem. Some conflict between individuals is normal, and some complaining should be expected. However, if the interview indicates a concern regarding favoritism, bullying, intimidation, or similarly serious conflicts, the company should be prepared to respond.



Rehiring former employees

Unless employers have a union contract or other agreement that specifies or promises to rehire former employees, a company could choose to hire new workers. In fact, employers should be wary of making promises to rehire former workers, especially where the need for layoffs is used as an opportunity to eliminate low-performing employees, or others with problems (such as poor attendance).

In some cases, an employer will agree to give preferential hiring to former employees who apply for their former jobs (assuming the position becomes available). This makes sense because an individual who already has months or years of experience in a position is likely among the most qualified, and the former employee is also a known entity — the company is already familiar with work habits, relationships with coworkers, and other considerations.

However, there's nothing wrong with requiring former employees to apply for their old jobs and go through the interview and selection process along with other applicants. In this case, the preferential treatment might simply mean that the former employee is guaranteed an interview, but is not guaranteed a job offer.

Similarly, there's nothing wrong with simply calling a former employee and making an offer, even if the job opening hasn't been posted. In the absence of a contract, an employer's decision to hire workers, and who to hire, is entirely at the company's discretion.

If the relationship seemed beneficial and the company was sorry to lose the employee, then making an offer (assuming that person is still available) may not only fill the hiring need, but restore the "old team" and allow for rapid integration of the "new" employee with little need for training.

Employers can also choose whether to give credit for previous service. In cases where a layoff was temporary (especially where the duration was known to be short, perhaps a few months), employers will commonly restore the employee with credit for previous service. For example, if an employee had worked for eight years in a position, the company may agree to provide vacation accrual and other benefits with consideration for the prior service.

In some cases, the organization may decline to give credit for previous service. This may be the case where the duration of the layoff was unknown, or where a former employee is brought back to a different position. Just as employers have the right to hire whomever they choose, they have the right to decide whether to credit prior service.

Rehiring after layoff and the Form I-9

If a company is rehiring or contemplating rehiring after a layoff, it may be wondering whether or not it needs to complete a new Form I-9 for those employees.

As a general rule, if an employee is continuously employed — that is, he or she has a reasonable expectation of employment — the company does not need to re-verify the I-9 information when the individual returns to work. For example, re-verification is not needed for individuals who are returning to work after:

- Approved leave, whether it is paid or unpaid (FMLA, vacation, etc.);
- A temporary layoff due to lack of work; or
- Being on strike due to a labor dispute.

This raises the question of how long a layoff can last before the individual is no longer considered "continuously employed." Actually, there is no specific time limit; instead, the matter depends on other factors.

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If an employer claims that an individual was continuing in his or her employment, it must establish that the individual expected to resume employment *at all times* and that the individual's expectation is reasonable. The following factors may indicate that an individual has a reasonable expectation of continued employment:

- The history of recalling employees indicates a likelihood that the individual will resume employment within a reasonable time in the future;
- The former position held has not been taken permanently by another worker;
- The individual has not sought or obtained benefits that are inconsistent with an expectation of resuming employment (such as severance pay or retirement benefits);
- The organization's financial condition indicates the ability to permit the individual to resume employment within a reasonable time in the future; and/or
- Any communications with the employee (whether verbal or written, including statements made by supervisors) indicates that it is reasonably likely the individual will resume employment within a reasonable time in the future.

There isn't any federal or state law which bestows a right to recall or a right to resume working after a certain amount of time. Whether an employee has such rights depends on promises the company may have made, or by the terms of a contract or collective bargaining agreement, if either should apply.

In some cases, an employee might be terminated and be rehired after only a few weeks. In this case, a new Form I-9 would be required if there was no expectation of a continued employment relationship. In other cases, a layoff may last for many months, but the company still considers the employee "active" during that time, so a new Form I-9 would not be required. Each situation may be unique.

Forced to rehire someone who was fired

A newspaper in California was forced to rehire eight journalists that had been fired. An Administrative Law Judge (ALJ) found that they had been terminated because of their union activity, which is a violation of the National Labor Relations Act (NLRA). As part of the remedy, the ALJ ordered the reinstatement (with back pay) of the eight journalists who were terminated.

This is not the only situation where an employer has been forced to rehire a terminated employee. One of the key remedies in Sarbanes-Oxley (whistleblower) cases is reinstatement, and fired employees who won their cases have been granted reinstatement. While many don't want their job back, some actually do. So, how does an employer reinstate an employee who may not be well liked by management, other employees, or both?

While employers can't force people to like a returning employee, they can enforce civility in the workplace, expect employees to adhere to a professional code of conduct, and be on guard for any kind of retaliation. Everyone must put aside personal feelings and act professionally.

Make sure the returning employee knows who to contact if he or she feels any sort of retaliation taking place. Remind all employees before the returning employee begins work that he or she is being reinstated in accordance with a court order or other requirement of law, that they are expected to be civil and professional toward the employee, and that retaliation is illegal and will not be tolerated.

It won't be an easy road, and may in fact be awkward and uncomfortable for quite some time. Eventually, things may settle down, or the employee may choose to leave, given that the work environment may not be very friendly. A civil environment is not necessarily a friendly environment — in fact, it may be rather chilly. But whatever happens, the company has a duty to make sure things stay on a professional level.



Eligible for rehire

Employers may face situations where they are “forced” to rehire someone based on information given during a reference check or in a separation letter. For example, an employer might agree to let an employee resign, and might state that the employee is “eligible for rehire” or even something like, “Duane will be welcomed back if he chooses to return.”

Employers sometimes make these statements based on assumptions that the employee won't reapply in the future. However, some organizations have faced situations where the former employee's new job didn't work out, and the employee asks for his or her old job back. This can put the company in a bit of a quandary.

Statements like this are sometimes made to “soften the blow” of a separation, or even to help encourage another company to hire that employee. These statements might even be included over fears of a discrimination or harassment claim. However, if the former employee actually tries to come back, the statement could actually create the appearance of discrimination — you now have to justify denying employment to someone who you claimed would be welcomed back.

If you do not actually want to rehire a former employee, avoid making promises or indications that a job would be available. Statements such as “eligible for rehire” might only suggest that the individual is welcome to apply and will be considered alongside other applicants, but should not normally create a promise of future employment. However, broader statements that the former employee “will be given a job” or “will be welcomed back” should be avoided unless you intend to honor that promise.

Responding to reference checks

An employee who leaves the company for any reason other than full retirement will likely find a new career. After an initial interview, the prospective employer is likely to check references, which usually includes contacting former employers.

When someone calls for a reference on a former employee, it may be company policy to give out only basic information such as name, job title, and dates of employment. However, there may be times when employers are obligated to give out information to a prospective employer. The trick is in knowing when it must be done and how to do it.

In some cases, the prospective employer will ask for specific information. Whether the company chooses to provide information beyond the basics may depend on the nature of the request, whether company policy allows for disclosure, and whether that information must be disclosed for legal reasons.



Employers should also keep in mind that a former employee's manager may be friends or acquaintances with the hiring manager of another company. It does happen that a supervisor for a prospective employer will contact a former supervisor for details about an individual's work habits. While providing more than basic information to a friend may be tempting, keep in mind that if that information finds its way to the former employee, there could still be the potential for liability.

With that in mind, here are some of the basics for giving reference checks.

What employers *may not* say: Employers may not say anything defamatory about an employee, which is something that is *known* to be false and that injures his reputation. Truth is an absolute defense to a defamation claim, so if the information is truthful, the company has a chance of defending itself if the matter should ever go to court.

Interestingly, courts have held that information an employer *believed to be true* (but which was, in fact, false) is also a defense, because the information was given in good faith. Many states have laws that protect employers when they give information in good faith.

Employers also may not say anything discriminatory. Think of it this way: The rules for the subjects employers can't ask about during an interview apply here. This would be information that someone can't legally use to make a hiring decision, such as race, religion ("he needed time off for religious reasons"), gender ("she was always home with her sick kids"), disability ("he required accommodations"), and so on.

What employers *may* say: Employers may give information that is truthful and factual. For example, if someone was suspected of stealing but it was never proven, say he was suspected of stealing but that it was never proven. Don't say he stole from the company if that was never proven. The prospective employer could be told that he was fired for suspected misconduct or for a suspected policy violation, or perhaps that the company lost confidence or trust in the employee. However, plainly stating that he was fired for theft may create an obligation to prove the accusation.

Any information given should be objective, not subjective. For example, say "Ed was late to work on 17 separate occasions during his last six months" instead of "Ed didn't take his job seriously and didn't feel a need to show up on time."

What employers *must* say: Finally, there are times when an employer cannot keep silent. There is a legal theory called negligent referral, which occurs when an employer who knew or should have known that a former employee may pose a risk fails to warn the prospective employer.

Examples of this include teachers who molest children in one school district and get fired, then obtain jobs in another school district. The first school district never tells the new district what happened, and consequently, it happens again. Parents have successfully sued the first school district because the harm may have been prevented.

This also has come into play where employees have physically harmed customers or other employees and are terminated, only to do the same thing at the next employer's place of business.

Defamation concerns

Defamation is a type of lawsuit in which someone claims that what was written or said about him or her is untrue and is so serious that it injures the person's reputation to the extent that others refrain from dealing with him or her. Many HR professionals are concerned that giving a negative reference may cause a former employee to bring a lawsuit for defamation.

A former employee may allege that the previous employer made false statements that damage his or her reputation and limit the ability to obtain other employment. However, many states have passed job reference immunity laws to protect employers from a defamation suit for statements made in good faith, because statements that are true are not defamatory.

As a general rule, in most states, employers have no legal obligation to provide information about a former employee. However, there are exceptions. Employers may be found guilty of negligent referral where they withhold information about a former employee that they had an obligation to disclose because of the potential for harm to others.

It may feel like a no-win situation, because the company could get sued for defamation for saying something negative, or negligent referral if it doesn't provide the right information. Here are some general guidelines for giving references:

1. When giving out information, be truthful and factual.
2. Keep the information objective ("Bob had five unexcused absences in a six-week period") instead of subjective ("Bob was a slacker who lacked motivation").
3. Even if company policy only permits giving basic information, there may be times when the employer has to disclose information, especially if someone may be harmed if the information isn't given.
4. If the state has a reference immunity law, the law protects employers who give information in good faith; giving information that is truthful is also protected by law.



Best practice

Defense against defamation

Many states offer safe harbor laws which protect employers when they give truthful, factual information on a former employee as a reference. These are commonly known as reference immunity laws. These laws provide a legal defense should a former employee sue for defamation.

Defamation, by definition, is an untruthful statement that harms another's reputation. Truth is an absolute defense to a defamation claim, even outside states with reference immunity laws. This is why it is important to stick to the facts, and not speculation, when giving an unflattering reference.

While employers should primarily be concerned with giving false references, some employers are concerned about potential liability if the organization accepts a negative reference (and withdraws a job offer) but later discovers that the information given was false or defamatory. In most cases, an organization should not face liability for relying in good faith on information given, if the organization did not have any reason to believe that the reference was false.

Employers should, of course, watch for potential red flags, particularly when a reference includes characterizations of the individual rather than objective statements (as discussed in the previous section). For example, if the applicant is described as “lazy and unreliable” rather than being described as “tardy at least one day per week,” then the organization may suspect some underlying conflict between the employee and the person giving the reference, and may choose to seek clarification or additional references.

When supervisors are asked for references

If the company hasn't counseled managers or created a clear policy outlining their responsibilities in regard to referrals, the organization's risk of legal trouble increases dramatically. In some cases, relaying the wrong kind of information could land the organization at the wrong end of a lawsuit for defamation or negligent referral.

Because of concerns like this, many HR departments prefer that their managers and supervisors give only neutral information to individuals seeking references, including basic data such as name, job title, and dates of employment. Of course, this is a conservative route.

Defamation is understandably a concern with referrals, but courts generally hold that what is said about a former employee is not defamation unless the information is a deliberate lie. This means that if managers and supervisors limit what they say to factual and relevant information (and provide the information only to individuals who have a legitimate business interest in receiving it), their references shouldn't be problematic.

If the company decides to go the conservative route and only offer minimal information, make sure that managers and supervisors understand the danger of negligent referral. While it's a rare case that this would become an issue, it's still important to explain.



Best practice

Consistency is key with referrals

In addition to the risk of negligent referral, a glowing reference for an employee who was terminated for poor performance could also undermine a non-discriminatory reason for firing the individual. If the person had reason to allege that the company discriminated against him, the contradiction of the reference and the reason for termination may support a discrimination claim.

As references on social networking sites become increasingly popular, employers may have to worry about managers and supervisors leaving such potentially contradictory comments online. For example, Joe asks his friend and manager, Robin, to write a reference for him to build his LinkedIn profile. Robin gives a brief but positive review of Joe. Several months later, Robin terminates Joe, citing poor performance dating at least six months back. The positive reference Robin wrote stands in stark contrast to the cited reason for Joe's termination.

If the organization has adopted a policy that limits references to neutral information, it may also be a good idea to prohibit online recommendations. Being able to cite the organization's policy will help keep managers and supervisors from feeling awkward when asked to provide an online reference.

Stick to the facts

A supervisor will probably receive more than a few calls asking to discuss a current or former employee as part of a reference check, but do they know what they can and cannot tell someone seeking information about an employee? Consider the following situations to help them understand:

Reference checker: *Can you tell me a little bit about Harry's work ethic?*

Supervisor: *Well, I didn't work that closely with Harry, and I don't have any proof of this, but I always got the impression that Harry wasn't very motivated. He seemed to do the minimum amount of work to get his paycheck every week.*

In this case, the supervisor confesses to speculating, admitting to limited interaction with Harry and a lack of evidence to back up his claim. Since his answer isn't rooted in fact, the supervisor probably shouldn't have shared his personal feelings.

Reference checker: *What can you tell me about Harry's relationship with his coworkers?*

Supervisor: *Oh, Harry was everybody's favorite guy — always friendly and ready to help out.*

If this statement is true, there's not much risk for the employer. However, if Harry is actually facing termination for violent behavior, the statement is untrue. The supervisor may hope that by giving a complimentary reference, Harry will get a job elsewhere and leave.

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Providing misleading information — specifically giving an overly positive reference for someone who was known to be less than stellar — is a form of negligent referral. If Harry was known to have acted violently, the information provided could cause him to be hired. If Harry is involved in a violent incident at his new workplace and it is found that his behavior could have been predicted, the new employer may have cause to sue Harry's former organization for negligent referral.

Reference checker: *Did Harry leave on good terms?*

Supervisor: *Well, I wouldn't say he left on good terms — he sexually harassed several of our female employees, and we suspected that he was stealing from the company.*

With this answer, the supervisor has provided information that is not necessarily based in fact. While several female employees did complain about Harry, the term “sexual harassment” is a legal phrase that implies harassment to an unlawful level. Additionally, the supervisor's suspicion that Harry was stealing from the company was also not confirmed, so it shouldn't have been shared. Harry would have a legitimate claim of defamation here.

Reference checker: *How was Harry's attendance?*

Supervisor: *Harry used three sick days last year. He also used all 15 of his vacation days.*

Assuming the information given here is completely true, the supervisor hasn't given out any information that shouldn't be shared. It's important to remember that there's usually minimal risk involved when reference information given is factual, related to an individual's future employment, and shared with an individual who has a legitimate business reason to obtain it.

When supervisors are asked for a reference, they should first consult the organization's policy on providing references. They must stick to the facts and refrain from offering information that wasn't specifically asked for or isn't relevant — even if the person who called for the reference is a trusted friend.

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