

# **The Three D's**

## **Documentation, Discipline & Discharge**



Presented by:

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# In-House Counsel

**What is your role in the three D's?**



**What are your fears about that role?**



# The Cat's Paw

- When an employee or supervisor, motivated by discriminatory intent, influences an otherwise unbiased decision-maker to take an adverse employment action against another employee. In the end, the employer is still held responsible.



# Early Documentation is Key

- Assesses a pattern of behavior or performance v. an aberration
- Reflects on the positive, as well as the negative
- Provides details that will be forgotten over time
- Gives a balanced perspective when preparing evaluations
- Records conversations that may lead to more formal discipline down the road
- Creates a contemporaneous record-not “papering the file” after the fact

# Key Elements For All Discipline

- Consistent
- Timely
- Impartial
- Progressive
- Appropriate
- Keep it “Clean” and “Neat”



# The “Clean” Rule



- **C**onsider the facts
- **L**earn the employee's, manager's and witnesses' story
- **E**valuate prior discipline for similar offenses
- **A**nalyze risk
- **N**arrow potential options and decide

# The “Neat” Rule

- Notice
- Explanation
- Assistance
- Time to Improve



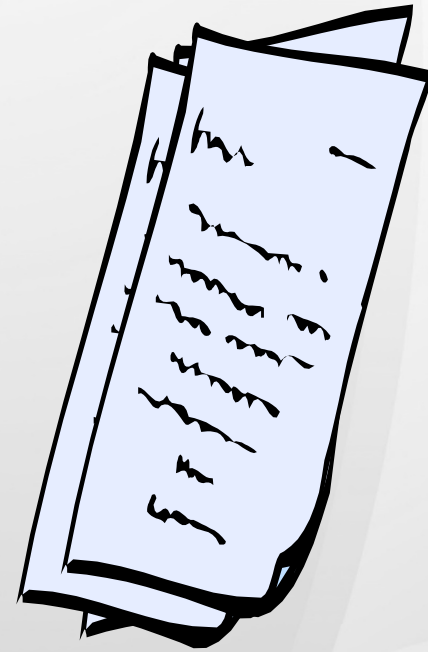
# Verbal Warning Procedures

- Talk to the employee privately
- State the specific problem in terms of desired performance and actual performance
- Refer to previous casual conversations about the problem
- Give the employee a chance to respond
- Have the employee confirm he/she knows exactly what you expect
- Indicate your confidence in his/her ability to perform properly
- Document the conversation



# Verbal Warning Documentation

- The employee's name
- The date of the verbal warning
- The specific offense or rule violation
- A specific statement of the expected performance
- Any explanation given by the employee or other significant information



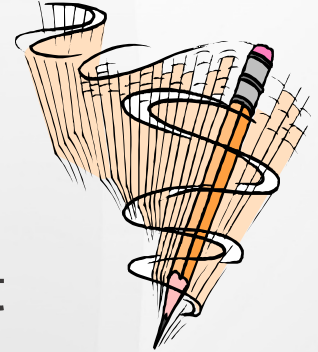
# Written Warning Procedures



- During the meeting:
  - State the specific problem
  - Refer to the previous verbal warning (if there was one)
  - Give the employee a chance to respond
  - Indicate your confidence in his/her ability to perform properly
  - Have the employee confirm he/she knows exactly what you expect
  - Deliver the written document, give the opportunity to provide comments
    - May be contemporaneous or shortly after the meeting

# Written Warning Documentation

- Date of the conversation
- Specific rule violation or performance problem that has occurred
- A reference to previous conversations about the problem
- A statement of the specific change expected
- Any comments or statements the employee made during the conversation, or offer a space for comments
- Witness and Signatures





# Documenting Discipline

- Every warning should end with:  
“Repetition of this conduct, failure to follow any of our policies and procedures, or failure to meet our standards of performance will result in further disciplinary action, up to and including immediate termination of your employment.”

# “I Didn’t Do That!”

If it’s not documented, it didn’t happen.



# Coaching/Counseling and Documentation



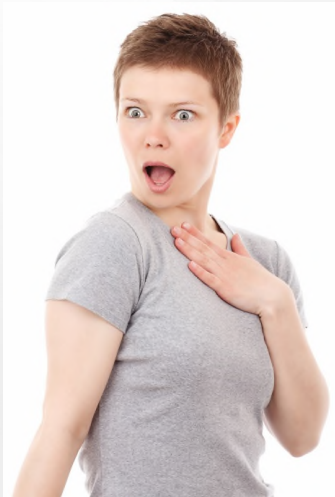
- Employees do not “hear” you until you write it down.

# The Three Failures from Lack of Documentation

- Cheats the employee and prevents him/her from functioning to full capacity
- Cheats the Company of the ability to have a firm footing for later termination, if needed
- Cheats the Company of the full effort of the employee who has not been appropriately coached for improvement



# Anti-Surprise



- Good documentation also removes the “surprise” from situations where the Company determines that the individual will be terminated.
- People sue when they feel that their termination came as a surprise or that they were not treated with dignity.

# Evaluations

- Set forth goals for next year
- Identify areas of strength and areas for growth
- Don't give a "meet standards" evaluation to a poor performer
- Don't give a good evaluation to a mediocre employee
- Pay raises associated with evaluations
- Performance Improvement Plans

# Effective Use of Evaluations

- Evaluations are important to employees.
- Make sure that they are delivered timely.
- Make sure you are providing the employee with meaningful input.
- Do not sugar coat.
- Provide or offer additional training if it is needed.
- Do not tolerate evaluations that are inconsistent with reality.

# PIP, PIP, Hooray!

Continuous Supervision Training  
Priorities Communication Grow  
**PERFORMANCE**  
**MANAGEMENT**  
Measurable Feedback Development HR Commitment  
Improvement Employees  
Objectives Goals by Corrective  
Direction Job Descriptions Review  
Coaching Promote Monitor Reward

# Performance Improvement Plans

- Demonstrate your commitment to the employee's success
- Set reasonable goals and expectations
- Give clear action steps to accomplish the goals
  - Get the employee's input
- Set reasonable deadlines for accomplishment
- Follow up along the way-revisit the plan
- Don't assume they will fail
- Measure the success and determine next steps

# Build Trust Through Training

- Training for management
  - How to document and take notes
    - Objective, not subjective
  - What are the company's policies on conduct, performance and discipline
  - When and how to deliver discipline
  - How to complete company disciplinary forms
  - How to complete performance evaluations
  - How to complete performance improvement plans
  - What they will be expected to provide if they recommend termination, demotion, etc.

# At-Will Employment

- I am in an at-will state. That means I can fire someone for any reason I want to and I don't have to give them a reason, right?

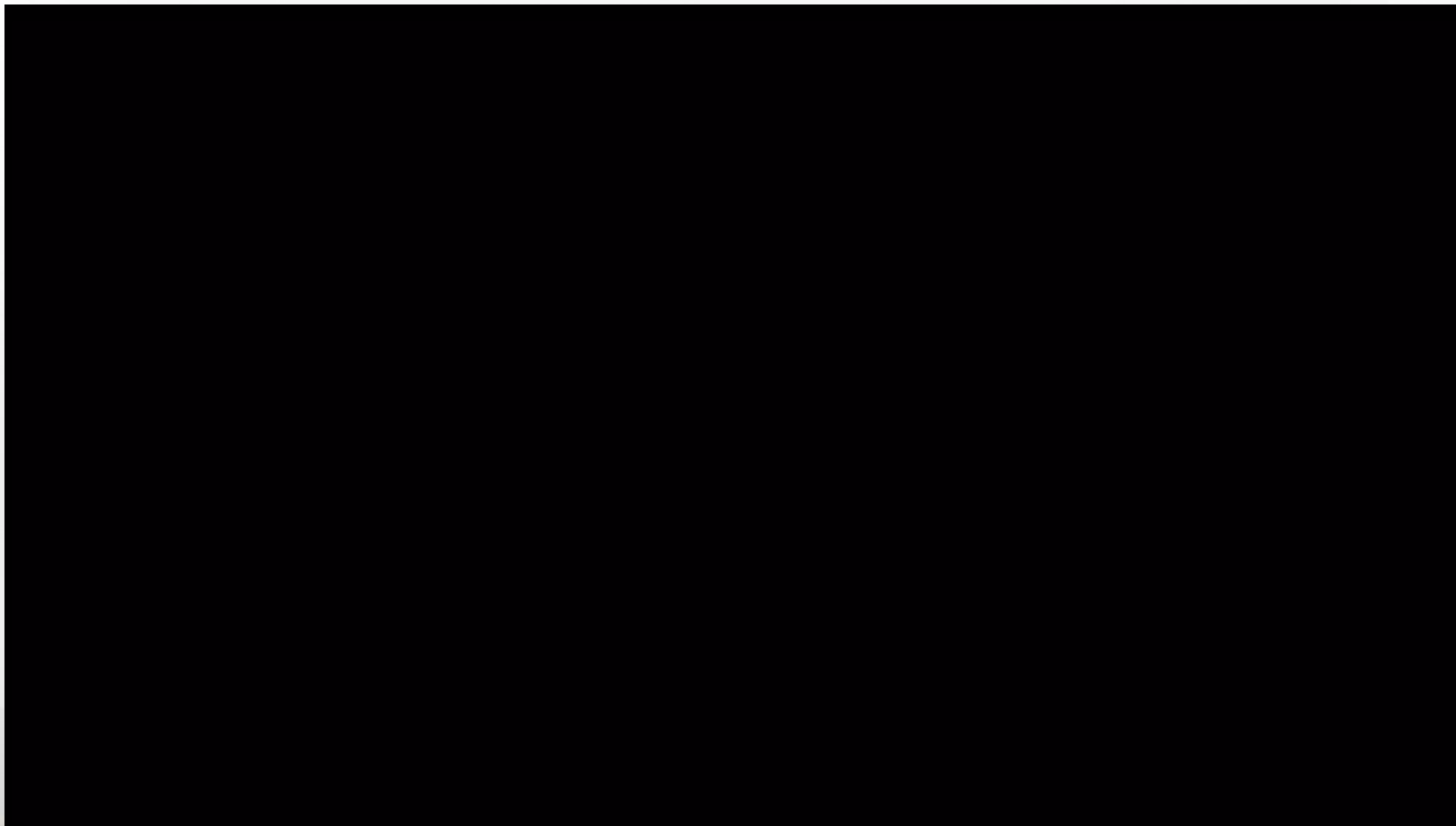


# What do you need to know?

- What's in their personnel file?
- Review prior discipline and performance evaluations
  - Pay increases (merit v. cost of living)
  - PIP or notice of not meeting expectations and potential termination
- Review available supporting evidence
  - Notes, emails, texts, work product, stats, performance metrics, etc.
- Are there prior comparable situations?
  - Strive for consistency
- Consider pretext for discrimination
- Consider prior complaints of discrimination/harassment
  - Screen for retaliation



# MARIJUANA



# Louisiana Law

- Act 261 was passed in 2015: allows physicians to prescribe medical marijuana
- Louisiana State University and Southern University are the only legal growers of marijuana plants, from which medicines will be extracted
- Medical marijuana should be available in May 2019
- Only a limited number of specially-licensed pharmacies will distribute medical marijuana
  - Ten licensed pharmacies in the state of Louisiana

# What is Medical Marijuana?

- “Using the whole, unprocessed marijuana plant or its basic extracts to treat symptoms of illness and other conditions”
- Does not include the inhalation or vaping of cannabis
  - **IT CANNOT BE INHALED OR SMOKED**
- Acceptable forms are:
  - oils, extracts, tinctures, sprays, capsules, pills, solutions, suspension, gelatin-based chewables, lotions, transdermal patches and suppositories.

# Louisiana Law –Medical Conditions

- Cancer
- Positive status for HIV, AIDS
- Cachexia or wasting syndrome
- Seizure disorders
- Epilepsy
- Spasticity
- Crohn's disease
- Muscular dystrophy
- Multiple sclerosis
- Glaucoma
- Parkinson's disease
- Severe muscle spasms
- Intractable pain
- Post traumatic stress disorder

# Louisiana Law-Medical Conditions Cont.

- Conditions associated with autism spectrum disorder:
  - Repetitive or self-stimulatory behavior of such severity that the physical health of the person with autism is jeopardized;
  - Avoidance of others or inability to communicate of such severity that the physical health of the person with autism is jeopardized;
  - Self-injuring behavior; and
  - Physically aggressive or destructive behavior.

# What about CBD Oil?

- CBD Oil: Cannabidiol (CBD) – extracted from marijuana or hemp plants
  - Some has low levels of THC
  - May show up on a drug test
- Lots of confusion over the legality
- Louisiana Board of Pharmacy and Louisiana ATF both say it's illegal to sell under state law
  - Permit violations
- Law enforcement is not cracking down on sellers or buyers...yet

# Must You? Can You? Should You?

- Have a zero-tolerance policy with respect to marijuana use?
- Accommodate onsite recreational marijuana use? Offsite?
- Accommodate onsite medical marijuana use? Offsite?
- Discipline employees for onsite recreational marijuana use? Offsite?
- Discipline employees for onsite medical marijuana use? Offsite?

# Best Practices

- Include information addressing how you treat marijuana use as part of an updated, comprehensive substance abuse and testing policy
- Consider whether use poses a threat to workplace safety and identify areas/positions of high risk
- Notify applicants and current employees of the policy
- Tailor policies to adhere to differing state requirements, if applicable
- Maintain uniformity in policy enforcement and discipline

# ADA Implications

- Employers may prohibit current illegal use of drugs and alcohol in the workplace; and
- Require that employees report for duty without engaging in the unlawful use of drugs.
- A positive test result establishes “current” use.
- Under federal law, medical marijuana use is excluded from protection as illegal drug use.
- Employers should still approach challenges to test results based upon ADA with care.

## Other Options Available in Response to Voluntary Disclosure

- Even though an employer typically need not “accommodate” medical use, it may consider options short of discharge for those verified as qualified registrants.
- An employer may choose to rely upon signs of present impairment
- In some cases, other options may be available.
  - Alternative medication
  - Extended leave
  - Scheduled changes



# Thank You



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