

# DOCUMENTATION OF PERFORMANCE

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Documentation of personnel matters is often one of management's least favorite activities, but it is critical for a number of reasons and should be a part of every supervisor's daily "to do" list. Problems often arise when supervisors choose to wait and allow an employee's performance issues to accumulate. The employee may be unaware that his or her performance is not meeting expectations and, without guidance from management or other sources, may be heading further and further off target.

Although at-will employers aren't obligated to give ongoing feedback to employees, supervisors should still strive to do so as a matter of effective management and of fairness. It's never good management practice to deliver a poor performance appraisal after six months or one year, when the employee didn't understand the expectations or didn't know his or her performance was unsatisfactory.

Also, supervisors who aren't contemporaneously providing feedback, counseling employees, and documenting performance issues will have a much more difficult time reconstructing events later, and the documentation will not be as accurate or helpful as if it would have been were it completed when events were still fresh in the employer's (and employee's) mind. The purposes of effective documentation are twofold: to develop employee potential, fixing problems as they arise, and building a provable case to defend a termination if things don't improve.

## When to document

- ✓ Every time you meet with an employee for significant work-related reasons;
- ✓ Every time you discipline an employee (even if you merely give a verbal warning);
- ✓ Every time a personnel action is taken;
- ✓ Every time you discuss policies and procedures;
- ✓ Every time an employee has a grievance;
- ✓ Every time an investigation is conducted, even if the complaint is ultimately unfounded;
- ✓ Every time significant events or discussions occur.

## How to document

- ✓ Document in a neutral, objective fashion;
- ✓ Use specific language;

- ✓ Document employees consistently in terms of detail, tone, and frequency;
- ✓ Document primarily facts (who, what, where, why, when and how) more than just opinions. Documentation should be similar to a newspaper article as opposed to an editorial. For example, if an employee has used objectionable language in the workplace, quote that actual language rather than writing that the employee was “rude and vulgar” or “used profanity.”
- ✓ Document the event as soon as possible, so that details are fresh in your mind;
- ✓ Identify any behavior or conduct that must change and reiterate the standard to be met;
- ✓ If change is needed, identify the timeline (“immediately” is an option);
- ✓ If termination is imminent unless dramatic improvement happens, state that is the case;
- ✓ To comply with Oregon and federal disability laws, keep any medical information obtained in a separate, confidential medical file and make sure the reason for any discipline is unrelated to the employee’s protected class status, such as a disability, workers’ compensation claim or use of family leave.

## **Traditional approach to progressive discipline**

Progressive discipline is a process in which the penalty becomes greater for each succeeding infraction. In addressing performance issues, many employers choose to use some sequence of verbal warnings, written warnings, suspension(s), demotion, and, as a last resort, termination.

Many employment attorneys caution at-will employers that discipline policies must be written carefully so as not to create a contract. Employers who promise that specific disciplinary steps will be taken in some specific order may be legally bound to follow those steps. It is wise to provide in your disciplinary policies that a violation may result in discipline *up to and including termination*, to give you the flexibility to terminate an employee for a particularly egregious violation such as theft or violence. Sample language is provided in our Policywriting Guidelines Handbook.

In fact, even using the term “progressive discipline” may imply that the employer will follow specific disciplinary steps.

Employers who wish to retain their at-will status should reiterate in any discipline policy that the employment relationship is at will. It would be prudent to state that the policy only lists potential disciplinary measures that the employer may choose, and that the employer reserves the right to initiate discipline at any level or to skip steps, at management’s discretion and depending on the circumstances.

It’s also wise to explicitly state in the discipline policy that immediate termination is an option.

Employers might wish to list examples of violations that could lead to immediate discharge, but should take care to retain flexibility. For example, stating that an employee “may be immediately discharged for violence, harassment, theft or gross insubordination” could suggest the employer doesn’t have the right to immediately discharge for other bad acts not on this list.

Therefore, it would be wise to indicate that the listed infractions are merely examples, that this is not intended to be an exclusive list, and that management reserves the right to immediately discharge an employee, at its discretion, for other reasons or without having a reason. You don’t want to give your employees the mistaken impression that they can only be terminated for cause.

## **EMPLOYER QUERY: WRITTEN WARNINGS**

### *Employer’s policies determine discipline measures*

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*QUESTION: I was terminated after receiving just one written warning. How many warnings does an employer have to issue before terminating an employee?*

ANSWER: That’s entirely up to the employer to decide, as the law doesn’t require warnings at all. Of course, it’s wise for employers to document policy violations and use progressive discipline, but employers who aren’t subject to a contract or collective bargaining agreement are free to determine their disciplinary rules and how many warnings are “grounds for termination,” as long as they apply their standards in a non-discriminatory manner.

## **EMPLOYER QUERY: EMPLOYEE SIGNATURE ON WARNINGS**

### *Employee signature on records not mandatory, but good idea*

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*QUESTION: Are employees required to see and sign written warnings before they go in their personnel files?*

ANSWER: No. In fact, there’s no law that requires an at-will employer to follow specific disciplinary steps or to issue formal written warnings at all. But if your goal is to show fairness in the workplace, then using progressive discipline and having an employee sign a written warning are excellent ideas.

Though not legally required, it’s a way of showing you gave the employee