



## **Documentation: How to Reduce Your Claims Liability**

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***Disclaimer: This training is designed to provide general information about the subject matter covered. Neither TAC nor the trainers are engaged in rendering legal advice. If you need legal advice, TAC recommends that you seek the services of a competent attorney who is familiar with your specific situation.***

As Supervisors we have been taught that documentation is a critical component within any county. Documentation is a recording of evidence or information about employment events that can be formal or informal.

Today's session is going to help you with the following objectives:

- 1) Why is good documentation important?
- 2) How to document effectively.
- 3) How discipline and documentation work together
- 4) What liability does the county have when we fail to document?

### **The Only Method of Proof is Documentation!**

The county opens itself up to liability without proper documentation. This can lead to increased claims which result in higher premiums for coverage, decreased benefits, no pay increases, etc. When an employee's job performance is not meeting our expectations, it is important that Supervisors address it the first time and if it continues, we document so we have grounds for termination. Many times, we get calls saying that this behavior has been going on for "some time" and we are done with this behavior, and we just want to terminate them. When we ask if this has been addressed and documented – the answer is usually "no". Therefore, documentation is vital to your organization.

### **Documentation is a Communication Tool**

In the workplace, documentation can be an effective communication tool. Supervisors can use this to address concerns and have a recording of the facts surrounding those concerns. What is the concern? When did it happen? How can we correct it? When we address these issues in a timely manner, we let the employee know there is a concern, we give them a clear understanding of the expectations going forward and what disciplinary actions will follow if the issue is not corrected. Employees want to know if they are doing a good job. We do not want a termination to be the way we communicate to our employees that they were not meeting our expectations.

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### **Forms of Effective Documentation**

Using handwritten notes or email is a great way to remind employees of a conversation you had that addressed a minor concern. A more formal way of documenting is a performance evaluation. These can be used not only to address behavioral or performance concerns but also to let an employee know what the expectations are for improvement. Using disciplinary forms is critical when you have an employee that is violating policies or has an attitude or attendance problem. These are simple documents to use and can be very effective in either correcting or eliminating the problem. You do not want to have a poor employee that is not meeting expectations around for months before you address it. Using any of these forms of documentation can provide all the explanation you need and be the difference between winning or losing an unemployment or EEOC claim.

- Focus on what the employee did wrong – what was the behavior? Do not embellish.
- Why is this a problem? Did they violate county policy?
- What specific impact did this have? Was anyone else affected?
- What are the expectations to correct the behavior? Are there consequences if it is not corrected?

### **What should be Documented?**

- Job description Acknowledgments – New Hires
- Employee Handbook Updates\*
- Disciplinary Actions – Attitude or Attendance issues
- Complaints – Harassment, Discrimination
- Requests for Accommodations

\*Recommending as a “best practice” to have Handbook Acknowledgments sent out every 5 years to remind employees of their responsibility in being familiar with the handbook. It can be effective in winning an unemployment claim.

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### **Job Descriptions:**

For management, a well written job description is essential in evaluating job content, recruiting, salary comparison, training and development and career planning. Not having job descriptions can make it difficult to address employee issues based on performance, attendance or attitude. When we fail to have these documents with proper job titles, requirements, essential functions miscallify marinal dutes as essential, or forget some of the physical requirements or work conditions – it is



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difficult to defend our reasons for termination. The essential functions outline why the job exists, without them there is no need for the position – limit these to 5 or 6. Job descriptions need to be reviewed regularly by the department heads and when there are changes to the job, the job description needs to be updated. This is a living document and should evolve as the position does.

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### **Performance Improvement Plans**

These are commonly used to identify job performance issues. They list in detail what the performance issues are and the expectations for achieving continuous improvement. It is important to follow up regularly with the employee. Are they improving? If not, what needs to be addressed? The employee needs to know there are consequences if they do not improve and do not continue the improved behavior. Always have them sign the document to show that you discussed it with them in detail. If they refuse, ask them to state why they do not want to sign it – this is acknowledgment.

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### **Employee Handbooks**

All new hires should receive an Employee Handbook when hired and sign an acknowledgment. This is their acceptance of responsibility in becoming familiar with the policies within it. Make sure your handbook is reviewed regularly for compliance. When policies are updated, distribute copies (or post it on county website) and have employees sign an acknowledgment form – keep these in their personnel file. A best practice is to remind employees of their responsibility in being familiar with county policies and have signed acknowledgments that are current. If you have not had your policy manual updated in the last 2 years – it is out of date. Part of the services you receive for having Public Official liability coverage with TAC is that we will review your policy and make recommendations to help you be in compliance – contact your TAC HR Consultant.

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### **Accommodations under ADAAA**

Requests for an accommodation can come to management directly from the employee – they do not have to be able to recite the law. They can also come from an employee's treating doctor when returning to work after an illness or injury. You want to review the essential functions of the job and what limitations, or performance problems the employee's disability creates and identify any changes or modifications that will allow the employee to perform those essential functions. Contact your HR person to help. They will have medical information from the employee's doctor and can help with this process. Things to consider: Will it pose an undue hardship to the county, how long will it be needed and when will we review for modifications? Discuss all of these with the employee and document all of this when it happens.

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### **Common Disciplinary Issues**

We all have experienced some of these issues within our departments. Do not let these go unnoticed: bad attitude, attendance, anger, and poor performance. Sometimes that poor performance can point back to expectations, lack of skills, conflict, health issues, or family issues. Address these when they come up and do not wait until it has become a continuous problem and there is no way to support your disciplinary actions. ***Once the employee states there is a medical reason, we need to determine if FMLA applies - involve your HR person.***

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### **Disciplinary Ground Rules**

It is important that you maintain "At Will" employment and have this as a written policy in your handbook. Refrain from making any employment agreements for positions within the county – this would contradict your "At Will" policy. Be cautious of having a progressive discipline policy – this



also implies that the county will have to follow these steps before terminating. Be sure that Harassment policies are in place and detail how employees can complain and how these complaints will be handled. Although employees may be terminated for no reason, it is always a best practice to have an employment reason for termination. When we fail to terminate for cause, the employee will find a reason and you will have to defend that reason against unemployment and the EEOC.

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### **Liability – The “L” Word**

As Risk Consultants our focus is to help counties avoid this type of risk. Counties can avoid liability when they follow their policies, apply them consistently to all employees, and document all actions they take with employees. Claims can be costly to employers when they are paid out due to wrongful termination, discrimination, and harassment; with the largest amounts being paid due to claims of retaliation. Employees are protected from retaliation so please don't retaliate against your employees. We can't treat them differently because we are upset that they are out on FMLA, have a worker's compensation claim or have filed a harassment claim against us. We must treat them as we would treat any other employee.

### **Winning Unemployment**

As elected officials it's important that we have policies and procedures in place for consistency and compliance. Employees must be made aware of these in writing and have signed an acknowledgment recognizing the importance of being familiar with them. We must be fair and consistent with all employees when enforcing policy. We cannot make exceptions – this creates liability. Employees should be given an opportunity to correct performance and behavioral issues – the goal is to salvage the employee. It's important that we document all interactions with employees, this could be the difference between winning and losing unemployment and EEOC claims. Without documentation, the EEOC says it didn't happen.

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### **Claims Liability**

When we do not address employment issues in the workplace and make them a priority, we increase our risk for liability. You need to take the initiative to document all actions that you take as a supervisor. It will be your employee's word against yours and they will win. This can result in high unemployment claims, EEOC claims and even increased premiums for the liability coverage that you must have to protect you from these claims. But these can also affect employees and the benefits the county offers – pay increases, paid medical insurance, and retirement.

You can reduce claims by remembering the following:

- Documentation is critical
  - Address issues and discipline in a timely manner
  - Be fair and consistent
  - Fight and win unemployment claims – this is the best defense against the EEOC
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