

# Supervisors Needs to Put on Their “Big Person Pants” *and Not Ignore Employee Performance, Behavior and Attendance Issues*



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**Y**ou are a senior executive in or owner of a company. Because you have very full plate otherwise, you may leave most discipline, hiring and firing decisions to others. Like most employers, you likely have long-term employees slowing down or coasting. That overbroad generalization certainly does not apply to all older employees, or even a majority, but there are a substantial number, whether older or younger, who may be coasting, have not really been pushed to perform, or otherwise have been off management’s radar for needed performance improvement plans.

You can’t simply tell your Human Resources people to “Let them go,” “Call it a layoff,” or say, “It’s not working out.” Rarely will you be able to rely exclusively on the “at-will” employment doctrine to let someone go, even with a new employee. Yes, at-will is a “thing” in California, and it is even codified in Labor Code Section 2922, but it is not an entirely failsafe “thing.” If an employee comes back at you alleging harassment, discrimination or retaliatory discharge, at-will is set aside as a defense and you must demonstrate the legitimate business reasons for the decision. That’s where the paper trail comes in.

Like many supervisors, you may not have strong (or any) documentation for your weak performers. If they are older, have had medical issues, or otherwise fall into another protected class, they present additional risk when you are contemplating discipline or stronger action such as termination. That is why it is critical to create a paper trail that focuses in detail (with examples) on the objective performance, behavior or attendance issues.

It is imperative that owners and senior managers stress to all supervisors (and themselves), that they need to address performance, behavior and attendance issues sooner than later for the weakest performers. If you ask any supervisor at any level – owner on down to working foreperson – who their weakest performer is, almost all will have an immediate answer. When pressed on what they have done to address that weakest performer, often there is silence. That is a problem endemic in most companies, despite our efforts to educate educate educate and despite HR departments’ best efforts to the contrary. It can also demoralize others in the workforce, as your strong performers are mystified as to why you are letting a weak performer get away with things. That is true especially if

that weak performer is a long-term employee and this has been a chronic issue. Others may start mirroring that slacker behavior and now you have compounded the problem.

You do not necessarily need a formal performance review, or even a formal disciplinary form to address performance issues. Those are preferred, of course. Even simple email exchanges can be effective to highlight issues. They also will help demonstrate the employee's commitment to improvement. If they make a meaningful response to criticism through an email or formal memo, that response will give you a sense of whether the employee really wants to keep their job. It also starts the paper trail that you will need to defend yourselves. Juries like to hear that you have alerted an employee to problems and given them an opportunity to improve. Without that documentation and opportunity for improvement, juries (and opposing counsel, judges, and government agency representatives), often will assume that your reasons for termination are related to a discrimination category. Employers, as you might imagine, will not get the benefit of any doubt. There is always doubt when your documentation is skimpy or nonexistent.

I do entire seminars on "Paper is The Employer's Best Friend." Unfortunately, many supervisors are lax in this area because it takes time, they are not quite sure how to handle it, they don't have support from HR (or ignore human resources' efforts to help), or simply don't like the conflict inherent in dealing with these sticky issues. As a supervisor, however, you and your senior team need to put on the "big person pants" to "own" these issues and take action. You make your HR department's (and my) job a lot harder when your supervisors have not initiated effective performance reviews, appropriate disciplinary action, or even simple emails pointing out issues that need to be remedied. It should be done early and often to get the employee on track or, after a few attempts at improvement, move them out appropriately (with severance to get a release).

If performance or other issues get bad enough, it usually is clear enough that the employee needs to go. Employees generally know when they are on the hot seat in those situations. Some just assume you will not do anything because you never have. The more nefarious employees will then claim an injury, complain about working conditions, or complain about harassment or some form of discrimination. These complaints put the employer on the defensive because any discipline you implement after that complaint will look retaliatory if you have not already started the paper trail.

The bottom line is that supervisors cannot let poor performers continue in that manner. It is bad for business and bad for morale. When you are ready to send them packing based on legitimate business reasons, and you have weak or no documentation, it may be too late to do so in a way that keeps you out of trouble. Your HR team can help prod supervisors to take action and help with the appropriate documentation, but ultimately it is up to the supervisors to actively and timely embrace proper reviews, discipline and interaction with employees regarding performance, behavior and attendance issues. Given California's anti-employer legal climate on these issues, it's too risky not to address these issues sooner than later.