

## Performance Management and Discipline in Nonprofits: Common Pitfalls, Unique Challenges, Effective Solutions

Wednesday, June 18, 2014, 12:30 p.m. – 2:00 p.m. ET

Venable LLP, Washington, DC

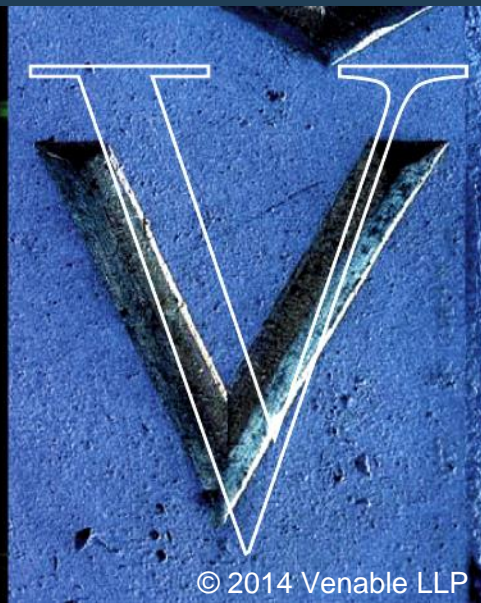
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# Agenda

- Principles of performance management and discipline
- Avoiding common pitfalls
- Using “PIPs” and other tools to address common problems



# Principles of Performance Management

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- My nonprofit's annual performance evaluation process is...
  - A very useful tool in communicating observations and expectations to our employees
  - Not as effective as I wish it was
  - A total waste of time
  - Non-existent



# Principles of Performance Management

- No bright line between performance management and discipline
- Same conduct in different circumstances may be most appropriately addressed via performance management or discipline



# Principles of Performance Management

- Purpose
  - To provide a fair and accurate evaluation of employees against the standards required for success in their positions
- Not to “paper the file”
- Not to game compensation



# Principles of Performance Management

- Regularity
- Objectivity
- Prompt identification of deficiencies
- Opportunity for improvement
- Support from management
- Identification of candidates for advancement





# Principles of Effective Discipline

- Documentation is key
  - Accurate records and consistent enforcement of clearly communicated standards are the best “defense” to potential claims
- Consistency in practices
  - Key is treating similarly situated employees alike, with supporting documentation
- Follow written policies
  - Ensure that progressive discipline is available at management discretion, but not mandatory



# Avoiding Common Pitfalls

# Pitfall: Botching (or Ignoring) Performance Management

- Perform appraisals on time and uniformly
- Train managers and hold accountable
- Avoid leniency or giving everyone a “middle of the road” rating
- Avoid the “halo” (or “horns”) effect – rating employees the same in all categories
  - Include specific comments, good and bad
  - Base on entire period covered by appraisal
- Provide for cross-checks and avenue for appeal



# Pitfall: Failing To Use PIPs and Other Tools in the Management Tool Chest

PIPs should provide:

- Objectivity
  - Clearly identify performance deficiencies
- Opportunity for improvement
  - Timeline for improvement (60 days, 90 days, etc.)
  - Clear performance targets
  - “Immediate and sustained improvement”
- Support from management
  - “Open door”
  - Scheduled meetings with supervisor
  - Mentoring



# Pitfall: PIPs That “Wipe the Slate Clean”

- “Magic Words”
  - You must make immediate and sustained improvement. If you do not – or if there are any further problems with your performance or violations of our rules, policies, standards, or practices – you will be subject to further discipline, including immediate discharge.



# Why Lawyers Love PIPs and Last Chances

- Road map for summary judgment
  - Clearly identify objective performance deficiencies
  - Reasonable performance targets
  - Reasonable opportunity for improvement
  - Support from management
- Foundation of non-discriminatory/retaliatory basis for discipline
- Can “clean up” lack of earlier documentation



# Pitfall: Leaping to Decisions

- Don't prejudge situation
- Document information concerning purported violation
- Determine appropriate investigators (*e.g.*, in-house v. outside consultant v. legal counsel)
  - Consider privilege/conflict implications
  - Consider presentation of evidence at trial



# Pitfall: Leaping to Decisions

- Conduct prompt investigation
  - Interview relevant witnesses
  - Collect and preserve all relevant documentation
    - Consider whether document “hold” is appropriate
    - Work with IT if available/appropriate
  - Allow accused employee to respond to allegations
  - Apply the same investigation standards to all similar problems/investigations
- Determine appropriate discipline, utilizing the following steps





# Pitfall: Failing to Realize That Discipline Is a Process, Not an End

- STEP ONE: Confirm that discipline/discharge does not violate a forgotten or “hidden” promise
  - Offer letters
  - Employment agreements
  - Employee handbooks
  - Stand-alone policies or employer memoranda



# Pitfall: Failing to Realize That Discipline Is a Process, Not an End

- STEP TWO: Follow disciplinary system, progressively if possible
  - Consider viability of alternatives short of termination
  - Don't overlook the power of monetary incentives
    - Suspensions without pay (note FLSA requirements)
    - Reduction of bonus potential (note individual contract requirements and state/local rules related to commissions)
    - Delay of pay increase or bonus



# Pitfall: Not Answering (or Asking) the Critical Question

- STEP THREE: Give fair warning
  - PIP if possible
  - Provide opportunity to improve
  - But don't remove or promise to remove if improvement occurs



# Pitfall: Not Answering (or Asking) the Critical Question

- STEP FOUR: Answer the critical question – what is the articulated reason for the discipline/termination?
  - In accord with policies?
  - Supported by documentation?
  - Consistent with appraisals and discipline records?
  - If the reason “shifts” down the road, the chances of an employee victory in court increases dramatically (as does settlement value)



# Pitfall: Failing to Check Your Blind Spots

- STEP FIVE: Do comparisons
  - Have there been other similar situations?
  - How were they handled?
  - If handled differently, how do we justify the difference?



# Pitfall: Failing to Check Your Blind Spots

- STEP SIX: Public policy check
  - Is there a “timing” problem?
  - Has the employee complained of discrimination, harassment, or failure to accommodate a disability? If so, have such issues been properly addressed?
  - Possible “whistleblower” angle?
  - Possible retaliation claim? (NLRA, workers compensation, FMLA, etc.)



# Pitfall: “Off with Her Head!!”

- STEP SEVEN: Handle the discharge conference with care
  - Have a second set of eyes/ears
  - Do not debate the decision
  - Release?



# Pitfall: “Off with Her Head!!”

- STEP EIGHT: Post-decision considerations
  - Have you complied with:
    - Applicable wage payment laws
    - Severance policies
    - Administration of benefits and insurance law requirements
  - Reference requests





# Pitfall: Failing to Use Other Tools in the Management Tool Chest

- Executive coaching or other third-party review
- Prospective pay reduction or hold-backs
- Suspension
  - Ensure referenced in discipline policies
  - Exempt employees can be subject to unpaid suspensions for “serious misconduct” if pursuant to written policy
- Last chance warnings



# Common Challenges

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- Disability and discipline
- Job-protected leave and performance management/discipline



# Common Challenges

- The bully – “Why are all of my subordinates so useless?”
- The toxic co-worker – “I hate this place and everyone in it!”
- The borderline or “yo-yo” performer
- The “wrong fit” (can’t put my finger on it, but it just ain’t working)
- Tardiness and attendance issues
- The true believer – “You can’t fire me, I’m [insert protected category here]!!”



# Questions?

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