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DIFFERENT WORKS

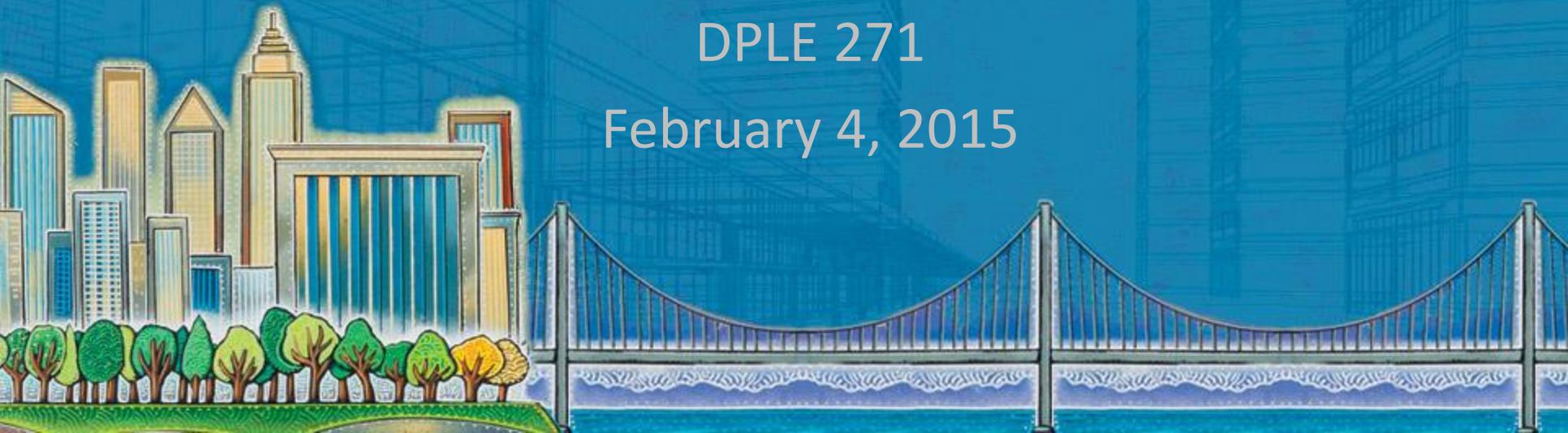
Human Resources and Employment Law for Employers – How to Prevent Costly Mistakes

RLI Design Professionals

Design Professionals Learning Event

DPLE 271

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■ Course Description

As with many things, in employment law, prevention is the key to avoiding expensive mistakes and legal battles.

No company wants to become embroiled in an employment-related dispute.

They can be costly, disruptive, and media relations nightmares.

This course is intended to help you prevent and minimize the risk of litigation, and to strengthen your position if dispute avoidance is not possible.



■ Learning Objectives

Participants will:

1. Discover how to avoid costly mistakes in the creation and maintenance of employee handbooks.
2. Learn some of the important considerations in determining leaves of absence.
3. Review how to properly address disciplinary actions and terminations.
4. Understand the resources that are available to assist you in navigating through difficult employment situations.



**Risk
Management
Tip #1**

Effective Employee Handbooks



■ Why Do I Need A Handbook?

- Answers basic employee questions
- Describes employee benefits
- Identifies expectations via policies and procedures
- Outlines acceptable and unacceptable behavior
- Provides legal protection



■ The Most Common Mistakes

- Copying another employer's policies
- Giving employees "rights"
- Altering at-will employment
- Not including a disclaimer
- Creating contractual rights
- Trying to solve every problem
- Failing to get proof of receipt
- Forgetting to update



■ The Essentials

- Disclaimer
- At-will
- EEO
- No Illegal Harassment, Discrimination, or Retaliation
- Drugs and Alcohol
- Basic Work Rules
 - Workplace Conduct
 - Work Schedule
 - Computer Use Policy
- Leave Policies
 - Jury Duty
 - Witness Duty
 - Voting Leave
 - FMLA
- Reasonable Accommodations



■ EEO

- Include *all* protected categories
- Include *all* employment actions
- “Failure to follow this policy may result in discipline, up to and including immediate termination”



■ Sample EEO Statement

STATEMENT OF EQUAL EMPLOYMENT OPPORTUNITY

THE COMPANY HAS ALWAYS BEEN, AND WILL ALWAYS BE, COMMITTED TO PROVIDING EQUAL EMPLOYMENT OPPORTUNITIES TO ALL ITS EMPLOYEES AND APPLICANTS FOR EMPLOYMENT. AS A RESULT, IT IS THE POLICY AND PRACTICE OF THE COMPANY TO HIRE, TRAIN, PROMOTE AND COMPENSATE ITS EMPLOYEES, AND TO ADMINISTER ALL OF ITS PERSONNEL POLICIES WITHOUT REGARD TO RACE, COLOR, NATIONAL ORIGIN, ANCESTRY, CITIZENSHIP STATUS, RELIGION, SEX, GENDER IDENTITY, AGE, DISABILITY, MARITAL STATUS, VETERAN OR MILITARY STATUS, SEXUAL ORIENTATION, PREGNANCY, GENETIC INFORMATION OR ANY OTHER CHARACTERISTIC PROTECTED BY APPLICABLE FEDERAL, STATE OR LOCAL CIVIL RIGHTS LAWS.

ALL EMPLOYEES ARE RESPONSIBLE FOR COMPLYING WITH THIS POLICY. AS A CONDITION OF EMPLOYMENT, EVERY EMPLOYEE IS TO TREAT ALL OTHER EMPLOYEES EQUALLY AND FAIRLY. ANY EMPLOYEE VIOLATING THIS POLICY WILL BE SUBJECT TO APPROPRIATE DISCIPLINARY ACTION, UP TO AND INCLUDING IMMEDIATE TERMINATION.



■ No Harassment, Discrimination or Retaliation

- Include *all* protected categories
- Define prohibited acts broadly
- Include managers and supervisors
- Include clients and third-party vendors
- Include a clearly defined complaint procedure



■ Drugs and Alcohol



- “In your system” standard
- Test “at any time”
- List prohibited acts beyond simply testing positive

■ Basic Work Rules – Workplace Conduct

- Do *not* promise progressive discipline
- Use broad, general categories
- May result in discipline “up to and including immediate termination”



Sample Workplace Policy

HONESTY, INTEGRITY AND PROFESSIONALISM

The Company places a high level of importance on its employees' honesty, integrity and professionalism. Employees who travel on business or who represent the Company at any gathering should act in a lawful, courteous and professional manner at all times, and act in accordance with all applicable Company policies as well. Drunkenness, obscene language, disorderly conduct or similar acts are inappropriate in any setting where you may be construed as representing the Company.

The following conduct (whether done directly or indirectly or by inducing another to do so) is justification for disciplinary action and may be grounds for immediate termination.

- Theft or misappropriation of Company, client, customer or employee property.
- Falsification of personnel records, including job application, work records, expense accounts, insurance claims submitted under the Company's health insurance plan and time sheets.
- Taking or giving bribes of any kind as an inducement to obtaining work or retaining contacts of any kind.
- Misuse of or removal from premises of customer lists, Company records or confidential information of any nature.
- Making false or malicious statements concerning the Company's products.
- Using Company equipment or supplies, without authorization, to do any non-Company work.
- Negligent or deliberate destruction of Company-owned property, property of a Company employee or property belonging to a visitor of the Company.
- Borrowing tools, supplies, office equipment, etc., without permission.
- Misrepresenting reasons for paid or unpaid absences.
- Insubordination or willful neglect of job duties.
- Interfering with the performance of work duties by other Company employees.
- Falsification of any Company record.
- Clocking in, clocking out or otherwise reporting the arrival or departure time for an employee other than yourself, or otherwise falsifying Company time records.
- Loafing or sleeping on the job during working hours.
- Entering or remaining in Company working areas more than fifteen minutes before or after scheduled working hours.
- Violation of the Company's Equal Employment Opportunity Policy, Ethics Policy, or the Sexual and Other Harassment Policy.
- Reporting to work under the influence of alcohol, intoxicants, drugs or controlled substances.
- The use, sale or the unauthorized possession of intoxicating beverages, drugs or controlled substances on Company premises.
- Threatening, intimidating, coercing or fighting with other employees or customers, by word or deed, on Company premises.
- Dishonesty.

- Immoral, indecent or disorderly conduct of any kind.
- Violations of Company dress code policies or standards.
- Possession of firearms on Company premises.
- Contributing to unsafe or unsanitary working conditions by acts or omissions.
- Soliciting any tip or gratuity from any customer or visitor of the Company.
- Breaching any fiduciary duty to the Company.
- Violating any work rule, policy, published rule or practice of the Company or any department or division of the Company.

These rules are not intended to be all encompassing. The rules are merely examples of prohibited conduct. The Company reserves the right to discipline any employee up to and including termination for any conduct it deems inappropriate regardless of whether such conduct is listed or described above.



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- Falsification of personnel records, including job application, work records, expense

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- Dishonesty.

■ Basic Work Rules – Work Schedule

- Absenteeism
- Overtime
- Timekeeping



■ Leave Policies

- Jury Duty
- Witness Duty
- Voting Leave
- FMLA
- Medical Leave
- Personal Leave



■ Implementation

- Provide written notice announcing (re-)issuance of the handbook
- Conduct meetings with employees to cover the relevant changes
 - Keep track of attendance at meetings (*i.e.*, sign-in sheets, etc.)
- Distribute the employee handbook
 - Allow employees to keep a copy of the revised handbook
 - Have employees sign Acknowledgment Form
 - Photocopy or retain copies of signed documents
 - Give employee two or three hours of paid time to read and review handbook



■ Keep It Current

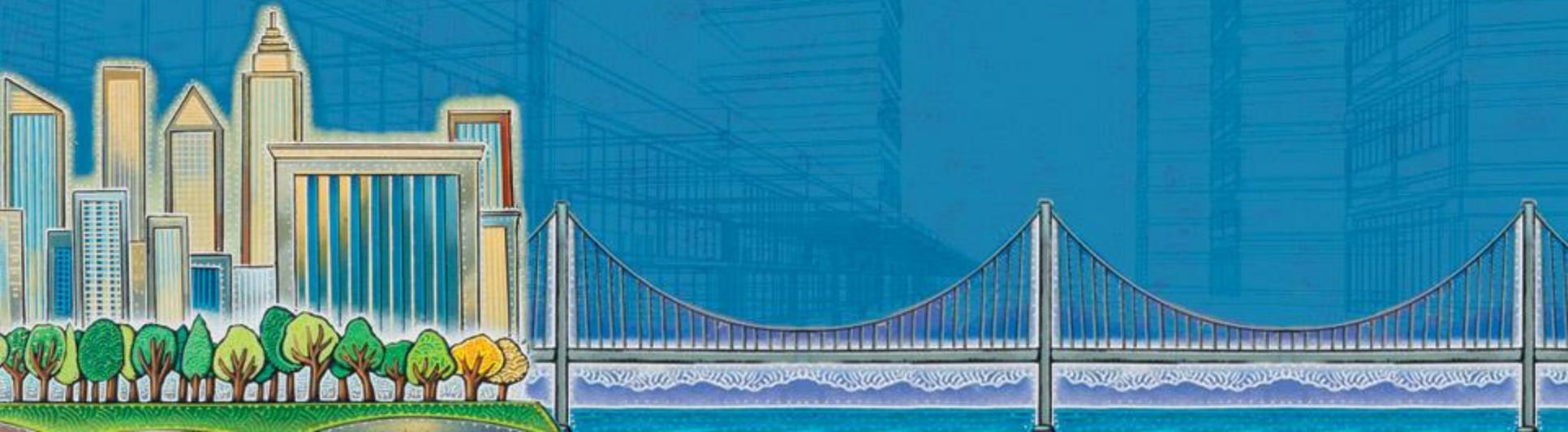


- When the law changes
- When your policies change
- Annually
- When you've run out of copies



**Risk
Management
Tip #2**

Leaves of Absence



■ Different Laws Involving Leaves of Absence

- Family and Medical Leave Act (FMLA)
- Americans With Disabilities Act (ADA)
- Workers' Compensation



■ FMLA Overview

The Family and Medical Leave Act (“FMLA”) provides up to 12 weeks of unpaid leave, or up to 26 weeks of leave to care for military service member



■ FMLA: Employer Eligibility

An employer that has fifty (50) or more employees for a 20-week period during the current or precedent calendar year, within a 75-mile radius, is covered under the FMLA



■ FMLA: Employee Eligibility

1. Employee has worked for the Company for at least 12 months – that is, 52 weeks
 - 12 months do not have to be consecutive
 - Count any week in which the employee is maintained on the payroll



■ FMLA: Employee Eligibility

2. Employee has worked for the Company for at least 1,250 hours during the 12 *consecutive* months preceding the start of the leave (not the date of the request for leave)
3. Employee works at a work site where there are at least 50 employees within a 75-mile radius



■ Six Qualified FMLA Requests

1. For employee's own "serious health condition" that makes him/her unable to perform job
2. To provide care for employee's immediate family member with "serious health condition"
3. For the birth of a child, and to care for the newborn child
4. For the placement of a child with the employee for foster care or after adoption



■ Six Qualified FMLA Requests

5. To provide care for a covered service member with a serious injury or illness related to certain types of military service
6. Exigent Circumstances Military Leave includes: short notice deployment, military events, childcare and school activities, financial and life arrangements, counseling, rest and recuperation, post-deployment activities



■ Benefits During FMLA Leave

- FMLA leave is unpaid, but employee may request (or employer may require) use of paid leave as a substitute for unpaid leave
- Employer must continue to maintain health care benefits, unless:
 - Employee's FMLA rights are exhausted
 - Employee provides Company with unequivocal notice of his or her intent to not return to work
 - Employee's job is terminated for non-FMLA reasons (e.g. layoff)
- Employees returning from leave must be fully restored to all benefits



■ Americans with Disabilities Act (“ADA”)

- ADA attempts to eliminate workplace disability discrimination by:
 - Emphasizing what employee can do as opposed to focusing on employee’s limitations
 - Requiring employers to evaluate an individual’s fitness to perform the essential functions of the job on a case-by-case basis and
 - Considering any reasonable accommodation in the process
 - This includes providing a leave of absence



■ ADA

- ADAAA of 2008 grossly expanded the Act
 - More individuals are protected
- One of EEOC's initiatives is to examine coverage issues, proper application of ADA defenses (undue hardship, direct threat, business necessity)
- **Can you hear me now?**
 - In the largest ADA settlement in EEOC history, Verizon Wireless agreed to pay \$20 million to settle a nationwide EEOC suit alleging failure to accommodate



■ Definition of Disability

- Definition of Disability
 - Construed in favor of broad coverage of individuals... to the maximum extent permitted by the ADA
- Coverage under ADA includes:
 - Visual impairments (e.g. wheelchair)
 - Non-apparent impairments (e.g. asthma, cancer, etc.)
 - Record of impairment (e.g. heart condition, cancer in remission, etc.)
 - Perceived physical or mental impairment
 - **TEMPORARY** conditions are not covered



■ Your Policies and the ADA

- Ensure your policies indicate:
 - The Company makes reasonable accommodations
 - The Company engages in the interactive process
 - There is a case by case assessment
- Obtain additional information/clarification when needed
- Check to make sure there are no open positions for which the individual may qualify
- Have clear job descriptions that identify all of the essential functions



■ Workers' Compensation Laws Emphasize:

- Focusing on the nature of the employee's disability
- Providing suitable compensation for lost earnings
- Losses resulting from a work-related injury



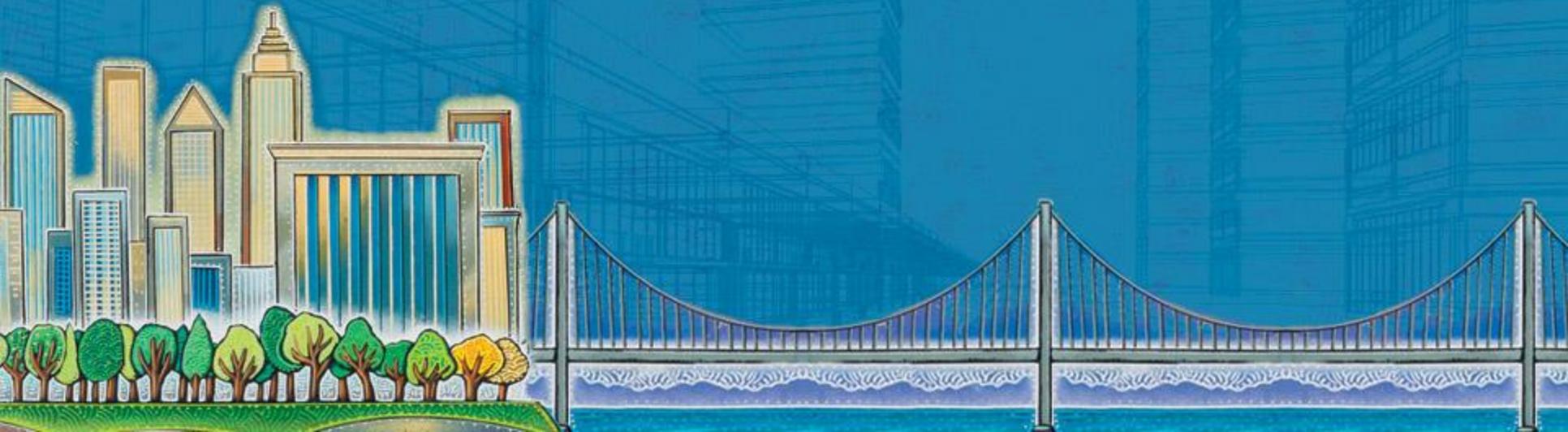
■ Coordinate Leave of Absence Procedures

- Ensure that leave of absence procedures are in writing and communicated to employees
- Ensure that procedures comply with the ADA and FMLA
- Provide written notification of the terms of a leave of absence when an employee begins leave
- Ensure that employees are evaluated on an individual basis in deciding whether to grant leave, allow their return or terminate them



**Risk
Management
Tip #3**

Disciplining and Terminating



■ The CLEAN Doctrine

- In developing best HR practices, you should focus on utilizing a “CLEAN” method when deciding what discipline to take
- The “CLEAN” method will minimize the chances of mud-slinging in administrative or civil litigation



■ THE “CLEAN” DOCTRINE

- **C**onsider facts behind discipline
- **L**earn what managers, witnesses and documents have to say
- **E**valuate what disciplinary action has been taken in the past
- **A**nalyze risk
- **N**arrow down potential options and decide



■ THE “CLEAN” DOCTRINE

- Consider facts behind potential discipline
 - What happened? (policy violation, altercation, performance issue)
 - Who are the witnesses and what is the documentation?
 - How was this brought to your attention and how “ripe” is the event?



■ THE “CLEAN” DOCTRINE

- Learn what managers, witnesses and documents have to say
 - First collect information from managers and review relevant documentation
 - If appropriate, talk to witnesses who may have seen the event or may have knowledge about issue (other managers about employee’s performance)
 - Get the employee’s side of the story



■ THE “CLEAN” DOCTRINE

- Evaluate what disciplinary action has been taken in the past
 - First look at employee to determine what discipline has been taken against him/her in past
 - Next look at whether employee is aware of deficiencies and what help has been provided him/her?
 - Next, look at how company has reacted to similar situations in the past (differential treatment reasons)
 - “Didn’ t we only ____ to Sally for this just last month?”
 - How is Sally’ s situation different (new hire, different situation, etc)?



■ THE “CLEAN” DOCTRINE

- Analyze risk
 - Who is the manager? (short-tempered?)
 - What is the support we have?
 - Protected categories
 - Recent medical leave
 - Employee morale effect
 - Will employee challenge the termination?
 - Are there other issues he could raise only because we discipline him (wage/hour, safety, etc.)?



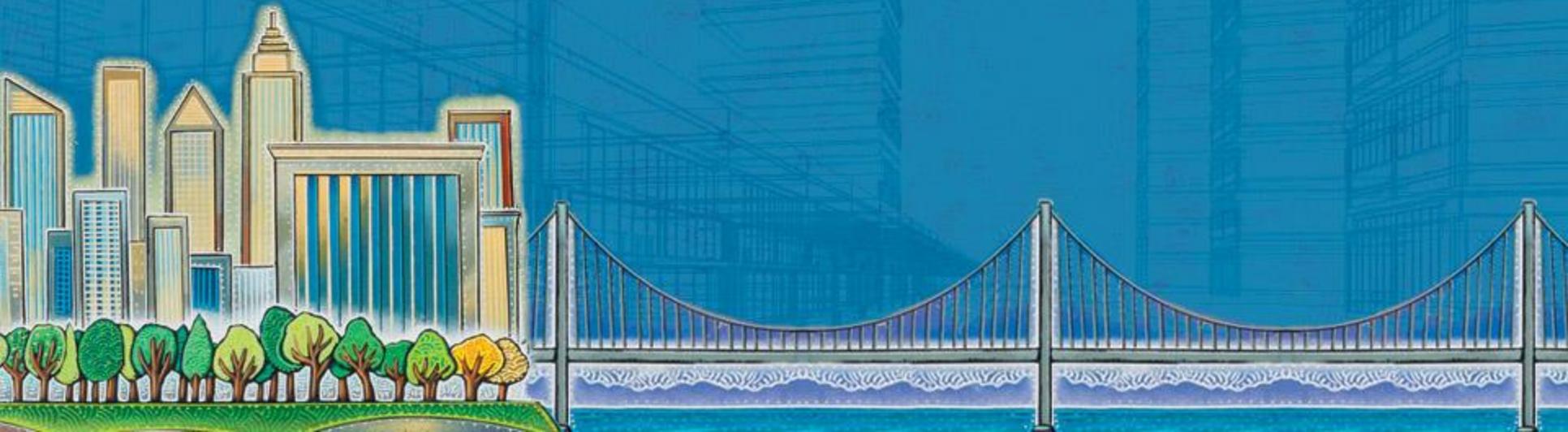
■ THE “CLEAN” DOCTRINE

- **N**arrow down potential options and decide
 - Terminate and, if so, severance?
 - Training, Policy Acknowledgment
 - Suspension, Reduction in Pay, change in schedule or position or office location
 - How are we treating similarly situated individuals?



**Risk
Management
Tip #4**

Documenting Discipline



■ DOCUMENTING DISCIPLINE: NEAT

- **N**otice
- **E**xplanation of deficiencies
- **A**ssistance in how to improve performance
- **T**ime for improvement allowable



■ NEAT

- Notice

- Have a witness present. Witness should have no conflict of interest
- Conduct in private setting
- Have documents prepared for delivery to employee
- Have employee sign it, insert “refuse to sign” or do anything to put his/her handwriting on that document



- **E**xplanation of deficiencies
 - Do not simply state “at will” or “poor performance”
 - Cite to general policy or performance requirement
 - Next cite to events resulting in violation of policy or performance requirement



- **E**xplanation of deficiencies
 - Ex: The Company requires you to sell 8 widgets per month. In August and September 2009, you failed to meet this quota
 - Ex: The Company maintains an attendance policy in its employee handbook, which you acknowledged receiving. You violated this attendance policy by being late on the following days in the past month: 8/21, 8/22 and 9/10



■ NEAT

- Assistance in how to improve performance
 - “The Company shall provide you sales training.”
 - “You will be required to undergo two hours of harassment prevention training.”
 - “In handling your accounts receivable, you must familiarize yourself better with _____ software or be more mindful of data entry errors.”



- **T**ime for improvement
 - Never set specific timetables in disciplinary action forms
 - Avoid “you have 30 days to improve” or “you will be put on 90 days probation”
 - Use terms such as “immediately improve” or “within a reasonable period”
 - You want to preserve the at-will status of the employee



■ Documenting Discipline

Every written warning should end with the following language:

“Failure to correct the deficiencies in your performance will result in further discipline up to and including termination.”

OR

“Further violations of Company policy will result in further discipline up to and including termination.”



■ Termination – Are You Being Fair And Consistent?

- **The Discrimination Test:**
 - What have you done in the past?
 - Can you distinguish prior leniency?
 - Document why current termination is different than prior non-terms?
 - Has employee made complaints or taken leaves?



■ Documenting Termination

How to word the termination notice...

- Avoid vague terminology
- Be specific
- Needs to be detailed; checking a box is not enough
- Refer to warnings and use same language as before
- Don't say anything you wouldn't testify to in court



■ Resources

- **Free Employment Law Phone and Email Hotline:** Policyholders receive prompt, free employment law advice from Fisher & Phillips attorneys. This exclusive program feature is available by dialing toll free 1-866-639-4541 or e-mailing whenever a precarious employment law situation arises.
- **Dedicated Panel/Pre-approved Defense Counsel** in Fisher & Phillips, a national management side labor and employment law firm with 30 offices nationwide and employment law specialists with extensive experience.
- **Free Webinars, Employment Law Legal Alerts and Newsletters:** Program participants are eligible to register with Fisher & Phillips to receive timely email alerts and publications notifying them of employment law and HR law issues affecting their business as well as attend periodic webinars on emerging employment law issues.





Thank you for your time!

QUESTIONS??

This concludes The American Institute of Architects
Continuing Education Systems Program

Nesheba Kittling, Attorney at Law
nkittling@laborlawyers.com

Laurel Tenuto, Client Risk Management Coordinator
Laurel.Tenuto@rlicorp.com

Barbara Sable, Assistant Vice President
Barbara.Sable@rlicorp.com

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