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“DISCIPLINE AND DISCHARGE – HOW TO SUCCESSFULLY MANAGE YOUR EMPLOYEES”

September, 2018

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The attached material must not be considered legal advice. The sample forms and policies are for educational purposes only. We strongly recommend that you consult with legal counsel before adopting or implementing any of the attached sample forms and policies to avoid potential liability

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"Discipline and Discharge - How to Successfully Manage Your Employees"

*Presented by
Roxana E. Verano, Esq.*

LANDEGGER BARON LAW GROUP, ALC
Exclusively Representing Employers
Employment Law, Advice, Litigation and Solutions

How To Successfully Manage Employees

- **Documentation**
- **Communication**
- **Training**
- At all stages of the employment relationship, including Pre-Hire, Post-Hire, Disciplining, and Termination.

Onboarding Documents

- **Required Forms in California** – New Hire Package including a Job Application.
- **Employee Handbook**
- **I-9 verification** -Reasonable appearance of genuineness?
- **Personnel Files**

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Onboarding Documents, contd.

- **Employee Handbook**
 - Not necessary for small employers, but make sure all mandatory policies are in place.
 - Highly recommended for employers with more than 15 employees.

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Benefits of Employee Handbooks

- **Facilitate Communication with Employees**
 - Communicate your company's history and business philosophy to employees (e.g. non-union shop). Key document at Orientation.
 - Facilitates the development of workplace policies and procedures that make sense for your company.
 - Provides a means to communicate workplace policies and procedures to employees.
 - Provides clear expectations.
 - Helps avoid misunderstandings and therefore litigation.

Benefits of Employee Handbooks

- **Ensure Compliance With Complex State and Federal Laws and Regulations**
 - Both Federal and California employment laws and regulations require certain notifications be given to employees.
 - Equal Employment Opportunity
 - Sexual Harassment Prevention
 - Discrimination/Harassment/Retaliation
 - Disability Rights, e.g. ADA/FEHA
 - Family and medical leave (if covered employer), e.g. FMLA/CFRA
 - Pregnancy leave rights

Benefits of Employee Handbooks

- **Provides Legal Defenses**
 - At Will Doctrine- contract claims
 - Privacy rights limitation- e-mail and other electronic forms of communication
 - Alcohol and Drug Policy
 - Meal and Rest Period Policy
 - Paid Sick Leave
 - Harassment/Discrimination claims
 - Workweeks and Workdays

Benefits of Employee Handbooks

- **Non Required Policies may still require a written policy**
- **If offered, Employer should have written policy.**
 - Vacation Cap
 - Progressive Discipline
 - Reimbursement for Business Expenses

Employee Handbooks

- **An Effective Tool for Management**
 - On-going reference tool for management
 - Uniformity / Fairness – Employee understand what is expected of him/her.
 - Consistency on the part of management if he/she can show reliance on employee handbook
 - Useful as an Exhibit in litigation
 - Shows commitment and efforts to comply with laws

Communication

- **Orientation/ Train Employees**
 - Once an applicant has been screened and they start work, employers miss the boat by failing to infuse into the employee the Company's philosophy on:
 - **Mission and Values**
 - **Expectations**
 - **Policies and Procedures (disciplinary policy)**
 - **Non Union Shop**
 - **Safety**

Personnel Files

- **Employee's right to inspection**
- **What should it include?**
- **What should be excluded?**
- **How long post-employment should they be retained? At least 4 years.**

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Personnel and Payroll Records

- **Labor Code Section 1198.5**
 - Current/former employees or representatives
 - 30 calendar days from receipt (may be extended 5 calendar days)
- **Labor Code Section 226**
 - As soon as practicable but no later than 21 days from the date of the request

Personnel Records

- ▶ **Personnel File - Documents relating to employee's performance or to any grievance concerning the employee**
 - Application and Resumes
 - Job Descriptions
 - Job offers, promotions, compensation, education and training
 - Performance Assessments and Goal Setting Records

Personnel Records

- **Personnel Records – cont.**
 - Employee acknowledgements and agreements
 - Letters of Recognition
 - Warnings, counseling and disciplinary actions
 - Grievances
 - Termination Records

Personnel Records

- **Other Documents Kept Separate Files- Privacy Issues**
 - Reference/Background Checks
 - Drug Test Results
 - Immigration (I-9) Forms
 - Medical/Insurance records
 - Child Support/Garnishments
 - Litigation Documents
 - Workers' Compensation Claims
 - Investigation Records

Payroll Records

- Documents to Include in Payroll File
 - Timesheets
 - Wage Statements – a duplicate of the wage statement or a computer generated record showing all required information (Payroll Registry not sufficient)
 - Corrections initialed by employee

Payroll Records

▶ Example of Exposure

- Labor Code Section 226 requires 9 items:
 - Gross wages
 - Total hours worked – not applicable to exempt employees
 - Piece rate and number of units
 - All deductions
 - Net wages
 - Pay period
 - Legal Name of employee and last 4 digits of SSN
 - Name/address of employer [special requirements for temporary services employer]
 - All hourly rates and hours worked for each rate
- Missing any one above can result in penalties [\$50/\$100/\$4000]
- New Paid Sick Leave Accruals

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The Importance of Documentation

- Employee's Personnel File should include employee's complete employment history.
- If it is worth talking about it, it should be documented- verbal warnings, "catch-up" memos, supervisors/co-workers/witnesses statements, Performance Improvement Plans.

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The Importance of Documentation

- Proper documentation shows Fairness, Consistency, Uniformity, and Honesty on the part of management.
- Brutal Honesty – management must be candid and direct with employee regarding performance and performance appraisals.
- Documentation concerning a termination should reflect the real reason for termination- do not rely on "at-will" doctrine.

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The Importance of Documentation

- Progressive Discipline- optional but recommended.
- Performance Reviews
- Accurate Job Descriptions – Essential Functions of the position; important when disabilities arise; may be revised and should routinely be reviewed for accuracy.

Termination

- Effect of terminating pursuant to At – Will Doctrine- blank piece of paper.
- Better practice for personnel file to show a the true legitimate business reason for termination.
- Performance Assessments must reflect accurate performance.

Termination Risk Analysis

- Before terminating employee consider the timing and potential exposure including,
 - Retaliation
 - Disability including workers' compensation claims.
 - Was employee properly classified?
 - Has employee been properly compensated, including meal periods?

Termination

- Any other protected categories concerns?
- Consider the benefits of offering a Severance Package

Final Pay Rules

- Termination – Pay is due immediately at the time of termination.
- Resignation with 72 hours notice – Pay is due immediately at the time of separation.
- Resignation without notice – Pay is due within 72 hours.
- Cannot mail final pay without authorization of employee.
- Labor Code Section 203 serves as a daily penalty for ANY unpaid wages (including accrued vacation and unpaid meal/rest period penalties) for up to 30 calendar days after separation.



Questions & Answers

- Any Questions?
- Contact Information:
 - Roxana E. Verano, Esq.
 - Los Angeles Office: 818.986.7561
 - Ventura County Office: 805.987.7128
 - Roxana@Landeggeresq.com

ACKNOWLEDGMENT OF RECEIPT

I, _____, acknowledge that I have received
(print name)

copies of the following documents:

Initials

_____ Labor Code Section 2810.5 for New Hires

_____ Federal Form W-4

_____ State Form DE-4 Employees Withholding Allowance Certificate

_____ Form I-9

_____ Form I-9 Instructions

_____ Workers' Compensation Benefits Statement and Physician Election Form
(English and Spanish)

_____ State Disability Insurance Booklet (DE-2515)

_____ EDD For Your Benefit Booklet (DE-2320)

_____ California Paid Family Leave (DE-2511)
(English and Spanish)

_____ Department of Fair Employment and Housing Sexual Harassment Pamphlet
(English and Spanish) (DFEH-185 and DFEH-185s)

_____ Company's Employee Relations Policy with Acknowledgment

_____ Sick Leave Policy

Date: _____

Employee Signature

EMPLOYEE ACTION NOTICE

Employee: _____ Date of the Violation: _____

Counseled By:

Name: _____ Position: _____

Name: _____ Position: _____

Name: _____ Position: _____

Type of Counseling (indicate whether this is the first, second, final, etc.):

- | | |
|---|--|
| <input type="checkbox"/> Verbal Warning | <input type="checkbox"/> Written Warning |
| <input type="checkbox"/> Suspension Pending | <input type="checkbox"/> Disciplinary Suspension |
| | <input type="checkbox"/> Final Warning |

It is necessary to warn you of the following: (check and give details under explanation)

- | | |
|---|--|
| <input type="checkbox"/> Absence | <input type="checkbox"/> Using abusive or vulgar language |
| <input type="checkbox"/> Tardiness | <input type="checkbox"/> Dishonesty |
| <input type="checkbox"/> Failure to call in | <input type="checkbox"/> Dissension with co-workers |
| <input type="checkbox"/> Horseplay | <input type="checkbox"/> Leaving work without permission |
| <input type="checkbox"/> Smoking in Unauthorized Areas | <input type="checkbox"/> Failure to meet job requirements |
| <input type="checkbox"/> Insubordination | <input type="checkbox"/> Willfully performing poor work |
| <input type="checkbox"/> Failure to follow instructions | <input type="checkbox"/> Unauthorized use/abuse of equipment/materials |
| <input type="checkbox"/> Falsification of records | |

Specifically describe the reason for counseling:

EMPLOYEE PERFORMANCE APPRAISAL

Employee Name: _____ Job Title: _____

Department: _____ Yrs/Mos in Job Classification: _____

Hire Date: _____ Supervisor's Name: _____

Length of Time Supervising Employee: _____

Date of Last Appraisal: _____

Dates Covered by this Appraisal: _____

DEFINITION OF RATINGS

Indicate a numerical rating for each performance standard listed below according to the following:

STANDARD	NUMERICAL RATING	DEFINITION
Outstanding	5	This level of performance over a sustained period of time approaches the best that the employer can possibly expect of an employee in a given position. The employee at this level should have mastered every essential element of the assigned position and should be performing at a level well beyond what would normally be expected of the great majority of employees with similar duties.
Exceeds Requirements	4	An employee at this level should be meeting all of the position requirements in a manner indicating full understanding of all the required functions. The results achieved by the employee are consistently better than those that would be expected of most of the employees with similar duties performing to job standards.
Satisfactory	3	At this level, an employee is consistently performing at a standard or average performance level.
Needs Improvement	2	A provisional level for inexperienced newcomers or others whose performance is below the acceptable level. Some elements of the position may still require considerable supervision and instruction before performance satisfactorily meets position requirements.
Unsatisfactory	1	An employee at this level consistently performs below an acceptable level and should be placed on probation and is not eligible for a wage increase. A specific improvement period should be established for the employee to improve his or her performance to the job standard. In the case where improvement is not made, termination of employee should result.

5-Outstanding; 4-Exceeds Requirements; 3-Satisfactory; 2-Needs Improvement; 1-Unsatisfactory

When determining which rating is appropriate, consider the criteria listed under each standard. Comments and examples should be provided to support ratings and are required when a ranking of 1, 2, 4 or 5 is given.

STANDARD	RATING
<p>JOB KNOWLEDGE: Consider the extent to which the employee understands and applies the knowledge required to fulfill the duties and responsibilities of the position.</p> <p>Comments:</p>	
<p>QUALITY OF WORK: Consider the accuracy, thoroughness, neatness, and related characteristics to work produced or accomplished (disregard volume of work).</p> <p>Comments:</p>	
<p>COMMUNICATION: Consider the ability of the employee to transmit knowledge and ideas orally and/or in writing with effectiveness and clarity, relative to the requirements of the job.</p> <p>Comments:</p>	
<p>QUALITY OF WORK: Consider the extent to which the employee consistently maintains the volume of work in relation to the volume required for proficient job performance.</p> <p>Comments:</p>	
<p>ATTENDANCE: Consider employee's prompt arrival to work, number of days absent (not including FMLA leave), time spent away from job duties during the day, and time left early.</p> <p>Comments:</p>	
<p>SAFETY/GOOD HOUSEKEEPING: Consider the extent to which the employee observes and practices the safe use of equipment, wearing of safety apparel, and good housekeeping measures.</p> <p>Comments:</p>	

STANDARD	RATING
<p>LEVEL OF REQUIRED SUPERVISION: Consider how much time and effort is required to direct and manage the employee.</p> <p>Comments:</p>	
<p>PLANNING: Consider the extent to which the supervisor takes responsibility for prudent cost control, methods development, and controlling.</p> <p>Comments:</p>	
<p>LEADERSHIP: Consider the extent to which others naturally follow the supervisor's example of direction. How well does the supervisor obtain good results from others?</p> <p>Comments:</p>	

SUMMARY OF RATINGS

Job Knowledge _____ Quality of Work _____ Communication _____
 Quantity of Work _____ Attendance _____ Safety/Housekeeping _____
 Level of Supervision _____ Planning _____ Leadership _____
 AVERAGE OVERALL RATING _____

Overall assessment of employee:

TO BE ASKED DURING EVALUATION

Is the employee suffering from any work related injury that has not been reported?

Does the employee have any complaints about harassment, wages or violations of the law?

Employee comments (Attach Additional Pages As Necessary):

Goals for the next 12 months and timetable for meeting goals:

EMPLOYEE ACKNOWLEDGMENT

I have read and discussed this completed appraisal with a supervisor, and I have received a copy. I understand that my signature indicates that I have been personally apprised of my performance. It does not, however, indicate my agreement with the appraisal. I understand that a positive performance evaluation or a raise in pay does not alter the at-will nature of the employment relationship, which can only be modified by a written agreement signed by the President of the Ranch Foundation.

Signature of Employee: _____ Date: _____

Signature of Supervisor: _____ Date: _____

Recommended Salary Increase (if any): _____

Reviewed as to form and content
by President of the Board of Directors: _____

**PRE-TERMINATION OF EMPLOYMENT
CONSULTATION FORM**

To: LANDEGGER BARON LAW GROUP
A Law Corporation
15760 Ventura Boulevard
Suite 1200
Encino, California 91436
(818) 986-7561
www.landeggeresq.com

Send: By Facsimile to (818) 986-5147 or
By e-mail to roxana@landeggeresq.com

From: Name of Company: _____
Contact Person: _____
Phone Number: _____
Address: _____

Date: _____

This communication, including all attachments, is protected by the attorney client privilege and/or work product doctrine. The purpose of this communication is to seek a preliminary legal opinion concerning the potential termination of an employee. The review of this Form, the attached documents and our preliminary opinion will be provided to you as a service of _____.

Landegger Baron Law Group will advise you if the termination creates a potential for legal exposure and whether you should seek additional legal advice. Our goal is to provide you with advice so as to avoid employment related claims. Landegger Baron Law Group cannot advise you whether this is a reportable event to your Employment Practices Liability Insurance carrier or Directors and Officers Insurance carrier. If this matter is beyond what we can do in this free consultation, we will so advise you. If you require additional legal advice, Landegger Baron Law Group can provide legal advice at our normal billing rates.

Pre-Termination of Employment Consultation Form Cont.

Please complete the attached form in its entirety. If you send an incomplete form, it will be returned to you prior to receiving a consultation. You will receive a return call as soon as possible from an attorney with Landegger Baron Law Group. We request that you submit this form at least twenty-four hours before expecting advice by telephone.

This form is not to be used to seek advice concerning any employee's complaint of harassment, including sexual harassment, and discrimination. If you receive such a complaint, Landegger Baron Law Group can assist you at our normal billing rates.

PRE-TERMINATION OF EMPLOYMENT CONSULTATION FORM

1. Name of Employee: _____

2. Date of Hire: _____

3. Current Position: _____

4. Rate of Pay: _____

5. State in detail the reason that you wish to terminate this employee:

6. Do you think that this Employee is likely to file a legal claim? If so, why?

7. Is the employee in any protected class? Please identify each applicable category and provide as much detail as is available.

Age (over 40): _____ Color: _____

Race: _____ National Origin: _____

Color: _____ Ancestry: _____

National Origin: _____ Physical Disability: _____

Religion: _____ Mental Disability: _____

Sex: _____ Medical Condition: _____

Physical or Mental Disability: _____ Genetic Information: _____

HIV/AIDS: _____ Marital Status: _____

Sexual Orientation: _____ Sex: _____

Gender Identity: _____ Gender: _____

Medical Condition: _____ Gender Identity: _____
(cancer or genetic characteristics)

Gender Expression: _____

Pregnancy Disability: _____ Age: _____

Marital Status: _____ Sexual Orientation: _____

Race: _____ Military and Veteran Status

Religious Creed: _____ of Any Person: _____

PRE-TERMINATION OF EMPLOYMENT CONSULTATION FORM

8. Has the employee reported a work-related injury or have a record of a Workers Compensation claim?

Yes: _____ No: _____

If yes, please attach available documents including DWC 1 Forms and doctor's notes.

9. Has the employee requested or taken time off for medical reasons, military, Pregnancy Disability Leave or Family and Medical Care Leave?

Yes: _____ No: _____

If yes, please attach available documents including LOA forms and doctor's notes.

10. Has the employee received prior verbal or written counseling?

If so, please attach.

Yes: _____ No: _____

11. Has the employee violated a written rule or policy contained in your employee handbook? *If so, please attach a copy of the policy.*

Yes: _____ No: _____

12. Do you have an oral or written agreement with the employee concerning any term or condition of employment?

Yes: _____ No: _____

13. Do you have a formal or informal progressive discipline policy?

If so, please attach or describe.

Yes: _____ No: _____

14. Are there any additional facts or factors that are relevant to this proposed termination?

Yes: _____ No: _____

Please state the additional facts or factors.

15. Have you considered a Final Written Warning, demotion, transfer or further training? If not, why? _____

PRE-TERMINATION OF EMPLOYMENT CONSULTATION FORM

16. What type of discipline has been imposed on other employees involved in similar circumstance(s)? _____

I agree to the above terms and conditions and verify all of the above information is accurate and complete.

[Signature of person sending form]

Notice to Employee as to Change in Relationship (Company Name Here)

Name: _____

Social Security #: _____

Position and/or Department: _____

Your employment status has changed for the reason checked below:

- Voluntary quit effective ___/___/___
(date)
- Layoff effective ___/___/___
(date)
- Leave of absence effective ___/___/___, with a return to work date of ___/___/___
(date)
- Discharge effective: _____
- Refusal to accept available work effective ___/___/___
(date)
- Change in status from employee to independent contractor, effective ___/___/___
(date)

Specific Reasons for Discharge:

Comments: _____

Supervisor's Signature

Date: ___/___/___

.....

Notice Acknowledgment

I received a copy of this notice on ___/___/___
(date)

(Signed)

Notice to Employee as to Change in Relationship
(Company Name Here)

EXIT INTERVIEW CHECKLIST

Name: _____ Date of Separation: _____

- Review of Employee's entire personnel file regarding work history (proper) documentation regarding progressive discipline.
- Termination/Separation Report Completed.
- Report signed by Employee.
- COBRA information provided.
- Return of Company property (keys, parking card, files, etc.).
- Exit Interview scheduled or conducted.
- Memorandum to payroll.
- Final paycheck (accrued earning, accrued and pro-rated vacation benefits, etc.).

DATED: _____ By: _____
Employee's Signature

DATED: _____ By: _____
Signature of Company Representative

RULES OF DISCIPLINE

1. **FAIRNESS.** Ask yourself the following question: Is it fair to discipline this employee based upon the quality and quantity of the facts before you?

2. **CONSISTENCY.** In the past has the Company imposed the same discipline in similar situations?

3. **UNIFORMITY.** The Company has an employee handbook, so employees know what is to be expected of them and what the Market provides for them for benefits. As a supervisor you must promote the understanding of such policies to each employee.

Examples: Excessive absenteeism.
 Insubordination.

4. **HONESTY.** During discipline it is essential that you are candid and direct with the employee regarding performance and performance appraisals. Never tell any employee they are being laid off when performance is the real issue.

5. **BE OBJECTIVE.** To demonstrate validity and legality of actions.

6. **FOLLOW RULES 1, 2, 3, 4 and 5.** Be in a position to demonstrate all of the above. Imagine yourself in the witness chair. This is what you want to portray to the judge or the jury.