

EMPLOYMENT  
& LABOR LAW

ADVICE  
SOLUTIONS  
LITIGATION

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# **LANDEGGER | BARON | LAVENANT**

A L A W C O R P O R A T I O N

## **DISCIPLINE AND DISCHARGE**

### **How to Manage Employees with Success**

#### **Employment Law Workshop**

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## Managing Employees

- Topics to be covered:
  - How To Screen Applicants and Employees Before They Infect Your Workplace
  - How To Sugar Coat Company Policies Evenly
  - How To Prevent The Disease From Spreading
  - Which Medicine Cures The Disease

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## Toxic Employees

- Examples of Toxic Employees:
- One Who:
  - Always arrives late to work or leaves early
  - Refuses to work overtime, particular schedules, or extra shifts
  - Gossips or badmouths management, co-workers or customers
  - Argues with management, co-workers or customers
  - Decreases productivity while encouraging others to follow suit
  - Constantly says "It's not my job."

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## Toxic Employees

- Why Don't We Want Toxic Employees?

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## Toxic Employees

- Why Don't We Want Toxic Employees?
  - Lowers Morale
  - Decreases Production
  - Increases Opportunities for Workplace Violence
  - Destroys Customer Service and Reputation
  - Maximizes Civil Liability!!!!

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Ventura County Star


### \$22.5 million awarded in injury case

A Ventura County jury has awarded a local woman more than \$22.5 million, the biggest award in a personal injury case in recent county history, attorneys said Monday.

The Superior Court jury made the award to Dawn Renae Diaz, 38, for severe brain damage and other injuries she sustained in a 2006 traffic accident on Highway 101 in Camarillo.

The collision on Jan. 20, 2006, occurred between a box truck and a pickup truck. The collision sent the pickup over the center divider, landing on top of Diaz's vehicle, which was traveling in the opposite direction.

The box truck driver's previous employer had told his employer that he was an unsafe driver and was fired because of this. Sugar Transport's hiring officer testified that they hired the driver because they were busy and needed to put "bodies behind the wheel."




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## Toxic Employees

- What is One Of The Best Ways To Avoid Toxic Employees?

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## Toxic Employees

- What is One Of The Best Ways To Avoid Toxic Employees?  
– **DON'T HIRE THEM!!!**

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## Toxic Employees

- Screening Applicants
  - **Application:** should request, among other things, the applicant's name and any other names that the applicant presently or in the past has used, address and telephone number, and the applicant's work history (including the names, addresses, and telephone numbers of former and current employers) for at least the past ten years.

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## Toxic Employees

- Screening Applicants
  - **Application:** The employer should also require the applicant to provide the name, telephone number, address, and relation of at least three references. The applicant's response, as well as his or her failure to completely respond to such questions, can be useful in a background check and in assessing the applicant's trustworthiness.

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## Toxic Employees

- Screening Applicants
  - **Application:** Application should include a statement that the applicant certifies that the information contained in the application is correct and that the applicant understands that any misrepresentation or omission of information requested on the application is sufficient cause to be denied a job offer, or if the misrepresentation or omission is discovered after hired, grounds for immediate dismissal.

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## Toxic Employees

- Screening Applicants
  - **Application:** Include statement that the applicant acknowledges that employment with the company is "at-will." Also, the applicant acknowledges that no promise or guarantee of continued employment has been given, and that any assurances of continued employment, whether written, oral or by conduct, shall not be interpreted as changing the nature of the employment relationship.

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## Toxic Employees

- Screening Applicants
  - **Background Checks:**
    - Credit Report/Background Check
      - Internet
      - Megan's Law Website
    - Fingerprinting
    - Drug/Alcohol Screen
    - Physical examination

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## Toxic Employees

- Screening Applicants
  - **Background Checks:** The relatively small costs of a background check (\$50-\$125) is dwarfed by the high costs of defending against administrative claims or worse yet
  - litigation (\$10,000-\$250,000).

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## Toxic Employees

- Screening Applicants
  - **I-9s:** Stick by technical rules. Do not allow an employee to talk you out of completing this document correctly. If the employee cannot provide the required documentation within three (3) days from the date of hire.
  - For **most** employers, retain a copy of the documents used to complete I-9.

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## Toxic Employees

- Screening Applicants
  - **New Hire Documentation**
  - **Employee Handbook**
  - **Job Descriptions**
  - **Job Offers**

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## Toxic Employees

- Screening Applicants
  - Document the application and new hire process. Provide a copy of each document reviewed and signed by each new hire. Obtain acknowledgments out the ying-yang.
  - **Do Not Hire Anyone That Refuses To Follow Your Application or New Hire Procedures!!**

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## Toxic Employees

- Train Employees
  - Once an applicant has been screened and they start back to work, employers miss the boat by infusing into the employee the Company's philosophy on:
    - Customer Service
    - Production/Manufacturing
    - Interpersonal Relationships
    - Safety

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## Toxic Employees

- Sugar Coating Company Policies
  - Continuously monitor competitive policies, benefits and compensation structures
  - Have policies reviewed for legality
  - Provide regular meetings to employees to explain certain policies and procedures and the rationale
    - Highlight different topics each meeting
    - Do not allow meeting to explode into "b----" session

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## Toxic Employees

- Sugar Coating Company Policies
  - Train management regularly to ensure that policies are being applied uniformly
  - Communicate to employees the health of the company
  - Do not be afraid to add/revise/delete policies
  - Work on HOW policies are communicated

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## Sugar Coating Policies

Language Subtleties Influence Your Management Abilities

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## Language Subtleties

How we say something is just as important as what we say.

Managers can better communicate by an inclusive rather than exclusive manner.

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## Sugar Coating Policies

- Language Subtleties – Inclusive Language:
  - By inclusive, you should consider this term to mean the mental state of optimism; while exclusive is pessimism.
  - You can change the way you say things so they come out inclusive, positive. When you convey an optimistic attitude, you gain more control over yourself and get more from your staff and co-workers.

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## Sugar Coating Policies

- Inclusive Language can be used effectively in the following areas routinely encountered by managers:
  - Evaluation
  - Appreciation
  - Promotion
  - Prohibition
  - Persuasion
  - Motivation

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## Sugar Coating Policies

- Studies have found that “optimistic” employees are up to fifty percent (50%) more productive than “pessimistic” employees.

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## Evaluation

- We are always evaluating and making judgments. Mostly, we're unknowingly making evaluations in exclusion. Here are some examples:
- "Not as bad as I thought."
- "I don't have a problem with that."
- "I don't see any reason why we couldn't do it."
- "It certainly wouldn't be out of the question."

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## Evaluation

- | EXCLUSION EXAMPLES            | INCLUSION EXAMPLES                |
|-------------------------------|-----------------------------------|
| • I can't argue with that.    | I'm inclined to agree with that.  |
| • I can't complain.           | I think it's okay.                |
| • I'm not ignoring that.      | I'm aware that's a consideration. |
| • If nothing gets in the way. | If everything goes as planned.    |

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## Promotion

- Here are some examples of inclusionary promotional advertising:
- Citicorp: "Citicorp, because America wants to succeed, not just survive."
- MCI: "If not us, who? If not now, when?"
- Pirelli Tires: "Power is nothing without control."
- Paul Mason Wines: "We will sell no wine before its time."
- Vidal Sassoon: "If you don't look good, we don't look good."
- American Express: "Don't leave home without it."

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## Promotion

- These ads are promoting these products in an exclusionary fashion.
- Every day, you're promoting something, whether it be yourself, a program or an attitude.
- The point is to be aware that we are surrounded by various types of language.
- If you are to keep control of your own optimism, it is best to limit negative or exclusionary language.

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## Prohibition

- It seems that everywhere we turn, we're told not to do something. It's as if we were kids again and constantly being watched for our own safety.
- Whenever you see a sign posted, it almost always tells you what you are not able to do.
- Suppose you were to rewrite the signs so they gave their instructions in inclusion as opposed to exclusion.
- What might they say?

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## Prohibition

- Instead of saying, "No Smoking," you could say, "Smoke Free Area."
- Instead of saying, "No Eating in This Room," you could say, "Eating Prohibited in This Room."
- Instead of saying, "No Entrance," you could say, "Entrance Prohibited."
- Instead of "No Littering," you could say "Keep this area clean."

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## Prohibition

- Messages telling us what is acceptable or what is unacceptable in a language of inclusion creates an entirely different feeling, and a greater likelihood that we would want to follow the message.

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## Persuasion

- If you understand this category, you will be empowered because when you really understand how to position your persuasion methods in inclusion, you'll have so much more horsepower when it comes to influencing people.

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## Persuasion

- In many business relationships, co-workers attempt to persuade each other with some form of "why don't you" or "why don't we."
- "Why don't we get together on Monday?"
- "Why don't we stop doing this?"
- "Why don't I send that to you?"
- "Why don't I bring the contract over?"

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## Persuasion

- If you and your co-worker are deciding where to eat, and one of you says, "Why don't we go to The Cheesecake Factory?"
- The other's first unconscious impulse is to begin to answer the question, "Well, there are three reasons why I don't want to go to the Cheesecake Factory. One, I don't want to drive that far; two, I don't really like the food; and three, it's too expensive."

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## Persuasion

- What's interesting is that when you ask somebody, "Why don't we/you?," the receiver frequently resists with some form of a "No."
- However, if you were to change the question from exclusion to inclusion, from "why don't you/we" to "How about," or "Let's," the ambivalent person is much more likely to be persuaded.

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## Persuasion

- Here are some suggestions on inclusive language:
- Instead of saying, "Why don't you call me on Monday?", say, "How about you call me on Monday?"
- Instead of saying, "Why don't you get me the report?", say, "How about getting the report?"
- Instead of saying, "Why don't you quit worrying?", say, "What are your thoughts about the problem?"

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### Motivation

- Motivation is linked to language. This makes it a very good area in which to apply language skills.
- Your language can make a huge difference when you want to impact your own motivation as well as the motivation of those around you.

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### Motivation

- You should act as if most people prefer to think of themselves as "going toward" when it comes to their motivation.
- However, it's clear that it's very difficult to be a "going toward" person if you're always speaking in the language of "don't, never, and can't."

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### Motivation

- You might be quite pleased to see how your and your employees' outlook changes when you speak in inclusion.
- You might even slowly watch your motivation change from a going away perspective to one that goes toward your objectives.

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## Motivation

- "Going toward" is definitely preferable as a motivator.
- So to increase this likelihood, speak in terms of "yes, always, and can."
- Then watch the gradual transformation of yourself and those around you from "going away" to "going toward."
- Your motivation will have a healthier and powerful feel.

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## Motivation

- This conversion from exclusion to inclusion will require some practice.
- As with all new learning, it will seem out-of-place and artificial at first.
- You should avoid becoming fanatical and fearful of every word you plan to utter.
- But focus on the good stuff, the choices you can make in your words that will lead to uplifting results that you desire.

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## Using The Rules of Discipline To Prevent Spread of Disease

- Following the rules below should minimize your Company's exposure to any kind of allegations of unfair treatment, discrimination or wrongful demotion or termination:

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### 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 evidence before you?

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### Rules of Discipline

- 2. CONSISTENCY.
- In the past has your company imposed the same discipline in similar situations?

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### Rules of Discipline

- 3. UNIFORMITY.
- Each Company should have an employee handbook, written policies or job descriptions so that employees know what is to be expected of them. Each company must promote the understanding of such policies to each employee.
- Examples: Excessive absenteeism.
- Insubordination.

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### Rules of Discipline

- 4. BRUTAL 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.

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### Rules of Discipline

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

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### Rules of Discipline

- 6. VALIDATION.
- 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.

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## Rules of Discipline

- HERE ARE SOME TOOLS THAT YOU SHOULD ADOPT IN DISCIPLINE:
- Investigation – Be thorough.
- Protect the integrity – Consider having two people present.
- Flexibility in progressive discipline system - Do not rely on "at will" LC 2922.
- Careful Balance - Patience vs. too much patience.

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## Rules of Discipline

- HERE ARE SOME TOOLS THAT YOU SHOULD ADOPT IN DISCIPLINE:
- Document, document, document - The final warning notice should not be the first written notice.
- Good documentation - If it's worth talking about, it's worth putting in writing. When, where, who, what happened in the first person. Tell employee what employee must do to improve performance and what is wrong with current performance. Tell employee how long you will allow to improve (don't put on probation for 30, 60, 90 days). Tell employee what to expect if unable to or unwilling to improve performance appraisal vs. progressive discipline.

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## Curing The Disease

- **What Type of Discipline is Available?**
  - Disciplinary action may include, but is not limited to, the following:
    - Coach/Counseling
    - Verbal warning
    - Written warning
    - Unpaid leave/suspension
    - Probationary period
    - Reassignment/demotion
    - Reduction in pay/benefits
    - Transfer
    - Termination

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## Curing The Disease

### • What Type of Discipline is Available?

- The choice of any disciplinary action is within the complete discretion of the company and if done right will not alter the employee's at-will employment relationship with the company.

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## Curing The Disease

### • When Should The Discipline Be Issued?

- An employee should be disciplined when:
  - They have engaged in a violation of established work rules or performance standards;
  - They have engaged in a series of events that create an unproductive environment, even if one of the actions standing alone is not violative of work rules or performance standards;
  - They have engaged in conduct that did or could have caused harm to themselves or others;
  - Promotion of the Company's mission or goals may be furthered by admonishing misbehavior; or
  - Failure to discipline an employee may result in liability to the company or third party.

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## Curing The Disease

### • When Should The Discipline Be Issued?

- HR managers and other senior company officials often make discipline and termination decisions based on facts and recommendations from subordinates. In fact, disciplinary decisions should not be made in a vacuum. If the supervisor is unfamiliar with the work history or the employee(s) involved, a brief discussion with the prior supervisor, HR officer, or a review of the personnel file would be help. Ignorance of the employee's past may not be a defense if the employee action is potentially unlawful.

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## Curing The Disease

### • How To Document The Prescription?

- Document, document, document: It is absolutely essential that there is sufficient documentation in the file to support discipline, including a termination. Warning memorandums and notices should be in written format and placed in the employee's personnel file. Never verbally counsel or discipline an employee without documenting such discipline in the employee's personnel file.

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## Curing The Disease

### • How To Document The Prescription?

- Do not simply keep notes regarding employee discipline as such notes have no value in litigation unless the employee is given a copy, and they are placed in an employee's personnel file. Written warnings should be properly filled out and should clearly state the offense committed by the employee. The employee should be permitted to make any comments on the warning that they feel are appropriate. Any written warning should be placed in the employee's personnel file.

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## RULES OF EMPLOYEE COUNSELING

1. **FAIRNESS.** Ask yourself the following question: Is it fair to discipline, counsel, or constructively evaluate 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 or performance rating in similar situations?
3. **UNIFORMITY.** The Company has an employee handbook, so employees know what is to be expected of them and what the Company 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 employee counseling it is essential that you are candid and direct with the employee regarding their attitude and performance. In a termination situation, 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. In a discrimination or wrongful termination claim, this is what you want to portray to the judge or the jury.

## 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.

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><b>JOB KNOWLEDGE:</b> 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><b>QUALITY OF WORK:</b> Consider the accuracy, thoroughness, neatness, and related characteristics to work produced or accomplished (disregard volume of work).</p> <p>Comments:</p>	
<p><b>COMMUNICATION:</b> 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><b>QUALITY OF WORK:</b> 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><b>ATTENDANCE:</b> 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><b>SAFETY/GOOD HOUSEKEEPING:</b> 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
<b>LEVEL OF REQUIRED SUPERVISION:</b> Consider how much time and effort is required to direct and manage the employee.  Comments:	
<b>PLANNING:</b> Consider the extent to which the supervisor takes responsibility for prudent cost control, methods development, and controlling.  Comments:	
<b>LEADERSHIP:</b> Consider the extent to which others naturally follow the supervisor's example of direction. How well does the supervisor obtain good results from others?  Comments:	

### 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: \_\_\_\_\_

## 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.):

☐ Verbal Warning

☐ Written Warning

☐ Suspension Pending

☐ Disciplinary Suspension

☐ Final Warning

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

☐ Absence

☐ Using abusive or vulgar language

☐ Tardiness

☐ Dishonesty

☐ Failure to call in

☐ Dissension with co-workers

☐ Horseplay

☐ Leaving work without permission

☐ Smoking in Unauthorized Areas

☐ Failure to meet job requirements

☐ Insubordination

☐ Willfully performing poor work

☐ Failure to follow instructions

☐ Unauthorized use/abuse of  
equipment/materials

☐ Falsification of records

☐ Specifically describe the reason for counseling: \_\_\_\_\_

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Since this conduct is not conducive to good business operations, a further occurrence cannot be tolerated and will lead to termination. This warning affords you the opportunity to correct the situation.

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
Signature of Supervisor

I have read the above warning and acknowledge receipt of a copy of it. I am aware that I have the opportunity to write a response.

Employee comments: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
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\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
Signature of Employee

# 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: \_\_\_\_\_(date)
- ☐ 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