

# 8 Steps To Record Employment Decisions In Uncertain Times

By **Lauren Ziegler** (November 18, 2020)

In light of the COVID-19 pandemic and an increased focus on social justice, stakes have never been higher for employers to make and document good employment decisions. Those that make poor employment decisions — or do not sufficiently document good decisions — face significant exposure and unwanted scrutiny, both internally and externally, during a time when many employers are struggling to survive.



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The need for thoughtful decisions and supporting documentation has therefore become critical, as companies need to make bona fide employment decisions and be able to justify them. Effective documentation helps ensure companies can accomplish both of these goals. This article provides a step-by-step guide that will help employers create effective documentation.

What makes documentation in employment cases effective or ineffective or, put more bluntly, what documentation makes an employment decision credible? There are four tiers of documentation.

Let's look at each in best to worst order: effective documentation, ineffective documentation, no documentation and bad documentation.

## **Effective Documentation**

Effective documentation serves as a road map that demonstrates how and why employers reached certain decisions, and it tells a complete story. When documentation tells a complete and reliable story, it provides employers with a first line of defense. Effective documentation is the perfect answer to a demand letter or an U.S. Equal Employment Opportunity Commission charge.

It enables employers to prevail on summary judgment.[1]

Employers who demand effective documentation also help ensure employment decisions are fair and consistent. Documentation protocols force decision makers to articulate and memorialize their justifications for employment actions, which reduces the likelihood of arbitrary or capricious decisions and the risk of perceived favoritism or discrimination.

## **Ineffective Documentation**

Ineffective documentation occurs where there are gaps in the story — i.e., where additional documents or testimony will be needed to fill in the holes. Termination paperwork that says an employee was terminated for "continuous policy violations" but does not specify which policy was violated, or when or how it was violated is ineffective.

Documentation that was never presented to the employee for signature is ineffective. So too is cumulative, rather than contemporaneous, documentation. Such documentation raises as many questions as it answers. Its credibility is undercut by those kinds of gaps.

Overdocumentation is equally ineffective. A disciplinary recommendation because an employee hit another parked truck in the yard is undercut by adding that the employee also failed to wear their uniform shirt that day. Documentation needs to focus on what is important; documentation that suggests that management is out to get the employee is always ineffective.

### **No Documentation**

With no documentation, it is easy for the employee to deny that something occurred or to challenge the details. That is what happened in *Ledbetter v. Good Samaritan Ministries*, decided by the U.S. Court of Appeals for the Seventh Circuit in 2015.[2]

There, the employer reprimanded Linzie Ledbetter twice in a five-month period. A supervisor met with Ledbetter regarding his performance. Ledbetter then accused the company of trying to frame him for termination. Ledbetter was then terminated in a follow-up meeting eight days later.

But there was no documentation to show that termination was discussed. Ledbetter asserted that he was not advised of his firing until two days after the employer learned that he filed a charge with the EEOC. Thus, with no documentation, Ledbetter succeeded in getting past summary judgment on his retaliation claim.

### **Bad Documentation**

Bad documentation does not refer to the recording of seemingly bad events that have taken place. Instead, it means what you have recorded proves that discipline or discharge is unwarranted. Bad documentation shows the company was not following its own policy or acknowledges that the motive was protected activity rather than work rule violations.

Bad documentation is far worse than ineffective documentation or no documentation because it locks a company into an unfavorable position. There is a temptation to make human resources the editor in chief, but please resist that temptation.

Those email exchanges are discoverable and only make more bad documentation. Additionally, contradictory or multiple drafts can make it look like you're trying to get your story straight, which will never sit well with a jury.

### **How To Prepare Effective Documentation Consistently**

Imagine a situation where Employee A observes Employee B failing to follow a safety protocol. Employee A reports that to Manager C, who confirms that Employee B was not following the protocol, such that discipline is warranted. Now watch as draft documentation evolves applying eight steps.

#### **1. Who**

Employee A was involved as a witness/the reporter. Employee B was involved as the employee who violated the policy and will be receiving discipline. Manager C was involved as the investigator and the supervisor issuing the discipline.

## **2. What**

Employee A observed Employee B failing to follow company safety policy. Employee A reported the conduct of Employee B to Manager C. Manager C questioned Employee B, who confirmed he was not following the protocol, in violation of company safety policy.

## **3. When**

On Jan. 1, Employee A observed Employee B failing to follow company safety policy. On Jan. 2, Employee A reported the conduct of Employee B to Manager C. On Jan. 3, Manager C questioned Employee B, who confirmed he was not following company safety policy on Jan. 1.

## **4. Where**

On Jan. 1, Employee A observed Employee B failing to follow company safety policy at the water cooler — a common area. On Jan. 2, Employee A reported the conduct of Employee B to Manager C. On Jan. 3, Manager C questioned Employee B in the production office; Employee B confirmed in that conversation that he was not following company safety policy on Jan. 1.

## **5. How**

On Jan. 1, Employee A observed Employee B failing to follow company safety policy by not wearing his mask while at the water cooler — a common area. On Jan. 2, Employee A reported the conduct of Employee B to Manager C verbally. On Jan. 3, Manager C questioned Employee B in the production office; Employee B confirmed he was not wearing his mask at the water cooler on Jan. 1, in violation of company policy.

## **6. How Much or How Many**

On Jan. 1, Employee A observed Employee B failing to wear his mask while at the water cooler — a common area. On Jan. 2, Employee A reported the conduct of Employee B to Manager C verbally. This was the only occurrence reported/witnessed by Employee A. On Jan. 3, Manager C questioned Employee B in the production office; Employee B confirmed he was not wearing a mask in violation of company policy.

This is Employee B's second disciplinary action for violating safety protocols. The first disciplinary action occurred on Dec. 1 when he failed to wear his safety goggles on the production floor.

## **7. Why This Is Important**

On Jan. 1, Employee A observed Employee B not wearing his mask while at the water cooler — a common area. On Jan. 2, Employee A reported the conduct of Employee B to Manager C verbally. This was the only occurrence reported/witnessed by Employee A. On Jan. 3, Manager C questioned Employee B in the production office; B confirmed he was not wearing a mask in violation of company policy.

This is Employee B's second disciplinary action for violating safety protocol. The first disciplinary action occurred on Dec. 1 when he failed to wear his safety goggles on the production floor.

This is a critical violation on multiple levels. It exposes the company to Occupational Safety and Health Administration fines; it exposes Employee B to COVID-19; and it is inexcusable because Employee B knows better and was previously disciplined for a similar violation.

### **8. Witnesses and Documents For Support**

On Jan. 1, Employee A observed Employee B failing to wear a mask at the water cooler — a common area. On Jan. 2, Employee A reported the conduct of Employee B to Manager C verbally. This was the only occurrence reported/witnessed by Employee A. On Jan. 3, Manager C questioned Employee B in the production office; Employee B confirmed he was not wearing a mask in violation of company policy. HR specialist John Smith was present.

This is Employee B's second disciplinary action for violating safety protocol. The first disciplinary action occurred on Dec. 1 when he failed to wear his safety goggles on the production floor. A copy of that December disciplinary action is attached.

This is a critical violation on multiple levels. It exposes the company to OSHA fines; it exposes Employee B to COVID-19; and it is inexcusable because Employee B knows better and was previously disciplined for a similar violation.

Viola! There is now effective documentation ready to present for the employee's signature.

Make sure the form is dated; and make sure the decision maker involved is the employer representative who signs the form. Often, a supervisor who was not involved will simply sign the form, but the supervisor involved in the situation, here Manager C, should be the one to sign it.

If Employee B disagrees with the contents of the documentation, employers should allow the employee to note his/her specific disagreement on the forms, provide any supporting evidence, and sign the version with those additions. If Employee B declines to sign, that should be annotated noting the date and time that it was presented for his review — and preferably signed by a witness as well.

Effective documentation is readily achievable with attention to detail — and could save employers time and money later when defending a decision.

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[1] See, e.g., *Smelter v. S. Home Care Servs. Inc.*, 904 F.3d 1276, 1291 (11th Cir. 2018) (affirming district court's grant of summary judgment to employer on discrimination and retaliation claims where employer had sufficiently documented employee's performance issues and reasons for termination).

[2] 777 F.3d 955, 956 (7th Cir. 2015) (reversing summary judgment where employer lacked documentation establishing when the termination decision was made).