



# Top 10 Supervisory Survival Tools For 2013

Insights

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As the new year unfolds, supervisors may have even less time to manage all the complexities that arise in the world of employment law. With goals and deadlines to meet, well-intentioned managers may be tempted to rely on experience and “common sense” to guide them. Unfortunately, this approach often creates headaches and even litigation, despite managers’ good intentions.

Today’s alphabet soup of employment laws (ADA, ADEA, FMLA, OSHA, NLRB, etc.) is simply too vast and complicated for most supervisors to digest on their own. Other issues are so subtle or counterintuitive that even seasoned HR professionals can find it difficult to recognize and/or deal with them.

But there is a silver lining to this cloud. A few basic practices can help supervisors avoid many problems, or at least recognize when to turn to HR for guidance. With this in mind, here is our “Supervisor’s Top 10 Survival Rules for 2013.”

### **1. *Always tell employees the truth***

This rule encompasses more than avoiding outright falsehoods. Instead, it emphasizes the importance of making sure that employees always know how you assess their job performance. Of course this includes telling employees what they are doing well. But perhaps even more important, it means telling them how and where they are not meeting expectations. While many supervisors may prefer to avoid delivering “bad news,” this rule is an increasingly critical aspect of their jobs.

Performance evaluations illustrate this point. Audits routinely show that well over half of all evaluations rate employee performance above average, a *de facto* impossibility. Unfortunately, evaluations that overrate employees’ job performance can be devastating during litigation. Judges and juries are generally unsympathetic toward supervisors who suggest that they did not really mean what they wrote on a performance evaluation. This simple rule is so important that companies should consider discontinuing annual performance evaluations unless they can be done accurately and honestly.

### **2. *Communicate clearly and directly***

Going a step beyond Rule No. 1, supervisors should expect employees to do their jobs and cannot let “politically correct” language obscure their message. Specifically, they must communicate clearly without being insensitive or disrespectful.

For example, instead of telling an employee that he or she has an “opportunity” to improve, identify what specific aspect of performance is below expectations and what must be done to improve. Offer to assist, but make it clear that you expect improvement. When documenting these communications, be succinct and explicit. Always try to address, “who, what, when and why.” (As simple as it seems, this includes ensuring that documentation is legible, dated and signed where appropriate.) This rule applies to policy violations, poor attendance and simple coaching or reminder sessions.

### **3. Avoid surprises**

Many lawsuits result from anger or hurt feelings, which may be the result of an employee being surprised by disciplinary action or a termination. Remember, a supervisor’s silence is typically interpreted as approval. But if communication is consistent, clear, and direct, employees should never be surprised by disciplinary action. They may not agree with the supervisor’s decision, but they should never be able to say truthfully that they did not see it coming.

### **4. Always get both sides of the story**

It’s surprising how often supervisors violate this simple rule. As a practical matter, there should be no exceptions to it. No matter how egregious or clear-cut the facts appear to be, always give accused employees a chance to tell their side of the story. (The only possible exception might be when there is a legitimate, objective, safety concern that would prevent this from occurring.) Consistent with this rule, do not document conclusions or prepare termination paperwork until the investigation is finished.

### **5. Keep your promises**

And don’t make promises that you cannot keep. Supervisors who promise to meet periodically with employees or to provide periodic feedback must do so. Again, jurors are unlikely to forgive supervisors who criticize an employee’s job performance, but fail to abide by their own follow-up schedule. So do not set deadlines or timetables that you cannot meet. Instead, maintain some flexibility. And don’t make oral promises such as, “as long as you do your job, you will always have a place here.” In some states, these promises can be legally enforceable.

### **6. Do not ignore protected status in making employment decisions**

At first blush this rule may seem illogical, but when considering disciplinary action it is always important to consider how you have handled similar situations in the past. If an employee in a protected classification (race, sex, religion, age, disability, etc.) is treated differently under the same circumstances from someone who is not in the protected class, supervisors and HR must be able to justify the reasons clearly.

When considering which employees fall in a protected classification, don’t overlook employees who recently took FMLA leave, sought an accommodation under the ADA, or provided information in response to an investigation of alleged workplace discrimination. These activities protect employees from retaliation and likewise require consideration of comparable situations where no employee had engaged in protected activity.

## **7. Think before hitting “send”**

Email traffic provides increasingly fertile ground for both sides in employment cases. Supervisors must therefore recognize that their email messages are potential trial exhibits. A quick, off-hand message has the potential to be extremely embarrassing if presented, out of context, to a jury. Therefore, it is never a good idea to fire off quick responses, especially when emotions are running high. Wait a few moments before hitting “send” – and be especially carefully about using the “reply to all” button.

## **8. Document important facts when they’re still fresh**

Important details can easily get muddled in today’s fast-paced work environment, so make a habit of jotting down those key facts when they occur. When doing so, be sure the documentation is dated, legible and understandable (see Rule No. 2). Always include objective language describing “who, what, when, where, why” and identifying any witnesses. Identify the author of the documentation. Sometimes nothing can be more difficult than retrospectively trying to determine who prepared unsigned material.

## **9. Send it to HR**

When supervisors keep files containing notes or information that has not been forwarded to HR, it almost always creates problems when litigation ensues. This can force the employer to change a representation it has already made to the EEOC or plaintiff’s counsel.

More importantly, it can support a plaintiff’s contention that the supervisor (who is usually the alleged wrong-doer) cannot be trusted or is hiding something. On a related note, always refer employment verification and reference inquiries to HR, who will ensure companywide consistency in responding.

## **10. Never forget that you are the boss**

Even during meal breaks, after hours, on weekends, or away from the workplace, supervisors still carry the mantle of company authority. Unguarded, inappropriate, or “joking” comments can and do come back to haunt supervisors who forget this. When an employment relationship goes bad, seemingly innocuous comments often emerge. Comments made in jest rarely look good in front of a jury. This is a critical and sometimes painful lesson for supervisors to learn.

## **Bonus Rule 11**

Always strive to be fair, considering, “how would this look to a sceptical third party (like the EEOC or a jury) who knows nothing about me or the employee?”

The workplace is complex and demanding, especially for supervisors striving to meet deadlines, maintain positive employee relations, and avoid legal pitfalls. While they are not a “cure all,” these Survival Rules for 2013 can help supervisors manage more effectively and save considerable time by keeping many small issues from mushrooming into big ones.

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