



# Five Documents Sure To Appear In Your Lawsuit

Insights

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Although simple and oftentimes overused, sports metaphors can provide insight into complicated topics. When it comes to employment litigation, cases often boil down to “blocking and tackling.” In other words, the fundamental (but unglamorous) activities often make a far greater difference than sophisticated lawyering.

Employment litigation can easily prove both complicated and time consuming. Interpretations regarding legal concepts often evolve rapidly, based on court decisions, agency interpretations, or actions by Congress or state legislatures. And even though claims are based on these changing laws, basic documents created by an employer lie at the core of an employment dispute. In litigation, these documents can make the difference between success and failure.

## The Big Five

Five key documents arise most frequently, especially in cases involving an alleged adverse employment action: the job description; the handbook; performance evaluations; disciplinary documents; and responses to administrative charges. They vary in importance depending on the claims asserted and the underlying issues, but they’re almost always included among documents produced in employment litigation.

In fact, these documents are included in the “Pilot Project Regarding Initial Discovery Protocols For Employment Cases Alleging Adverse Action,” which some Federal District Courts are already requiring. This program introduces pre-trial procedures aimed at encouraging efficient and less costly discovery. The Pilot Project accepts that there is a core set of documentation exchanged in litigation and asks that a mandatory list of documents be exchanged even without a request by the employee’s counsel.

Included in the mandatory list are the following: 1) “Job description(s) for the position(s) that the plaintiff held”; 2) “Workplace policies relevant to the adverse action in effect at the time of the adverse action” and “The table of contents and index of any employee handbook...”; 3) “The plaintiff’s performance evaluations...”; 4) “The plaintiff’s...formal discipline” and “Documents concerning the... termination...of the employment relationship at issue in this lawsuit”; and 5) “Responses to... administrative charges and complaint by the plaintiff that rely upon any of the same factual allegations or claims as those at issue in this lawsuit.”

Absent the Pilot Project, any diligent plaintiff's attorney will surely request these documents. So, knowing that these documents will most certainly be read by an employee's lawyer, a judge, or a jury – why not make certain that they are going to help make a potential litigation successful?

Like tackling and blocking in football, these documents are fundamental but not glamorous – generally requiring meticulous drafting or frequent revision. The impact that they make in litigation, however, can lead directly to success or defeat. Let's take a closer look at each.

## **Job Descriptions**

Of the five documents, job descriptions are often the most overlooked. With positions often evolving or with companies changing structures, it can be difficult to keep up with an employee's core duties and functions.

But a fundamental question in litigation is going to be, "What did this person do?" Although a supervisor can provide this information through testimony at a later time, it is always best to have a contemporaneous document that clearly sets out both the employee's job duties and expectations.

This information can prove important for various reasons. With respect to claims for failing to either hire or promote an employee, the duties that the employer felt the applicant could not successfully accomplish serve as a central issue. The essential functions of a job are an important aspect in many litigations involving the Americans with Disabilities Act.

Although not determinative, the job description helps in establishing duties or responsibilities in misclassification claims under the Fair Labor Standards Act. In unlawful discrimination or retaliation claims where an employer terminated an employee because of failure to properly execute job duties, it's helpful to have documentation establishing that the employee was indeed the one responsible for fulfilling the duties in question.

Let's say you fire a salesperson for failing to achieve consistently positive customer satisfaction scores – it is helpful in subsequent litigation to use the job description as a basic document to establish that you expected the employee to achieve such scores, and that the employee understood the expectation. Although such an expectation may appear obvious to a manager or human resources representative, a third-party who later evaluates the claim may not be familiar with your business or expectations.

## **Handbooks**

Handbooks serve a critical role in any place of employment since they set out basic policies for employees. Unfortunately, however, handbooks can negatively impact employment litigation as much as they can help support important arguments.

Handbooks often serve as the document establishing that the employer has policies prohibiting the conduct the employee complains about, such as policies on equal employment opportunities, medical leave, and requesting accommodations. Clear policies regarding reporting potential

harassment or discrimination underpin important legal defenses – especially when employees fail to use reporting avenues.

But a handbook that fails to provide succinct and relevant policies does not serve as good guidance for employees; it even poses a danger during potential litigation. This most often occurs where handbook policies set out intentions or expectations that are not consistently applied or were not applied properly in the events resulting in the lawsuit. This could involve policies related to attendance, tardiness, or general expectations regarding behavior.

Of course, policies should be updated and revised regularly. Even if there is no discriminatory motive, a manager's reliance on an outdated – or unlawful policy – will undoubtedly assist an employee in mounting a challenging case. For example, a manager may terminate or discipline an employee based on a policy that prohibits employees from discussing their pay with coworkers. In a subsequent Title VII litigation, the manager may not have intended to discriminate against the employee based on race or gender, but the policy applied violates the National Labor Relations Act. Even though the NLRA is not at issue in the litigation, it still creates an uncomfortable circumstance where you may be left to argue that you did not violate Title VII but may have violated the NLRA.

Many times handbook revisions should include trimming down the existing document. Handbooks sometimes become the storage place for an overabundance of policies or procedures (some of which are best kept in a separate operations manual), which could provide a roadmap for counsel to explore areas that might not arise otherwise.

## **Performance Evaluations**

Performance evaluations are routine documents usually included in an employee's personnel file. This document becomes important in cases involving a termination for poor performance. In such a circumstance, the performance evaluation can either support the decision or serve to raise suspicions that an attorney can exploit.

Often times, a manager's reluctance to provide an honest and thorough evaluation results in documents stating that most employees are "meeting expectations" or "exceeding expectations." This high rating will pose a contradiction when trying to convince a jury or judge that, in reality, the employee was actually not meeting expectations. A skeptical third party will likely take these documents at face value and believe that the employee met expectations or exceeded expectations. If the manager has to explain the inconsistency by admitting that the evaluation is inaccurate, a judge or jury may surely begin to question whether the manager is being truthful.

## **Disciplinary Documents**

Disciplinary documents or termination sheets generally serve as a key piece of evidence detailing the employer's reasons for taking the actions that the employee claims were done for discriminatory or retaliatory motives.

If the adverse action involved a termination, the termination sheet will unquestionably be a key document. A clear explanation of the reason for the termination that is articulated at the time the event occurred can help anchor your credibility.

But when managers create these documents they may not have potential litigation in mind. This can result in vague shorthand comments such as “policy violation” or “not following directions.” Where the sheet provides options for a manager to check off the reason for the termination, filling out this information in a hurry could result in selecting an inaccurate reason.

For example, the manager might select “policy violation” instead of “insubordination” where an employee has refused a direct order. Although a vague comment or an error in selecting a reason do not prove fatal to a litigation, they create scenarios where opposing counsel can exploit the error. These mistakes or oversights can be used to both question managers’ credibility or embarrass them by forcing them to admit that they were careless.

### **Response To Administrative Charges**

Responses to administrative charges, such as statements of position to the Equal Employment Opportunity Commission, differ from the other documents discussed since they are created after the underlying facts have taken place. These responses also usually incorporate the other common documents as exhibits or sources of information. Such responses are critical since they serve as precursors for the story that the employer will flesh out in litigation.

Since they serve as the initial opportunity for an employer to address allegations of unlawful conduct, these responses have long-lasting effects. Such documents lock the employer into certain positions. In other words, if a termination or disciplinary decision is not articulated accurately or fully in a response, clarifying or elaborating upon the reasoning at a later time may appear suspicious. Using the “blocking and tackling” metaphor here, responses to administrative charges should be concise and simple, addressing the allegations directly and accurately.

### **The Bottom Line**

To sum up, the legal environment is often changing and uncertain. Nevertheless, these fundamental documents will usually appear during an employment litigation, and the time and effort spent in drafting them will reduce later difficulties.

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