

# GETTING IN FRONT OF THE 8-BALL

## HIRING CHECKLIST

- What job needs to be filled?
- Is there a job description on file?
- Must a job description be created?
- Is the position budgeted for?
- Are there job requisition requirements?
- What are the job selection criteria?
- Will the job be internally posted? If so, where?
- Will the job be externally posted? If so, where?
- Will you need to use a recruiter? Who?
- Who will be on the interview team?
- Are there any interview parameters or designated questions?
- Have you trained your interviewers and provided guidance?
- Review applications and resumes?
- Who is in charge of social media?
- Have social media protocols been put into place?
- Set up Interviews
- Perform background searches and reference checks on top candidate or two
- Notify successful candidate
- Notify unsuccessful candidate
- Complete initial hire paperwork
- Review job description with new hire
- Review policies and procedures and start date with new hire

## GETTING IN FRONT OF THE 8-BALL

- Set up all personnel files
- Prepare team introduction to new hire
- Prepare work environment for new hire
- Prepare for new hire training
- Retain all documents as required by document retention

# GETTING IN FRONT OF THE 8-BALL

New Position Form					
Date _____					
Position to be filled: _____					
Job Description Reviewed/Updated:		Yes	<input type="checkbox"/>	No	<input type="checkbox"/>
Posting Plan:	Internal	Yes	<input type="checkbox"/>	No	<input type="checkbox"/>
	External	Yes	<input type="checkbox"/>	No	<input type="checkbox"/>
	Recruiter	Yes	<input type="checkbox"/>	No	<input type="checkbox"/>
External Posting Plan:					
_____					
_____					
_____					
_____					
Job Selection Criteria					
_____					
_____					
_____					
_____					
Interview Team					
_____					
_____					
_____					
_____					
Interview Team Trained		Yes	<input type="checkbox"/>	No	<input type="checkbox"/>
Interview Questions Selected					
_____					
_____					
_____					
Social Media Review		Yes	<input type="checkbox"/>	No	<input type="checkbox"/>
Reviewer: _____					
_____					

## GETTING IN FRONT OF THE 8-BALL

New Employee Checklist						
Name of Employee:						
Date Hired						
Rate of Pay						
Job Description						
Department						
Requirements				Date	Initials	
Explained Pay Schedule						
Explained Benefits						
Explained PTO						
Explained Dress Code						
Explained Performance Review Process						
Introduced to Team						
Given Tour of Facility						
Given Handbook						
Policy Sign-offs Obtained						
Completed W-4						
Completed I-9						
Administered Pre-Employment Tests						
Provided Needed Passwords						
Obtained Direct Deposit Form						
Obtained Emergency Contact Form						
Obtained Insurance Forms						

## GETTING IN FRONT OF THE 8-BALL

### **REASONABLE ACCOMMODATION REQUEST CHECKLIST**

- Recognize the request
- Talk to Employee
  - Don't editorialize
- Talk to Supervisor
- Gather medical data (if needed)
- Review past accommodations given
- Evaluate requested accommodation
  - Cost
  - Impact
- Offer alternatives (if needed)
- Document selected accommodation (if any)
- If no accommodation, determine next steps
- Monitor success of accommodation
- Document, document, document
- Maintain documentation

# GETTING IN FRONT OF THE 8-BALL

REASONABLE ACCOMMODATION REQUEST FORM			
Employee Information			
Name		Request Date	
Address		Department	
Address		Job Title	
City/State/Zip		Supervisor	
Telephone Number		Appeal Date	
Request for a Reasonable Accommodation			
Please answer the following questions to assist us in understanding the basis and nature of your request for a reasonable accommodation (attach additional sheets if necessary)			
<p><b>A. Indicate the physical or mental limitation(s) and expected duration of limitation(s). It is not necessary to indicate a medical diagnosis or condition.</b></p>			
<p><b>B. Explain how the limitation affects the ability to perform one or more essential functions of the job:</b></p>			
<p><b>C. List accommodation(s) requested in order to perform essential functions of the job:</b></p>			
<p><b>D. Has a medical care provider recommended a specific accommodation? Yes _____ No _____.</b>  <b>If Yes, please attach a copy of the recommendation(s).</b></p>			
Signature			
Employee Signature _____		Date _____	
<b>TO BE COMPLETED BY HUMAN RESOURCES DEPARTMENT ONLY</b>			
Accommodation Granted?	Yes <input type="checkbox"/>	No <input type="checkbox"/>	
Employee Signature _____		Date _____	
Alternative Request for a Reasonable Accommodation or Appeal of Denial			
<p><b>A. Would you like to appeal the denial of your request for an accommodation? Yes _____ No _____</b></p>			
<p><b>B. If No, list alternative accommodation(s) requested in order to perform essential functions of the job:</b></p>			
<b>TO BE COMPLETED BY HUMAN RESOURCES DEPARTMENT ONLY</b>			
Alt. Accommodation Granted?	Yes <input type="checkbox"/>	No <input type="checkbox"/>	
<p>The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information," includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assisted reproductive services.</p>			

Cat Burgett  
 Annee Duprey



# GETTING IN FRONT OF THE 8-BALL

## CONDUCTING INTERNAL INVESTIGATIONS

Conducting an internal investigation can be a very complex matter, but one that is extraordinarily important in the employment context. It is also the only reasonable approach when a corporation is confronted with allegations of wrongdoing. One of the first issues to address is deciding who should conduct the investigation. That choice depends on the goals of the investigation.

Several situations may prompt an employer to consider conducting an internal investigation, including:

- A formal employee complaint;
- Harassing, threatening, intimidating or violent behavior;
- An administrative agency inquiry or subpoena;
- Receipt of a summons for a lawsuit.

A good practice is to involve in-house or outside counsel whenever the situation might reasonably lead to some sort of legal proceeding. Counsel may direct the investigation to preserve the confidentiality of the interviews and notes.

The tips that follow provide a general overview of various aspects of an investigation triggered by a harassment complaint. They can be modified as needed, to correspond with other types of investigations.

### **I. Preliminary Matters**

- A.** Determine the goals of the investigation and pay particular attention to the intended “audience” for the report and the consequences surrounding the type of misconduct at issue. Ensure that the objectives of and manner of conducting the investigation are consistent with the employer’s legitimate business needs.
- B.** Assess the potential disadvantages of an investigation. Even when the investigation is required by law, potential risks exist and should be identified. For example, the investigation could lead to adverse publicity or unintended discovery of other confidential corporate matters.
- C.** Consider what those involved in the investigation should be told regarding the confidentiality of the investigation.
- D.** Consider suspension of the accused employee, with or without pay as allowed by law, as a way to remove the employee from the work place pending the results of the investigation.
- E.** Consider placing the alleged victim on paid administrative leave as a means of removing that employee from the workplace.

## GETTING IN FRONT OF THE 8-BALL

- F. Avoid conditioning discipline or discharge solely on the results of an investigation or legal proceeding which is outside of the employer's control.
- G. Conduct yourself in a manner that recognizes all parties have rights. Do not assume either party is "right."
- H. Suspend all document (including electronic) destruction procedures and notify employees of same.
- I. If counsel becomes aware of the possibility of a criminal investigation, employees should be notified of their rights.
- J. Select the appropriate investigator, both in terms of position and the person's reputation for honesty and credibility. Remember that the investigator will be a key witness in any subsequent litigation that might follow from the complaint being investigated.
- K. Set a timeline that includes each step of the investigation and a completion date. The chronology of interviews can either contaminate or enhance the success of the investigation. A contingency plan should be devised in case a premature disclosure jeopardizes the investigation strategy.

### **II. Documents**

- A. By compiling and reviewing documents prior to conducting interviews, the interview of witnesses can be done more efficiently. Relevant documents may include: rules, policies, procedures, supervisor notes or memoranda regarding the incident, time cards, logs or diaries, expense reports and receipts, communications to employees, prior complaints, personnel and security files, samples of the employee's work and others' for comparison, and computer audit trails, if available.
- B. Maintain "evidence" in a separate file. Access should be guarded and limited. Other than working drafts, documents should not be destroyed once the investigation has begun. Investigation records should be retained for at least one year after the date of the complaint, or longer if counsel determines it would be necessary.
- C. Detailed notes should be made of all interviews and kept in the evidence file. Be as factual and as complete as possible. For example, instead of writing "witness confirmed employee X harassed employee Y," state "witness saw employee X standing too close to employee Y, that he put his arm around her, and employee Y pulled away."
- D. Determine if there are any previous complaints concerning either the complaining employee or the accused.



## GETTING IN FRONT OF THE 8-BALL

- E. The documents reviewed should be noted in a log and organized in a manner that facilitates easy retrieval (*e.g.* chronologically, by subject, by author, etc.). This will depend on the nature of the investigation.
- F. Make sure that you have an effective system for knowing the source of a given document. Keep master list of original documents.

### III. Witnesses

- A. Outline the questions you need to ask each witness, to ensure a thorough and consistent line of questioning.
- B. Explain the company's position regarding discrimination and harassment to all witnesses and how seriously the company takes such matters.
- C. Advise complaining employees that if they later feel that they have been retaliated against in any way, they should contact management.
- D. Tell all witnesses that retaliation is strictly prohibited.
- E. Generally, the complaining employee should be interviewed first in order to gather the facts underlying the complaint.
- F. Obtain details regarding the alleged discrimination or harassment. Determine the effect the alleged conduct has on the complaining employee.
- G. When discussing allegations during an investigation or questioning individuals, avoid broad accusations or labels. Instead, provide a descriptive version of the facts.
- H. If a witness cannot be trusted to keep matters confidential and that witness does not have information material to the investigation, think twice before involving that person and risking possible defamation problems.
- I. Determine whether you have willing witnesses. Ask witnesses to commit their statements in writing or submit to video or audio taped interviews.
- J. A statement handwritten or typed by the witness is preferable, but if management types the statement, encourage the witness to make and initial any changes.
- K. Ask witnesses whether they would be willing to testify at a hearing or trial.
- L. Tape record an employee or witness statement only with the employee's permission and confirm their consent on tape.

## GETTING IN FRONT OF THE 8-BALL

- M. Conduct interviews in private. Employees are more candid in private. If bystanders overhear, parties may claim you negligently publicized the incident and invaded their privacy.
- N. Encourage every participant with the need to keep your discussions confidential.

### IV. Interviewing Witnesses

- A. Ask who, what, where, when, how often, how long, and who else has information about the situation.
- B. Do not unnecessarily disclose information to witnesses, particularly those involved only peripherally. Rather than “Have you seen Paul touch Kathy?”, ask “Have you seen anyone touch Kathy and make her uncomfortable?”
- C. Explain the company’s policy concerning harassment and discrimination to each employee witness. Also, explain that the company will not tolerate retaliation in any form against a participant in such an investigation because of the participant’s cooperation with the company in such investigation.
- D. Confine the investigation to relevant facts—even good faith attempts at casual conversation during the course of an investigatory interview can be misconstrued.
- E. Make notes of the complaining employee’s answers to questions, as well as his/her non-verbal conduct, such as jumpiness, crying, agitation, etc.
- F. Determine whether other persons, including persons of the opposite sex, persons of a different ethnic background from the complaining employee, persons of a different religion from the complaining employee, and so on, were subjected to similar conduct by the accused.
- G. Identify the social relationship, if any, between the complaining employee and the accused. This information is most relevant in sexual harassment investigations but can also be important in investigating other forms of harassment.
- H. Determine the time between when the alleged conduct occurred and the time when the complaint was made.
- I. Ascertain what remedy the complaining employee wants, but do not promise to grant it.

## GETTING IN FRONT OF THE 8-BALL

- J.** Always ask the accused employee's side of the story. Document the response. Do not give the appearance of having already decided the case by immediately announcing your decision.
  - K.** Tips for interviewing "the accused"
    - 1.** Present the substance of the complaint, or the observations reported, to the accused. Is there surprise? Anger?
    - 2.** Remember, the accused is innocent until proven guilty.
    - 3.** Go through the details of the complainant's story, step by step, seeking areas of agreement, disagreement, and corroboration by third parties, if any.
    - 4.** Do not merely accept a denial. Probe for the possible motivation for a complainant to make an untrue accusation.
    - 5.** What is the accused prepared to do about the situation? Any suggestions about how this can be resolved?
    - 6.** Regardless of the outcome of your investigation, remind the accused that he or she **must not** take any retaliatory action against the complainant or anyone perceived to have been involved in the investigation.
  - L.** After interviewing the accused, it is important to interview the accused's supervisor. The point of the interview should be to:
    - 1.** Learn about any discipline issues or behavior patterns of the accused.
    - 2.** Ascertain whether the complaining employee reported the conduct to the accused's supervisor.
    - 3.** Ask whether the supervisor has ever received any other complaints about the accused.
    - 4.** Ascertain whether, and how, the supervisor responded to those other complaints, if any.
    - 5.** Determine whether there is available documentation to support a conclusion that the supervisor knew or had reason to know of the conduct.
- 1. Evidence**
- A.** Once "official action" is taken, it should be reflected in the personnel file of the accused and complaining person.
  - B.** Obtain statements of persons who were identified as witnesses by the complaining employee or by the accused. Be aware of such person's possible reluctance to speak with the investigator because of fear of retaliation.
  - C.** Tips for evaluating conflicting stories, documents, or other evidence:

## GETTING IN FRONT OF THE 8-BALL

1. Search thoroughly for corroborative evidence by co-workers or supervisors.
2. Is corroborative evidence lacking under circumstances where it logically should exist?
3. Is the account of the incident sufficiently detailed and internally consistent as to be plausible?
4. Have there been prior, similar allegations against the accused?
5. Are there reasonable explanations to account for any inconsistencies? If so, identify them in your notes.

### 2. Attorney-Client Privilege

- A. Work with legal counsel to protect notes, interviews and reports from disclosure.
- B. If complaint is such that you might reasonably anticipate a legal proceeding to follow, make sure all witnesses know that your discussions are subject to attorney-client privilege.
- C. Explain that the privilege belongs to the corporation, and that you cannot promise to keep anything the employee says confidential from the corporation's counsel or corporate officers involved in the investigation.
- D. Only corporate officers and directors may waive the privilege, but it can be waived voluntarily or involuntarily. Accidental or inadvertent disclosure is usually considered a complete waiver.
- E. To preserve attorney-client privilege for the communications documented during the investigation, the following factors should apply:
  1. the communications were made by corporate employees to counsel;
  2. the communications were made at the direction of corporate superiors in order for the company to obtain legal advice from counsel;
  3. employees were aware that these communications were being made in order to obtain legal advice;
  4. the information provided was not available to upper management;
  5. communication concerned matters within the scope of the employee's duties; and
  6. communications were confidential when made and were kept confidential by the company.
- F. In house counsel often play a dual role of lawyer/manager. If the lines are blurred, communications with in house counsel may not be considered for purposes of obtaining legal advice, and the communication may not be privileged.

## GETTING IN FRONT OF THE 8-BALL

### 3. Investigation Results

- A. All communications must be limited to those persons with a legitimate need to know.
- B. Prompt remedial action is almost always better than stonewalling and hoping that time will heal the wound.
- C. In situations where the misconduct was contrary to the employer's rules or was engaged in by someone acting outside the scope of his employment, prompt remedial action and disavowal of the action by the employer is necessary in order to limit liability.
- D. Resist the urge to issue a general memorandum or give an explanation to all employees at the conclusion of an investigation which has lead to the discipline or termination of an individual. Be extremely cautious when contacted for references by a prospective employer if an individual has been terminated.
- E. **Follow Up.** Make sure that corrective or remedial action has taken place and that the person who initiated the investigation has not been the victim of retaliation. Make sure you inform the accuser of the results (if not the specifics) of the investigation.

## GETTING IN FRONT OF THE 8-BALL

### **FMLA LEAVE REQUEST CHECKLIST**

- Recognize the request
- Check employee's hours
- Check number of employees at worksite
- Check months of employment for employee requesting leave
- Check other FMLA leaves for same employee
- Send eligibility notice within 5 days
  - Include medical certification
  - Include rights and responsibilities
  - If not eligible, state at least one reason why
  - Tell employee consequences if not returned
  - Maintain proof it was sent
- Calendar due date for certification
- Send follow-up when late (maintain proof)
- Send Designation/Denial/Request for More Information/Request for 2nd Opinion
  - Designation
    - Within 5 days
    - Substitution of leave requirements
    - Fitness for duty requirements
    - Amount of leave designated and counted
  - If request for clarification or authentication, give employee 7 days to cure
    - Tell the employee in detail what is missing
    - If not cured, you can call the doctor or deny the leave
  - Denial
    - Put it in writing
  - Request for Second Opinion
    - In writing
    - Find a suitable doctor (not a hired gun)
    - Tell the employee they will have to send medical records or consent to their release
    - Explain the process
    - Count the leave (for now)
- Inform the employee of any call off requirements and consequences
- Talk to the employee about benefits and premium payments

## GETTING IN FRONT OF THE 8-BALL

- Protect against scavengers
- Inform the supervisor of the need for leave (not the reason)
- Work with supervisor re: replacement or work adjustment
- Is another position a viability?
- Teach the supervisor how to track/report the leave and what to look for
- Track the leave
- Be on the lookout for patterns or evidence of abuse
- Calendar recertification date (if needed)
- Calendar return to work (if needed)
- Set up trigger when leave is running out
- Maintain documentation in medical file

# GETTING IN FRONT OF THE 8-BALL

FMLA WorkSheet					
Name					
Employee ID					
Date of Hire			Department		
Contact Date			Supervisor		
Method of Contact			Job Position		
Home Address					
Reason for Request					
Expected Date Leave Begins					
Expected Date Leave Ends					
Intermittent?	Yes	<input type="checkbox"/>	No	<input type="checkbox"/>	
Leave Balances as of _____			Projected		
Sick					
Vacation					
Personal					
Holiday					
STD					
On Company's Insurance	Yes	<input type="checkbox"/>	No	<input type="checkbox"/>	
Employee Share of Premium					
Eligible for FMLA Leave	Yes	<input type="checkbox"/>	No	<input type="checkbox"/>	



## GETTING IN FRONT OF THE 8-BALL

<b>Meeting with Employee</b>					
					Initials
Employee Request for Leave - Signed					
Notice of Rights and Responsibilities					
Medical Certification Provided					
Date Medical Certification Due to HR					
Explain Benefits Continuation					
Explain Call in Procedures					
Explore Internal Transfer					
Explain paid leave running concurrently					
Explain RTW Requirements					
Designation Notice Provided					
Deadline near exhaustion of leave for HR to contact employee:					
Date Employee Returns					
Return to Work Obtained					
Work Restrictions, if any:					
Completed By:					

## GETTING IN FRONT OF THE 8-BALL

### **JOB DESCRIPTION AUDIT CHECKLIST**

- Announce audit
- Gather the job descriptions
- Compare job descriptions with actual jobs listed
- Compile list of jobs without descriptions and descriptions without jobs
- Review descriptions
- Interview supervisor
- Interview employees
- Revise job description – job related
  - Job Title
  - Department Name and Reporting Relationship
  - Job Summary
    - A one-paragraph explanation
    - Explain why the position exists in the organization – what is the job’s purpose?
    - View from 30K feet
  - Essential Functions
    - The ADA gives three reasons why a function is essential:
    - The position exists to perform the function. If a hospital needed someone to operate an X-Ray machine – operation of the machine would be an essential function
    - There are a limited number of employees available to perform the function.
    - In a one person office, the ability to answer the phone would be essential
    - The function is highly specialized and one person is hired for their special expertise.
    - A piano tuner in a concert hall
  - Nonessential Functions
    - These must be listed separately from essential functions and labeled as “non-essential”
    - This is where the “wish list” for each job is described

## GETTING IN FRONT OF THE 8-BALL

- Job Specifications ( i.e. Education, Physical Demands, Mental Demands, Working Conditions)
  - Describe any requirements/standards related to the essential functions
  - These standards include:
    - Process Standard
      - What methods, techniques, procedures and tools are used?
      - How much physical exertion is required? (including but not limited to: lifting, standing, bending, reaching, twisting and crawling.)
      - Is the process an essential part of the activity? (i.e. reading, seeing, verbal, etc.)
    - Time Standard
      - How much time is allowed to perform the function?
      - Is the pace consistent?
      - How many employees are available to perform this particular job or job function?
    - Quantity/Frequency Standard
      - How often is the function performed?
      - Are the functions performed less frequently as important to success as those done more frequently?
    - Quality Standard
      - How is success measured for the position/function?
      - What happens if the task is done wrong?
      - Are there any pre-set limits (i.e. 2% rejection rate is acceptable)
- Job Requirements
  - Education, physical demands, mental demands
  - Ensure these conform with the employees currently in place
  - Be specific
- Working Conditions
  - What are the environmental, psychological and physiological considerations?
- Supervision/Control
  - How frequently is supervision required?
  - Will the employee be expected to meet goals independently?

## GETTING IN FRONT OF THE 8-BALL

- Qualifications
    - What attributes are required?
    - i.e. personable, self-directed
  - What knowledge is required?
    - i.e. knowledge of GAAP
  - What skills are required?
    - i.e. Fluent in Excel, Access
- Review job descriptions – legal
- Define the task – not how it's performed
  - Disclaimer
    - Nothing in this job description restricts management's right to assign or reassign duties and responsibilities to this job at any time.
    - This job description reflects management's assignment of essential functions, it does not prescribe or restrict the tasks that may be assigned.
    - Job duties are subject to change.
    - Nothing in this job description shall be construed to create a contract for employment.

## GETTING IN FRONT OF THE 8-BALL

### FMLA AUDIT CHECKLIST

- Is your policy up to date?
- Do you have employee sign-offs on the policy?
- Have you set your FMLA 12-month “year”?
- Does your FMLA packet for employees contain:
  - Your policy
  - The DOL’s R&R
  - Eligibility Notice
  - Medical Certification
- Are your posters in the right place?
- Are your posters current?
- Are your posters in the right language?
- Are your FMLA forms kept separate from your other files?
- Are they in a locked cabinet?
- Have you trained supervisors on the FMLA? When?
- Do your other policies line up with the FMLA?
- Are you using the DOL’s latest forms?
- Do you utilize the GINA safe harbor language?
- Select a statistically significant sample size and pull FMLA files
  - All forms completed? Accurate?
  - All notices given?
  - Leave tracked correctly? Consistently?
  - Patterns of abuse?
  - What happened when leave ended?
- Do you have all the records you are required to keep for the required timeframe?

## GETTING IN FRONT OF THE 8-BALL

- Could your FMLA front line personnel pass a FMLA test?
- Utilize a “secret shopper” to test supervision and FMLA responsible employee
- Consider interview with employees who utilized FMLA

## GETTING IN FRONT OF THE 8-BALL

### WAGE AND HOUR AUDIT

- Obtain direction of counsel to make the audit privileged.
  - Audit correspondence will be directed to counsel.
  - You can always waive the privilege later.
- Conduct an initial interview of supervisors and managers.
  - What issues have been raised by employees?
  - Review your job descriptions to begin exempt vs. non-exempt decision (this can change over time)
- Review Payroll Practices
  - What unusual compensation practices do we have?
  - Piece rate? Travel time? Independent contractors?
  - Offsets from compensation?
  - Are we clearly OK on minimum wage?
  - Are you relying on in-kind payments to meet minimum wage?
  - Bonus plans? Generally, must be rolled into overtime payments
- Assess Independent Contractors
  - Is their use a regular part of your business?
  - Do you have contractors who are performing the same functions as employees?
  - Are you in the business of doing what your contractors are doing?
  - How much freedom do your contractors really have?
  - Are they in business for themselves, truly?
  - Is the relationship continuous, such that they're basically paid a salary?
  - Did the contractor substantially invest in tools and equipment?
  - Who chooses the hours of work?
  - How much specialized skill is involved?
  - What do your agreements say?
  - Significant opportunity for profit or loss?
  - When in doubt, convert to employee relationship.
- Assess Exempt Classifications
  - General

## GETTING IN FRONT OF THE 8-BALL

- Compile a list of who you're treating as exempt.
- What categories do they generally fall into?
- How many hours are they working each week?
- Do you have exposure?
- How would you show their hours?
- Salary Basis
  - Are they paid enough?
  - Not less than \$455 per week, with a minimum guarantee, except for doctors, teachers and lawyers, for which there is no minimum
  - Are you improperly docking?
    - You can dock for personal days and for illness after sick time is exhausted
    - You can dock for FMLA time
    - You can dock for partial first and last weeks of work
    - You can dock for any week in which no work is performed
    - You can dock for infractions of safety rules of major significance.
    - You can dock for disciplinary full day suspensions for infractions of certain workplace conduct rules, imposed pursuant to a written policy applicable to all employees
    - You cannot dock for partial day absences, except for FMLA and 1<sup>st</sup> and last weeks of work
    - You cannot dock for jury duty or witness duty
    - You cannot dock for lay-offs
    - You cannot dock if work is performed that day
- Duties – Executive
  - Primary duty is management. All typical management duties would qualify. No bright line percentage test on performing non-exempt duties. 50% or more on management duties, though, is good
  - Of a customarily recognized department or subdivision - with a subpart of a business that has an ongoing status and continuing function within the company
  - Customarily and regularly directs the work of two or more other employees. Supervision/direction must occur normally and recurrently in every workweek



## GETTING IN FRONT OF THE 8-BALL

- Has authority to hire or fire other employees or whose suggestions as to status changes are given particular weight
- Duties – Administrative
  - Primary duty is the performance of office or non-manual work directly related to the employer's management or general business operations or the employer's customers, not on a manufacturing production line or selling a product in a retail or service establishment
  - Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance, which involves the comparison and evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered
- Duties – Professional
  - Primary duty is performance of work requiring advanced knowledge in a field of science or learning, predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment
  - Customarily acquired by a prolonged course of specialized intellectual instruction, which generally restricts the exemption to professions where a specialized college degree is a standard prerequisite for entrance into the profession
  - Alternative - Primary duty is the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor
- Other Exemptions?

### Assess Written Documents on Exempt Status

- What do your personnel policies say about docking for absences?
- What do your job descriptions say?
- Do they track the language for the exemption?
- Have you adopted the safe haven language? (You invite complaints and you correct mistakes.)
- Have you addressed suspensions and major safety infractions?

### Hours Worked Issues?

- To get paid, employees do not have to be required or even requested to work
- Anything suffered or permitted is work time if the employer knows or should know about it
- Are non-exempt people working hours they aren't writing down?

## GETTING IN FRONT OF THE 8-BALL

- Do our policies address the fact that overtime must be approved by management?
  - Are people working through their lunch periods and not getting paid for them?
  - Preliminary or postliminary activities?
  - Overnite travel and day travel?
  - When does the workday begin and when does it end?
- Volunteers
- An employee, generally, cannot volunteer for you.
  - An individual, if you're a regular business, cannot volunteer for you.
- Issues with paid breaks?
- Retaining Documents?
- Are employees paid appropriately?
- Review time cards?
- Too uniform?
  - Missing?

## GETTING IN FRONT OF THE 8-BALL

### PERFORMANCE IMPROVEMENT PLAN

- Listen to Supervisor
- Review personnel file
- Verify complaints
- Investigate prior interventions
- Research similar PIPs
- Plan pre-meeting with supervisor to review protocols
  - What
- Plan meeting with employee
  - Set date, time, and location
  - Set obtainable action items
  - Designate length of PIP
  - How will success be measured
  - Can the PIP be extended?
  - What happens if the employee doesn't pass PIP
  - Plan for contingencies
    - Allegations of harassment and discrimination
    - Defense
    - Quit
    - Tears
    - Excuses
    - ADA issues
    - FMLA issues
- Conduct the PIP meeting
  - Be clear
  - Do not apologize
  - State what will happen if the PIP is not passed
  - Do not get sidetracked, set up additional meetings if needed
  - Focus on the performance, not the employee
- Follow-up with supervisor and employee throughout the PIP time period
- Retain all documents

# GETTING IN FRONT OF THE 8-BALL

Performance Improvement Plan								
Employee Information								
Name _____				Date _____				
Position _____				Hire Date _____				
Supervisor _____				Document Date _____				
Identified Job Performance Concerns								
(e.g. absenteeism, improper conduct, substandard work, not meeting goals, policy violation, insubordination, etc)								
Employee Comments								
Previous Level of Disciplinary Action								
Verbal Warning					Suspension without Pay			
Written Warning					Discharge			
Suspension with Pay					Other _____			
Current Level of Disciplinary Action								
Verbal Warning					Suspension without Pay			
Written Warning					Discharge			
Suspension with Pay					Other _____			
Expected Corrective Outcome and Applicable "Up-To" Time Period to Exhibit Immediate and Sustained Improvement								
Signature								
Supervisor Signature _____				Date _____				
Employee Signature _____				Date _____				
<b>FAILURE TO CORRECT JOB CONCERNS OR IMPROVE PERFORMANCE MAY RESULT IN FURTHER DISCIPLINE UP TO AND INCLUDING TERMINATION</b>								
<p>*Participation in this Performance Improvement Plan ("PIP") does not alter your employment at will relationship with the Company. This Plan is not a contract for employment, hours of work, or the providing of benefits. The designation of a PIP time period does not obligate the Company to retain the employee until the end of, during, or after the specified "up to" time period. If the Company determines, at any time, the employee is not exhibiting the necessary immediate and sustained improvement, or has other performance or misconduct issues, he or she will be terminated.</p>								

# GETTING IN FRONT OF THE 8-BALL

Performance Improvement Plan			
Employee Information			
Name		Date	
Position		Hire Date	
Supervisor		Document Date	
Identified Job Performance Concerns (e.g. absenteeism, improper conduct, substandard work, not meeting goals, policy violation, insubordination, etc)			
Employee Comments			
Assistance to be Provided by Company			
Expected Corrective Outcome and Applicable "Up-Tp" Time Period to Exhibit Immediate and Sustained Improvement			
Signature			
Supervisor Signature _____		Date _____	
Employee Signature _____		Date _____	
<b>FAILURE TO CORRECT JOB CONCERNS OR IMPROVE PERFORMANCE MAY RESULT IN FURTHER DISCIPLINE UP TO AND INCLUDING TERMINATION</b>			
*Participation in this Performance Improvement Plan ("PIP") does not alter your employment at will relationship with the Company. This Plan is not a contract for employment, hours of work, or the providing of benefits. The designation of a PIP time period does not obligate the Company to retain the employee until the end of, during, or after the specified "up to" time period. If the Company determines, at any time, the employee is not exhibiting the necessary immediate and sustained improvement, or has other performance or misconduct issues, he or she will be terminated.			



# GETTING IN FRONT OF THE 8-BALL

Progress Review	
<b>A. Time Period Involved:</b> _____	
Has the employee shown immediate and sustained improvement to warrant continued participation in this Performance Improvement Plan?	
<input type="checkbox"/>	Yes
<input type="checkbox"/>	No
Employee	Date
_____	_____
Supervisor	Date
_____	_____
<b>B. Time Period Involved:</b> _____	
Has the employee shown immediate and sustained improvement to warrant continued participation in this Performance Improvement Plan?	
<input type="checkbox"/>	Yes
<input type="checkbox"/>	No
Employee	Date
_____	_____
Supervisor	Date
_____	_____
<b>C. Time Period Involved:</b> _____	
Has the employee shown immediate and sustained improvement to warrant continued participation in this Performance Improvement Plan?	
<input type="checkbox"/>	Yes
<input type="checkbox"/>	No
Employee	Date
_____	_____
Supervisor	Date
_____	_____
<b>D. Time Period Involved:</b> _____	
Has the employee shown immediate and sustained improvement to warrant continued participation in this Performance Improvement Plan?	
<input type="checkbox"/>	Yes
<input type="checkbox"/>	No
Employee	Date
_____	_____
Supervisor	Date
_____	_____

## GETTING IN FRONT OF THE 8-BALL

### TERMINATION

#### Script for Termination Meeting

- *[Provide the most important of the reasons for the termination. Keep it brief, focused on performance or other non-personal reason, and somewhat open-ended. It's impossible to list every reason for a termination - don't try. As you know, \_\_\_\_\_.* As such, the Company has made the decision to terminate your employment as of \_\_\_\_\_.
- *[If there are appeal rights, provide them, if not:]* This decision is final.
- *[If the employee wants to argue, you should state that the Company has already thought about the decision and that decision is final (if it is). If the employee wants to know who made the decision, tell the employee that it was a Company decision and many individuals were involved. **DO NOT** get into an argument with the employee. If the employee threatens legal action, provide the name of your employment counsel. If the employee raises discrimination, inform the employee that discrimination played no role in the decision.]*
- You will receive your final paycheck on our next regularly scheduled payday, which is \_\_\_\_\_. You will be paid for all time worked through the end of today. The check will/will not include \_\_\_\_ days of vacation. Any expense reimbursements you've submitted as of today will also be included. Once you receive your final paycheck, if you think there are any mistakes, please report them to me as soon as possible.
- Can you please confirm your mailing address? \_\_\_\_\_
- *[If applicable]* We will also be mailing you COBRA forms so you may decide whether you will continue your health insurance.
- *[If applicable]* Additionally, the Company is offering you \_\_\_\_\_ of severance pay in return for your signing our standard separation agreement. *[If applicable]* You have 21/45 days to consider the agreement if you choose to take that amount of time. You also have seven days to revoke the agreement after signing it if you change your mind. Once you have reviewed the Agreement, if you sign it, please return it to General Counsel/HR.
- There is no need for you to finish out the rest of the day, but we do need to get from you any Company property that you may have. If you are unable to remove your personal items today or you have company property at home, please make arrangements with \_\_\_\_\_ to take care of these matters. *[Additionally, we will need your phone to delete all company information].*
  - Keys (building, file cabinets, etc.)
  - Company credit cards

## GETTING IN FRONT OF THE 8-BALL

- Company Cell Phone
  - Laptop computer (retrieve all passwords)
  - All software/application passwords
  - Company documents and supplies
  - Anything kept at your home?
  - Anything else?
- An announcement informing employees of the fact that you are no longer with the Company will be sent on \_\_\_\_\_.
  - *[DO NOT tell the employee that you disagree with or do not understand the decision.]*
  - *[Stick to the script, keep the meeting brief and to the point. You cannot make the employee feel better about the decision.]*
  - Escort the individual out of building and say you will make arrangements for the delivery of any personal property or escort to desk to get personal items.

### **General Advice for Termination Meetings**

- If the employee needs some time to compose himself/herself, either allow the employee to use the room where the meeting has occurred or direct the employee to another room close by.
- Do not force the employee to return to his/her work area or encounter others while visibly emotional.
- Arrange for the departure of the employee and removal of his/her personal property with as little visibility and exposure as possible.
- Give the employee options: collecting his/her personal property before he/she leaves, arranging a later time for pickup, or having his/her property forwarded to him/her.
- Do not use extra security unless truly necessary. But, if necessary, don't be embarrassed to have security present.
- Do not discuss the reasons for termination or the termination interview with anyone except on a need-to-know basis.
- Prepare a short memo to the file summarizing the termination meeting, including attendees, and any issues raised by the employee. If follow-up is needed, document what will be done. Allegations of harassment or discrimination should be investigated.



## GETTING IN FRONT OF THE 8-BALL

- Have a plan for communicating the termination to the rest of the workforce and clients or vendors.
- If litigation is a concern, immediately create a backup of the employee's email, computer hard drive, and any personal drives.
- Arrange to have email and phone calls forwarded to someone else for review.
- If the employee brings up a topic that you cannot answer, respond "I cannot answer that question." If important and it's information you can share, state that you will follow-up after the meeting. Do not interrupt the meeting to find an answer. If the information cannot be shared with the employee, state that the information is confidential and cannot be released.
- IT/Security should disable security and computer access, including remote access, during the termination meeting.
- Consider changing locks, security codes, and passwords for computer system, etc.
- Do not agree to employee requests during the meeting. State that you will look into that and get back to the employee.

### **After the Termination Meeting**

- Calendar the date the employee should return the signed agreement.
- Send employee's final check with all amounts due and owing.
- Send employee required COBRA notice, if applicable.
- Notify insurance carriers of termination (Health, Life, AD&D). Notify former employee in writing that this coverage is terminated.
- Do not discuss the termination with people who have no legitimate business need to know. For those with a business need to know, simply state "Effective today, \_\_\_\_\_ is no long with the company. His job duties will be assumed by \_\_\_\_\_. Please do your part in effecting a smooth transition."
- Discourage gossip about the circumstances of the departure.

## GETTING IN FRONT OF THE 8-BALL

- Anticipate reference requests by making sure that all employees are familiar with the organization's policy for handling such requests.

*\*The contents of this handout are intended to provide information of general interest and should not be construed as legal advice. Questions about individual or state-specific situations should be discussed with the attorney of your choice.\**

000000.0001536 4846-1943-0036v1