

Employment Law Series: Session 3 – Performance Management

Collaborative. Accountable. Authentic.
Legal Solutions for Business Objectives.



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Better as One with Hopkins Carley

Presenters



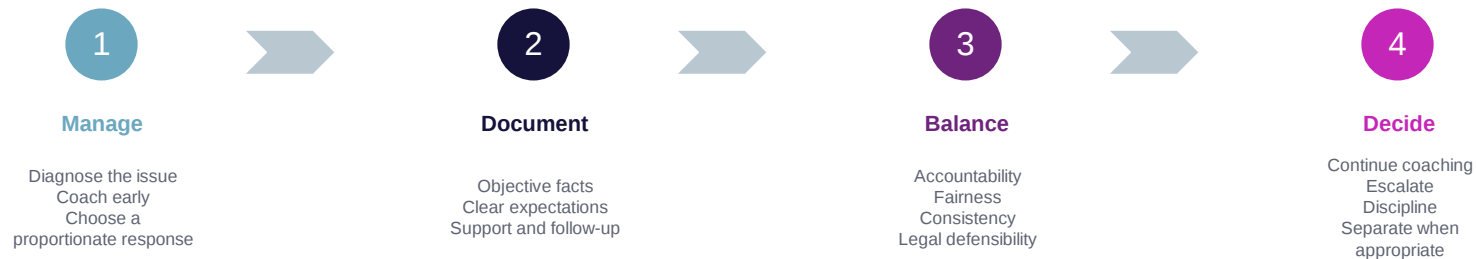
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Today's Performance Management Roadmap

A one-hour framework: manage, document, balance, and decide



Address early. Document objectively. Decide consistently. Escalate intelligently.

First Diagnose the Problem

The response should fit the issue actually presented

Performance

- Missed goals
- Quality or productivity s
- Incomplete or inaccurate work

Conduct

- Policy violations
- Disrespectful behavior
- Failure to follow directions

Attendance

- Tardiness
- Unscheduled absences
- Reliability concerns

Capability / Support

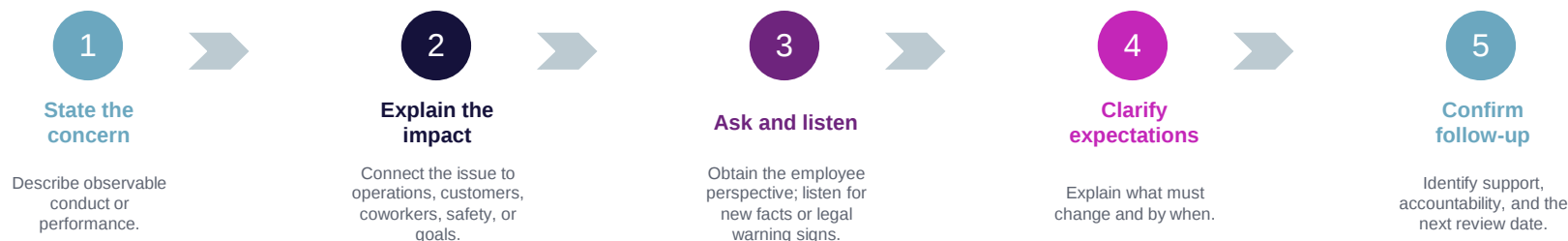
- Unclear expectations
- Inadequate training
- Insufficient resources
- Possible accommodation issue

What problem are we actually trying to solve?

Do not treat every problem as a motivation problem.

A Practical Framework for Difficult Conversations

Specific, respectful, and action-oriented



“I want to discuss a specific concern, understand your perspective, and clarify what is expected going forward.”

Listening does not prevent accountability. It improves decision-making.

Coaching, Counseling, or Discipline?

Match the response to seriousness, history, impact, and likelihood of improvement

Coaching

Early or minor concern
Correctable issue
Clarification, training, or support may help

Corrective Counseling

Repeated concern
Clearer warning is necessary
Defined plan and follow-up

Formal Discipline

Significant or repeated deficiency
Policy violation
Serious or escalating misconduct



Progressive discipline is a management tool, not an automatic formula.

What Would You Do? The High Performer

A top producer is also creating operational and team problems

A top salesperson exceeds every revenue target but repeatedly submits reports late, dismisses administrative staff, and interrupts coworkers. The manager has tolerated the conduct because of strong sales.

High-Risk Response

Keep ignoring the issue; or impose sudden severe discipline without acknowledging prior tolerance.

Lower-Risk Response

Address specific conduct; reset expectations; document the conversation; schedule follow-up; apply standards consistently.

Discuss: Does strong output mitigate conduct? Would another employee be treated the same way?

The Six Elements of Effective Documentation

Write for a neutral reader who was not present

1 What happened?

2 When and where?

3 What expectation applied?

4 What impact resulted?

5 What improvement is required?

6 When will progress be reviewed?

Document facts, expectations, support, and next steps, not frustration.

Documentation: Before and After

Describe conduct. Avoid character judgments.

Ineffective

"Jordan has a bad attitude, is not a team player, and does not seem committed."

Effective

"During the August 14 and August 28 team meetings, Jordan interrupted two coworkers after being asked to allow them to finish. On August 30, the manager explained the expectation of respectful communication. Progress will be reviewed in 30 days."

Observable conduct

Dates

Expectation

Follow-up

Five Documentation Traps

The record should be candid, consistent, and supportable

1. The Surprise

Severe criticism conflicts with prior praise.

2. The Label

Conclusions appear without facts.

3. The Exaggeration

“Always” and “never” exceed the evidence.

4. The Diagnosis

A manager speculates about health, motive, or legal rights.

5. The Moving Target

Expectations change or are applied inconsistently.

If you would not want the statement read aloud to a neutral decision-maker, revise it.

The Four-Part Decision Making

A sound outcome requires both a legitimate reason and a credible process

Accountability

Clear expectations
Timely feedback
Meaningful consequences
Follow-through

Fairness

Employee perspective
Relevant circumstances
Proportionate response
Avoidable surprises minimized

Consistency

Comparable situations
Policy and past practice
Legitimate reasons for differences

Legal Defensibility

Documented business reason
Protected rights assessed
Appropriate review

Would a neutral reviewer understand both the decision and how it was reached?

California Legal Guardrails for Performance Decisions

The same management action can implicate multiple statutory protections

FEHA

No discrimination or retaliation based on protected status or protected activity.
Reasonable accommodation and a timely, good-faith interactive process may be required.

Protected Leave

CFRA, pregnancy disability leave, paid sick leave, and other protected time may affect attendance and timing decisions.

Whistleblower / Labor Rights

Complaints about suspected legal violations, wages, safety, or working conditions may be protected.

At-Will Is Not Risk-Free

At-will status does not permit a decision based on an unlawful reason or in violation of contractual or statutory limits.

See Gov. Code, § 12940, subs. (a), (h), (m), (n); Gov. Code, § 12945.2; Lab. Code, §§ 98.6, 1102.5, 2922.

Who May Investigate a Performance-Related Complaint?

Match the issue to the agency, while recognizing that jurisdiction may overlap

California CRD

FEHA discrimination, harassment, retaliation, accommodation, and CFRA-related matters.

May investigate, facilitate resolution, and pursue legal action.

EEOC

Federal discrimination, retaliation, disability, age, genetic-information, and related charges.

State and federal charges may be dual-filed.

Labor Commissioner / DLSE

Wage-related retaliation, whistleblower protections within agency jurisdiction, equal pay, and other Labor Code retaliation matters.

RCI investigates retaliation complaints.

Cal/OSHA

Workplace safety and health complaints and inspections.

Safety-related retaliation complaints are generally directed to DLSE.

NLRB

Protected concerted activity and unfair labor practice charges, including some nonunion group workplace concerns.

Practical point: Preserve records, identify decision-makers, and coordinate a consistent response across overlapping forums.

Pause and Escalate When Legal Rights May Intersect

Protected activity does not create immunity, but it changes the risk analysis

Complaints

Discrimination, harassment, retaliation, wages, safety, whistleblowing

Leave / Absence

CFRA/FMLA, pregnancy disability leave, paid sick leave, other protected time

Accommodation

Medical disclosure, schedule change, leave, workplace modification

Investigation

Participation, witness activity, disputed facts

Major Action

Suspension, final warning, termination, high-visibility employee

Timing, documentation, consistency, and decision-maker knowledge matter.

What Would You Do? Performance and a Medical Disclosure

Separate past performance from prospective accommodation obligations

An employee has missed deadlines for two months. During a planned written-warning meeting, the employee says a medical condition and treatment schedule are affecting work and requests two remote-work days per week.

Continue Managing

Address documented performance through the date of disclosure. Clarify essential expectations and avoid excusing unrelated misconduct.

Pause and Escalate

Do not demand a diagnosis or reject the request on the spot. Engage HR and begin an individualized interactive-process assessment.

Evaluate Prospectively

Assess effective accommodations, essential functions, operational impact, and whether another accommodation may work.

Legal requirement: timely, good-faith interactive process when triggered. Best practice: document both tracks separately.

When Should a Manager Escalate?

Escalation means informed review, not the end of accountability

Immediate Escalation

- Safety or violence concern
- Serious harassment allegation
- Whistleblower or retaliation concern
- Serious misconduct
- Proposed suspension or termination

Prompt HR Review

- Leave or accommodation issue
- Repeated failure
- Disputed material facts
- Inconsistent history
- Unclear policy or precedent

Ordinary Management

- Clear expectations
- Confirmed facts
- Correctable issue
- No identified legal warning signs
- Response within manager authority

HR or legal review may affect the investigation, timing, documentation, or available options.

What Would You Do? The Complaint Before Discipline

A protected complaint may change the risk analysis, not eliminate accountability

Performance concerns began three months ago, but the manager delayed documenting them. The employee recently complained of discrimination. The manager now wants to issue a final warning or terminate.

High-Risk Response

Assume the complaint is tactical; rush the decision; create retroactive documentation; give different explanations to HR and the employee.

Lower-Risk Response

Preserve the existing record; route the complaint for review; confirm when concerns arose; review comparators; use one accurate explanation.

A complaint does not automatically prevent discipline. Close timing, weak records, or shifting reasons can increase scrutiny.

Continue Coaching or Evaluate Separation?

Focus on the likelihood of sustained improvement and the quality of the process

Is sustained improvement reasonably achievable?

Continue Coaching

- Issue is correctable
- Expectations can be defined
- Meaningful progress appears
- Training or support remains available
- Continued employment is viable

Evaluate Separation

- Expectations were clear
- Support or opportunity was provided
- Deficiency remains material
- Misconduct is serious or repeated
- Further coaching is unlikely to succeed

HR / Legal Risk Review

California Separation Implementation Checklist

A defensible decision can still create risk if implementation is mishandled

Decision and Message

- Confirm authority
- Use one concise reason
- Prepare meeting script
- Avoid debate or new reasons

Final Pay

- All earned wages due
- Accrued vested vacation/PTO
- Commissions or bonuses assessed
- Expenses addressed

Logistics

- Benefits information
- Property return
- Systems access
- Meeting participants
- Security needs

After the Meeting

- Preserve records
- Need-to-know communications
- Respond to references consistently
- Monitor retaliation risks

California rule: discharged employees generally must receive all earned wages immediately. (Lab. Code, §§ 201, 227.3.)

Q&A

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