

Attorneys

Cheryl G. Strecker
General Counsel

Peter J. Paukstelis
Associate General Counsel

Lindsay A. Chapman
Assistant General Counsel

Maureen A. Redeker
Assistant General Counsel

Paralegal Staff

Amy L. McLemore
Nancy A. Kruse



Office of General Counsel

Kansas State University
111 Anderson Hall
Manhattan, KS 66506
785-532-5730
785-532-5603 fax
attys@k-state.edu

Documentation of Employee Performance and Conduct

Managing people may be the most time-consuming and difficult aspect of a supervisor's job. Documentation of conduct or performance issues is often neglected since we are all tempted to put off burdensome duties. However, even if the right thing was said to the employee, if it's not documented by the manager, it may be difficult to remember or prove when necessary. And documentation given to the employee, when appropriate, also provides clarity of message and ensures that everyone is on the same page as to expectations.

Keep the following in mind when documenting employee performance or conduct:

- Don't forget the details. Include the date of the conversation, the date of the conduct discussed, the employee's name and title, and your name and title. These seemingly obvious details can help create a timeline later if the employee exhibits repeated behaviors or changes managers.
- Focus on the facts. Try not to editorialize. Include quotes and specific behavioral examples whenever possible. For example, don't state "Joe was a jerk again today when I called him on being late." Instead, write what actually happened, such as "Joe was fifteen minutes late today. When I asked him why he was late, he stated 'Why would I be in a hurry to get here?' and slammed his office door."
- Leave out irrelevant information, such as references to the employee's private life or political beliefs.
- Make notes about performance management conversations even if formal documentation was given. A formal disciplinary notice does not include the conversation that was had upon its delivery. Make sure to document the details afterwards, preferably the same day.

- Incorporate into the annual evaluation the employee counseling you have given during the year. Employees might mistakenly assume that, if you omit references to the counseling you gave them six months ago, the issue is no longer something they need to worry about. If they have corrected the problem, include it as a success in the evaluation, so that there is a complete record. For example, "Your work output was below the monthly goal from January through April. Thank you for improving your productivity and exceeding the goal from May through December."
- Give your notes to the next manager if the employee changes jobs within K-State or if you leave your supervisory position. This can help the new manager timely and effectively respond to repeated behavioral or performance issues, and can help prevent problems from being shuffled around the University without appropriate recourse.

Department personnel files should not be a catch-all bin for every document, note, or thought about the employee. Memos addressed to the employee regarding performance or conduct should be maintained in the personnel file. But managers should maintain a separate working file for each employee supervised. This working file will be used to refresh the supervisor's recollection when completing annual evaluations, when taking formal personnel actions, or if a formal grievance or lawsuit develops. If formal action is to be taken, the information relied upon needs to be moved into the personnel file via a performance evaluation, written counseling, or other disciplinary documentation. Stay tuned to future issues of *Legal Briefings* for tips on properly maintaining personnel files, and keep in mind the University's Retention of Records policy, found at Chapter 3090 of the Policies and Procedures Manual.

Avoiding a Bribery Charge: The Importance of FCPA Awareness

The Foreign Corrupt Practices Act, better known as the "FCPA," is a federal law that

prohibits bribery of foreign officials and political candidates. Under the FCPA, the University

continued on back



Featured FAQ

Q: Who can sign contracts (including employment contracts, purchasing agreements, MOU's, and other agreements) on behalf of the University?

A: Only the President of the University and those University officers designated by the President, as certified to the General Counsel for the Board of Regents, are authorized to execute contracts on behalf of the University. See the list of designated University signatories by visiting k-state.edu/policies/ppm/forms/Misc/3070030AS.pdf.

For purchases of goods and services, the Vice President for Administration and Finance and the Director of Purchasing are the designated signatories. In addition, for contracts under \$5,000, the departments have limited signature authority. Only officially designated departmental signatories whose names are on file with the University's Purchasing Office and who have certified that they will abide by Purchasing Office requirements may sign such contracts.

For further guidance and a convenient central reference to University policies pertaining to contracts, please see PPM Chapter 3070 by visiting k-state.edu/policies/ppm/3000/3070.html.

For more FAQs, please visit our website at k-state.edu/generalcounsel/faq.

Visit our website:

k-state.edu/generalcounsel

Our website gives an introduction to the services we provide and addresses frequently asked questions. It also houses a list of resources for easy access to laws and policies applicable to University operations.

FCPA Awareness continued

and its employees are prohibited from paying, authorizing, or promising to pay money *or anything of value* to a foreign official to influence the foreign official or to secure any improper advantage in order to assist in obtaining or retaining business.

"Foreign officials" include an expansive group of people, such as local and national officials, political candidates, and their family members or related entities. Notably, "foreign officials" include employees and agents of government-owned and -controlled universities and businesses. This encompasses faculty, administrators and other employees at our counterpart public universities around the globe.

And there is no exception to the FCPA simply because the meal, entertainment, gift or other payment is small; rather, the focus of the FCPA remains on the purpose of the payment. *Any plans to provide gifts, travel, meals, or entertainment to any "foreign official" should be scrutinized closely for FCPA compliance.* Some questions to keep in mind when considering FCPA compliance include:

- (1) What is the purpose of the payment or "gift" you are making?
- (2) Is the payment, gift, distribution or other item of value going to a "foreign official" or political candidate (or their family member or other entity associated with the official)?
- (3) Is that person assisting you or the University in conducting or retaining business or obtaining other benefits, such as obtaining a contract with the University or relieving you from the responsibility to meet a legal requirement?

Compliance with the FCPA and all other applicable laws is of utmost importance to protect the University from liability. Violations can result in fines in the millions of dollars. If you are traveling abroad or otherwise interacting with foreign officials, we encourage you to review the [Department of Justice's Resource Guide to the FCPA](#). We also invite you to contact the Office of General Counsel for more information and guidance.

Case Law Update

Fisher v. University of Texas at Austin (see September 2013 issue of Legal Briefings for background on this case) — On remand from the U.S. Supreme Court, the Fifth Circuit in a 2-1 decision upheld the university's consideration of race in its admissions program, but stated that because of the highly fact- and context- specific nature of the case, the program was a "unique creature" offering "no template for others." Fisher's attorneys filed an appeal seeking en banc review by the

full Fifth Circuit, and an eventual appeal to the U.S. Supreme Court is possible. Stay tuned....

Lane v. Franks — The U.S. Supreme Court unanimously held that a government employee's sworn testimony in judicial proceedings was citizen speech protected by the First Amendment even though it pertained to his employment duties, clarifying the *Garcetti v. Ceballos* distinction between protected citizen speech on matters of public concern and unprotected employee speech.

End Notes:

Political Campaign Activity Rules

It's campaign season again! Because K-State is a publicly supported governmental entity, many different rules and policies regarding political activities apply to our campus and employees. In collaboration with the Office of

Governmental Relations, we created the Campus Administrator's Reference for Political Activities, available at k-state.edu/govrelations/university/PAP.html. Please take advantage of this useful resource.

About this Publication:

This newsletter is designed to serve as a practical informational tool, bringing you topics of interest and practical tips. It should not be relied on as a substitute for legal advice. Laws, regulations and policies change frequently, and legal advice requires careful consideration and application of all relevant facts. If you have legal questions or need legal advice concerning any University matter, please contact the Office of General Counsel directly at 785-532-5730 or attys@k-state.edu