

# The Same Day Summary at Work

By Jathan Janove, J.D.

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In a previous column ([www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/humanity-into-hr/Pages/progressive-employee-discipline.aspx](http://www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/humanity-into-hr/Pages/progressive-employee-discipline.aspx)), I asserted that it's time to end progressive disciplinary policies and practices. I urged that they be replaced by the Same Day Summary ([www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/humanity-into-hr/Pages/Putting-Humanity-into-HR-Compliance-Down-with-Documentation.aspx](http://www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/humanity-into-hr/Pages/Putting-Humanity-into-HR-Compliance-Down-with-Documentation.aspx)) (SDS).

I have since received many comments from HR professionals about the SDS. Overall, they've been positive and encouraging. Several HR professionals expressed their own frustration at having to administer progressive discipline and their awareness of its abundant problems.

I've also been asked a number of questions. In this column, I address them.

**Q:** If we replace formal progressive disciplinary documentation with SDSs, won't this make us vulnerable in employment litigation?

**A:** Not in my experience. If done properly, the SDS provides the documentation you need. As noted by Brian McDermott, a management lawyer at Jackson Lewis in Indiana, the law generally does not require progressive discipline. Rather, the employer generally must base its decisions on legitimate, nondiscriminatory reasons. He explained, "The SDS can help the employer meet its goals of providing the employee notice of the need to correct behavior or improve and documenting communications with an employee about the need to correct behavior or improve. And because juries often look at matters from a fairness perspective, the SDS can help an employer show it acted fairly toward an employee."

**Q:** Is it necessary to include in an SDS language such as "failure to improve may result in further disciplinary action up to and including termination of employment"?

**A:** No! I find that sentence repugnant. It's negative. It's adversarial. It's dehumanizing. And it's unnecessary.

To defend or ward off most wrongful-discharge claims, you need to show clear notice and opportunity to improve. If you're at what would otherwise be called the "final warning" or "last chance" stage, explain to the employee directly and specifically what must change, by when, and what the result will be should the change not happen. Confirm your employee's understanding verbally, then confirm this in your SDS: "As we discussed and as you said you understood, the following changes must occur in the next 30 days ... As I said, we hope you're able to make these changes and that you remain a member of our team. If not, however, your employment will end at that time." Assuming you behave consistently with what you said and wrote, you'll have a supporting document if needed.

**Q:** What if an employee regresses after receiving the SDS?

**A:** Confront the employee promptly, directly, specifically and respectfully. Point out the language in the SDS confirming what needed to happen, and contrast it with what has occurred. Focus on specific behaviors and facts to provide clear and unemotional feedback to the employee about how deliverables have not been met: "We discussed that you would provide this report every Wednesday, and three times this month, the report was not delivered until the following Monday." This will help the employee see what needs to change and avoid the perception that he or she was targeted for some other reason.

This is often a good time to ask the employee whether he or she thinks the job is the right fit. "I'm concerned that this problem has again arisen. I need to be clear that it cannot continue. Either we need to find a way to fix this problem long term, or we need to recognize that the fit is not right and you need to transition from this position and potentially from our company. What do you think?"

This approach puts you on a path either to an intervention that works or to a respectful and dignified termination of employment. Just be sure to follow this conversation with an SDS, including what the employee said in response to your question.

**Q:** Can you have more than one SDS per employee?

**A:** Yes. The number depends on how many important discussions you have. For each discussion, there should be an SDS. It's that simple.

**Q:** Should we have the employee sign the SDS?

**A:** No. In my experience, good communication and record-keeping practices greatly reduce the risk that an employee can credibly claim to have never received the SDS. Moreover, requiring a signature undermines the constructive, solution-oriented concept the SDS promotes. It also makes the SDS a higher-maintenance exercise with increased risk of error in application.

In my view, it's enough that the employee receives the SDS and that it contains such language as "if you have further questions, or if I missed or misstated anything of importance, please let me know right away." If you still feel the need for more documentation, make a contemporaneous note for your files of the date and time of the SDS discussion and who was present.

**Q:** Will the SDS reduce the number of involuntary terminations?

**A:** Yes. It's not so much the SDS itself that reduces the number of such terminations as the behavioral guidance it provides for management and HR. The SDS encourages and supports prompt, direct, specific and interactive discussions with a problematic employee. It helps employees clearly understand when and how expectations are not being met and the impact of this failure. The SDS is solution-oriented rather than blame-oriented. Indeed, many employees will see the writing on the wall through these specifics and self-select out of the organization rather than be terminated.

**Q:** We're a large employer and have followed formal, progressive disciplinary procedure for many years. How can we transition to the SDS?

**A:** First, I suggest you modify your written disciplinary policy if it's inconsistent with the use of the SDS. Inform employees of this change so there are no surprises and they understand any new expectations.

Second, do a pilot project. Identify particular managers, departments or units where you can test the SDS on a smaller scale. This will give you a better sense of the level of training needed of management and HR, and it will identify any potential kinks or obstacles that need correction.

Colleen McManus, SHRM-SCP, an HR executive and consultant based in Arizona, suggests a pilot project using the SDS for what would be "lower" forms of discipline in your current procedure. "This will maintain the integrity of your progressive disciplinary procedure for the higher forms of discipline that are most subject to appeal, complaint or litigation," she explained, "while letting you obtain feedback, buy-in and training needs from those using SDS during your pilot."

Thereafter, with the benefit of lessons learned, you'll be ready to scale the process companywide in a way that is most appropriate for your organization.

Please keep your questions coming to [JathanJanove@comcast.net](mailto:JathanJanove@comcast.net) (mailto:JathanJanove@comcast.net), and please share experiences you have. I'm encouraged by the overall positive reaction of HR professionals to the SDS and strongly believe it will help build trust, respect and appreciation of the HR function.

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