

# The Worst Part Of My Job: The 5 Most Difficult Conversations To Have With Employees



**jackson lewis**

Preventive strategies.  
Positive solutions.

*Presented by:*

**Richard I. Greenberg, Esq.**

*Jackson Lewis LLP*

666 Third Avenue,  
29th Floor

New York, NY 10017

[GreenbeR@jacksonlewis.com](mailto:GreenbeR@jacksonlewis.com)

(212) 545-4000



# **What Are The Most Difficult Conversations To Have With Employees?**

# Why Some Conversations Are Difficult?

- ▶▶ Embarrassing Issues
- ▶▶ Personal Relationships
- ▶▶ Lack of Knowledge
- ▶▶ Fear of Deflection
- ▶▶ Fear of Retaliation
- ▶▶ Reluctance To Create Legal Exposure
- ▶▶ General Discomfort

# Risks Associated With Not Having “The Conversation”

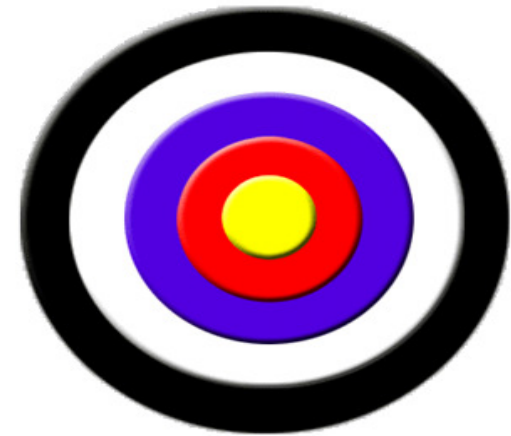
- ▶▶ Exposure To A Legal Claim
- ▶▶ Deterioration of Employee Morale
- ▶▶ Sending The Wrong Message
- ▶▶ Injury / Workplace Violence
- ▶▶ Disruption of Business Operations
- ▶▶ Rumors
- ▶▶ Explosion Without HR Involvement

# Guide To Tackling The Difficult Conversation

- ▶▶ Goal for Conversation
- ▶▶ Timing of Conversation
- ▶▶ Potential Downside of Conversation

# What Is Your Goal For Difficult Conversations?

- ▶▶ What is your focus?
  - Stay on right side of the line
- ▶▶ Ensure you are prepared?
  - Know the facts
- ▶▶ Have you created a roadmap for success?
- ▶▶ Are you prepared for twists and turns?
- ▶▶ Is the goal clear?



# Have You Timed The Conversation Correctly?

- ▶▶ Nexus with intended goal?
- ▶▶ Time of the day?
- ▶▶ Witness / Location



# Have You Considered Legal Risks?

- ▶▶ What are my exposure areas?
- ▶▶ Can they be avoided?
- ▶▶ Can I limit those exposures?
  - Rehearse – how do I say it?
  - Reasonable accommodation
  - Documentation



**Difficult Conversation #5:**  
**“The Malodorous Colleague”**

***Managing Employee Odor In The Workplace***

# Difficult Conversation #5 - “You Smell”

## ▶▶ Goal:

- Address odor issue in workplace – It’s about the smell
- Body Odor
- Perfume / Cologne
- Other Types

## ▶▶ Timing:

- Limit embarrassment

## ▶▶ Legal Risks:

- Disability discrimination
- Religious discrimination
- Retaliation

# Difficult Conversation #5 - “You Smell”

## ▶▶ Conversation:

- Understand the facts
  - “It is being reported that \_\_\_\_\_.”
  - This is not an isolated report and it has been made by several co-workers.
- Invite employee to propose solution
  - “We all share this workplace. What can we do?”
- Don’t encourage discussion of legal risks . . .
  - “Why?”
- . . . but be prepared to respond
  - “What can we do to help resolve this issue?”

**Difficult Conversation #4:**  
**“You’re Just Not Yourself”**

***Suspicion That Employee Is Suffering From  
Some Type of Mental Condition***

# Difficult Conversation #4 – “You’re Just Not Yourself”

## ▶▶ Goal:

- Improve performance and workplace morale.
  - Effect on job
  - Effect on co-workers

## ▶▶ Timing:

- Limit embarrassment
- Response to a specific incident or complaint

## ▶▶ Legal Risks:

- Disability discrimination/Retaliation
- Workplace violence
- Employee well-being (we care about our employees)

# Difficult Conversation #4 – “You’re Just Not Yourself”

## ▶▶ Conversation:

- Understand the facts (justify conversation)
  - “It has been reported that \_\_\_\_\_”
  - “This is coming on the heels of \_\_\_\_\_”
  - “This violates our policy” or “Performance is unacceptable”
  - “This is a-typical”
  - “Needs to be corrected”
- Invite employee to communicate / propose solution
  - Is this anything you would like to discuss with us?
  - “How can we help you with performance / communication?”

# Difficult Conversation #4 – “You’re Just Not Yourself”

## ▶▶ Conversation (cont.):

- Be prepared for identification of medical condition
  - EAP
  - FMLA
  - Other type of leave
  - Responding to medication usage
- If serious . . .
  - “Direct threat” scenario

## Difficult Conversation #3:

“He / She Said or Did **What!?!**”

*Confronting The Accused As Part of A  
Harassment Investigation*

# Difficult Conversation #3 – “He / She Said What!?!”

## ▶▶ Goal:

- Determine whether a violation of your harassment policy took place and, if so, what are the necessary/appropriate consequences
  - No place for personal feelings
  - Objectivity must prevail

## ▶▶ Timing:

- Contemporaneous with complaint
- Limit embarrassment
- Sequence of interviews
- Appropriate investigator / witness

# Difficult Conversation #3 – “He / She Said What!?!”

(Cont.)

▶▶ Legal Risks:

- Confidentiality / Defamation
- Retaliation
- Deflection > Discrimination

# Difficult Conversation #3 – “He / She Said What!?!”

## ▶▶ Conversation:

- Understand the facts
  - “There has been an allegation that you \_\_\_\_\_”
  - “The complaint was made by \_\_\_\_\_”
  - “We have spoken to several individuals who have \_\_\_\_\_”
- Application of funnel technique
  - “What happened?”
  - Trend to the specifics

# Difficult Conversation #3 – “He / She Said What!?!”

## ▶▶ Conversation (cont.):

- Ask the tough, specific questions – don’t be afraid!
- Encourage a thorough and complete response
- No need to disclose source of information / witnesses
- Get details
  - “What specifically was said to you?”
- Be prepared to start all over again!
- Be prepared for the cross-complaint

# Difficult Conversation #3 – “He / She Said What!?!”

## ▶▶ Additional Thoughts:

- Be open-minded and impartial
- Don't just focus on words . . . body language may tell story
- Entertain explanation / defer deflection
- Listen for motives
- Ask about other possible witnesses
- Handling non-cooperative employees

**Difficult Conversation #2:**  
**“Are You On Something?”**

***Handling A Potentially Under-The-Influence  
Worker***

# Difficult Conversation #2 – “Are You On Something”

## ▶▶ Goal:

- **Determine whether employee is under the influence of drugs / alcohol**
  - Ensure safety and health of workplace/ensure integrity of workplace
  - Put personal feelings aside

## ▶▶ Timing:

- Contemporaneous is critical
- Appropriate witness / properly trained
- Security / location

## ▶▶ Legal Risks:

- Disability discrimination
- Workplace violence
- Negligence

# Difficult Conversation #2 – “Are You On Something”

## ▶▶ Indications:

- Direct observation of possession, distribution, or use of drugs or alcohol
- Slurred, rapid or incoherent speech
- Hyper-body movements, staggering, unsteady, poor muscular control or motor coordination
- Dilated or constricted pupils
- Bloodshot or watery eyes
- Extreme fatigue or sleeping on the job
- Excessive sweating or clamminess of skin
- Flushed or very pale face

# Difficult Conversation #2 – “Are You On Something”

## ▶▶ Indications (cont.):

- Highly excited or nervous mood
- Nausea or vomiting
- Smell of alcohol
- Disheveled appearance
- Dry mouth (frequent swallowing / lip wetting)
- Dizziness or fainting
- Shaking hands or body tremors / twitching
- Breathing irregularity or difficult breathing
- Puncture or “track” marks

# Difficult Conversation #2 – “Are You On Something”

## ▶▶ Conversation:

- Understanding the facts
  - “We have observed \_\_\_\_\_”
  - “We have been informed \_\_\_\_\_”
  - Identify short / long term indicators
  - “It is our preliminary conclusion that you are under the influence of \_\_\_\_\_”
- Not interested in “Story of Woe”
  - “I am focused on what is happening now”

# Difficult Conversation #2 – “Are You On Something”

## ▶▶ Conversation (cont.):

- Don't be afraid to ask the tough question
  - “Were you drinking today?”
- Admit / Deny
  - Consider substance abuse test
  - Focus on transportation!
  - Be prepared for employee to disclose use of controlled substances

## **Difficult Conversation #1:**

**“Your Employment Is Being Terminated”**

***Parting Ways – By Choice Or By Force***

# Difficult Conversation #1 – “Your Employment Is Being Terminated”

## ▶▶ Goal:

- To separate employment without issue or drama or unnecessary strife
  - Don't forget goal!
  - Not the time to investigate
  - No surprises!

## ▶▶ Timing:

- Contemporaneous is critical
- Limit embarrassment
- Location / privacy
- Appropriate witness
- Security concerns

## ▶▶ Legal Risks:

- Everything!

# Difficult Conversation #1 – “Your Employment Is Being Terminated”

## ▶▶ Conversation / Layoff:

- “As you may be aware, the Company has \_\_\_\_\_”
- “Unfortunately, this affects many dedicated employees like you”
- “As a result of this \_\_\_\_\_, we are forced to separate your employment”
- Stay away from details regarding basis for selection
- Transition package / release
- Benefits / pay
- Additional assistance

# Difficult Conversation #1 – “Your Employment Is Being Terminated”

## ▶▶ Conversation / For Cause Termination:

- “As you are aware, the Company has investigated \_\_\_\_\_ you \_\_\_\_\_”
- “As you know, we have repeatedly discussed our concerns with your performance”
- “Unfortunately, we have concluded \_\_\_\_\_”
- “This decision is effective immediately”
- Benefits / pay

# The Termination Meeting

## ▶▶ Preparation Is The Key To Success

- Workplace due process
- Final paycheck, benefit calculation, etc.
- Reason? Rehearse!
- Appropriate person / witness
- Location / privacy
- Timing of meeting

# The Termination Meeting

- ▶▶ Guidelines For An Issue-Free Termination Meeting
  - Be consistent, brief and direct/CONTROL THE DIALOGUE
  - Do not argue / debate / justify
  - Do not suggest self-improvement
  - Do not apologize
  - Be on board with decision
  - Avoid discriminatory remarks/be respectful
  - Arrange return of Company property
  - Non-compete?
  - Exit interview

## Additional Difficult Conversations

- ▶▶ “You fell asleep again at your desk”
- ▶▶ “Our employee reports he / she is in an abusive relationship”
- ▶▶ “Did you really say that you were going to harm yourself and others?”
- ▶▶ “Is it true your Facebook pages says \_\_\_\_\_?”
- ▶▶ Did you put that you had my title on LinkedIn?

THANK YOU