

SPARE THE ROD, SPOIL THE EMPLOYEE? Effective (and Legal!) Workplace Discipline

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A sweeping majority of wrongful termination disputes have at their core the employer's attempt to discipline an employee and the employee's adverse reaction to that disciplinary action. By implementing a few key suggestions in the disciplinary process, employers can ensure the smoothest possible discussion and the most successful outcome.

Workplace Conduct Policies

As with most employment situations, documentation is key. Employers should have workplace conduct policies that clearly define the various behaviors that will result in discipline and the consequences of engaging in those behaviors. In listing the conduct that will lead to adverse employment action, employers should include a catch-all phrase of "any violation of company policy or management directives," or similar language to cover violations employers may not think to describe.

That said, however, workplace conduct policies should avoid any mention of progressive discipline. It is natural to escalate disciplinary action as violations continue, and many employers believe it is fair to provide employees with clear warnings that they are on a negative track. When workplace conduct policies specify that first violations will leave to verbal warnings, second violations will lead to written warnings, and so on, that progressive discipline must be applied to every instance of misconduct. This means, for example, that the employee who is tardy and the employee who steals from your cash register both receive a verbal warning for the first offense. This also means that the employee who steals from the employer multiple times cannot be terminated until the requisite preliminary warnings have been given and ignored.

Disciplinary, Counseling and Probationary Memos

When documenting performance problems, it is important to begin with the positive. Employees are humans, just like employers, and no one wants to feel like a complete failure. What is working for you with this employee? Start with the areas that are working and then note that there are other areas of improvement necessary that are detracting from the positive.

Review prior warnings to make sure that you are on track. If the employee previously received two warnings for the same conduct, the third must be more stringent. If the employee has several prior "final warnings," explain why this warning is really the "final" warning this one last time.

When you have neglected to document any past behavior, write a "catch-up memo." Note that this warning "is in keeping with the prior verbal discussions we've had about the same problem." Document that you've "talked about this issue on multiple occasions, with no resulting improvement."

Employee Probation

When placing an employee on probation, be very specific about the conduct that is problematic, the improvement you expect to see, and the consequences if it does not occur. Give a specific timeline for improvement, and be realistic. An employee who is making only 25% of his sales goal isn't going to hit 100% in 30 days – provide sufficient time to move upward, or risk a finding that you've been unfair or contrived in your discipline.

Note that the employee must show “immediate and sustained improvement.” This means that he must improve immediately, not wait for several weeks and then kick into high gear. When he does improve and is officially off probation, he must sustain that improvement, not backslide again in a few months. Future performance problems lead to termination, not a second chance at probation.

Employee Suspension

Suspension without pay is always a viable disciplinary option, but it must be proactive rather than retroactive. Employers cannot dock pay for time that has already been worked, but can send an employee home and dock pay for that unworked time going forward. Suspension may be a good method of capturing the employee's attention, but for an employee who is happy to have additional leave time (even unpaid), this may be ineffective for disciplinary purposes.

When suspending an employee, consider the immediate circumstances. If you are investigating a claim of wrongdoing and don't yet have a clear answer as to what may have occurred (or, if you know what occurred but need time to document your backup), you can suspend an employee with pay (typically referred to as “administrative leave with pay”). This provides “breathing room” for the employer to resolve outstanding issues, investigate the situation, meet with counsel if necessary and make a clear and well-documented decision.

This is also a good approach where there is an emergency situation – where an employee has been violent, or retaliation for a complaint is almost certain, or an employee expresses fear or extreme stress, send employees home with pay for a few days while you work toward resolution. As long as the employee has been paid, there is no damage to the employee, and it may protect your workplace by maintaining the status quo while you address a problem.

Employee Termination

When moving toward termination, first consider whether there is a way to reassign the employee. Sometimes a new department, new supervisor, or new responsibilities may bring out the best in someone who is otherwise struggling. Analyze your employee's best qualities and skills and determine whether they are currently working in a position that is a good fit for what they can legitimately bring to the table.

Once termination is certain, review the file to make sure that the termination decision is in line with prior warnings and performance reviews. If things have changed since the last review, be sure to document the decline, to establish a basis for the difference of opinion about this employee.

Treat the employee with respect in the termination process. Have a private meeting, preferably with two members of management, during off hours or at the end of the day. Give the employee a chance to clear out his desk (in your presence), but don't permit him access to the computer system. If he has items stored on your system that he'd like to acquire, find out what they are and have a management representative provide them separately.

Talk to the employee briefly about the reasons for termination, and provide a written memo with more detail. Some employers shy away from written termination memos to avoid "rubbing salt in the wound," so to speak, but documentation of your reasons for termination may make all the difference between a clean break and a wrongful termination lawsuit. At a minimum, reference performance problems in the final notice of termination, and draft a more detailed memo to file.

Communication Tips

When an employee argues with you about your disciplinary action or termination, let them vent about their position, but do not fall into the trap of defending your decision. After hearing the employee for several minutes, tell the employee, "I understand that you see things differently, but our decision stands." It is important to listen, but equally important not to waiver in your position.

If the employee does bring up something unexpected that would legitimately change your mind, acknowledge that this is new information and continue the meeting to a later time so that you can look into the new details. Follow up on what the employee told you and then speak with the employee once again. You may change your mind, or you may come to the same conclusion, but if you are legitimately surprised by the employee's response, request additional time to look into it so that the employee knows that you have considered all angles.

For the employee who insists that the problems you are raising are not their fault, respond by asking, "are you telling me that you do not intend to make any effort to improve?" Tell the employee, "it concerns me that you take absolutely no responsibility for this situation, which indicates that no matter how many chances I give you, you are not going to change your behavior." Challenge the employee to come up with solutions – ask, "tell me what two or three things you can do that would make the difference....you can't control someone else's behavior, but tell me what you intend to do about your own behavior."

Ultimately, employers want to ensure the utmost productivity in the workplace. When manageable changes will improve conditions for you and for your employees, take those steps to improve morale and energize your workforce. When disciplinary measures or termination are inevitable, protect the company and avoid unnecessary disputes by using clear language, careful documentation, and professional and respectful communications with the employee.

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