

Discipline and Discharge and Everything in Between

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TERMINATION/DISCIPLINE

HANDLING DISCIPLINE

Management Objectives in Disciplining Employees

- To correct improper conduct
- To enforce reasonable office rules and regulations
- To help employee help himself to be a better worker
- To save the company's investment in training and replacement costs
- To protect the health and safety of all employees

HANDLING DISCIPLINE (*continued*)

- To deter employees from engaging in improper conduct
- To warn other employees that breaches of conduct and rules will be punished
- To provide the best possible atmosphere for and service to residents

TYPES OF DISCIPLINE

- There are several types of discipline available to you, such as probation, written warnings, suspensions, or terminations from employment. The type of discipline imposed will depend on the severity of the offense, the collective bargaining agreement and any applicable work rules, and any progressive discipline policy that may apply.

Miscellaneous Points You Need to Know to Properly Discipline Employees Reporting to You

- Unionized employees are entitled to have a representative with them in any meeting with the employer that may result in discipline. The burden is on the employee to request such representation.
- When disciplining an employee, make sure that you are not treating that employee more or less harshly than a similarly-situated employee with an equally bad or even worse record.
- No “reprimand” or similar document should be placed in an employee’s personnel file unless a copy has been given to the employee.

Miscellaneous Points You Need to Know to Properly Discipline Employees Reporting to You (continued)

- Do not tape record disciplinary or investigatory meetings without the approval of the person being recorded. Generally, taping such meetings is a bad idea. The better practice is to take good notes.
- Do not ask or suggest that an employee take a polygraph exam.
- Often, you will have to decide whether an employee who may be subject to discipline is lying - do not “duck” this task especially in “he said / she said” situations.
- Do not wait for the criminal justice system to “decide for you” what to do with an employee who has been arrested or is being investigated. The employer needs to make a decision independent of the criminal justice decision on such an employee.

Miscellaneous Points You Need to Know to Properly Discipline Employees Reporting to You (continued)

- There are times when you should suspend an employee with pay until you can properly investigate the situation.
- Off-duty conduct that is directly job-related or that can have an adverse effect on morale, efficiency, or public perceptions can be a basis for discipline.
- An employee can “deliver” unsatisfactory job performance even though he/she has a good attitude and tries hard. In such a case it is fair to take particular care to train and encourage the person. However, it is also important to document the training and attention given the individual and the performance problems. Ultimately, if the person does not finally “get it” and fails to become reasonably productive, the person must be let go or reassigned.

Miscellaneous Points You Need to Know to Properly Discipline Employees Reporting to You *(continued)*

- The following is a helpful checklist to refer to when issuing discipline of any kind:
 - Do I have the necessary facts?
 - Did the employee have an opportunity to tell his side of the story?
 - Did I check with the employee's immediate supervisor?
 - Did I investigate all other sources of information?
 - Did I hold my interviews privately to avoid embarrassing the employee?
 - Did I review relevant personnel files and other relevant documents?
 - Did I exert every possible effort to verify the information?
 - Have I shown any discrimination toward an individual or group?

Miscellaneous Points You Need to Know to Properly Discipline Employees Reporting to You *(continued)*

- Have I let personalities or emotion affect my decision?
- Have I administered the corrective measure in the proper manner?
- Am I prepared to explain to the employee why the action is necessary? For instance:
 - Because of the effect of the violation on the employer, fellow employees and himself.
 - To help him improve his efficiency and that of the department.
- Am I prepared to tell him how he can prevent a similar offense in the future?
- Am I prepared to deal with any resentment he might show?

Miscellaneous Points You Need to Know to Properly Discipline Employees Reporting to You *(continued)*

- In determining the specific penalty, have I considered the seriousness of the employee's conduct in relation to this particular job and his employment record?
- Have I decided on the disciplinary action as a corrective measure – not a reprisal for an offense?
- Have I properly and completely documented the incident and the discipline?
- Termination ends someone's livelihood – treat it as such.

Issues to Consider in Discipline and Termination

- **Be Rational: Step Back And Evaluate Before Taking Action.**
 - Don't Discipline "On The-Spot."
 - Very few infractions call for immediate termination or severe discipline. The employer and the employee are best served by taking an objective look at the circumstances surrounding the proposed discipline.
 - Investigate.
 - Gather all available information before approving any discipline up to and including termination. Interview at length the manager/supervisor suggesting the termination.

Issues to Consider in Discipline and Termination (*continued*)

- During the interviews in the investigation, get all the facts:
 - WHO was involved?
 - WHAT happened?
 - WHEN did it happen?
 - WHERE did it happen?
 - WHY did it happen?
 - and sometimes HOW?
 - Was the employee forewarned of the possible or probable consequences of his conduct, or was the misconduct so serious that any employee could be expected to know such conduct may result in discipline or discharge?

Issues to Consider in Discipline and Termination (*continued*)

- Is the employer's rule reasonable under the circumstances?
- Did you inform the employee of the allegations against him/her?
- Did you conduct a thorough and objective investigation?
- Did you permit the employee to tell his/her side of the story and did you follow up appropriately?
- Was the evidence against the employee substantial?
- Have you applied the applicable rules and policies consistently to all employees?

Issues to Consider in Discipline and Termination (*continued*)

- Play Devil's Advocate.
 - Make sure you are convinced of the wisdom of the termination or discipline. You should be comfortable that the proposed discipline is the appropriate response to the particular problem, is related to the employer's interests, and is not based on personality issues or personal biases. Consider the arguments that a lawyer would make in opposition to the discipline/termination. Will your decision stand up before an arbitrator? Before a jury?
- Rule of Thumb.
 - If the termination or discipline does not sit well with you, it will not sit well with an arbitrator or jury.

Issues to Consider in Discipline and Termination (*continued*)

- Be Fair.
 - Arbitrators/Courts/Juries Look for Fairness.
 - Putting the legal burdens and standards of proof aside, arbitrators/courts/juries look for fairness. If your action seems unfair, your chances of success will be reduced.
 - Get Human Resources Involved Early.
 - Depending on the infraction, the lack of previous documentation of alleged disciplinary or performance issues may provide good reason to postpone discipline. Ideally, documentation and notice to the employee of possible consequences of poor performance or misconduct should both be in place before termination.

Issues to Consider in Discipline and Termination *(continued)*

- Practice Progressive Discipline. Ask yourself:
 - Has the employee received prior verbal and written warnings for the same or similar conduct? If not, the employee should have the opportunity to correct the problem, and the employer should adequately document the problems.
 - Did the last warning inform the employee about the possibility of termination? The final written warning should contain: (1) a statement of the problem; (2) the effect that the problem has on the employer; (3) a plan or strategy for correcting the problem; and (4) clear notice that failure to correct the problem or future infractions will result in termination.
 - Is the problem serious enough to warrant termination? Avoid terminating employees for relatively minor infractions that might not justify termination to an arbitrator or jury.

Issues to Consider in Discipline and Termination *(continued)*

- Are there reasons for disciplinary problems? For example, is an employee's excessive absenteeism or lateness due to treatment for a disability? If so, assess legal implications before proceeding, like the Family Medical Leave Act and Americans with Disabilities Act.
- Are there good reasons for immediate or expedited termination, such as threats against co-workers, acts of violence or egregious instances of harassment?
- Explore Alternatives to Termination/Discipline.
 - Performance Improvement Plans.
 - Additional warnings with clear action plans or conduct guidelines.
 - Reassignment, transfer, demotion.

Issues to Consider in Discipline and Termination *(continued)*

- Allow Employees to Challenge Disciplinary and Performance Decisions.
 - Fair Treatment Policy
- Be Consistent.
 - Inconsistency May Look Like Discrimination. Make sure that:
 - HR and supervisors are acting consistently;
 - Supervisors in different units and groups are acting consistently;
 - The manager and supervisors are following company policies;
 - All warnings about performance and all reasons given for termination are consistent.

Issues to Consider in Discipline and Termination *(continued)*

- Documentation
 - Once you decide that discipline is warranted, following the steps below will ensure that your write-up is comprehensive and effective.
 - Draft a clear description of what occurred. Include time, place, and dates of relevant facts. Chronology should be from beginning to end.
 - Describe the procedure or course of the investigation.
 - List any technical charges violated. These come from published rules or policies, general orders, a collective bargaining agreement, a civil service code, statutory law, etc.
 - Refer to relevant past discipline.
 - Be specific.
 - Warn of future consequences.

Issues to Consider in Discipline and Termination *(continued)*

- Do Not Overlook Problem Managers.
 - Check the disciplining supervisor's record of discipline and terminations (and non-discipline and non-terminations) to look for reasons and patterns. Confirm that there is no disproportionate treatment of "protected groups" versus the general employee population. Even in the absence of such a specific issue, you must satisfy yourself that the manager/decision maker is managing and assessing employees properly.
 - Check for high incidence of resignations among employees of particular managers/supervisors.

EMPLOYEE TERMINATIONS: HOW TO TERMINATE AN EMPLOYEE

MAKING THE DECISION TO TERMINATE

- COOL DOWN!
- Review the documentation and past disciplinary actions (which should be documented) to be sure that the employee has been put on notice of unacceptable conduct or deficient performance and has had an opportunity to take corrective action, if appropriate under the circumstances.
- Stay off email when discussing discipline/discharge possibilities with HR colleagues or front-line supervisors – keep all deliberative discussions off email!

EMPLOYEE TERMINATIONS: HOW TO TERMINATE AN EMPLOYEE *(continued)*

- Consider your past practice regarding similarly situated employees who have engaged in the same or similar conduct or who have had the same or similar performance deficiencies.
- Does the employee fit within one or more protected EEO categories under federal, state or municipal law? If so, will the employee be able to show that similarly situated employees outside the protected categories were not terminated for the same or similar conduct?

EMPLOYEE TERMINATIONS: HOW TO TERMINATE AN EMPLOYEE *(continued)*

- Has the employee recently exercised protected rights under federal, state or municipal law or public policy? If so, will the employee be able to show any connection or relation between the exercise of such rights and the termination?
- Consider the employee's work history, unique skills, training, longevity and other factors relating to his/her value to your company. Should the employee be afforded another opportunity to take corrective steps? Have you considered other forms of disciplinary action short of termination?
- If you have questions or concerns, discuss them with your supervisor, and/or the Human Resources Department and/or the Legal Department – but not an email!

**EMPLOYEE TERMINATIONS:
HOW TO TERMINATE AN EMPLOYEE (continued)**

PRELIMINARY ADMINISTRATIVE STEPS

- Take care of administrative details, such as paychecks, keys, passcodes, IT issues, etc.
 - Pay withholding issues
- Outline the critical points you want to cover in the meeting.
- Arrange for a private place for the meeting.
- Whenever possible, arrange for another manager to sit in on the discharge interview.

EVERYTHING IN BETWEEN

**WHY GOOD DOCUMENTATION IS
IMPORTANT**

- Can Be a Critical “Tie-breaker” in Factual Disputes, Particularly Those That End up in Legal Proceedings
- Allows the Company to Reconstruct the Events after the Passage of Time and Departure of Personnel
- Enhances the Conclusion That the Company Acted in a Fair and Consistent Manner with its Employees
- Provides a Method to Evaluate the Evaluators and Encourage/oversee Supervisory Compliance with Company Expectations
- Improves Communication Between Supervisors and Employees and Facilitates Efforts to Enhance Performance

SIX KEY POINTS IN A WRITTEN WARNING

Six key points should be included when preparing a written warning to an employee. The key points are:

- Statement of the problem or violation. Consider who, when, where, how and why.
- Statement explaining how the employee’s action or performance had a negative impact on operations.
- Statement of employer policy or customary practice regarding the situation.

SIX KEY POINTS IN A WRITTEN WARNING *(continued)*

- Reference any previous oral or written warning about the same or related problems.
- Summary of the agreement reached with the employee on corrective action which will be taken or the reasons why no such agreement was reached.
- Warning of the consequences of failure to improve.

EFFECTIVE USE OF PERFORMANCE APPRAISALS



- Performance appraisals have legal significance when an employer must defend an adverse employment action, such as a termination or a refusal to promote.

PERFORMANCE APPRAISALS

- Employers should use performance appraisals to alert employees to performance deficiencies and unacceptable workplace conduct to help correct these problems and to document performance accurately.
- Inaccurate or poorly completed evaluations may undercut an employer's stated reason for action it took (or did not take). For example, if an employee has received an inflated performance appraisal, it may be difficult to justify discharging the employee.

“MECHANICS” OF UMC EVALUATIONS

Evaluations are meant to be two-way communication tool. Providing input during the year will prevent any surprises during the Performance Evaluation. Associate feedback can be instrumental in determining business-related decisions. In order for the evaluation process to be successful, below are suggested guidelines.

- Review a copy of the associate's job description being evaluated before completing the evaluation.
- Review the performance of the associate based on the specific responsibilities as defined in the job description.
- Review associate's file for any commendations, awards, disciplinary notices, absenteeism records, etc.
- Under Associate Response/Comments, the associate should list goals with specific time frames that are measurable and realistic for the coming year.
- Encourage the associate to make comments and sign and date the evaluation.
- Return the evaluation to the ARD/Administrator in your community to place in the associate's file.

PERFORMANCE APPRAISAL PITFALLS

- Contains statements that are too general.
 - “Jen is a solid performer.”
 - Reality: Although Jen generally is meeting expectations, she has finished assignments late on three occasions and failed to follow her supervisor’s directions on another.
- Takes individual strengths or weaknesses out of context without adequate explanation.
 - “Adam’s problem-solving skills are commendable.”
 - Reality: Adam fixed a broken machine once, four months ago.

PERFORMANCE APPRAISAL PITFALLS (continued)

- Overemphasizes certain qualities or the lack thereof.
 - “Josh is a stellar employee with excellent customer service skills. All of our customers find him to be pleasant. He should continue to practice such skills.”
 - Reality: One customer told Josh’s manager that Josh helped him
- Is ambiguously worded.
 - “Ryan’s attendance is an issue.”
 - Reality: Ryan has come in late on at least 5 occasions and called off work 4 times in the last 6 months.

PERFORMANCE APPRAISAL PITFALLS (continued)

- Fails to appraise honestly the negative aspects of an individual’s performance or conduct for fear that it may hurt the individual’s feelings or result in hostility.
 - “Sheila should work on her sales pitch.”
 - Reality: Sheila has not achieved her sales goals for the last 2 quarters and is in danger of not achieving it this quarter as well.
- Is incomplete or hastily written.
- Is not signed by the employee.
- Is not signed or dated by the evaluator.

EIGHT KEY POINTS FOR MANAGING THE DIFFICULT EMPLOYEE

- Be fair.
- Be consistent.
- Be accurate.
- Be aware of confidentiality concerns – respect the employee’s privacy
- Decisions regarding discipline should be work-related.
- Do appropriate documentation!
- Do appropriate documentation!
- Do appropriate documentation!