

PERSONNEL ISSUES:



DISCIPLINE AND TERMINATION

Personnel Issues: Discipline and Termination

EMPLOYMENT LIABILITIES

I. The Litigious Workforce

- A. Employment related lawsuits, while once very rare, have become commonplace in our present society.
- B. Employers are paying large sums as the result of charges of wrongful discharge, discrimination, retaliation, and other similar claims.
- C. As a result, many employers find the processes of hiring, disciplining, or terminating an employee to be very traumatic.
 - 1. In discipline and termination, it is not uncommon for an employer to try to ignore a major problem because of fear of being sued.
 - 2. This often results in a “bad employee” staying on the payroll.
- D. Employers have the right to take action against problem employees but the process is somewhat like handling dynamite -- it can be done but it should be done very carefully.
 - 1. Usually, employment lawsuits are not the result of what was done but, instead, how it was done.
 - 2. To protect themselves, employers need to understand the issues involved in the employer-employee relationship and develop (and follow) policies and procedures that will minimize the chance of a lawsuit and provide part of a defense if one is filed.

II. Employment at Will

- A. Broadly stated, the legal doctrine of “employment at will” means the employer can terminate the employment of any employee at any time, for any reason (good reason, bad reason, or no reason), with or without notice. The employee also has the right to terminate the employment relationship at any time.
- B. While employment at will seems to remove liability from the employer for terminating an individual, the employer must remember that legislation and court decisions have greatly eroded the employer’s rights under this doctrine.
 - 1. Based on this, the definition of employment at will needs to be expanded to say that the employer can terminate an employee for any reason “except for an illegal reason or where the employee has a property interest in his or her job.”
 - 2. Illegal reasons for termination include terminating an employee because of protected status under federal or state law or retaliation for exercising a legal right.
 - 3. Property interest in a job means that the employee has reason to believe there is some guarantee of duration of employment, or that the job cannot be taken away without some form of due process.

III. Protected Status

- A. Under Title VII of the Civil Rights Act of 1964 and later related legislation, it is illegal to terminate an employee if any part of the reason for termination is based on the employee's race, color, religion, sex, national origin, age, or disability.
 - 1. In certain very limited situations, an employer may discriminate on the basis of national origin, religion, or sex where the employer can show that a bona fide occupational qualification (BFOQ) exists.
 - 2. In other situations, the limitations that come with age may prevent a person from meeting job requirements, but age, in and of itself, should not be a job requirement except in the rare instances where it is dictated by law.
- B. It is also a violation to discriminate against an individual during the hiring process because of his or her inclusion in one of the protected status groups.

IV. Retaliation

- A. Employees have protection against retaliation for exercising legal rights such as filing a valid workers' compensation claim, filing a complaint with the Department of Labor for alleged violations of the Fair Labor Standards Act, filing a discrimination complaint with the Equal Employment Opportunity Commission, engaging in free speech, voting, and other such actions protected by legislation or the Constitution.
- B. Employees also have protection against retaliation for carrying out legal obligations such as jury service or military duty.

V. Property Interest

- A. An individual has a property interest in his or her job when he or she has reason to believe that there is some guarantee of duration of employment, or that the job cannot be taken away without some form of due process.
- B. A property interest, and thus an erosion of the employer's at will rights, is often created through "implied contracts" resulting from verbal statements by the employer or in statements found in documents, such as policy manuals, provided to employees.
- C. Examples of statements that could create an implied contract include:
 - 1. "This is a permanent position."
 - 2. "Your salary will be \$12,000 annually."
 - 3. "Employees will only be terminated for just cause."
 - 4. "If you do good work, you have a job until you retire."
- D. Rigidly stated disciplinary procedures, or lists of reasons for termination that appear to be all inclusive, can also create a property interest in a job.
- E. To reduce the chance for creating a property interest in a job, personnel policy manuals should have a prominent, clearly worded statement that all employment is "at will" and that no contract exists between the employer and employee for any duration. The employment application form should also contain an "at will" statement.

DISCIPLINE AND TERMINATION

VI. Types of Discipline

- A. There are three basic levels of discipline in the workplace -- preventative, corrective, and coercive.
 - 1. Preventative discipline includes all steps taken to reduce the potential for the occurrence of employment related problems.
 - 2. Corrective discipline includes the initial actions taken once a problem occurs.
 - 3. Coercive, or punitive, discipline is the final step in the discipline process and involves a negative consequence for failure to meet the standards set by the employer.
- B. The ultimate goal of any form of discipline should be to avoid or correct a problem, not to punish an employee.
- C. The key to effective discipline is communication.
 - 1. Communication with employees should be precise and clear – saying exactly what you intended to say and saying it in such a way that it will be understood by the employee.
 - 2. Standards and expectations communicated to employees should be stated in terms that are specific, observable, and measurable.

VII. Preventative Discipline

- A. Preventative discipline, as the name implies, is intended to keep problems from occurring.
- B. This is the softest form of discipline and really does not appear to be discipline to employees.
- C. The key to effective preventative discipline involves communicating our expectations to our employees during the interview process, employee orientation and training, and our day to day contact with our employees.
 - 1. During interviews and orientation, the supervisor needs to clearly define job duties and performance expectations.
 - 2. Training should also reinforce how we expect things to be done and the levels of performance that is expected.
- D. Personnel manuals and other written materials provided to employees are also part of the preventative discipline process.
 - 1. These normally define workplace rules that are part of the total workplace expectations for employees.
 - 2. It is important to have employees acknowledge receipt of any such documents.
- E. Feedback, goal setting, and performance appraisal are all part of preventative discipline.
 - 1. Recognizing good work is an excellent way to reinforce desired behavior in employees.
 - 2. Clearly communicating your performance expectations is also an essential part of the preventative discipline process.
 - 3. An important rule to remember is that if you are expecting a specific result from an employee, you need to state your expectations in clear, precise terms.

VIII. Corrective Discipline

- A. Corrective discipline includes those initial steps taken when a problem starts to occur with an employee.

VIII. Corrective Discipline (continued)

- B. At its basic level, corrective discipline usually involves an informal consultation with the employee concerning the problem and what the employee must do to correct it.
 - 1. Normally, no formal documentation for the employee's personnel file is prepared at this stage.
 - 2. It is, however, a good practice to prepare notes about the meeting, when it occurred, and what was said. These notes should be kept in a file maintained by the supervisor.
- C. At its next level, corrective discipline may involve a formal reprimand or mild form of action such as a short suspension without pay.
 - 1. This action is usually taken after an employee has failed to respond to counseling.
 - 2. If the employee does not respond at this level of corrective discipline, the next step would be coercive discipline.
- D. A good supervisor needs to keep the following in mind when using corrective discipline:
 - 1. The goal is not to punish but to correct a problem.
 - 2. The employee should be allowed to respond because there may be circumstances of which the supervisor may not be aware.
 - 3. An employee should not be disciplined for situations that are beyond his or her control. It is the job of the supervisor to correct those situations so that the employee can do the job expected.
 - 4. Always be sure the employee knows specifically what is expected.

IX . Coercive Discipline

- A. Coercive, or punitive, discipline normally comes into play when the milder forms of discipline have not been effective.
 - 1. Coercive discipline is a formal process which includes preparation of a disciplinary document and a formal consultation with the employee.
 - 2. At this level, the employee is made aware of specific consequences that will occur if he or she fails to meet defined expectation standards within a given time frame.
- B. It is important that the disciplinary document be carefully prepared to reduce the potential for later liability.
 - 1. Any statements about the problem should be based on provable facts.
 - 2. Emotional statements, personal opinions, and vague or unsubstantiated accusations should not be included in a disciplinary document.
- C. A disciplinary document should contain the following information.
 - 1. **A statement of the problem** - This section would include documented incidents about actions on the part of the employee that show how the employee has failed to meet established workplace standards.
 - 2. **A statement of why the problem is a problem** - Here we describe the negative consequences of the problem to further reinforce why it must be corrected.
 - 3. **A description of the previous efforts to resolve the problem** - In this section, we summarize any counseling sessions and other actions already taken to correct the

IX. Coercive Discipline (continued)

- problem. This should be done in specific terms. The notes made about prior counseling sessions can be useful at this point to verify dates and specific statements made.
4. **A statement of what the employee must do to resolve the problem** - This statement must be made in specific terms based on standards that are observable and measurable.
 5. **A time frame in which the employee must meet the set standards** - Based on the nature of the problem, the time frame may be immediate (it better not happen again), or up to several weeks to allow the employee time to develop skills, gain knowledge, etc. to meet the standards set by the supervisor.
 6. **A statement of what the supervisor is willing to do to help the employee resolve the problem** - This shows a good faith effort on the part of the supervisor to help salvage the employee. The supervisor should not indicate that any assistance will be provided that the supervisor cannot or does not intend to provide.
 7. **A statement of the consequences for failure to meet the required standards within the time frame set by the supervisor** - This could include anything from a suspension without pay up to termination. One important thing to remember is to never give a consequence that you cannot or are not willing to carry out.
- D. During the disciplinary conference, the supervisor needs to discuss all parts of the disciplinary document and be sure that the employee understands what is expected and what the consequences will be if the expectations are not met.
1. The employee should be given a chance to discuss the content of the document and ask any questions to clarify its content.
 2. At the close of the disciplinary conference, the employee needs to sign a statement at the bottom of the disciplinary document saying that he or she has read it and understands it. It is not necessary to have the employee say that he or she agrees with it; only that it is understood.
 3. If the employee refuses to sign it, have a neutral third party witness this refusal (someone in a managerial or supervisory capacity) and then document the refusal for the record.
- E. If the employee meets the standards you have set, this should be recognized. If not, the consequences should be immediately carried out at the end of the time frame that was set.

XI. Termination

- A. While our first goal in dealing with a problem employee should be to salvage the employee, there are times when the employee does not respond to our attempts to do so and it becomes necessary to terminate the employee.
- B. If not handled carefully, a termination can create a tremendous liability.
1. Prior to any termination, a supervisor needs to consider the following questions:
 - a. What are my real reasons for wanting to terminate this employee?

XI. Termination (continued)

- b. Are these reasons work related?
 - c. How would a jury view these reasons? (Valid, fair, etc)
 - d. Do I have specific, objective documentation supporting my reasons for this action?
 - e. Does the employee fall into a protected status and is that status any part of my reason for taking this action? Also, have I done anything that would **make it appear** that this status may be part of my reason for this action even though it is not?
 - f. Is this decision consistent with current policy and past practice?
 - g. Have I taken reasonable steps to help the employee identify and resolve the problem?
 - h. Have I warned, or do I intend to warn, the employee that his or her job is in jeopardy?
 - i. What do the personnel files contain that could be a problem if a lawsuit is filed? (Remember that glowing performance review you gave the employee three months ago because you didn't want to hurt his feelings?)
2. If significant problems are expected from the termination, such as the high probability of a lawsuit, you should consult with an attorney knowledgeable in employment law before taking action.
- C. To facilitate the actual termination process, these preparatory steps should be taken:
1. Decide when and where the employee will be told of the termination;
 2. Have the personnel department prepared to advise the employee of any benefits or rights he or she may have and to have any paper work ready to be completed;
 3. If the employee uses a computer in his or her job, have the data processing staff remove computer access as soon as the employee is called in to the termination conference.
 4. Whenever possible, have the final paycheck ready;
 5. Have boxes ready for the employee to pack up personal items;
 6. Have security personnel available if problems are expected; and
 7. Where necessary, have a neutral third party available to take the employee home.
- D. During the termination session, it is important that the supervisor or manager maintain control.
1. Immediately state the purpose of the meeting. This is not a time for small talk.
 2. State the effective date and time of the termination and that the decision is final.
 3. In stating the reason for the termination, it is best to give only one valid documented work related reason for the decision. The potential for problems increases with the amount you say.
 4. Keep the meeting on track. If the employee tries to talk about the performance or problems with other employees, firmly let the employee know that the only purpose of the meeting is to discuss his situation, not that of others.

XI. Termination (continued)

5. Remain objective and avoid emotion. In some situations, an employee may show anger, depression, make slurs, or cry. You must remain in control by not overreacting to these emotional displays.
 6. Explain what the exit procedure will be and begin it at the close of the interview.
- E. It is also important that you help the employee retain his or her dignity during the termination process.
1. Treat the employee with respect without becoming emotionally involved.
 2. Schedule the termination for a time and place that will minimize exposure to other employees by the terminated employee.

XII. Immediate Termination

- A. In some instances, an employee's actions may be so severe that immediate termination is necessary.
- B. When this occurs, some action should be taken as soon as you become aware of the situation. The longer you delay taking action, the more difficult your defense becomes that it was a terminable offense.
1. If you need to consult with an attorney or other officials before taking final action, you should suspend the employee until you finish the follow-up work.
 2. It is important to show that you were not willing to keep the employee in an active status until a final decision had been made concerning the situation.
- C. As with all terminations, it is important that thorough, specific documentation be prepared.

XIII. Ongoing Responsibility

- A. Termination of an employee is a management issue and is not to be shared with other employees.
- B. Using an employee's termination as "an example to other employees" can possibly lead to a lawsuit.
- C. Providing references on terminated employees can also create a liability. Any reference requests should be handled by someone who is familiar with these exposures.

***NOTE:** This paper is provided for informational purposes only. Nothing in this paper is intended to be, nor should it be construed as, legal advice or guidance. Where legal assistance is needed, the services of a qualified attorney should be sought.*