DISCIPLINE AND TERMINATION BEST PRACTICES

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MEA Knowledge Guide: Discipline and Termination Best Practices

Note: Although the concept of "discipline" usually refers to addressing employee misconduct, violations of company policy (e.g., excessive tardiness), discipline can also generally refer to addressing performance issues, whether those performance issues are intentional or unintentional. As used in this guide, the term "discipline" is used in the very broadest sense, meant to encompass both discipline for misconduct, and for poor performance.

1) Introduction: Why is it so important to understand and to follow best practices for discipline and terminations?

There are many reasons why it is vital to understand and to follow best practices when disciplining and terminating employees. First, solely from an employee relations standpoint, adhering to these best practices – in particular, being fair and consistent – helps foster employee morale, improves retention and productivity, and generally engenders trust of the company by employees.

Of course, following sound best practices also helps avoid legal liability. For example, being inconsistent with enforcing rules and policies, failing to document poor performance and misconduct, and failing to understand the risks related to termination and the various laws that apply, can lead to liability for:

- Unlawful harassment;
- Discrimination;
- Retaliation;
- Wage and hour violations (e.g., failure to pay accrued paid time off, or failing to pay within the required amount of time following termination);
- Among other violations of law.

With respect to understanding the substantial risks related to liability for discrimination, it is also useful to dispel a common and pervasive myth about the nature of "at-will" employment.

a) Correcting the pervasive misunderstanding of "at-will" employment

In order to understand why it is so important to follow best practices for discipline and termination, and why doing so is vital to avoiding legal liability, it is useful to first understand the true (and practical) meaning of "at-will" employment.

All states in the U.S. (with the exception of one, Montana) generally follow the "at-will" employment law, which is defined as follows: either party to the employment relationship – both the employer and employee – can end the employment relationship with or without cause, and with or without notice. This means that terminating an employee for no reason at all is, technically, lawful. It also means that terminating an employee for a bad reason is also lawful (e.g., it is lawful – but only technically speaking – to terminate an employee because your favorite sports team lost the game the night before).

But many employers too often rely on "at-will" employment to their detriment by terminating an employee without sufficient cause, and more importantly, without sufficient documentation of the reasons. Why is this so legally problematic? Because as a practical matter, "at-will" employment no longer applies if the employer is sued by the employee for discrimination, harassment, retaliation, or a host of other reasons. In order to understand why, employers must understand how an employee proves wrongful discrimination in court, which is explained below.

b) Without proper documentation, employers will often lose a discrimination lawsuit, even if employee cannot prove their case

While it is true that "at-will" employment permits an employer to terminate an employee for any reason, no reason, or even a bad or irrational reason, they cannot terminate an employee for an unlawful reason (for example, Title VII, the federal anti-discrimination law, makes it unlawful to terminate an employee because of their race, gender, ethnicity, religion, or a number of other "protected classes").

When an employee sues an employer alleging discrimination in violation of Title VII, they need only initially show that they are a member of a "protected class", that they were terminated, and allege that other persons in a different protected class were not terminated for the same or similar conduct. Once an employee is able to make this showing (which is very difficult to dispute), the burden shifts to the employer to demonstrate that they had a "legitimate, non-discriminatory" reason for the termination. If the employer fails to provide sufficient documentation of this "legitimate, non-discriminatory" reason, the law will usually presume that the employee's allegations of discrimination are true.

This means that an employee could win the lawsuit even without necessarily proving their case in court, and can win simply because the employer failed to provide sufficient documentation, such as poor performance reviews or discipline. An employer will never be able to demonstrate a legitimate, non-discriminatory reason simply by citing the law of "at-will" employment, they will need much more.

This is why, as a practical matter, the principle of "at-will" employment does not exist; because if sued, an employer will only be able to avoid legal liability by having sufficient and sound documentation demonstrating it had a "legitimate, non-discriminatory" reason for the termination.

And this is why understanding, and following, sound best practices for disciplining and terminations is so important.

2) Discipline Best Practices

a) STEP ONE: identify the relevant rule, policy, or performance standard you seek to enforce

Before you can effectively impose effective discipline, you need to first identify the relevant rule, policy, or performance standard which applies; the sources of these rules, policies or standards can be any one of the following:

- **A written policy**, whether stand-alone or in an employee handbook.
- **Past-practice.** Particularly since many conduct policies do not exhaustively list all types of infractions, identify your past practice to determine whether this is a rule you have enforced before (there may be instances, of course, where the particular rule has never been violated before; e.g., an employee brings a gun to work). If this is the first time addressing the particular infraction, that's OK; document how you handle it, and be consistent in the future.
- **Employment contract.** If the employee has an employment contract, it may include provisions which address both the employee's conduct, as well as their performance expectations (e.g., established sales goals per quarter). Be sure to review the agreement for both, particularly since these could vary from the policies applicable to other employees.
- **Offer letter.** Just like an employment contract, an offer letter may include provisions governing both misconduct and performance expectations.
- **Collective bargaining agreement.** For unionized employees, a collective bargaining agreement ("CBA") will usually include many provisions governing both employee conduct, as well as, expectations. CBAs will also often include detailed procedures for disciplining an employee.

b) STEP TWO: determine the nature and severity of discipline to impose

Once you have identified the relevant rule, policy, or performance standard which applies, you should then determine the nature of discipline to impose; this could range from informal verbal counseling to immediate termination. The sources of the relevant rules, policies, or performance standards may also dictate the nature and severity of discipline to impose; for example:

- **Progressive discipline policies**. Employers may have progressive discipline policies which identify the proper nature and severity of discipline under the circumstances. In this case, it may also be necessary to review employee's past discipline, if any, to determine whether the next "progressive" step is warranted. Note: If employers do have a progressive discipline policy, it is important that it include a disclaimer that employer has the right, in its sole discretion, to bypass one or more steps depending on the nature and severity of the infraction, including the right to proceed immediately to termination, for a first offense.
- **Policies which specifically identify the nature of discipline to impose**. Employers often have policies which specifically identify the types of infractions which will lead to immediate termination, such as bringing a weapon to work, or a drug violation. Note: Employers should be aware that, under certain circumstances, there may be reasons why to decide not to terminate an employee for those violations (e.g., a last chance agreement for a drug or alcohol violation).
- **Past-practice** (if no written policy).
- **Employment contracts, offer letters, and/or CBAs**.

Note: Although it is not absolutely necessary in every case to identify a policy an employee violated to support a discipline or termination, employers should consider developing and implementing sound policies governing its expectations of employees. These policies can often be central to being able to demonstrate a legitimate, non-discriminatory reason for termination.

i) Consistent and objective application of rules and the issuing of discipline is key to avoiding claims for discrimination and harassment

The law recognizes that employees will almost never be able to prove discrimination or other unlawful conduct through direct evidence (e.g., there is almost never an email stating "let's fire Jane because she is a minority."). This is why employment laws permit employees to prove unlawful conduct based largely or solely on circumstantial evidence. This evidence is usually in the form of showing that Jane (who is a minority) was treated less favorably than Bob (who is not a minority) under the same circumstances.

This is why it is critical for avoiding legal liability for employers to apply the rules, and issue discipline, consistently. A mere inconsistency, even absent any discriminatory intent, can lead to liability for discrimination.

c) STEP THREE: determine whether the discipline is unlawful, or if it could even *appear* unlawful

This step is critical. Employers often attempt to issue discipline either for legally protected activity or in a manner which the law would deem unlawful (whether it actually is unlawful, or merely appears unlawful when the law analyzes the facts objectively). Specifically, when making this evaluation, employers should:

- **Review and understand applicable laws, and determine if the discipline is for legally protected conduct**. For example, it is unlawful for employers to:
  - Discipline employees because their Workers Compensation claim was denied and they suspect, but cannot prove, it was fraudulent.
  - Discipline employees because an investigation into their harassment complaint found their claim was unsubstantiated, unless employer can prove it was made in bad faith.
  - Discipline employees for absences which might be protected by the ADA.
  - Discipline employees for taking too much time off work, if that leave is protected by the FMLA, the ADA, or other laws.
- **Review and understand applicable laws, and determine if the discipline could appear as retaliation for legally protected conduct**. For example, discipline could appear like retaliation if the discipline is issued shortly after employee engaged in legally protected activity (e.g., filing a harassment complaint, requesting leave under the FMLA or ADA, or filing a Workers Compensation claim). Note: Although there is no clear-cut rule, many laws (and courts) will presume discipline is retaliatory if it occurs within 30 days of a protected activity.

d) STEP FOUR: issue the discipline

The nature of the discipline that the employer issues, including whether it is a written or verbal discipline, and the severity of the discipline will be guided by factors outlined in step two. When issuing written discipline, it is best practice to use consistent forms (see below for sample model forms).

- Sample Warning Letter (.DOC)
- Performance Improvement Plan (.DOC)
- Corrective Action Notice Form (.DOC)

When issuing and delivering the discipline, employers should follow the following guidelines:

- **Prepare, and rehearse, the discipline script**. This should only contain objectively stated facts and observations (e.g., on July 5th, you were 15 minutes late), and never include subjective terms or phrases, or statements which are vague (e.g., "you were unprofessional", or "you really didn't perform well"). Identify the relevant rule, policy, or performance standard the employee failed to comply with.
- **Have a witness**. This witness need not saying anything, but should attend for the purposes of taking notes and serve as a third-person observer.
- **Be direct, clear, and concise**. Make only the necessary points but do not minimize the reason for the decision.
- **Avoid arguments and do not get personal**. It is acceptable to answer limited (and reasonable) questions from the employee, but avoid unnecessary, irrelevant, or personal arguments unrelated to the narrow points at issue.

i) Document, document, document (particularly if it is a verbal counseling only)

Employers should not underestimate the legal significance of documentation. As explained at the outset, if sued for wrongful termination, employers will have the burden of proving the reason for the discipline (or termination) was legitimate and non-discriminatory. Absent sufficient documentation, this will be very difficult to prove. But documentation is also vital for another reason.

Under most employment laws, merely the fact that documentation exists and was created contemporaneous with the incident, will create a legal presumption that the conduct or performance issue identified in the documentation actually occurred. Accordingly, it is crucial for avoiding liability that employers:

- **Document all discipline (particularly if verbal).** Note: Documentation need not be overly formal, and employee does not necessarily need to know about the documentation. For example, if an employee is late and employer says something to the employee about lateness, it would be sufficient in that situation (unless a more formal written warning is warranted) to document the verbal counseling by way of an email from the person issuing the discipline to himself/herself. An email creates a record of the verbal discussion and it creates a time-stamp indicating the date and time the discussion took place.
- **Document ASAP after the incident.** Because documentation is most valuable if contemporaneous with the event (because it creates the presumption it contains true representation of what actually occurred), employers should document the incident the same day if possible.
- **Avoid retroactive documentation whenever possible.** Just like contemporaneous documentation can help an employer, retroactive documentation can hurt. Avoid "creating a record" of past misconduct or performance issues if not created shortly around the time it

occurred, or the time employer discussed the situation with employee. Note: However, it may be acceptable to create documentation in conjunction with a year-end performance review, even though the poor performance happened at some point earlier. Ideally however, to avoid the perception of "creating a record", year-round performance counseling is recommended.

- **Documentation should be objective.** When creating documentation, employers should follow the same guidelines as for delivering the message (e.g., be objective, avoid subjective or vague terms, etc.).

3) Termination Best Practices

Generally, the steps and guidelines outlined above for discipline also apply to terminations, with some additional important considerations. Specifically, prior to terminations employers should:

- **Review relevant policies and practices to ensure the termination follows established protocol**. This includes, for example, determining whether employee will be paid accrued unused paid time off, whether the employer has a severance policy, etc.
- **Identify any other agreements which may be relevant** (e.g., employment agreements, offer letters, etc.). Also identify if employee has any non-disclosure, non-solicit, or non-compete agreements, which may need to be addressed at the termination meeting.
- **Assess the relevant legal risks**. This not only includes determining whether the termination is for legally protected activity, or which could be perceived as retaliation (see discussion above), but also a more general assessment of risk, including the relevant protected category of the individual relative to the rest of the employees (e.g., terminating the oldest employee is, as a very general matter, more risky than terminating the youngest employee). The legal risk will also depend on the extent of documentation supporting the termination, including prior warnings and disciplines.
- **Determine whether to offer severance in exchange for a release of claims agreement (i.e., a waiver).** This may largely be based on the level of legal risk.
- **Take steps to protect confidential information and company property.** It may be necessary to revoke an employee's access to confidential information or other company property (e.g., by changing passwords, removing email access, etc.) before the termination meeting to avoid the risk of employee improperly taking this information.
- **Plan and prepare the termination script (in accordance with the above applicable to issuing discipline).** But also prepare to discuss potential references; to outline post-employment benefits; and to identify any applicable post-employment agreements and obligations, such as non-compete agreements.
- **Determine when and how the employee will leave the premises and collect their belongings.** In potentially contentious situations, employers may also need to determine if security should be involved.