

Discipline and discharge: best practices for avoiding costly litigation

Disciplining and terminating employees are realities of doing business, but by adhering to certain practices, employers can help reduce the risk of costly litigation.

Discipline or termination (often referred to as “adverse employment actions”) can give rise to allegations of unlawful discrimination or retaliation. Discrimination involves actions taken because of a worker’s protected characteristic, such as race, color, religion, sex, sexual orientation, gender identity, age, or disability. Retaliation, on the other hand, describes actions taken because of a worker’s protected activity, such as filing a workers’ compensation claim, complaining of illegal activity occurring at the workplace, or taking protected leave. When an employer takes an adverse employment action against an employee based on a protected characteristic or an employee who has engaged in protected activity – even when the adverse employment action is taken for legitimate reasons – such action may allow an employee to argue that they were subject to discrimination or retaliation.

An employee’s protected characteristic or engagement in protected activity, however, does not prevent an employer from taking corrective action or terminating the employee. By keeping a few simple principles in mind when dealing with disciplinary issues, employers may reduce the risk and cost of litigation.

Document, document, document!

Proper documentation can help an employer build a defense to a claim of unlawful termination. Employers should ensure that their managers are trained to document performance and disciplinary issues contemporaneously. Generally, efforts to discipline an employee or coach them on how to improve their performance should always be documented, even if it seems like a minor or insignifi-



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cant conversation.

Documentation should be objective and straightforward, generally record the facts giving rise to the discussion, and note who was present, where and when the conversation took place, and identify the instruction given to the employee. The specifics of the conduct that led to disciplinary action are important, and documentation should use precise quotes when describing an employee’s words – even a note of the employee’s demeanor and reaction to the discipline might be useful.

Contemporaneous documentation helps authenticate the accuracy of the note and it lends more credibility to such documents when used as evidence. Employee grievances – especially those involving perceived unfair or unlawful treatment by management – and any follow-up investigation into such complaints should also be thoroughly documented.

Implement progressive discipline policies

Having a clear policy on progressive discipline is another tool that employers can use to reduce the risk of being sued. Employees who are blindsided by a termination are more likely to feel like they have been wronged – i.e., more likely to file a lawsuit against their current or former employer. Employees who are subjected to multiple rounds of progressive discipline, where expectations are clearly spelled out to the employee and the employee is given a reasonable chance to improve their performance, are less

likely to cry foul when terminated. More importantly, progressive discipline can be effective in improving the performance of struggling employees. At each stage of progressive discipline, employees should be given the specific reason why they are being disciplined, the expectations for future conduct, and the opportunity to respond to the disciplinary action.

It is worth noting that employers that wish to use a progressive discipline system should exercise care when drafting such policies for their employee handbooks. Promising that disciplinary steps will occur in a specific order may allow employees to argue that any deviation from those steps was unlawful. To avoid that risk, written policies should emphasize that the employer has discretion when disciplining employees, that management reserves the right to skip steps in the progressive discipline process if warranted, and that employees may be immediately terminated with or without cause.

Discipline consistently and uniformly

Uniform application of policies and rules helps reduce allegations that employers have taken inappropriate disciplinary action toward employees because of protected characteristics or for engaging in protected activity. Employers sometimes have the urge to bend the rules for “good” or productive employees. But by allowing some employees to violate policies without any corrective action or with lighter discipline than others, an employer may give the appearance of

applying policies in a discriminatory or retaliatory fashion.

Be mindful of the timing of actions

Employers should also beware of when they take adverse employment actions – especially in cases where employee misconduct coincides with an employee’s engagement in protected activity. Disciplinary action that follows close on the heels of an employee’s protected activity may appear to be retaliatory. That proximity could create difficulty in overcoming allegations that the disciplinary action was taken to punish the employee for their protected activity. However, employees who have engaged in protected activity are not immune from discipline. Maintaining thorough documentation of the reasons for any disciplinary action may help employers’ counterarguments that an action was retaliation against an employee for engaging in protected activity.

By getting the right policies in place, an employer can mitigate the risk of taking an adverse employment action against an employee who may raise claims of discrimination or retaliation. The risk associated with disciplining or terminating an employee, however, can only be assessed on a case-by-case basis, and it is advisable to seek counsel when taking such difficult actions.

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