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# Employee Discipline – Best Practices

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- Ms. Martinez has over 13 years of experience in human resources
- Ms. Martinez provides HR guidance and advice to both small and large employers from a wide array of industries, including hospitality, retail, fast food, medical, construction, agriculture, transportation, distribution and logistics.
- Prior to joining ePlace in 2013, Ms. Martinez worked as an HR Director for a large international manufacturing company where she specialized in performance improvement, managing leaves of absence, and conducting background checks.
- Ms. Martinez graduated from California State University of Fresno with a bachelor's degree in Business Administration/HR, and is certified as a Senior Professional in Human Resource (SPHR) from the Society of Human Resource Management (SHRM).

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- Ms. Gerbs has over 15 years' experience working in human resources
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- Prior to joining ePlace Solutions in 2015, Ms. Gerbs worked as an HR Manager for a nationwide hospitality company, handling all aspects of HR from recruitment to benefits administration.
- Ms. Gerbs graduated from University of Phoenix with a bachelor's degree in Management and has a Masters degree from the University of the Rockies in Organizational Development and Leadership. She is also certified as a Professional in Human Resource (PHR) and is certified as a SHRM-CP from the Society of Human Resource Management (SHRM).

# Laurian C. Rutterbush, Esq.

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- EPL Practice Manager for ePlace Solutions, Inc., a risk management company currently providing HR services to over 30,000 companies throughout the USA
- As an attorney since 2005, Ms. Rutterbush has focused on labor and employment law
- Prior to joining ePlace in Solutions, Ms. Rutterbush was engaged in the practice of law with a large law firm with offices throughout California
- Ms. Rutterbush has litigated all types of employment claims and regularly provided counseling and advice regarding a wide array of employment issues including wage/hour problems, harassment and discrimination claims, and handling employee leaves of absence
- Active member of the bar in California

# NOTE

- These materials are meant to be general reference materials. They are not intended to provide legal advice.
- If you have any specific questions about any legal matter, you should consult with an attorney.
- Questions? Email us at [hrdirectors@eplaceinc.com](mailto:hrdirectors@eplaceinc.com).

# Agenda

- **The Goal of Disciplinary Action**
- **Other Benefits of Disciplinary Action**
- **...But we are At-Will employers?!**
- **What about our Probationary Period?**
- **Forms of Discipline**
- **Progressive Discipline Policy**
- **When to Provide Disciplinary Action**
- **Levels/Types of Disciplinary Action**
- **Red Flags**
- **Why is Consistency Important?**
- **Determining the Level of Discipline to Provide**
- **The Dos and Don'ts of Conducting Disciplinary Meetings**
- **Potential Pitfalls**

# The Goal of Disciplinary Action

- **Corrective**
  - Serves to put the employee on notice that they are not meeting your expectations
  - Spells out the consequences of continued failure to meet expectations
  
- **Not Punitive**
  - Punish the employee for their actions
  - “Make things right” mentality

# Other Benefits of Disciplinary Action

- If termination is the result, the reason is known
- Reduces risk of a claim
- Unemployment will ask for records of disciplinary action
- Provides proof that you are addressing inappropriate/illegal behavior, i.e. harassment
- Perception of fairness



# ...But We Are At-Will Employers?!

- Employment relationship can be terminated at any time, with or without notice or cause by either the employee or the employer as long as the reason does not violate the law.
- How do you prove that the reason does not violate the law?
- Supervisors should be trained on the law, your policies, and your procedures.

# What About Our Probationary Period?

- **Belief – works in the *employer's* favor**
  - Employee can be fired during this period without risk of a legal or unemployment claim
- **Reality – works in the *employee's* favor**
  - Employee fulfills a specific period of employment during which they are assessed on meeting the standard
  - Results in perception that such completion will result in continued employment
- **Does not in any way shield an employer from receiving a claim**

# Progressive Discipline Policy

- Progressive discipline - increasingly formal efforts to provide feedback to the employee to correct the problem
- Be cautious with your policy

*“employees will be subject to progressive discipline... first a verbal, then a 1<sup>st</sup> written warning, then a 2<sup>nd</sup> written warning, then suspension, and finally termination.”*

*“employees found in violation may be subject to disciplinary action up to and including termination.”*

- If former, include language that you will “skip steps” for particularly egregious conduct.

# Levels/Types of Discipline

- Verbal Counseling and Coaching
- Written Warning(s) OR Performance Improvement Plan (PIP)
- Suspension
- ~~Demotion~~
- Termination
- Website Resource: Sample Written Warning and PIP forms

# Verbal Counseling/Coaching Session

- **Appropriate when the employee has committed a minor infraction**
- **When conduct or job performance may be slightly off course, but their behavior can be corrected easily before becoming a serious issue.**
- **Not appropriate for a serious rule violation**
- **Train supervisors/Managers to document all counseling sessions**
  - **A “note to file” should be placed in the employee’s file every time an employee is verbally counseled about job-related conduct.**

# Written Warning

- The first documented warning which the employee acknowledges and signs
  - Appropriate when the employee has not altered their conduct after a verbal or when they commit a serious infraction
- Additional warnings become progressively more severe in tone
  - May culminate in a final warning, notifying the employee that failure to improve immediately will result in termination
- If the employee refuses to sign
  - The supervisor may ask why and reason should be noted, in addition to the date presented and “refused to sign”
- **Website Resource: Written Warning Form**

# Suspension

- Suspensions are a useful tool when an employee would pose a potential risk if they remain in the workplace, such as pending investigation of
  - Theft
  - Workplace violence
  - Sexual harassment
- If less than a suspension or termination is justified, be prepared to make the employee whole
- Serious infraction of your rules, and/or with a final written warning
- Not recommended to correct absenteeism
- Exception: Exempt employees

# Demotion

- **Why is it not recommended?**
  - Rarely effective
  - De-motivating
  - Employee's morale suffers and this negatively impacts others
- **Manager to employee transition**
- **Instead use progressive discipline and a performance improvement plan to correct conduct**



# Termination

- Appropriate when an employee fails to improve despite repeated, formal warnings
- Some offenses, such as theft, are grounds for immediate termination
- A thorough review of the situation and the employee's file is necessary prior to making that decision
- Situation & Red Flags review...

# Red Flags & Support for Termination Review

- Access our document on our website any time you consider an adverse action, such as demotion, suspension, and termination
- Obtain review of the situation from a neutral third -party
- Help to ensure your action is reasonable based on the facts of the situation
- Reduce your risk
- **Website Resource: Red Flags When Taking Adverse Action**

# Performance Improvement Plan (PIP)

- An effective tool to address a variety of issues
- Helps document lack of performance to date
- Clarifies specific areas of improvement needed
- Provides a plan of action
- Spells out consequences for failure to improve
- Requires that performance improvement be sustained
- Provides for periodic check-in and documentation of progress
- **Website Resource: Coaching – PIPs, sample PIP form**

# When to Provide Disciplinary Action

- **Policy violation**
  - Attendance – Absence or Tardiness
  - Misconduct
  - Inappropriate behavior
  - Illegal behavior
  - Failure to adhere to procedures
- **Poor performance**
- **Website Resource: The Disciplinary Process (Article)**

# Why is Consistency Important?

- Do I have to treat everyone the same?
- Can I give my “good” employees another chance?
- Issues to Avoid:
  - Perception of fairness
  - Subjective criteria
  - Discrimination claim

# Determining the Appropriate Level of Discipline

- **Consider:**
  - Intent – honest mistake vs refusal
  - Violation – policy vs law
  - Severity of the violation – minor vs major
  - Ramifications to company – effect on customers, continued business, license/permit, etc.
  - Prior disciplinary action
  
- **Website Resource: Disciplinary Checklist & Worksheet**

# Determining the Level of Discipline to Provide: Attendance

- **Consider: What is your policy?**
  - You decide on the attendance requirements
  - You decide when absences or tardiness are excessive
- **Consider: What is the reason for the absence?**
  - Is there a protected reason for the absence?
  - Is there paid time off the employee may use?
- **For the level of discipline to provide:**
  - Is it excessive?
  - Has the employee had prior warnings?
  - Are you prepared to provide all employees in the same situation with the same disciplinary action?

# Example: Excessive Absenteeism

- Pat called you at 8:05 am to notify you she would be unable to report to work on-time because her indoor cat ran out of the house and she can't find him. Her shift begins at 8:00 am.
- Disciplinary language:

*On 11/17/16 you called in at 8:05 am to notify us you would be unable to report to work on time because your cat ran out of the house and you were unable to find him.*

*ABC company requires that employees maintain regular and dependable attendance. In addition, when employees are unable to report to work on time, they are expected to notify the company at least 2 hours in advance.*

*This written warning is being issued to you for your absence and for failing to provide sufficient notice of your absence. Continued violations may lead to further disciplinary action, including termination.*



# Determining the Level of Discipline to Provide: Misconduct/Behavior/Procedure

- Situations when an investigation may be necessary
- Seek to understand:
  - What policy was violated
  - Who observed incident
  - When did this happen
- Interview witnesses & the accused
- Once you have all the facts, arrive at a conclusion
- Based on conclusion, determine if disciplinary action is necessary and appropriate level
- Document investigation, including witness statements, conclusion, respond to complainant
- **Website Resources: Investigation toolkit**

# Example: Misconduct/Behavior

- Mark and John work at a pizza joint. They have a tendency to horse around in the back near the pizza oven and have been warned about their behavior in the past. The Assistant Manager has observed them again engaging in this behavior.

- Disciplinary language:

*On 11/17/16 at about 8:00 pm, you were observed slapping a coworker on the back and then running away. You have been warned previously regarding unsafe and inappropriate behavior in the workplace.*

*ABC company requires that employees maintain safe and professional behavior at work at all times.*

*This final written warning is being issued to you for your repeated violation. The company takes these violations very seriously and any further incident may lead to immediate termination.*

# Determining the Level of Discipline to Provide: Performance Improvement Plan

- When employee is not meeting the performance requirements of the job
- More of a memo format vs a written warning
- Prior to drafting, you should have a good understanding of the problem in order to address it effectively
- Highlights:
  - Areas of deficiency
  - Improvement that is required
  - Provides an action plan
  - Establishes periodic review dates
  - Consequences of failure to improve
  - Expectation of continued performance

# Example: Lack of Performance

- Betty has been employed for two months, however is not performing as expected of a two-month employee. You are concerned that she is not a good fit for the position.
- Upon discussing the issues with her and asking her why these errors are occurring, you find she was not aware of some of the company's procedures.
- She requests re-training over the next week and you agree to provide.

# Example: Lack of Performance (Cont.)

- **Disciplinary language:**

*The purpose of this memo is to confirm our conversation on 11/17/16. We discussed your excessive errors, which are a result of your failure to adhere to our procedures, including X, Y, and Z. You have requested retraining from 11/21/16 – 11/25/16 and we have agreed to provide.*

*Subsequently, we will be meeting weekly on Monday mornings at 9:00 am to discuss the prior week's performance and your progress. The first meeting will take place on 12/5/16.*

*We expect that you will be able to correct these shortcomings by 12/23/2016. Failure to meet and sustain improved performance may lead to further disciplinary action, up to and including termination.*

*Corrective action, up to and including termination of employment, may be taken in conjunction with, during, or after the performance plan.*

# Dos of Conducting Disciplinary Meetings

- Meet privately
- Remain professional even if the employee does not
- Plan for sufficient time to discuss
- Have a witness – not a peer
- Give a clear, concise statement of the violation
- Have a copy of the policy(s) for the employee
- Ask why the violation occurred and if the employee can adhere going forward
- Ensure it is clear what improvement is necessary
- **Website Resources: Conducting Disciplinary Meetings**

# Don'ts of Conducting Disciplinary Meetings

- **Avoid personal attacks/judgment**
  - “The pace of your work needs to improve” vs “You are slow”
  - “You need to work towards better organization” vs “You are sloppy”
- **Don't apologize**
- **Don't respond emotionally**

# After the Meeting

- **Ensure your documentation is in order**
  - **If investigation was conducted, ensure that your file is complete**
    - **Complaint**
    - **Statements**
    - **Conclusion statement**
    - **Feedback to complainant**
- **Even if employee does not write comments, keep notes of how the meeting went and employee's responses**
- **If you track disciplinary action, add to your system**
- **Maintain confidentiality**



# Potential Pitfalls: Accommodation

- **Accommodation**
  - Disability (medical issues/pregnancy) – may require certification
  - Religious – may not require certification
- Ask why employee has been unable to meet your job requirements (including attendance)
- If reason is medical, ask what accommodations are necessary
- Obtain medical certification confirming restrictions
- Meet with employee to follow-up/agree on accommodation
- **Website Resources: See Disability Accommodation page**

# Potential Pitfalls: Reduction of Hours

- In PIP situations: reduces the employee's opportunity to demonstrate improvement, or practice
- In disciplinary situations: similar to demotion, it demotivates the employee
- Remembering that discipline should not be punitive, consider whether it is really necessary

# Questions & Answers

Call us at 800-387-4468



Thank You for Attending!

The Disciplinary Process

