

RISK COMMUNIQUÉ

Progressive Discipline & Terminations—Management Liability Exposures

Wrongful discharge is a leading cause of employment practices claims. Changes have occurred over the years and employers/organizations must be aware of their responsibilities pertaining to disciplining employees. Employees exercising their legal rights, such as seeking resolution to civil rights grievances, are guaranteed certain legal protections. It is always best for the disciplining supervisor to seek advice from those responsible for personnel matters and/or legal counsel prior to determining whether formal discipline is warranted. Guidelines are listed below to help guide an organization through the disciplinary or termination process.

Documentation

Progressive discipline is a method of imposing discipline in steps, where a first offense results in a lesser punishment and subsequent offenses receive progressively harsher penalties. Of course, the organization may bypass certain steps as warranted by the nature and severity of the offense (i.e., violence). Four basic progressive discipline steps are:

- **Verbal warning** – Although it is a “verbal” warning, documentation of such warning should be noted and placed in the employee’s file. The supervisor giving the warning should sign and date the warning form or other document.
- **Written warning** – This should include a description of the behavior, what change is needed of the employee and what consequences the employee may face if the behavior continues. A written warning is generally signed by both the employee and the supervisor and placed in the employee’s personnel file. A signed warning by the employee does not admit fault, but rather acknowledges the fact that the warning was received. The employee has the right to respond in writing to the warning and have this included in the personnel file as well.
- **Suspension** – This may be paid or unpaid and range from a few days to a few weeks. The length of suspension should match the severity of the wrongdoing or policy violation.
- **Discharge** – There are some offenses that could warrant bypassing lesser disciplinary steps and result in immediate termination. Those may include (but are not limited to) criminal acts, violence, destruction of property, and intoxication.

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Documentation

If a written progressive discipline policy exists, your organization should follow it. Documentation of the various steps is the key to uniformity and fairness. A well-documented personnel file is typically the best piece of evidence supporting the organization's discipline or termination decision.

The documented record should include:

- Date, time and place of policy infraction(s).
- Factual details of the incident(s).
- Specific rules and policies violated.
- Remedial steps recommended.
- Signature of the supervisor and employee being disciplined.

Determining Discipline/Termination

The following checklist is designed to assist the organization in determining first whether disciplinary action is needed and then what level of discipline is appropriate.

- Consult with the organization's legal counsel. (The attorney should be experienced in labor and employment law.)
- Has the organization followed what is required by personnel policies and/or the collective bargaining agreement?
- When appropriate, follow the terms and conditions of the employee's individual employment contract.
- Did the organization follow its existing progressive discipline policies?
- Assure that you have clear, understandable work rules and notification of disciplinary action if violated.
- Are rules and policies written in plain, easy-to-understand language?
- Has the employee signed an acknowledgement form indicating the understanding of the organization's rules and corresponding penalties if violated?
- What does the employee's personnel record/file reflect concerning the circumstances surrounding the disciplinary or termination decision?
- How were other employees treated or disciplined for similar past actions? Treat similarly situated employees the same.
- Has the organization conducted an impartial review of the facts and circumstances surrounding the potential discipline/termination?
- Has the organization considered the employee's point of view?
- Have appropriate levels of management reviewed the disciplinary decision?
- What harmful impact did the employee's conduct or wrongdoing have on other employees, the organization or outsiders?
- If little or no harm was caused, what could be the potential harm to co-workers, the organization or outsiders?
- Has the employee had sufficient time and opportunity to correct conduct that may result in disciplinary action?

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- Was the employee's conduct malicious, intentional or negligent?
- Is the employee likely to commit future wrongdoing or misconduct?
- What are the legitimate business reasons for the discipline or termination?
- What prior notice or disciplinary documentation exists with respect to performance deficiencies, misconduct and an opportunity to correct such actions?
- In the event of litigation, what witnesses and documentation would be available to justify the disciplinary or termination decision?
- Did the employee cooperate with investigation efforts?
- If the employee committed workplace wrongdoing or otherwise violated organization rules, did the employee show remorse?
- What is the impact of the employee's continued presence on fellow employees and outsiders?
- What action best prevents further wrongdoing or misconduct while protecting co-workers, outsiders and providing a safe and productive work environment?
- Is an alternative to termination appropriate in order to allow for additional time to investigate and deliberate before dismissal, or otherwise allow the employee's performance to "turn around"? Examples include suspension, probation, leave of absence, reassignment, demotion, or a performance improvement plan.
- Has the organization hired or does it plan to hire another person to take over the terminated employee's job responsibilities? Be prepared to explain how, when and why those arrangements were made. What are the qualifications of the replacement? Are there any facts present that could suggest unlawful discrimination or nepotism?
- Make sure your organization understands the whistleblower laws in your state.
- Would a jury conclude that the organization's treatment of the dismissed employee was unquestionably fair and reasonable?

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Termination Administration

This checklist may serve as a guide for conducting responsible terminations.

- Did the organization consult with its legal counsel (experience in employment and labor laws) before the termination meeting or decision?
- All termination letters, confidentiality agreements, releases, severance agreements and other correspondence should be reviewed internally by those responsible for personnel relations and legal counsel.
- Prepare final paycheck, and particulars of compensation and benefits for presentation during the termination meeting and be prepared to explain.
- Have those conducting the termination session received training on proper procedures?
- Has a written outline been prepared to make sure all points are covered?
- Has the dismissal interview been scheduled at a time that will eliminate or minimize the employee's personal contact with the other employees before he or she leaves the premises?
- Is the termination meeting documented (i.e., exit interview form)?
- Be professional, courteous, and accurate with what is said and written during the termination session. Remember that everything written could be seen by others outside of the organization (i.e., attorneys, judges, juries).
- Listen to what the employee has to say and write down everything for the record.
- Let the employee read and sign the exit interview form. If the employee refuses to sign, note the refusal on the form.
- Place the exit interview form in the employee's personnel file.
- Consider having a witness present for the termination meeting. It is recommended to have a witness present to help corroborate what was said to reduce exposure to false allegations, defamation claims, and violence.
- Keep disciplinary actions and documentation as confidential as possible.
- Has the organization considered whether outplacement counseling is appropriate?