

EMPLOYEE DOCUMENTS, DISCIPLINE AND DISCHARGE

by

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II. WHEN AND HOW TO DISCIPLINE OR DISCHARGE

A. Putting a Discipline Policy in Place Proactively.

1. Policy. Create and use a progressive and/or corrective discipline policy that clearly outlines the type and sequence of discipline:
 - a. Typical types of discipline to include are:
 - Verbal counseling, documented with a memo or note in employee's personnel file;
 - Written reprimand, with a place provided for employee to give comments;
 - Suspension with or without pay;
 - Fair Labor Standards Act (FLSA) consideration: 29 C.F.R. §541.602 – “Deductions from pay of exempt employees may be made for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules. Such suspensions must be imposed pursuant to a written policy applicable to all employees.”

¹ The following material is intended to provide information of a general nature concerning the broad topic of employment law. The materials included in this paper are distributed by the Law Offices of Cynthia N. Sass, P.A., as a service to interested individuals. The outlines contained herein are provided for informal use only. This material should not be considered legal advice and should not be used as such. Thank you to Yvette D. Everhart, Esquire, of the Law Offices of Cynthia N. Sass, P.A. for her assistance in preparing these materials.

- Termination or discharge.
- b. Other forms of discipline may be:
- Demotion;
 - Transfer;
 - Reduction in hours; and/or
 - Reduced or no raises or bonuses.
2. Documentation. Document all discipline on all employees and keep proper records.
 3. Written Action Plans. Use written action plans designed to help correct discipline and performance issues and make sure the plans are realistic and not impossible for an employee to meet.
 4. Policy Enforcement. Consistent enforcement of the policy can help avoid claims for disparate treatment or discrimination.
 - **Case Law**. Failure to follow employment policies are probative of discrimination:
 - “An employer’s departure from its own employment policies can constitute circumstantial evidence of discrimination.” *Long v. Teachers’ Ret. Sys. of Ill.*, 585 F.3d 344 (7th Cir. 2009);
 - “[D]epartures from procedural regularity” can create an inference of discriminatory intent, sufficient to establish a prima facie case.” *Stern v. Trustees of Columbia University in City of New York*, 131 F.3d 305, 313 (2d Cir. 1997); and
 - “Departures from normal procedures may be suggestive of discrimination.” *Morrison v. Booth*, 763 F.2d 1366 (11th Cir. 1985).
 5. Discretion Option. Make sure the policy includes language that the employer is permitted to exercise discretion in discharging or disciplining an employee without following all of the progressive discipline steps.
 - **Case Law**. An employer’s discretionary use of progressive discipline policy not evidence of discrimination:

- “[I]f management has discretion as to whether to follow the discipline policy, then a failure to follow the policy does not show pretext.” *Ritchie v. Industrial Steel, Inc.*, 426 Fed. Appx. 867 (11th Cir. 2011) (unpublished opinion).
 - “When a progressive discipline policy permits the employer to exercise discretion in discharging an employee without exhausting all of the policy’s steps, failure to follow all of the steps does not suggest a discriminatory motive.” *Long*, 585 F.3d 344;
 - Where the employer reserves the right to fire at-will employees without any prior warnings, the failure to follow the discipline policy is not probative of pretext. *Morris v. City of Chillicothe*, 512 F.3d 1013 (8th Cir. 2008).
6. Case-by-Case Basis. Make sure the policy is clear that management may impose discipline on the individual facts and circumstances of each employee’s case. Avoid using words in the policy like “must,” “shall,” or “will.”
 7. Discrimination, Harassment and Retaliation. Ensure that the policy prohibits unlawful discrimination, harassment and/or retaliation, and states that employees can be subject to discipline up and to including termination for violating same.
 - Provide a reference to the discrimination and harassment policies and the complaint procedures for same.
 8. Train Staff on Policy.
 9. Collective Bargaining Agreement.
 - Follow negotiated disciplinary steps of collective bargaining agreement.

B. What To Do When There is No Policy Addressing an Offense.

- Impose discipline consistently, but where it cannot be consistent or if it was not followed, make sure to have documents supporting legitimate reasons.

- When creating the policy, make sure it includes language that the employer is permitted to exercise discretion in applying the policy and other disclaimer language.
- Include language that the policy is not intended to cover every possible infraction or offense.
- If there is no discipline policy in place, ensure that discipline practices are consistently followed.

C. How Much of an Explanation to Give the Employee (What Goes in the Discipline/Discharge Letter).

- Be as accurate as possible when outlining the basis for discipline and provide legitimate reasons for the actions being taken.
- Include factual support for the disciplinary decision.
- Address which company policies were violated or which offenses occurred that give rise to the need for discipline.
- Provide a space on the disciplinary records for the employee to provide comments or feedback in response to the discipline.
- If necessary, give time frames for correction of the action or performance issues.

D. What to Tell Other Employees.

1. Need-to-Know Basis. Avoid discussing an employee's discipline with other employees, especially those who do not have a need to know, as it can form the basis for potential defamation claims.
2. Defamation. Generally, defamation is defined as a false written or oral statement published to a third party that damages another's reputation. *Black's Law Dictionary* (2d Pocket Ed. 2001). State law may recognize exceptions or defenses to defamation as well, such as privilege, pure opinion and truth.

- For example, in Florida, employer statements made to unemployment or in an unemployment proceeding are absolutely privileged from claims of defamation. *See* Florida Statute §443.041(3).
3. Confidentiality. Instruct management and supervisors to maintain confidentiality of employee discipline.
 - Discuss discipline with the employee privately, because if the employer does not, it can cause lawsuits and is a poor management practice.
 4. National Labor Relations Act (NLRA). Use caution on prohibiting employees from discussing discipline to avoid unfair labor practices in violation of the NLRA.
 - a. **Application**. Applies to employers, which are defined as “any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization” 29 U.S.C. §152(2).
 - b. **Concerted Protected Activity**. Employees have the right to engage in concerted activities for the mutual aid and protection of the employees. 29 U.S.C. §157. Concerted protected activity involves employees joining in concert or acting together to improve wages, hours and other terms and conditions of employment.
 - Concerted protected activity includes seeking to improve wages, benefits, working hours. *See New River Industries, Inc. v. NLRB*, 945 F.2d 1290, 1294 (4th Cir. 1991).
 - Mutual aid and protection protects employees who “seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-

employer relationship.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565, (1978).

- State law violations may occur depending on the state. Employers prohibiting public sector employees from discussing discipline may violate state laws prohibiting interference with employees’ rights to engage in concerted protected activity.
 - For example, Florida law prohibits public employers (i.e. state, counties, and cities) from interfering with non-management employees’ rights to engage in concerted protected activities. *See* Florida Statute §447.301.
- c. **Supervisor.** A supervisor is not included in the definition of “employee”. 29 U.S.C. §152(3), and thus are not protected under the NLRA.
- d. **Employee Rights.** Employees have rights under the NLRA to discuss discipline or disciplinary investigations. *Caesar’s Palace*, 336 NLRB 271, 272 (2001).
- e. **No Overbroad Confidentiality Rules.** The National Labor Relations Board (NLRB) has held that an employer cannot make a blanket rule on confidentiality and employees discussing investigations, as confidentiality prohibits employees from engaging in concerted activity.
 - The NLRB held that an employer policy with a blanket rule on confidentiality of employee investigations violated employees’ Section 7 rights. NLRB Advice Memorandum, *Verse Paper*, Case 30-CA-089350 (January 29, 2013).
- f. **When Confidential Rules Are Permitted.** Confidentiality policies are permissible if an employer can demonstrate a legitimate and substantial business justification that outweighs the employees’ rights to engage in concerted activity. In other words, an employer must demonstrate a particularized need for a confidentiality rule.

- Supervisors and management employees are not protected under the NLRA, so they can be restricted from discussing discipline.

E. At What Point Should Discharge Be Considered?

- Discharge should depend on the severity of the offense or the employee's past disciplinary history.
- Review the personnel file of the employee and all relevant documents to determine if termination is appropriate. If an employer is not sure whether termination is the best course of action, **consult legal counsel**.
- Employers should consider and review whether other employees have been terminated for the same thing.
- Review the progressive discipline policy and determine whether it was followed or whether there are legitimate reasons for deviating from the policy.
- Otherwise, if the conduct or offenses can possibly be corrected, give the employee an opportunity to correct before termination. If no improvement, then terminate.
- If the employee has committed severe offenses, such as safety issues, or the conduct is not able to be corrected, then terminate the employee at that point, do not wait.
- Discharge may be a defense in certain circumstances.
 - Case Law. For harassment claims where there is no tangible employment action (i.e. termination, reductions in pay, etcetera), an employer is entitled to a defense where it takes prompt remedial action to correct or prevent discrimination or retaliation and employee fails to follow policies for complaining about harassment. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). This defense limits an employer's liability and damages.

F. Minimizing Liability When Discharging an Employee.

1. Practical Tip: If employer is threatened with a claim, and carries employment practices insurance, consult with legal counsel whether to notify the insurance carrier.

2. Discrimination/Retaliation Considerations. Make sure legitimate non-discriminatory, non-retaliatory reasons for discharging an employee exist to avoid discrimination or retaliation claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.* (Title VII), the Americans with Disabilities Act of 1990, 42 U.S.C. §12101, *et seq.* (ADA), the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621, *et seq.* (ADEA), and state anti-discrimination laws and other employment laws (i.e. Family and Medical Leave Act of 1993, 29 U.S.C. §2601, *et seq.* (FMLA), FLSA, whistleblower claims). Be able to substantiate the reasons for termination with adequate documentation and/or witness statements.
3. Disability and/or Medical Leave Considerations. If the employee has a disability and/or is out for medically related issues, consider whether termination is appropriate and that all obligations under the ADA and the FMLA, if applicable, have been met.
 - a. **ADA.** If discharge is related to performance issues, determine whether the employee requested an accommodation or may need an accommodation. If so, find out if the employer engaged in the reasonable accommodation process.
 - b. **FMLA.** The FMLA applies to employers engaged in commerce or an industry affecting commerce with 50 or more employees for each working day in 20 or more consecutive work weeks.
 - Under the FMLA, an employee who has been employed for more than 12 months and worked more than 1,250 hours (can be intermittent or continuous) is entitled to up to 12 weeks unpaid leave in a 12-month period to care for a serious health condition for him or herself or to care for a family member with a serious health condition. 29 U.S.C. §§2611(2) and (4); *See* 29 U.S.C. §2612.
 - Upon completion of leave, if the employee is able to be returned to work, the employee is to be returned to the same or a similar position

with the same rate of pay and benefits. 29 U.S.C. §2614.

- It is important to ensure the employee is not subject to retaliation for exercising his or her rights under the FMLA. 29 U.S.C. §2615.

4. Workers' Compensation Considerations. If the employee is on workers' compensation or receiving workers' compensation benefits, use caution in terminating and have legitimate reasons for the termination to avoid workers' compensation retaliation claims. Check state laws regarding same. *See* Florida Statute §440.205.

5. Termination Checklist:

- Do not terminate the employee in front of others, do it privately.
- Be professional.
- Do not apologize.
- Give real reasons for the termination.
- If the employee voices concerns or questions, listen to the employee.
- Provide information on final pay check, benefits, reference policies, etcetera.
- Provide copies of employment obligations, such as confidentiality, non-competes, and trade secret obligations.
- Terminate employee's access to electronic data.
- Get employee's passwords and make sure they are changed.
- Allow employee to collect all personal belongings, and be present.
- Ensure employee returns all company property.
- Do a forensic examination, if needed, of the departed employee's computer and other electronic equipment.

6. Be Consistent. Consistently apply policies when discharging employees. For example, review whether other employees have been terminated for the same or similar offenses.

7. Investigation. Before termination, conduct thorough investigations and keep documents and good records of these investigations. Make sure the records

include who, what, where, when and why, and get signed and dated statements from witnesses and the parties involved.

8. Contract Compliance. Verify whether there are any contracts or agreements with the employee that require compliance by the employer or impose other obligations on the employer.
9. Exit Interview. Performing exit interviews will help identify any employment claims the employee has or any other areas of concern about the employee while employed.
10. Severance Packages. Offer severance packages.
11. Notice. Provide proper notices regarding employee benefits, such as those required under the Consolidated Omnibus Budget Reconciliation Act (COBRA) or conversion of 401K and/or retirement plans.
12. Record Retention. Comply with the record retention requirements as discussed above.
 - Maintain adequate documentation, including the employee's personnel file and payroll records.
 - Maintain business records in both written and electronic formats.
 - If an employer anticipates that an employee may bring legal claims against it, preservation of evidence is paramount as there are significant sanctions for spoliation (destruction) of evidence, even if inadvertent, such as:
 - Monetary sanctions;
 - Exclusion of expert testimony;
 - Adverse inference jury instruction;
 - Dismissal of offending party's claim;
 - Default judgment against offending party; and
 - Imprisonment.

G. Common Mistakes to Avoid During Discharge.

- Being untruthful during the termination.
- Silence as to reasons for termination.

- An employer's failure to provide reasons for termination at the time of discharge, even after direct inquiry, among other factors, may constitute pretext. *See Wilson v. AM General Corp.*, 167 F.3d 1114 (7th Cir. 1999).
- Not being properly prepared to answer questions and concerns of employee at the time of termination.
- Not informing the departing employee about continuation of their benefits.
- Failing to provide the employee with any contracts or agreements that the employee is bound by, i.e. confidentiality, non-competition and/or non-solicitation agreements.
- Failing to obtain all company devices, laptops or other company materials from employee before their departure and/or making sure the employee returns all company property.
 - If appropriate, perform a forensic review of the employee's computers and electronic devices to determine if the employee took any company proprietary information.
- Failing to get passwords and copies of all company documents.
- Failing to preserve electronic data, such as e-mails, smartphone messages, voicemails, etcetera.
- Offering an employee a letter of recommendation if the employee is truly terminated for poor performance.
- Forgetting to disengage an employee's access to employer servers, e-mail systems, intranets and other electronic devices.
- Failing to pay all monies owed, such as wages, commissions.
- Ensuring that the employee receives final paycheck in accordance with state law. Some states require immediate payment of the employee's final wages, such as California (Labor Code Section 201).
- Not offering a severance package.
- Showing a lack of respect to departing employees during the termination process. For example:

- Terminating employees over the phone;
- Escorting employees from the premises by use of law enforcement or security personnel, if not necessary for security reasons; or
- Making untrue or exaggerated statements to, and/or having unnecessary communications with, others about the termination.

H. Waivers and Releases -- Their Use After Termination. Important considerations exist when requesting employees to sign waivers and releases of claims:

1. Use. If done properly, the primary use of a waiver and release is to have an employee or former employee waive any and all legal claims against the employer. [PLEASE REFER TO MICHAEL SHADIACK’S MATERIALS – VI.B. SEVERANCE/RELEASE AGREEMENT.] However, the agreements may be used for other reasons:
 - If the waiver and release agreement is not drafted properly, the waiver and release may not be binding and the employee could still sue;
 - The agreement can be used as evidence if not consistently given to employees. For example, it may be evidence of discrimination if female employees are given releases to sign, but males are not;
 - It could be used to demonstrate illegal activity, such as prohibiting whistleblowers from reporting violations to appropriate government authorities; or
 - It may invalidate prior existing agreements, if there is language stating that the release supersedes all understanding and agreements.
2. Legal Considerations. Ensure the release waives all claims allowable by law.
 - Whether can validly waive FLSA unpaid wages.
 - Whether can validly waive FMLA claims.
 - Whether can validly waive class claims and the NLRA implications.
 - *See D.R. Horton, Inc. & Michael Cuda, 357 NLRB 184 (Jan. 3, 2012)* (holding that requiring the waiver of class claims in any forum

constitute an unfair labor practice and violate the NLRA).

- Whether can validly waive unemployment compensation benefits.
- Making sure the Older Worker Benefit Protection Act (OWBPA) is complied with and all necessary requirements provided in the agreement.
- Knowing and voluntary acceptance by the employee.
- Whether can validly waive administrative agency filing, such as the EEOC, the Department of Labor.
- Whether can validly prohibit employees from assisting others in administrative claims.
- Whether can validly prohibit employees or former employees from making disclosures to federal or state governmental or regulatory agencies.