

Charting Your Success in Employee Disciplinary Actions - Best Practices for Managing Staff Performance

No doubt employee discipline can be one of the most challenging aspects of human resource management. Perhaps this is due to the term “discipline” and the negative connotation associated with the details of disciplinary actions. Much of the stress related to managing staff disciplinary action surrounds the fear of being sued for wrongful termination or discrimination. The best defense against this concern is setting expectations for staff and consistently documenting discipline from the very beginning.

Management of staff expectations begins in the interview process as the applicant receives details of position performance standards in their job description. An employee focused orientation process reinforces those standards. The well-written employee handbook defines clear boundaries and provides illustrations of prohibited behaviors and rules of conduct. Additionally, the handbook should outline the details of performance management including disciplinary actions and employee grievance policies. With these tools in place, employee management and discipline become a constructive way to change behavior, attitude and job performance.

In dealing with the process of addressing performance and conduct issues the employer must understand the legal considerations of the disciplinary process. When terminated employees sue the employer for wrongful discharge, they must prove that they were denied “due process” which is what we typically refer to as “progressive discipline.” Due process is the employee’s right to be informed of unsatisfactory performance and to have the chance to both defend him/herself and show improvement before the employer chooses an adverse employment action (such as termination/discharge). Having policies in place makes these tasks easier and reduces slight missteps or errors.

Elements of due process are:

- Employees must understand the employer’s performance expectations and the consequences of not meeting them.
- Employers must be consistent in the application of company rules.
- Discipline must be appropriate for the situation or offense.
- Employees must be given the opportunity to respond during the disciplinary process.

- Employees must be given the opportunity to demonstrate acceptable behavior or performance improvement.

In dealing with due process, the employer should also remember:

- While the employer has the right to make changes to handbook or employee policies, employers must give employees advance notice of those changes with the effective date. This allows the employees to be ready for the change.
- Consistency in dealing with employee disciplinary action is important.
- Failure to provide due process in any termination action that does not involve progressive discipline or warning steps could result in legal complaints from employees.

A progressive disciplinary system gives structure to management of staff conduct and employs a number of steps that progress or lead to discharge if the conduct persists after multiple warnings. While employers may vary in the number of steps in their policies, most use between three to five. It is important for the employer to outline in the policy that serious infractions may result in skipping steps. Examples might include threatening a coworker with serious bodily injury or theft of company property.

Typical steps in a progressive disciplinary system:

1. **Verbal Warning** (with full documentation on file) - This warning is typically with open dialogue regarding what involves the nature of the infraction or where the employee has not met expectations of their position. Documentation includes the details or reasons for the counseling session, the date and time of the counseling and who was present during the discussion.
2. **First Written Warning** – This written warning outlines the problem or occurrence with full expectations for acceptable conduct. The tone is professional and objective. Often this puts the employee on probation for a specific period of time during which improvement is expected. The employee understands that any further incidences may warrant more serious action by the employer. Unlike the initial verbal counseling, the employee is asked to sign the document acknowledging the details and is given opportunity to respond in writing on the form - but is not required to do so.
3. **Second Written Warning** – This warning is in writing with discussion of expectations and consequences of non-compliance. The employee has opportunity to respond and sign the warning form. Often this warning may include a short suspension period of one to three days.
4. **Third or Final Warning** – This warning often includes a deadline for expected improvement and may include long suspension of at least one work week.
5. **Termination – Final result – If all other options have failed.**

Each step of progressive discipline should include a private meeting to discuss the warning, along with the employer's expectations, and allow the employee to respond. The progressive discipline system is the best protection against making mistakes that put the

practice at risk for wrongful discharge or discrimination claims. There are times when some infractions warrant skipping one or more of these steps. Examples might include physical altercation between employees or anything that puts patients or other employees at risk.

Termination Decisions

The employer should have a formal termination checklist. This useful tool assists the practice in gathering all the facts to make an informed decision. It includes interviews of those involved, investigation of previous issues with the employee, or other similar cases, review of the information gathered and a final meeting with the employee. Before making this final decision the employer should ensure that there are no concerns related to statutory considerations or protections related to discrimination, public policy protections related to whistle blowing or recent filing of workers compensation claims, or other issues such related to the National Labor Relations Act, Family Medical Leave Act or leave that falls under the Uniformed Services Employment and Reemployment Rights Act.

Legal counsel should always be consulted when unsure of action to be taken or when there are concerns related to claims of wrongful discharge or discrimination.

Document/Document/Document – It is a MUST!

Documentation of each step of the process is important to support decisions, particularly in the context of discipline that may result in termination. During the termination process the employer must document and support the decision for termination in detail. Even if the termination is not challenged by legal action or unemployment claims the documentation must be kept on file. This is also true in cases where the employment relationship is “at-will” (when an employee can be dismissed by an employer for any reason – so long as not discriminatory – without having to establish just cause and without warning). The documentation of all disciplinary actions must be maintained. Disciplinary forms can become a permanent record in the employee’s personnel file. Keeping these on file assists the human resource professional or management in determining appropriate actions necessary to address any future violation of policy or further performance management needs for the employee. If the practice chooses to remove such warnings from the files of current or even terminated employees, consult legal counsel before proceeding.

Day of Termination

The termination meeting should be short and direct. Use of an outline can be helpful to keep the meeting on track. A witness should always be present in the termination meeting. Reading the termination letter often makes the process easier on all involved. In the event that there are several reasons for the termination, ensure that all are listed and provided in the discussion. Consider preparing a formal termination checklist for gathering any company property that needs to be returned. If items to be returned are not on hand the employer can set a time to facilitate the exchange. Remember that it is impermissible to

withhold earned wages from the employee's last check for items that have not been returned. It is important to know and follow the state requirements for providing the notice of termination to the employee as well as his/her final paycheck. The final paycheck should include compensation for all hours worked as well as any accrued/unused time off that is outlined in the employee handbook as payable at the time of termination.

When in doubt – do the right thing!

The contents of The Sentinel are intended for educational/informational purposes only and do not constitute legal advice. Policyholders are urged to consult with their personal attorney for legal advice, as specific legal requirements may vary from state to state and/or change over time.