



Webinar Overview

Performance Evaluations, Progressive Discipline and Best Practices for Termination

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Intro/Setting The Stage

What Are the Most Common Pitfalls for Discipline and Termination of Employees?

- Statistics indicate that the employee who believes they were treated unfairly by the employer is much more likely to sue or file a claim for wrongful discharge, whether or not they have viable grounds for such a claim.

Note: Managers very often find disciplining employees and making the final decision to terminate employment very challenging. One challenge is that with every decision there is a risk of a lawsuit. So, proceed carefully. Even the most experienced supervisors encounter stress and anxiety during this process. You must have a clear idea of proper disciplinary and termination procedures to prevent you from making costly mistakes. The more you know about how to handle these tricky situations, the more confidence you will have knowing you are within the limits of the law. Source: <https://silvermanacampora.com/guide-to-employee-discipline-and-termination/>

Common Pitfalls for Employers

1. Improper Handbook Training

- The best way to avoid having to exercise disciplinary action is emphasizing the value of policy and handbook training during the on-boarding process.

2. Emphasizing Discipline over Improvement

- When an employee understands your meeting's objective is to improve their performance rather than reprimand behavior, they are more likely to receive your advice more graciously.

3. Assuming an Employee Knows their Behavior is a Problem

- Before confronting an employee about their behavior, give the benefit of the doubt and be sure to ask if they're aware of the issue.
- Asking about the details of the occurrence may help you and your employee clarify what might have gone wrong.

Note: Practicing empathy in this situation and explaining why a certain behavior is a problem will not only contribute to immediate resolution, but may also increase the level of trust between you and your employee.

4. Failure to Document

- The most important element to appropriate action is documenting the corrective conversation with the employee.

Performance Evaluations

Why Conduct Performance Evaluations

- All employees should be subject to performance management in order to ensure that they are excelling in their position, and so that employers can “take the temperature” of their staff.
- Performance management is also crucial in determining employee promotions and raises.
- Performance management is necessary to improve any deficiencies in employee performance.

When to Conduct Performance Evaluations

Employers should institute a routine performance management system.

- Many companies conduct performance reviews annually, but that may not be enough. Goal setting and review of progress can be incredibly overwhelming if only completed once every twelve months.
- Consider setting individual and company/department goals at the beginning or the end of a calendar/fiscal year, but then breaking down the goals into sizable mini goals and have regular checkpoints throughout the year to discuss.

The Process at a Glance

- Review Different Areas of Performance:** Rather than focus on one skillset, evaluate an employee in a variety of areas of performance that relate to the job



Note: For instance, interpersonal communication skills are one important area for just about every employee—how does a person interact with his/her peers and with clients or customers? In addition, there are core skills related to specific positions that should also be evaluated like technical skills and time management. Rather than look at one single trait, take a holistic view of an employee's performance. And make sure this is a consistent list of skills measured over an entire team, not customized for each individual employee.

- **Maintain a Standardized Review System:** In order to avoid claims of wrongful termination, as well as any other claims of unlawful treatment, having a standardized performance review system which all employees are subject to is crucial.
- **Documentation is Critical:** Keeping a record on performance reviews and general feedback is useful and important for the employer and employee. Keeping a consistent record on file will be important if disciplinary measures must be taken.

Note: An employer facing a wrongful termination lawsuit will be in a much better place if they can show a pattern of poor performance reviews. If you are taken to court for wrongful termination the employee must prove that you based your decision on an illegal factor (e.g., age, race, gender, etc.) and not on a legitimate business reason such as poor performance or violation of a work policy. In almost any lawsuit challenging an employment decision the employer should prevail IF records clearly establish a legitimate business reason for the action. For example, if an employee alleges, he/she was terminated unlawfully due to age, but the employer's documents establish he/she was let go for repeated violations of company rules, the employer should have nothing to worry about.

Performance Improvement Plans

- A performance improvement plan (PIP), also known as a performance action plan, is a tool to give an employee with performance deficiencies the opportunity to succeed. It may be used to address failures to meet specific job goals or to ameliorate behavior-related concerns.
- Outcomes may vary, including improvement in overall performance; the recognition of a skills or training gap; or possible employment actions such as a transfer, demotion or termination.

Before instituting a PIP, the employer should:

- 1. Determine if a PIP is appropriate-** A PIP should be used when there is a commitment to help the employee improve, not as a way for a frustrated manager to start the termination process. The employer should consider the following:
 - Is there an actual performance or behavioral issue that can be substantiated?
 - Do you feel the manager is committed to helping the employee succeed, or is his or her intention focused on terminating the employee?
 - Is it likely that the issue can be “fixed” through a formal improvement plan?
 - Does it appear the employee has received proper training to succeed at the task?
 - Is there a known personal issue that may be affecting the employee's performance?
- 2. Develop a Plan-** The employee's direct supervisor and HR should work on a draft plan, which should include:
 - Information on what acceptable performance levels are and how the employee's current performance is deficient. Specifics regarding the unacceptable performance should be given, including dates, data and detailed explanations. Attach the job description and any relevant employer policies to further clarify expectations.
 - Specific and measurable objectives that are achievable, relevant and time-bound (otherwise known as SMART goals). PIPs usually last 30, 60 or 90 days, depending on the specific issue.
 - Guidance on what management will do or provide to assist the employee in achieving these goals, such as additional resources, training or coaching.

- Details on how often the manager and employee will meet to discuss progress. This is often done once a week, but may vary depending on the circumstances.
- Clearly stated consequences for not meeting the objectives of the plan. Options may include demotion, transfer to a different position or termination.

3. Implement the Plan- The employee, their direct supervisor and HR should meet to discuss the plan and expectations. If the employee is unable to commit to the PIP process at this point, the employer will need to determine whether termination, demotion or another appropriate employment action should be taken.

4. Monitor Plan Progression- The manager should ensure all progress meetings are scheduled and occur on time.

5. Plan Conclusion- When the employee has responded positively by meeting plan objectives, possibly before the expiration date of the plan, the employer should formally close the PIP, recognize the employee's success and allow the employee to continue employment. While a positive occasion for the employee, the manager must be sure the employee understands that continued good performance is expected.

- If an employee is unable to improve or if his or her performance worsens, the PIP should be closed, and a possible reassignment, demotion or termination should be considered, based on the specific circumstances.

All Performance Reviews should be clearly documented and conveyed to the employee!

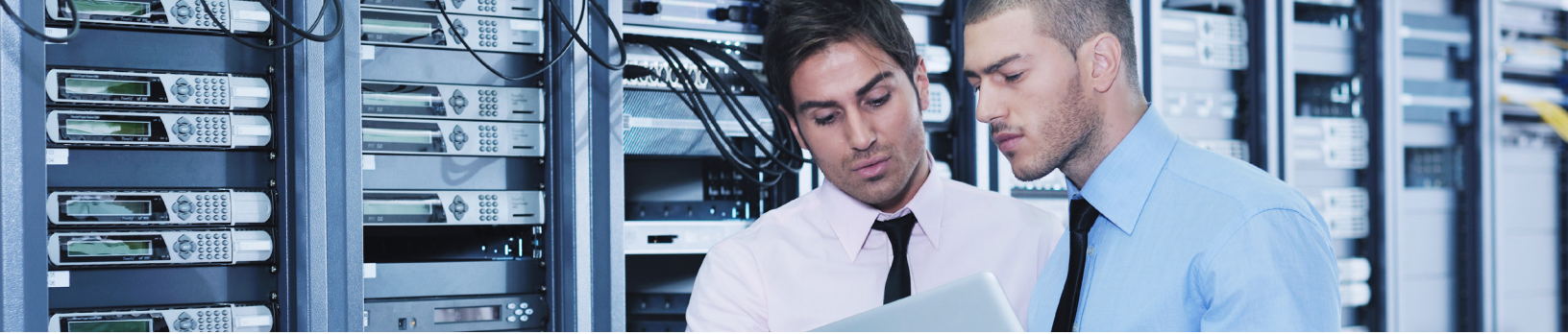
Progressive Discipline

The Disciplinary Process

- Disciplinary processes should satisfy the following general principles:
 - Must be fair
 - Must clearly communicate standards of conduct and consequences for violating such standards

- Must be consistently applied
- Must be manageable for business and for those in charge of implementation
- Must result in discipline that effectively remedies behavior
- Key elements of the disciplinary process
 - Standards of conduct and consequences
 - Forms of discipline
 - Review process
 - Written discipline policy
 - Separate anti-discrimination and anti-harassment policies
- Training HR and managers is key to ensure effective, fair, and defensible disciplinary actions that foster organizational goals and minimize legal risk:
 - Help them understand legal risks arising from behavior and contemplated discipline
 - Provide guidelines on handling levels of discipline, including documentation
 - Ensure documentation is preserved and easily accessible
 - Direct when/how managers and HR should escalate disciplinary matters
 - Ensure HR and managers conduct thorough investigations in situations when one incident of misconduct leads to discipline





Conducting Disciplinary Meetings

- Settings should be face-to-face in a quiet, private setting
- At least two company representatives (i.e. HR and the direct supervisor) should be present
- Standard disciplinary documents should be:
 - Complete, accurate, honest, and detailed
 - Consistent with organization's policies, practices, and standards of conduct
 - Aligned with job description
 - AND should not reference protected characteristics or interfere with employee rights
 - ALG has a standard Notice of Discipline which we recommend using
- At the end of the meeting, manager or HR representative should ask employee:
 - If they have any questions?
 - Do they understand what was covered in the discussion and any physical documents provided?
 - To sign any discipline documents presented in the meeting
- After the meeting, document the following:

• Name, titles, department of persons involved	• Future consequences
• Dates	• Date/time of further meetings, if required
• Description of behavior and performance	• Identification of witness
• Employee statements	• Signatures and notations
• Corrective action and time for improvement	

Note: In some cases of egregious conduct, the employer may elect to not hold a disciplinary meeting. Rather, they will instead decide to terminate the employee. In such cases, a "Final Notice of Discipline" should be provided to the employee at the time of termination so that the reasons underlying the termination are clear.

General Tips for Disciplining an Employee

- Do not make decisions based on protected characteristics
- Rigorously document all personnel exercises and decisions
- When the process is transparent and fair, it is less likely to be challenged!
- Use frequent employee performance meetings to address issues before they become a problem.
- Train managers to communicate, enforce and abide by policies.
- Train employees in certain policies and procedures.
- Establish a culture of respect and collaboration.

Best Practices For Termination

Contractual vs. At-Will Employees

- Employment relationships generally fall into two categories: [contractual and “at-will”](#). If a contract exists, discipline and termination must be handled in accordance with the terms of the contract.

Note: Contracts can take many forms, from collective-bargaining agreements to executive-compensation agreements. An employment contract ordinarily dictates your ability to fire as well as the employee’s ability to resign. It may also define the circumstances under which you may terminate the employee (e.g., “only for gross misconduct”) and how much advanced notice is required. But much more common is at-will status.

- Unless your employees have contracts, their status is most likely considered to be at-will employment. The at-will doctrine means that the employment relationship may be terminated at any time — by either the employer or the employee — for any reason or no reason at all (except illegal ones).

Legitimate Business Reasons for Termination

- Even if an employee is at-will, advising an employee of the reason for the termination is considered a best practice. Providing the reason at the time of termination can head off accusations that the termination was for an improper reason and can bolster the employer’s position later for possible claims.
- Examples of Legitimate Business Reasons for Termination:
 - **Poor performance:** This usually means an employee has consistently performed below expectations, in spite of you giving clear feedback that improvement was needed.
 - **Work rule/policy violation:** This usually occurs when an employee’s conduct is in violation of a company policy or the employee has acted in a manner that significantly jeopardized the company or fellow employees.
 - **Layoff:** This usually results from lack of available work or other financial/budgetary concerns.

Termination Checklist

Best Practices: Before terminating an employee, employers should review a “Termination Checklist” in order to see if there are any issues which may arise. These questions include:

- Demographic Information of Employee
 - Employee’s Age, Date of Birth
 - Employee’s nationality/race
 - Any known disability?
 - Any other protected categories that might apply?
- History of Issues
 - Any recent complaints by employee to be aware of?
 - Any recent complaints about the employee by supervisors/other employees to be aware of?
- Does the employee have an employment agreement, or any other agreements with the Company?
- If there is an employment agreement, is it for a fixed term?
 - Employment agreements for fixed terms will have termination procedures within the agreement that will need to be followed to avoid being in breach of the agreement
- Is the employee in a union?- Unionized employees will be subject to a Collective Bargaining Agreement, which will likely set out what grounds are valid for terminating the employee.



Documentation

- Is the relevant performance-based documentation consistent with the employer's performance management process and other relevant policies?
- Any documented discipline against employee? If so, who prepared the discipline notice and what was the date?
- Is the employee under a Performance Improvement Plan?
- How did the employee's performance compare to similarly situated employees not in a protected group and/or have not engaged in protected activity?
- Do inconsistencies exist in performance-related documents (ex: employee recently received commendations, raises, and promotions) and can they be adequately justified?
- Is there missing or incomplete performance-based documentation that could undermine termination?
- Does evidence exist that the employee received relevant performance-based documents and did the employee sign the document(s)?