Effective Discipline and Discharge

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EFFECTIVE DISCIPLINE AND DISCHARGE:

HOW TO “KEEP THE KEEPERS”
WHILE CUTTING AWAY THE ANCHORS THAT DRAG YOUR BUSINESS DOWN
OR . . .

HOW TO AVOID SPENDING TIME WITH YOUR LAWYER
Basic Requirements for Effective Discipline and Discharge

- Communicate expectations
- Investigate
- Select appropriate action: Act on observed behavior
- Take consistent action
- Document
Three Basic Ways to Communicate Expectations

- Clear discipline guidelines, including rules of conduct and penalties
- Formal and informal job evaluations
- Job descriptions and performance requirements
Investigation

- Required – no matter how clear the facts seem
- Always time – never rush to discipline or discharge – can always suspend pending completion
- Begin the investigation process promptly
- Talk with all necessary witnesses
- Consult with necessary management/departments (i.e., HR, loss prevention, safety, risk management, etc.)
Investigation

- Have a third-party witness present at all interviews to take notes
- Provide employee opportunity to tell his or her side of the story before the discipline or discharge
- Lock-in witnesses and participants – before other motives take over → Get it in writing
- Must move beyond “he said/she said” to make reasonable judgments about what happened from the total fact picture
Investigation

- Assure witnesses that the Company wants the complete truth – good or bad – and there will be no retaliation for good faith participation in the investigation.

- Assure witnesses you will be discreet, but don’t promise confidentiality.

- Direct witnesses not to talk with others to avoid “witness pollution.”
Investigation

- Review **all** relevant documents and physical evidence

- Start broad and then narrow focus of interview to judge credibility and reliability of the witness
Witness Statements

- Complete – including context and even absence of events/factors

- Specific – including date/time/location of events and other witnesses

- Employee’s own handwriting is best

- Help the employee as necessary -- write out bullet points and have employee date and sign; add detail and have employee initial

- Interview notes vs. witness statements
Selecting Appropriate Action

- Judge behavior; avoid speculation on motives
- Observed or admitted behavior strongest basis for discipline
- Consider notice of applicable work rule/policy
- Consider prescribed penalty under work rule/policy
- Consider seriousness of the offense and impact on workplace
Selecting Appropriate Action

- Mitigating and aggravating factors
  - Overall work record of employee, including length of service
  - Prior discipline record – especially recent
  - What’s the “right thing” to do
  - Willful violation or simple negligence
  - Associate expression of remorse or willingness to improve
Selecting Appropriate Action

- Impact of the discipline
- Penalties imposed in similar cases:
  Be consistent
Selecting Appropriate Action

- Progressive discipline vs. discharge
  - Don’t apply work rules in mechanical manner
  - Progressive discipline to correct behavior → no longer warranted where record shows no reasonable basis to keep “working on it”
Selecting Appropriate Action

- Use your judgment to assess all evidence, including credibility and motivation of witness
  - Responsiveness
  - Eye contact
  - Hesitation
  - Inconsistencies
- Before final decision – review detail of investigation and basis for action with necessary individuals/departments
- Consider Performance/Behavior Improvement Plan
Performance/Behavior Improvement Plan

- Put it in writing
- Identify specific and measurable areas that must be improved
- Identify standards/targets that must be met and give completion date for each
- Avoid vague references to performance problems or generalities about employee’s personality
- Have employee acknowledge plan in writing
Performance/Behavior Improvement Plan

- Minimum of three sessions recommended
- Provide progress updates at each session
- Put each progress update in writing and have employee sign
- At third session:
  - Performance/behavior improved → no further action
  - Standards/target not met → demotion, transfer, termination
Implementing the Decision

- Have third-party witness present
- Show employee written notice
- Explain discipline decision and basis for it
- Review prior work record
- Clearly state the consequences if further problems
- Have employee sign written notice
- Document content of conversation to personnel file
Documentation

- Thorough, but simple and direct
- Avoid references that invite speculation about management’s motives (i.e., “bad fit,” “bad attitude”)
- Stick with observed behavior and consequences
- Promptly record/document
- Capture events (Who? What? When? Where? Why?) and absence of relevant events (i.e., lack of prior complaints and lack of witnesses despite busy area)
Documentation

- Capture impact of events on workplace, customers, reputation of Company
- Capture everything the employee says – whether it appears relevant or not
- Tell the whole story – documentation should stand alone years from now
- Capture the reasonable basis for discipline/discharge decision (or no action) based on events/rules/overall record
Severance/Separation Agreements

- Full release of claims, including affiliated companies, managers, and employees
  (*note: problem with release of workers’ compensation and FLSA claims, possible EEOC charges)
- Provide for severance/separation pay → consider tax consequences
- Vacation pay-outs/bonuses/other compensation
- COBRA/health insurance → possible tax consequences
Severance/Separation Agreements

- Acknowledgment that all compensation due was received (minimizes problem with FLSA release)
- Resignation/waiver of future employment
- No admission of liability
- Confidentiality
  - Of agreement (exceptions for spouse, tax advisor)
  - What to say if asked by third-parties
  - Penalty for violation
  - How realistic is confidentiality?
Severance/Separation Agreements

- Non-disparagement
- Neutral job reference
- Position on unemployment
- Return of all Company property
- Continuation of confidentiality/non-compete agreements?
Severance/Separation Agreements

- ADEA/OWBPA requirements for employees over 40
  - 21 days to consider (45 days if group layoff)
  - knowing and voluntary waiver
  - Advised to consult with an attorney
  - 7 days to revoke signature
  - If group layoff, must notify everyone affected of (1) job class or department involved, (2) eligibility factors, (3) time limits, and (4) job titles and ages of all in job class or unit, identifying those affected by layoff
Severance/Separation Agreements

- “Complete Agreement” – no oral or other promises made
- Consider governing law – home court advantage?
Severance/Separation Agreements

- Document what is said in discussions re severance/separation agreement
- Have a third-party witness present
Final Thoughts

- Worst problem: Failure to act on performance/behavior issues
- Undermines your credibility with management and disrespects responsible employees
- Don’t be afraid to discipline or discharge when justified
- Consider Severance/Separation Agreements
- Document, document, document!
Questions?
Thank You!