

PUMPING THE BREAKS OR PUMPING UP THE VOLUME?:

AN EMPLOYER'S GUIDE TO DISCIPLINING DIFFICULT EMPLOYEES

By

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Introduction

We have all had to deal with “difficult” or “problem” employees (e.g. those who don't follow work rules; employees who have poor attendance; workers who, after poor evaluations and warnings, don't improve their performance; and employees who simply don't get along with co-workers). With the many changes and developments in this area of the law in recent years, disciplining or discharging employees has become more complicated. Afraid to mis-step and create liability, or at least invite a lawsuit, employers frequently choose to ignore the matter or work around the problem. However, this course of action (or inaction, as the case may be) won't make the problem go away and it can create more problems down the road for employers.

There is hope. Employers can and should enforce work rules and performance standards. However, this requires a degree of attention to detail, following established policies and procedures and, of course, a commitment to addressing problems in a fair and consistent fashion.

General advice on how to discipline or discharge difficult employees

Supervisors and other members of management should be required to communicate to employees and document in the file any instances or patterns of unsatisfactory performance or misconduct. This is not to suggest that the file be “papered” or that the employee be harassed into quitting, but only that repeated or serious unacceptable performance or conduct be promptly noted and communicated directly to the employee.

When informing an employee of discipline or termination, the employer should give the employee the actual reason(s) for the decision. If you give false or misleading reasons (common examples are a reorganization or budget cuts when those are not the reasons for the action) and your actions are later challenged you will have to quickly backtrack and document the real reasons for your actions. This can cause an employee and/or a trier of fact to believe that the employer's suggested reason for the employment action were a pretext for other reasons.

In short, the best advice is to be direct, measured and clear when disciplining or discharging an employee.

Things not to do when disciplining or discharging an employee: Common pitfalls to avoid

In order to avoid or reduce the chances of a lawsuit following a discipline or discharge discussion, we offer the following general advice:

- **Don't** discipline or discharge an employee after a heated argument or major dispute. The best time is when you have collected all the facts and when cooler heads prevail.
- **Don't** delegate the difficult task of informing an employee of termination. That could add insult to injury. The decision makers need to deliver the news.
- **Don't** inform the employee of termination by letter only, unless that is the only means of communicating with that person. It is an acceptable practice to write a termination letter and to give the employee an opportunity to read it in your presence. However, mailing such a letter to the employee's home or to the employee's work station without any forewarning is not a good practice. **DON'T EMAIL OR TEXT AN EMPLOYEE TO INFORM HIM/HER OF THE TERMINATION UNLESS IT IS THE ONLY WAY TO CONTACT THE EMPLOYEE (AND THAT IS UNLIKELY).**
- **Don't** insult or belittle the employee during a discipline or termination session. Stick to the facts regarding the unsatisfactory performance or misconduct and the consequences.
- **Don't** characterize the reason for an employee's work problem. Avoid discussions about employee's personal problems unless they are directly related to performance at work.
- **Don't** forget to document an employee's performance problems in a timely fashion. A discussion with the employee at the time could also help correct some problems.
- **Don't** attempt to persuade the employee of the rationale for discipline or that termination is the appropriate step. If you try too hard, you're likely to engage in "overkill."
- **Don't** deny the employee an opportunity to respond to the evidence upon which you have based the decision to discipline or discharge. This will not only demonstrate fairness but, you may also learn some important things about the matter you didn't know.
- **Don't** rule out compromise once you have heard more information. You may not change your mind but this should always be an option. If nothing else, you may postpone your decision until you can check a few more things.
- **Don't** rely on just one source or perspective. Verify facts using more than one source and always have manager's consider alternatives before recommending that an employee be terminated.

Conclusion

The time and effort involved in establishing work rules, consistently enforcing them, promptly responding to problems and documenting actions will help prevent some disputes from

blossoming into lawsuits and for those unavoidable disputes, these steps may help shield employers from significant liability.

Let's be careful out there!

This outline and advice is general in nature and is not legal advice. This should not be applied to specific situations without consulting your attorney. Attorney Jim Reidy is the Chair of Sheehan Phinney's Labor and Employment group.

Thank you.

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