

HR COMPLIANCE BULLETIN

Best Practices for Employee Discipline

Employee discipline is a necessary but often fraught element of workforce management. Disciplinary action taken in lieu of immediate termination can help mitigate the risk of potential wrongful termination claims, but failure to handle employee discipline properly can negatively affect employee morale and expose employers to other legal claims. Therefore, it is important for employers to consider a variety of factors before disciplining employees.

To minimize legal risks and protect employee morale, employers may consider each of the following best practices in implementing employee discipline:

- Create clear and consistent policies;
- Establish a lawful and nondiscriminatory basis for employee discipline;
- Document the reason for discipline;
- Conduct an internal investigation;
- Consider potential limitations to discipline;
- Select an appropriate method of discipline; and
- Effectively communicate with the employee being disciplined.

Action Steps

Prior to taking any disciplinary action, employers should carefully consider their obligations and any potential legal or business risks. This Compliance Bulletin provides best practices for employers to reduce risks when implementing employee discipline by ensuring compliance with legal and contractual requirements and maintaining a positive company culture.

Highlights

To avoid employee claims, employees may want to establish practices for the disciplinary process to mitigate legal risks and protect employee morale, such as:

- Creating clear and consistent policies;
- Establishing a lawful and nondiscriminatory basis for employee discipline;
- Documenting the reason for discipline;
- Investigating misconduct;
- Selecting an appropriate method of discipline;
- Considering potential limitations to discipline; and
- Effectively communicating with the employee being disciplined.



Steps for Implementing Employee Discipline

Establish Consistent Policies

Employee-facing Policies

The first step in creating a disciplinary protocol is to establish clear and consistent policies for implementing employee discipline. Employers are generally not required to distribute written discipline policies to employees but may consider doing so as a best practice. Disciplinary policies may take various forms and may be provided as a standalone policy or included in the employer's employee handbook. In drafting such employee-facing policies, employers may want to consider the following factors:

- **Consistency**—When drafting a disciplinary policy, employers should be careful to ensure that the policy is applied consistently to all employees. Failure to apply policies consistently can result in advertent disparate treatment among different employee groups and potentially lead to employee claims. Additionally, employers should ensure that policies are consistent with one another. For example, certain employer policies may overlap, so employers should confirm that any such policies do not provide for contradictory methods of discipline;
- **Clarity and simplicity**—Employee-facing discipline policies should be written in a manner that employees understand;
- **Reasonableness and fairness**—Employers should ensure that any discipline policy is both reasonable and fair. In particular, employers may confirm that any disciplinary action is commensurate with the infraction or performance issue;
- **Nonbinding**—Employers may want to avoid using absolute language. Employers that state they will always follow a specific procedure for disciplinary actions can restrict how they may handle discipline on a case-by-case basis. To retain flexibility, disciplinary policies should generally provide broad but malleable guidelines on the disciplinary measures employers may but are not required to take; and
- **Legality**—Employers should also be mindful of potential legal restrictions in their disciplinary policies. For example, in some instances, employers may be limited as to whether or to what degree they may discipline employees for certain behaviors, such as legal off-duty conduct or taking protected leave. Therefore, employers may wish to consult local counsel in drafting such policies to ensure they do not run afoul of federal, state or local laws.

Internal Policies

In addition to employee-facing policies, employers may also consider creating separate discipline protocols that are only accessible to personnel tasked with enforcing disciplinary actions (e.g., HR and supervisory personnel). These internal policies may include more detailed procedures for employee discipline and guidance for those in charge of disciplining employees. Such policies can help ensure that personnel responsible for employee discipline treat all employees consistently for the same or similar problems.

Establish a Lawful and Nondiscriminatory Reason for Discipline

Lawful Reason for Discipline

When implementing employee discipline, it's vital to establish a lawful, valid and nondiscriminatory reason for the discipline. Valid reasons for discipline may include performance-related or attendance issues, inappropriate behavior in violation of company policy, cost-saving measures and position elimination.



In all cases, employers may **not** discipline an employee for any unlawful reason, including the following:

- Due to an employee’s protected characteristic, such as those protected under the following laws:
 - Title VII of the Civil Rights Act prohibits discrimination on the basis of race, color, sex (including pregnancy and related medical conditions), national origin and religion;
 - The Americans with Disabilities Act (ADA) prohibits discrimination on the basis of an employee’s disability;
 - The Age Discrimination in Employment Act prohibits discrimination on the basis of age (40 or older);
 - The Genetic Information Nondiscrimination Act prohibits discrimination on the basis of genetic information; and
 - The Uniformed Services Employment and Reemployment Rights (USERRA) prohibits discrimination on the basis of past, current or prospective military service;
- Because an employee seeks or takes protected leave, including:
 - Family and Medical Leave Act leave;
 - USERRA military leave;
 - Workers’ compensation leave;
 - ADA disability leave; and
 - Temporary or short-term disability leave (including on the basis of pregnancy);
- Because an employee seeks or obtains a disability, pregnancy or religious accommodation;
- In response to protected whistleblowing activities;
- In response to union organizing activity as protected by the National Labor Relations Act; and
- In response to an employee who sought to enforce their wage rights, including those under the Fair Labor Standards Act.

Consider Restrictions Regarding Off-duty Conduct

In addition to the restrictions above, some states and municipalities have enacted additional restrictions on when employers may discipline employees for off-duty conduct. For example, in some states, employers are restricted from disciplining employees who engage in **lawful** off-duty conduct (e.g., using legalized marijuana or engaging in political activities).

Moreover, some states offer protections for certain **unlawful** off-duty conduct as well. For example, some state laws protect employees from discrimination on the basis of arrest or conviction records. Therefore, employers should carefully review state and local laws before disciplining employees for activities conducted outside of the workplace.

Additional Legal Risks

Even if the employer has established a lawful justification for discipline, employees may take legal action against employers in connection with disciplinary measures when other circumstances could reasonably suggest the employee was disciplined for unlawful reasons. Such circumstances may include:

- The employee recently requested or received an accommodation for disability, pregnancy, childbirth or a related medical condition, or religious beliefs;
- The employee recently complained of discrimination, retaliation, unfair labor practices or inadequate wages, or similar complaints; and
- The employee has engaged in union-organizing activity.



The risk of such legal action is generally greater for more severe forms of discipline, such as demotion, than milder forms of discipline, such as verbal or written warnings.

Document the Reason for Discipline

To avoid a potential claim of discrimination or retaliation, it is imperative that employers document the lawful, nondiscriminatory reason for discipline. Specifically, in the event an employee later claims that they were disciplined for any unlawful reason, proper and timely documentation can provide a contemporaneous defense for the employer.

Conduct an Investigation

In certain circumstances, particularly where an employee is believed to have engaged in illegal or other inappropriate conduct, employers should first consider conducting an investigation to verify the wrongdoing. Conducting a prompt and fair investigation can help protect employers from future liability in the event they must take adverse action against the offending employee. Further, investigations can help protect employers in the event another employee is affected by the offending employee's conduct (e.g., alleged harassment), as it demonstrates the employer took reasonable efforts to correct such conduct.

Employers should assign a qualified team to conduct the investigation, which may include HR professionals, in-house legal counsel and other qualified personnel. In assigning such a team, employers should ensure impartiality. For example, employers may wish to avoid investigations conducted by an individual involved in or affected by the employee's actions or who has a personal relationship with the employee. Finally, it is important to conduct the investigation promptly so that witness interviews and other fact-finding are as accurate and comprehensive as possible.

Where an employer confirms wrongdoing, it is important that disciplinary action is taken in a timely manner so that it is clear the discipline is a direct result of the findings of the investigation rather than a pretense for another unlawful reason (such as discrimination).

Consider Contractual Restrictions

In some cases, employers will be restricted in the manner in which they may discipline employees pursuant to a contract or other agreement. One of the most common instances in which employers are restricted is with respect to collectively bargained employees. Frequently, collective bargaining agreements will set forth a specific disciplinary policy that employers must adhere to with respect to any employees covered by such agreement. Less frequently, employers may be limited by their own policies or pursuant to an individual employment agreement.

Therefore, employers should carefully review any relevant documentation to ensure that their proposed method of discipline does not violate their contractual obligations.

Select the Disciplinary Approach

After establishing the nature and severity of the problem, employers must then determine which form of discipline would be appropriate. Unless employers are constrained by a contractual disciplinary policy, such as one contained in a collective bargaining agreement, employers may generally select whichever form of discipline is most appropriate under the circumstances (so long as it is not done for discriminatory or retaliatory reasons).

Appropriate discipline will depend on a number of factors, including:

- The nature of the underlying issue (e.g., performance versus misconduct);
- The duration of the issue; and



- The severity of the underlying issue.

Often, employers will use “progressive discipline.” Progressive discipline generally involves applying increasingly severe forms of discipline as necessary. Approaches to discipline may include but are not limited to any or a combination of the following (which are listed in order from least to most severe):

- **Verbal warnings**—For less severe or isolated issues, employers may consider first issuing a verbal warning as an informal method of corrective action;
- **Written warnings**—In the case of a more severe issue or where a verbal warning was insufficient, employers may consider issuing a more formal written warning to the employee;
- **Coaching or training**—In some cases, employees may need more guidance than can be provided through verbal or written warnings. One method can be to offer individualized coaching or training to correct the underlying issue. Depending on the nature of the problem, employers may consider either assigning another qualified employee to provide such training or outsourcing such training to a third party;
- **Performance improvement plan (PIP)**—If the reason for discipline is poor performance, employers may consider implementing a PIP. Typically, employers select a PIP after other less formal methods of discipline have not been successful. A PIP is generally a written document that sets forth specific goals an employee should achieve in a specified time frame. These goals may include improving performance deficiencies, knowledge or skills gaps, behavioral problems or other issues. Regardless of the goal, employers should set forth clear, attainable goals, provide employees with the tools to achieve such metrics and conduct regular check-ins throughout the process;
- **Suspension**—A suspension (with or without pay) may be appropriate for certain employee issues. For example, suspension may be appropriate when the employee is subject to an internal investigation into alleged misconduct. In that instance, suspension should generally only last for the duration of the investigation; and
- **Reassignment or other job modifications**—Particularly in the case of poor performance, employers may choose to reassign the employee to a different role or modify their job responsibilities to align with their skill level. Such reassignment may result in a demotion or a change in employee compensation. Therefore, such disciplinary measures may be more susceptible to employee claims and expose employers to greater legal risk.

In each case (including with respect to verbal warnings), employers should document the approach to discipline, along with any follow-up, including employee progress or continued employee deficiencies. Such documentation can provide support for an employer’s decision in the event an employee claims they were treated unfairly or discriminated against.

Consider Termination

Generally, employers take disciplinary measures with the goal of improving employee performance so that they may continue and, ideally, thrive in their current position. However, in some cases, employers may determine that termination is more appropriate. Some instances in which termination may be necessary or preferable include but are not limited to:

- Prior attempts at disciplinary or remedial measures have failed;
- The employee poses a direct threat to the safety of other individuals;
- The employee failed a drug or alcohol test (subject to state and local restrictions); and
- The employee has committed an egregious violation of company policy (e.g., theft, assault).

However, employers should be careful to ensure that there are no contractual or legal restrictions on employee terminations. For example, while most employees are considered “at will” (which means an employer may terminate their employment at any time for any lawful reason), some employees may be subject to an agreement that indicates



employment is not at will. Therefore, employers should carefully review any existing agreements with the employee, including offer letters, handbook agreements or other contracts, to ensure that there is no language that indicates employment is not at will. Further, similar to disciplinary action, employers may only terminate employees for lawful and nondiscriminatory reasons.

Communicate the Disciplinary Action to the Employee

After establishing a preferred approach to discipline, employers should generally conduct an in-person or, for remote work environments, a video meeting to communicate the disciplinary approach. Doing so allows the employee to ask questions and understand expectations and helps to promote a collaborative approach to such discipline. In conducting such meetings, employers may wish to consider the following measures:

- Focus on the **valid and nondiscriminatory reason** for the disciplinary action;
- Identify the specific **employer policy** that the employee violated;
- Clearly state the **nature of the disciplinary action**;
- Establish **straightforward, objective and measurable goals** for the employee moving forward;
- Ensure **confidentiality** of such disciplinary measures to the extent feasible;
- Offer an opportunity for the employee to **ask questions**; and
- **Document the disciplinary meeting.**

Monitor Employee Progress

Following the disciplinary meeting, employers may wish to conduct regular check-ins to monitor whether the employee is meeting the goals and objectives established during the meeting. During such check-ins, employers may identify additional resources, provide more feedback or offer positive encouragement. Employers should also ensure they properly document any progress or lack thereof to support future employment or disciplinary actions.

Key Takeaways for Employers

Employee discipline can be complex and requires employers to contend with various legal requirements and business considerations. To minimize risk, employers should establish clear and consistent disciplinary policies and ensure proper documentation. Employers may also wish to train managers, supervisors and other HR personnel on compliance with such policies and their obligations under relevant employment laws.