

CHECKLIST | BEST PRACTICES FOR EMPLOYEE DISCIPLINE

Presented by Employco USA, Inc.

Employee discipline can be complicated, and if not executed properly, employers can open themselves up to costly legal challenges and negatively affect their business or reputation. Establishing procedures for employee discipline can help employers ensure that disciplinary measures are conducted in a manner that minimizes legal risks and accounts for various business considerations.

This checklist outlines key steps when conducting employee discipline. However, this checklist does not consider specific state or local laws. Therefore, this checklist should be used as a guide, and the steps in this list should be modified to meet the unique needs of each organization. Employers are encouraged to work with local counsel to carry out any disciplinary measures.

EMPLOYER POLICY CONSIDERATIONS

The first step in creating a disciplinary protocol is to establish clear and consistent policies for implementing employee discipline. Such policies generally fall into two categories: those that are distributed to employees and those that are only accessible to personnel tasked with enforcing disciplinary actions (e.g., HR and supervisory personnel).

Draft Employee-facing Policies	Completed
<p>Determine the method of distribution. Employers who choose to establish written disciplinary policies and distribute such policies may distribute them in any method of their choosing. For example, employers may consider including disciplinary policies in their employee handbooks or distributing them as standalone policies.</p>	<input type="checkbox"/>
<p>Ensure consistency. When drafting a disciplinary policy, employers should be careful to ensure the policy is applied consistently to all employees. Failure to apply policies consistently can result in disparate treatment among different employee groups and potential 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.</p>	<input type="checkbox"/>
<p>Draft clear and easy-to-understand guidelines. Employee-facing disciplinary policies should be written in a manner that employees understand. For example, employers may wish to avoid using “legalese” and other overly technical language.</p>	<input type="checkbox"/>
<p>Retain flexibility in administration. Employers may want to avoid using absolute language. Employers who state that they will always follow a specific procedure for disciplinary actions can restrict how they 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.</p>	<input type="checkbox"/>
<p>Create reasonable and fair procedures. Employers should ensure that any disciplinary policy is both reasonable and fair. In particular, employers may confirm that any disciplinary action is commensurate with the infraction or performance issue.</p>	<input type="checkbox"/>
<p>Ensure compliance with federal, state and local laws. 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</p>	<input type="checkbox"/>

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<p>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.</p>	
Draft Internal Policies	Completed
<p>Provide clear disciplinary guidelines. An effective internal policy clearly sets forth the employer’s disciplinary policy and establishes clear guidelines for the employees tasked with enforcing it. Such guidelines should generally include each employee’s role and responsibilities with respect to employee discipline, which employees they are responsible for disciplining, and guidance and contact information for when and where such personnel may need to escalate employee problems.</p>	<input type="checkbox"/>
<p>Offer examples of common issues and corresponding disciplinary actions. Employee discipline should generally be determined on a case-by-case basis. Having more than one individual in the company responsible for disciplining employees can lead to inconsistent disciplinary action and potentially disparate treatment. Therefore, an effective employer policy may include specific examples of common issues and corresponding and appropriate disciplinary actions to reduce the likelihood of these risks.</p>	<input type="checkbox"/>
<p>Remind personnel of legal obligations. There are some restrictions on when and to what degree employers may discipline employees (for example, employers may not discipline employees for any discriminatory or retaliatory reason). Internal policies may include information regarding such legal restrictions to avoid potential claims of discrimination.</p>	<input type="checkbox"/>
<p>Consider additional training. Employers may also consider administering training on disciplinary policies to relevant personnel. Such trainings can provide examples of appropriate disciplinary actions in response to and inform personnel of their obligations under the employer’s disciplinary policies. Trainings also give personnel the opportunity to ask questions about their roles and expectations regarding employee discipline.</p>	<input type="checkbox"/>

ESTABLISH A LAWFUL AND NONDISCRIMINATORY REASON FOR DISCIPLINE

Prior to disciplining an employee, employers should first decide whether discipline is an appropriate and lawful course of action. The list below sets forth some of the initial steps an employer may consider before implementing any disciplinary action. Failure to properly assess an employee’s rights and an employer’s obligations prior to the disciplinary measures could expose an employer to legal liability or negatively impact employee morale.

Decide Whether Discipline Is Lawful and Appropriate	Completed
<p>Establish the reason for discipline. As an initial matter, employers should set forth the reason for the employee’s discipline. The rationale should be clear, legitimate, and nondiscriminatory. Some examples of disciplinary reasons include:</p> <ul style="list-style-type: none"> • Performance-related issues; • Attendance issues; and • Inappropriate behavior or conduct in violation of company policy. 	<input type="checkbox"/>
<p>Confirm that the reason for the discipline is lawful. Employers may not discipline an employee for any unlawful reason, including:</p> <ul style="list-style-type: none"> • Due to an employee’s protected characteristics, such as those protected under the 	<input type="checkbox"/>

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<p>following laws:</p> <ul style="list-style-type: none"> ○ 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 Act (USERRA) prohibits discrimination on the basis of past, current or prospective military service. <ul style="list-style-type: none"> ● Because an employee seeks or takes protected leave, including: <ul style="list-style-type: none"> ○ Family and Medical Leave Act leave; ○ USERRA military leave; ○ Workers’ compensation leave; ○ ADA disability leave; or ○ 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. <p>Some states or municipalities may impose additional restrictions on employee discipline, so employers should confirm that the reason for discipline is lawful under relevant state and local laws.</p>	
<p>Confirm that discipline is appropriate. Even if an employee is at will and the reason for discipline is not unlawful, employers may want to confirm that discipline is appropriate under the circumstances. In assessing whether discipline is appropriate, employers may consider a variety of factors, including but not limited to:</p> <ul style="list-style-type: none"> ● Whether the employer is treating employees consistently; ● Whether the employer or the employee’s supervisors are partially at fault for the circumstances causing the proposed discipline; ● Whether the employer adequately communicated company policies or expectations to the employee; and ● Whether the employer has properly documented employee issues. 	<input type="checkbox"/>
<p>Consider state and local restrictions regarding discipline for off-duty conduct. Some states and municipalities have enacted restrictions on when employers may discipline employees for off-duty conduct. These restrictions generally protect employees from discipline on the basis of certain:</p> <ul style="list-style-type: none"> ● Lawful off-duty conduct, such as protection from discrimination on the basis of the use of legalized marijuana or engagement in political activities; and ● Unlawful off-duty conduct, such as protection from discrimination on the basis of arrest or conviction records. 	<input type="checkbox"/>

<p>Therefore, employers should carefully review state and local laws before disciplining employees for activities conducted outside of the workplace.</p>	
<p>Confirm whether there are any contractual restrictions to discipline. Employers should carefully review any existing agreements with the employee, including collective bargaining agreements, offer letters, handbook agreements or any other contracts, to ensure that there is no language that indicates a required disciplinary process. If employers are subject to a mandatory discipline procedure, they should confirm that they are able to meet all applicable requirements to carry out the discipline.</p>	<input type="checkbox"/>
<p>Evaluate other legal risks of discipline. Even if discipline is both lawful and appropriate, employers may still be at risk of employee claims. Specifically, employees may take legal action against an employer in connection with a valid or lawful disciplinary action when other circumstances could reasonably suggest the employee was disciplined for unlawful reasons. Such circumstances may include but are not limited to:</p> <ul style="list-style-type: none"> • The employee recently requested or received an accommodation for a disability, pregnancy or related condition or religious beliefs; • The employee recently complained of discrimination, retaliation, unfair labor practices, inadequate wages or similar complaints; and • The employee has engaged in union-organizing activity. <p>Even if any of the above circumstances apply, employers may still discipline an employee for valid, lawful reasons. However, given the greater risks, it is even more imperative that employers adequately document the reason for discipline when these circumstances exist.</p>	<input type="checkbox"/>
<p>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. In the event an employee later claims they were disciplined for any unlawful reason, proper and timely documentation can provide a contemporaneous defense for the employer. When documenting the reason for discipline, employers should consider noting the following, as applicable:</p> <ul style="list-style-type: none"> • The individuals involved; • Specific examples of employee misconduct or poor performance; • The particular employer policy or policies that have been violated; • Past attempts at correcting employee behavior (if applicable); and • Applicable dates and times, if known. 	<input type="checkbox"/>

CONDUCT AN INVESTIGATION (IF APPLICABLE)

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 if 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. The list below sets forth some steps an employer may consider in conducting an investigation.

<p>Conducting an Internal Investigation</p>	<p>Completed</p>
<p>Establish the goals of the investigation. As a preliminary step, employers may wish to set forth</p>	<input type="checkbox"/>

<p>clear goals for the investigation. Such goals may include but are not limited to determining:</p> <ul style="list-style-type: none"> • The veracity of an underlying claim (this may be particularly important where an employer is investigating an employee on the basis of another employee’s complaint or otherwise lacks firsthand knowledge); • Whether other parties were involved in the misconduct; • Whether there are any mitigating circumstances; and • Whether and what form of disciplinary measures would be appropriate. 	
<p>Assign the investigation team. Another important step in an investigation is identifying the person or group of people who will be in charge of conducting the investigation. The team may include a variety of individuals, such as an internal or outside investigator, in-house or outside legal counsel, and HR personnel. The team will depend on the nature and severity of the claim (for example, if the claim involves a serious allegation such as sexual harassment, the employer should likely include in-house or outside legal counsel). In all cases, employers should ensure that the investigation team:</p> <ul style="list-style-type: none"> • Is trained and experienced in conducting workplace investigations; • Is impartial and unbiased (for example, is not directly involved in the underlying claim and does not have a personal relationship with the parties involved); • Is knowledgeable about the employer policy or policies at issue; and • Maintains confidentiality. 	<input type="checkbox"/>
<p>Consider whether law enforcement should be involved. In some instances, an employer may need to consider whether to contact law enforcement regarding the investigation. Examples of employee conduct that may require the involvement of law enforcement include:</p> <ul style="list-style-type: none"> • Workplace violence, whether threatened or actual; • Sexual assault; • Fraud; • Theft; and • Other serious violations of the law. 	<input type="checkbox"/>
<p>Collect relevant documents. An important component of an investigation includes collecting and reviewing relevant documents. Such documents may include but are not limited to:</p> <ul style="list-style-type: none"> • Applicable employer policies; • Email or other written communications; • Performance reviews or disciplinary actions; or • Employee agreements. <p>In all instances, employers may wish to consult with legal counsel to determine which documents they may or may not obtain without judicial intervention (for example, employers may be subject to certain restrictions with respect to an employee’s personal mobile device).</p>	<input type="checkbox"/>
<p>Interview witnesses. After establishing the need for an investigation, it is important for employers to promptly interview witnesses to ensure the information gathered is as accurate and up-to-date as possible. The determination of who to interview will vary depending on the nature, severity and scope of the alleged misconduct. However, employers should generally aim to focus their interview efforts on those with firsthand knowledge of the situation.</p> <p>In general, employers may require employee witnesses to maintain the confidentiality of the investigation.</p>	<input type="checkbox"/>

<p>Follow up promptly. At the conclusion of the investigation, employers should determine their next steps in a timely fashion and communicate them to all relevant parties. In particular, where an employer confirms wrongdoing, it is important that disciplinary action is taken promptly so that it is clear the discipline is a direct result of the investigation findings rather than a pretense for some other unlawful reason (such as discrimination).</p>	<input type="checkbox"/>
<p>Document the process and findings. It is important that employers thoroughly document each stage of the process and provide a written analysis of their ultimate findings.</p>	<input type="checkbox"/>

SELECT AN APPROPRIATE DISCIPLINARY ACTION

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

Considerations for Choosing a Method of Discipline	Completed
<p>Determine whether progressive discipline is appropriate. In most cases, employers will apply progressive discipline, which generally involves applying increasingly severe forms of discipline as necessary. However, in some cases, particularly where an employee has engaged in serious or unlawful misconduct, it may be appropriate to skip preliminary methods of discipline (such as verbal or written warnings) in favor of harsher disciplinary action (such as suspension).</p>	<input type="checkbox"/>
<p>Select the appropriate method(s) of disciplinary action. 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):</p> <ul style="list-style-type: none"> • 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 is 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—If the reason for discipline is poor performance, employers may consider implementing a performance improvement plan (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—For certain employee issues, a suspension (with or without pay) may be appropriate. For example, suspension may be appropriate when the employee is subject to an internal investigation into alleged misconduct. In that instance, such suspension should generally only last for the duration of the investigation; and 	<input type="checkbox"/>

<ul style="list-style-type: none"> • Reassignment or other job modifications—In some cases, 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. 	
<p>Document the approach to discipline. In each case (including verbal warnings), employers should document the approach to discipline and 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.</p>	<input type="checkbox"/>
Consider Termination	Completed
<p>Determine whether termination is appropriate. 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:</p> <ul style="list-style-type: none"> • 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). 	<input type="checkbox"/>
<p>Confirm there are no legal or contractual restrictions to termination. Employers should be careful to ensure 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.</p>	<input type="checkbox"/>

CONDUCT A DISCIPLINARY MEETING WITH THE EMPLOYEE

After establishing a preferred approach to discipline, employers should conduct a disciplinary meeting with the employee. The below list provides some best practices for conducting such meetings.

Considerations for a Disciplinary Meeting	Completed
<p>Determine the format of the meeting. To avoid miscommunication, it is generally considered best practice to conduct an in-person or, for remote work environments, video meeting to communicate the disciplinary approach.</p>	<input type="checkbox"/>
<p>Consider the parties involved. Employers may also wish to decide who will conduct the meeting. This will depend on the nature of the underlying issue. For example, for minor issues that warrant only a verbal or written warning, employers may wish to involve only the employee’s immediate supervisor. For more serious issues, employers may consider involving HR personnel or legal counsel.</p>	<input type="checkbox"/>

Focus on the valid and nondiscriminatory reason for the disciplinary action. To avoid potential employee claims of discrimination, it is important that employers clearly identify a valid and nondiscriminatory reason for the disciplinary action.	<input type="checkbox"/>
Identify the specific employer policy at issue. In general, employers should avoid arbitrary disciplinary measures and, instead, implement discipline where employees have violated or failed to satisfy a particular employer policy.	<input type="checkbox"/>
Clearly state the nature of the disciplinary action. Employers should ensure the employee understands the nature of the disciplinary action and the potential consequences for failing to address the issue.	<input type="checkbox"/>
Establish straightforward, objective and measurable goals. The goal of discipline is generally to remediate employee issues. Therefore, it is important for employers to provide the employee with a set of clear and quantifiable goals and a reasonable target date or dates for achieving such goals.	<input type="checkbox"/>
Ensure confidentiality. Given the sensitive nature of employee discipline, employers should make efforts to ensure the confidentiality of the disciplinary action to the greatest extent feasible.	<input type="checkbox"/>
Offer the employee the opportunity to ask questions. While employees may ideally be able to anticipate disciplinary issues, they may be surprised to learn that they have violated policies or are underachieving. Therefore, it is important that the employer offers the employee the opportunity to ask questions and provide potential explanations for the underlying issue.	<input type="checkbox"/>
Document the meeting. Employers may wish to document the discussion, including the employee’s response and the agreed-upon call to action. Such documentation can be particularly helpful in the event of future litigation or employee claims.	<input type="checkbox"/>

POST-DISCIPLINE CONSIDERATIONS

After implementing a disciplinary measure, employers should continue to monitor employee behavior or performance, as applicable.

Post-discipline Considerations	Completed
Conduct regular check-ins. 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.	<input type="checkbox"/>
Consider additional remedial measures. In some cases, employees may still fail to meet the objectives set forth for them. Employers may then identify additional resources, provide further coaching or take some other remedial measures to promote employee improvement.	<input type="checkbox"/>
Document employee progress. Employers should also ensure they properly document any progress or lack thereof to support future employment or disciplinary actions.	<input type="checkbox"/>

Contact Employco USA, Inc. today for more information about workplace discipline practices.