

THE IMPORTANCE OF DOCUMENTATION DURING THE DISCIPLINE PROCESS

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Introduction

Employee discipline generally is seen as an unpleasant task for most supervisors. The issue of discipline and how it is handled will have a far-reaching impact on the entire organization. Therefore, it is imperative that firms develop even-handed and standard policies that apply to all employees. The employer's goal is to treat all "similarly situated employees" alike in like situations. Consistency toward all similarly situated employees in disciplinary procedures is one of the best lines of defense against claims of discrimination brought by an employee.

This article discusses the documentation procedures used during a firm's attempts to work with nonexempt employees with work related performance problems. If followed, these procedures may help the firm prevail against claims of wrongful discharge, breach of contract and discrimination made under Title VII of the Civil Rights Act of 1964. The goal of documentation during the disciplinary process is to clearly memorialize the firm's efforts to address these questions:

1. Are there performance/behavior expectations relating to the employee's position?
2. Was the employee made aware of those expectations?
3. Has the employee failed to meet those expectations?
4. Was the employee informed of the consequence if he/she failed to meet the expectations?
5. Was the employee given ample time and opportunity to improve/change?
6. Did the employee improve/change the behavior?

A Critical Element of Progressive Discipline: Documentation

No discussion of progressive discipline can begin without a thorough exploration of documentation. The most essential guideline for handling any and all disciplinary action is documentation. When followed regularly, accurate and contemporaneous documentation will add authenticity and credibility to the events leading to the disciplinary interview and will assist the firm in defeating any claims of discrimination brought by the employee. Furthermore, documentation will make it difficult to doubt the motives of the manager. Therefore, it is recommended that all supervisory personnel be specifically trained to conduct disciplinary interviews and document those interviews. Taking notes during or immediately after a discipline conference will create a record of what happened and support personnel decisions. Having a journal at hand for keeping dated notes of any and all conferences that take place in the manager's office should become routine, and in a litigated matter, could prove invaluable. Retrieval of those notes when needed will provide detailed and recorded observations that

memory cannot provide. While showing fairness and equity, documentation reflects sound and rational judgment on the part of management. Notes, journals and observations are the “back-up” to any memorandum. Therefore, they should be kept as part of the supervisor’s file in a secure area.

Before the procedure of progressive discipline becomes necessary, it is strongly recommended that periodic performance reviews with all employees be conducted and documented in order to ensure that the employee is fully aware of any failure to meet expectations. A job description may be utilized in these reviews to keep the employee focused on the requirements of the position. These review conferences, when made a part of the employee file, will support the position of the employer that the “surprise element” has been eliminated from any disciplinary action. Before a supervisor submits a performance review, the document should be carefully reviewed to insure that any instance of warning or discipline, and the outcome, is noted and that the review is neither inaccurately overly-positive nor overly-negative.

Throughout this process, there should be consultation with the firm’s employment law attorney, whether in-house or retained.

Progressive Discipline Procedures

Phase 1. Oral Warning

Once it has been determined that there is a performance issue or a behavior problem, the supervisor must take appropriate action immediately. In some instances, informing the employee of the problem or the behavior is sufficient to correct the situation. All the facts relating to the situation in question should be verified and available prior to any meeting. Allegations regarding behavior problems presented by others must be thoroughly investigated, and those individuals should be interviewed and their statements documented. Performance problems should be presented to the employee with supporting documents, such as attendance records, examples of errors in work product, supervisory complaints, etc., in order to eliminate any contradictions by the employee.

The meeting should take place in private and should be conducted in a positive manner, with the emphasis on what the employee can do to correct the problem. This first meeting can be treated as a counseling session, with the employer showing support and encouragement for change. A timetable should be set for the correction, keeping in mind that too short a time may not produce the desired result and too long a period may dilute the seriousness of the warning and, in extreme cases, leave an undesirable employee on the payroll for an indefinite period of time.

The supervisor must document the session and clearly note the requirements discussed and the expectations made of the employee. Any comments and/or promises made by the employee during this session should be documented, signed by the employee and made a part of the employment folder for future sessions.

Phase 2. First Written Warning

If problems continue, the supervisor should arrange a second meeting with the employee. An appropriate manager in a higher level of authority (i.e. HR director, administrator, partner/shareholder) should be included in this meeting, signifying a more formal step in the disciplinary process. At this meeting, it should be clearly identified that the problem still exists.

This meeting should be held in a calm and quiet manner, without hostility. Nothing should be said that would create an emotional atmosphere or invite inappropriate behavior. The documentation of the first session should be presented to the employee to reinforce that expectations were set and agreed to by the employee, but which have not been met. The employee should be given an opportunity to state his/her position and/or give an explanation of why the improvement has not taken place.

A written warning should be prepared in advance. This should clearly set out the seriousness of the problem or behavior, contain a statement of agreement for a solution or required change, and specify the time frame for a program which will produce immediate improvement. The written warning should also include a statement reflecting the consequences, up to and including termination, for non-compliance. The outcome of the meeting should be documented and the finalized memo signed by the employee. Should the employee refuse to sign, the manager should note on the document that the employee was presented with a copy of the memorandum but refused to sign. The employee can be asked to sign this note, in lieu of signing the memorandum itself.

Phase 3. Second Written Warning and Last-Chance Agreement

Despite counseling, warnings, and discussions of potentially severe consequences, it is entirely possible that the employee cannot or will not meet the expectations discussed during previous meetings. Depending on the behavior or the severity of the performance problem, the employer may wish to make a last-chance offer to the employee. This offer, and any subsequent agreement between the firm and the employee, is often memorialized as a last-chance agreement.

Again, a conference should be held with the employee and in the presence of another manager, who functions or serves primarily as a witness. All previous documentation should be reviewed and discussed in depth and the new instances of inappropriate behavior or substandard performance should be presented. In many cases, an employee may improve for a period of time and then lapse into the unacceptable behavior again. If a suspension without pay would get the attention of the employee, this would be the time to institute that penalty. However, be aware that the classification of exempt employees may be affected in certain cases, if they are suspended without pay, based on the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA).

If the firm elects to give the employee a final opportunity to improve, the employer should prepare a memorandum outlining a last-chance agreement. This document should clearly state that this is the last discussion of these matters and that if the behavior/performance problem is exhibited even one more time, the employee will be discharged immediately. The employee should sign this document and, as before, should the employee refuse to sign, a note should be added to the bottom of the document stating that the employee so refused. The employee should then be requested to sign that note. Always provide a copy of this entire document to the employee.

If, on the other hand, the employer has come to the conclusion that the actions of the employee demonstrate that there will be no further improvement and that other penalty options would be non-productive, a decision may now be made to discharge the employee following a final review of all documentation and the procedures and processes followed.

Review of Progressive Discipline Process

Before proceeding to any action which would create a tangible change in an employee's situation, the administrator should thoroughly review the disciplinary process which has been followed, including the following questions as they relate to the situation at hand:

1. Was the employee adequately warned?
2. Was the firm's rule or order reasonable and consistent with the approach taken with all similarly situated employees?
3. Did management investigate?
4. Was the investigation fair and objective?
5. Did the investigation produce substantial evidence or proof of guilt?
6. Were rules, orders and penalties applied evenhandedly and without discrimination?
7. Was the penalty reasonably related to the seriousness of the offense?
8. Has the process been thoroughly documented?

Range of Alternatives if Problems Persist

In the final phase of the process, the following range of possible discipline should be considered:

- ✓ Permanent written reprimand to employee file;
 - ✓ Suspension without pay. Caution is advised if you are considering this discipline for an exempt employee. Case law holds that disciplinary unpaid suspensions during weeks where the employee has performed work may jeopardize the employee's exempt status under the FLSA.^[5]
 - ✓ Transfer;
 - ✓ Demotion;
 - ✓ Wage reduction;
 - ✓ Last-chance agreement; and
 - ✓ Termination.
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