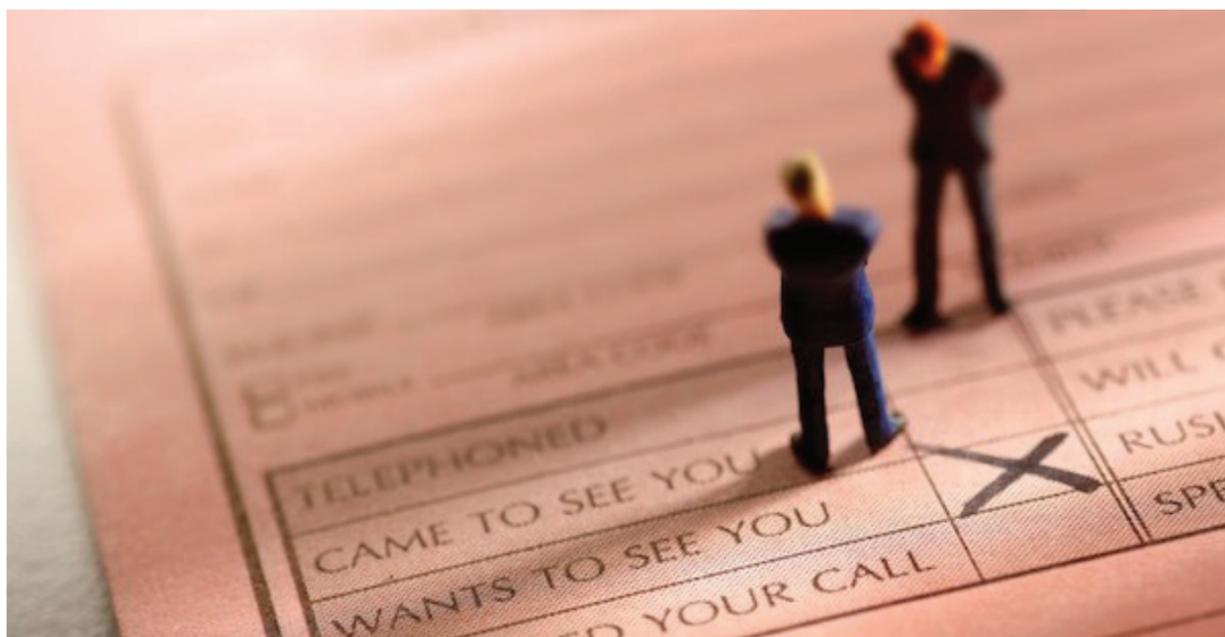


Employee Discipline and Termination

by Shayda Zaerpoor Le



Employee discipline and termination are some of the more difficult aspects of operating a business. Despite this difficulty, it is important to take the time in making these decisions to protect yourself and your business. The particulars of how you handle discipline and termination can vary greatly from one business to the next, but these are some best practices that can be utilized in taking these actions.

Progressive Discipline

Most employers utilize a process of progressive discipline. For each succeeding infraction, the employee is given an incrementally greater penalty, and warned that future infractions may result in increased discipline.

A typical process can include a progression from verbal warnings and written warnings,

to suspensions or performance improvement plans, and finally to termination. This method introduces a greater element of fairness, and lays an appropriate expectation for the employee in terms of what is to come.

However, it is important for your disciplinary policies to include language that will allow you to deviate from this process or

to skip steps at your discretion, or you may be locked into minor discipline for serious infractions.

The first time your employee is tardy, you may want to give a verbal warning, but the first time your employee brings a weapon to work and threatens a coworker with serious bodily injury, skipping straight to termination would be appropriate.

Establish a Methodology to Investigate Complaints of Employee Misconduct

If an employer receives a complaint of employee misconduct, the employer should establish a methodology to investigate the complaint. The investigation will create a record for you to use when deciding whether discipline is warranted. In investigating complaints, it is not only important to document your steps, but also to follow an organized and consistent process.

Take the time to conduct thorough interviews, starting with the complaining employee, moving to third-party witnesses, and ending with the subject employee. You will also want to gather all the relevant evidence (i.e. emails, work schedules, etc.), and use this information to make an informed decision on your course of action.

Before making any decision, provide the subject employee with an opportunity to respond, and avoid the urge to pre-judge. Remind all employees who participate with the investigation of your company prohibitions on retaliation, and set the expectation that there will be no adverse employment action or retaliation based solely on someone's complaint, or any employee's participation in the investigation.

Based on the record created by the investigation, you can decide whether a disciplinary action is warranted.

Document, Document, Document

Business professionals should apply this principle across many aspects of their operation, but it is particularly important in the context of discipline and termination. If a former employee challenges the decision to terminate, you will be expected to present a reason for the termination, even if the employment relationship is "at-will," and you will want to have documentary evidence supporting the disciplinary actions taken.

Keep in mind that your decision will be scrutinized by a jury with the benefit of hindsight and actions leading to termination may be taken out of context. This means that at some point, likely quite some time after the precipitating actions have taken place, you may have to explain the reasons for the termination, in detail. Documentation supporting that decision is going to be essential in defending against a claim.

In the process of documenting the reasons, behaviors, incidents, and issues supporting your decision, be specific and avoid generalizations such as "bad fit," "poor listener," and "personality conflicts."

In addition, once you have painstakingly documented your decisions with supporting evidence, make sure these records are actually kept for the appropriate retention period.

Timing

The proximity of the discipline or termination to a protected event, such as the birth of a child, medical leave, or asking for an accommodation, may be sufficient evidence to allow a claim to get to a jury, and greatly increase the cost associated with a claim of wrongful termination.

“If the supervisor or manager conducting the meeting is not very careful of the message which they communicate, they can create major issues for the business down the road.”

If for any reason you have made the decision to terminate, but need to delay the action, document the timing of the decision carefully. Unless absolutely necessary, avoid terminations during family leave, injured worker status, or any other protected event.

Even if you have good cause for discipline or termination, acting on that cause while an employee is in a protected status invites greater scrutiny. Alternatively, do not delay an investigation, disciplinary action, or termination unnecessarily, as the employee could move into a protected class with the passage of time.

The Final Meeting

At the termination meeting, effective and decisive communication is essential. This meeting should be short, and to the point, and there ought to be more than one person present from the business so as to provide a corroborating witness in the event of future issues.

You should take a minute to consider workplace safety when planning the final meeting and you should include safeguards as necessary. It is very important for the business to ensure that whoever is conducting this final meeting is clearly aware of how significant of a role they play in the process.

Statements made at the time of termination will be attributed to the business and may be used as direct evidence of the motive behind the decision.

If the supervisor or manager conducting the meeting is not very careful of the message which they communicate, they can create major issues for the business down the road.

If there are multiple reasons for the termination decision, provide all of them, and if some of them would independently constitute a sufficient basis for termination, make that specification as well.

Be prepared with a clear and calm denial if the employee suggests that the motive for the decision may be improper and avoid giving ambiguous reasons.

Failing to provide a clear reason when you have one might indicate to the employee that your decision was improper, or that the employee could still possibly save their job.

Have a checklist prepared of any company property that you need returned, and obtain all items possible at the final meeting itself. For any remaining items, have a plan to facilitate the exchange, tell the employee clearly and decisively that the items must be returned, and provide a deadline.

While you may withhold discretionary benefits such as severance pay, it is impermissible to withhold earned wages pending return of property. If it becomes necessary, you may need to file a civil suit or involve the police, but do not withhold wages.

Employers are not obligated to pay severance, but a severance payment can serve as consideration in exchange for a release of claims against the business.

If applicable, you may also remind the employee of their obligations under any nondisclosure, non-solicitation, or non-compete agreements.

Final Paychecks

The last aspect to the employee relationship is most often the final paycheck. Employers must abide by strict timelines

in providing the employee with their final paycheck, and therefore they should be very clear on the legal requirements in their particular state or country.

Wage laws are strict and are always construed to the employee's benefit. In addition, in the event of a violation, the penalties and attorneys' fees can be automatic.

The final paycheck must include all amounts owed, which can consist of much more than just the time worked: tuition reimbursement, earned but unused vacation or floating holidays (depending upon the employer's policy), bonus amounts, commissions, and any other reimbursements. When in doubt, it is often safest, and cheapest, to pay it.

What to Tell Other Employees

Understandably, the departure of an employee will be of significant concern to the rest of your employees. In determining what communication to give your employees regarding the change, it is important to be wary of possible defamation claims from the departing employee. It is also

practical, and important, to consider your corporate culture. Depending upon the particular business and the position held by the departing employee, some businesses will choose to ask the employee whether he or she would like to offer any input on the communication given upon their departure.

Often, the cleanest and simplest approach is to tell both the departing employee and the remaining employees that no reasons for the departure will be provided so as to protect the individual's privacy.

This approach may stave off concern, and therefore potential action. In addition, it communicates to the rest of your employees that your business is professional, and will also respect their individual privacy if an issue ever arises for them in the future.

Taking the time to set the groundwork for your decisions, following an established process and documenting the relevant issues and events, being mindful of timing, and conducting an effective final meeting will help protect your business, and ultimately create a more fair and predictable environment for your employees as well.



Shayda Zaerpoor Le

Attorney at Barran Liebman

T: +1 503 276 2193

Email: sle@barran.com

Shayda Zaerpoor Le is an attorney with Barran Liebman in Portland, where she represents and advises employers on a range of employment law issues.