

April 11, 2023

Limiting Legal Risk – Discipline and Termination

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Hypothetical Case



Termination Restrictions

Generally, employment is
“at will”

BUT:

- Employment contracts
- Promises of employment



At Will Status

At Will Caveat

- *But* employees cannot be terminated for *illegal* reasons.



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Discrimination

- The employee's protected class or protected conduct....
- ...was a motivating factor...
- ...in making an adverse personnel decision...
- ...or in harassing the employee.

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Discrimination Claims

Beware Of Protected Classes	
Race	Religion
Color	National Origin
Sex	Ancestry
Age	Marital Status
Disability / Pregnancy	Sexual Orientation
Genetic Characteristics	Military Status

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Retaliation/Whistleblowing

Beware Of Protected Activity	
Leave Absence	Reporting Illegal Conduct
Workers' comp	Disability Accommodation
Exercising Legal Rights	Discrimination Complaints

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How Can It Happen To Me?

- Lack of diversity
- Untrained supervisors
- Rogue supervisors
- Inadequate personnel policies
- Inconsistent/haphazard discipline
- Lack of communication
- Sloppy recordkeeping
- Bad timing
- Salting the wound



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Before the Need to Terminate Arises



**Clear
Rules
and
Procedure**

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Avoiding the Discrimination Claim



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Look for Red Flags



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Look for Red Flags

- Protected class
- History of complaints
- Recent whistleblowing / protected activity
- Long term employment (at-will?)
- Problem supervisor
- New supervisor

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Dealing With Red Flags

- Legitimate business justifications
- Bide time
- Double check
- Legal counsel
- Severance agreement



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Common Discipline Pitfalls

- Too lenient
- Too harsh (precedents)
- Uneven (inconsistent)
- Late
- No specific examples
- Narrow focus
- Failure to obtain employee acknowledgment



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Verbal Warnings

- Witnesses
- File Notes
- Incorporate Into Written Warnings



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Types of Supporting Documentation:

1. Performance Reviews
2. Counseling Memo
3. Disciplinary Reports



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Documenting Discipline

- Document the Investigation
- Document Statements
- Misconduct: The 5 W's
- Record of Counseling
 - Employee comments
- Employee acknowledgment



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Performance Improvement Plans

- Preserve "At-Will"
 - 60 day PIP does not guarantee 60 days
- Avoid Discrimination Claims
 - Use PIPs uniformly, according to handbook
 - Use objective standards (job descriptions)
 - Fairly identify deficiencies
 - Propose reasonable method to improve

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Performance Improvement Plans

- ❑ Be Careful What You Wish For ...
 - ... Be prepared to follow through
 - Fire the employee (or other discipline consistent with policies)
 - Retain the employee who meets PIP objectives
- ❑ Should be used only for performance problems, not misconduct

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Performance Reviews

General considerations for performance reviews:

- Training supervisors/managers
- Consistency (over time & among employees)
- Candidness and Accuracy
- Job-related criteria
- Effective rating or scoring systems (objective and subjective)
- Comments, including at least one area which needs improvement
- Opportunity for employee response
- Bonuses
- Wage increases

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Performance Reviews

How Reviews Minimize Liability

Create a record that can:

- Justify terminations/
layoffs
 - Track record of poor performance
 - Notice to employee and opportunity to improve
- Demonstrate Equal Treatment (vs. Discrimination)
 - Promotions
 - Pay
 - Disparate treatment

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Termination Due Diligence

- Supervisors, managers, HR agreement
- Policies followed
- Protected classes considered
- Fair and Reasonable
- Employee's response



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Final Meeting Checklist

- Compliance with written policies/procedures/agreements
- Payment of wages/accrued unused benefits
- Advances/loans
- Unpaid expenses
- Stock options
- Severance package
- Return of company property
- Outplacement
- Release agreement?



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Severance Agreements



- Discretionary benefit per employer policy
- Usually offered to employees terminated *involuntarily*
- Should contain release of all claims
 - *Exception* - cannot release wage claims per LC 206.5

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Discharge Letters

- Purpose:
 - Notice to employee
 - Contemporaneous evidence
 - Reduce risk of litigation
- Careful draft and review
- Giving a reason
 - Legal consequences of being too specific?
 - Legal consequences of being too general?



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Final Meeting Considerations

- Select time and place to conduct
- Make checklist of points to cover
- Have third party witness attend
- Be direct- do not "sugarcoat"
- Do not argue or become defensive
- Allow employee opportunity to respond
- Memorialize for personnel file



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Exit Interviews- should you have?

Valuable resource for employers to obtain information from the employee one last time, **if done correctly.**

- Exit interviews are a reality check
- Exit interviews offer opportunities to deliver important information



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Questions?



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Thank you!

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