

DISCIPLINARY PROCEDURES THAT PROTECT YOUR COMPANY FROM LITIGATION

Delaware Valley Labor & Employment Conference

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OVERVIEW

- What laws are at issue?
- Employee handbooks and training
- Investigating a complaint
- The discipline
- Remedies
- How to handle termination
- Performance reviews

WHAT LAWS ARE AT ISSUE?

- Federal and State laws define “protected” classes of employees and prohibit retaliation
 - Age (Age Discrimination in Employment Act)
 - Disability (Americans with Disabilities Act)
 - Equal Pay (Equal Pay Act)
 - Genetic Information (Genetic Information Nondisclosure Act)
 - National Origin, Race/Color, Religion, Sex (Title VII)
 - Pregnancy (Pregnancy Discrimination Act)
 - Sexual Orientation (Philadelphia Fair Practices Ordinance)

WHAT LAWS ARE AT ISSUE (CONT.)

- Harassment
 - Federal and state laws
- Retaliation
 - Federal laws
 - Pennsylvania Whistleblower Law
- Family and Medical Leave Act
- Employment in Pennsylvania is at-will, with some exceptions

EMPLOYEE HANDBOOKS

- Keep it up to date – review and revise annually
- Clearly defined policies
 - What conduct is prohibited
 - What are the consequences of violating a policy
- Provide a mechanism for complaints
 - Don't sweep complaints under the rug
- Apply the rules uniformly and consistently
- Train managers and employees
- Collective Bargaining Agreements

BLUEPRINT FOR ACTION UPON RECEIPT OF COMPLAINT

- Investigate promptly
 - Review the policies at issue
- Conduct thorough interviews
 - Complainant
 - Accused
 - Witnesses
- Document every stage of the investigation
- Consult counsel if necessary
- Reach a decision and be decisive in implementing it – avoid unnecessary delay

BEST PRACTICES FOR WORKPLACE INVESTIGATIONS

- Conduct an investigation promptly upon receipt of a complaint
- Be consistent and uniform in application of the rules
- Exhaust the recollection of the Complainant and witnesses
- Document the complaint, the investigatory process, the facts elicited and the basis for your disciplinary decision

BEST PRACTICES FOR WORKPLACE INVESTIGATIONS (CONT.)

- Never discipline or terminate an employee to “set an example”
- Remember, the point of corrective action is to communicate to employees that certain types of conduct are unacceptable and that the company’s policies are enforced
- Conduct all interviews face-to-face
 - Walk away from inflammatory e-mails/texts

PREPARING FOR THE INTERVIEWS

- Identify who should conduct interviews (and who should witness same) and who should conduct investigation
- Review the complaint and the relevant policies
- Review relevant personnel files
- Make a list of questions
 - Start with general questions, then move on to specific questions
 - Ask who, what, when, why, supporting documentation
- Create an opening statement
- Set aside a private area in which to conduct the interview

THE OPENING STATEMENT

- Use for the alleged victim, the accused and witnesses
- Explain importance of truthful and complete information
- Explain the interview process
- Explain the reason for the interview
- Ask to maintain confidentiality
- Explain the rules against retaliation
- Explain the procedure for reporting retaliation

INTERVIEWING THE COMPLAINANT

- Take every complaint seriously – don't fall into a trap
- Inform the Complainant that the employer will inform him or her of the results of the investigation
- Review the complaint
 - If possible, get it in writing
- Ask questions
 - Set the pace and do not rush
 - Sift through each factual allegation
 - Ask who, what, when, where

INTERVIEWING THE COMPLAINANT (CONT.)

- Ask if there is any documentation to support the Complainant's allegations
- Ask the Complainant to identify witnesses or other individuals with knowledge
- Exhaust the Complainant's recollection
- Instruct the Complainant to contact the investigator if he or she remembers additional information

WITNESS INTERVIEWS

- Interview the witnesses before the accused
- Emphasize the importance of truthful information
- Explain that retaliation is prohibited
- Disclose the specific allegations
- Ask for underlying facts
- Allow the witness to provide additional information

INTERVIEWING THE ACCUSED

- Explain the process
- Warn against retaliation and refer to the specific company policy prohibiting retaliation
- Do not get sidetracked – Be Persistent
 - If the accused tries to change the subject or raise extraneous issues, allow them to do so but return to your list of questions
 - Explain consequences of failing to cooperate with investigation

INTERVIEWING THE ACCUSED (CONT.)

- The accused does not have the right to legal representation – but does have right to union representation
- The accused does not have the right to assert a Fifth Amendment privilege
- The accused does not have the right to be informed of the specific allegations against him or her

TROUBLESHOOTING

- What if the Complainant refuses to cooperate?
- What if the accused refuses to cooperate?
- What if a witness refuses to cooperate?
- What if the accused retaliates against the Complainant or a witness?
- Inconsistent reasons for termination are trouble!

ADDITIONAL INVESTIGATION

- Review policies
- Review personnel files
- Follow up with the Complainant, the accused and witnesses if necessary – Be Thorough
- Obtain documentary evidence revealed in the interviews

THE DISCIPLINARY DECISION – QUESTIONS TO ASK

- Is there a rule that prohibits the type of conduct at issue?
- How does the company inform employees of that rule?
- Did the accused violate that rule?
- Was the investigation fair?
- Is the discipline for this type of infraction being imposed consistently?
- Is the discipline proportionate to the offense?

THE DISCIPLINARY DECISION – QUESTIONS TO ASK (CONT.)

- Consider the type and quality of the evidence (first-hand knowledge v. rumor)
- Consider the quantity of the evidence
- Assess credibility
- Bias/motive?

BE CAUTIOUS

- Ask yourself, is the employee:
 - In a protected class?
 - Someone who complained about discrimination or harassment?
 - A whistleblower?
 - Active in the union?
 - Returning from protected leave?

REMEDIES

- Progressive discipline – follow the policy if your company has one
 - Verbal or written warning → suspension → discharge
- If the offense is severe
 - Determine whether the company's policies allow progressive steps to be skipped for immediate discharge
 - Decide whether the offense fits into this category

REMEDIES (CONT.)

- Remember the purposes of corrective action
 - Deterrence
 - Establish basis for more severe subsequent discipline

HOW TO HANDLE TERMINATION

- Comply with termination policies
- Review employment contracts
- Consider a separation agreement and/or a termination letter

HOW TO HANDLE TERMINATION (CONT.)

- Do it later in the workday
- Have witnesses
- Terminate access to company's computer system
- Terminate access to facilities
- Arrange for security if necessary

HOW TO HANDLE TERMINATION (CONT.)

- Termination Meeting
 - Be direct
 - Provide reason
 - Rely only on reasons that can be substantiated
 - Deny any alleged unlawful basis for discipline
 - Be professional
 - Be respectful – do not humiliate

DOCUMENT, DOCUMENT, DOCUMENT!

- Documentation is crucial to the integrity of the investigation
- Keep in mind, the accused could dispute the termination
- Document the complaint, the investigatory process, the facts elicited and the basis for your decision
- Retain all relevant e-mails, texts, pictures, etc.

DOWNSIDE OF DOING IT WRONG

- The Complainant could file a lawsuit
- The company could spend time and money responding to charges
- Attorneys' fees
- Settlement
- Poor morale among employees
- Reputational harm

PERFORMANCE APPRAISALS

- Be consistent in application of performance standards
- Be honest and truthful – tough to discipline for poor performance without documentary support for same
- Provide constructive feedback
- Allow for an appeal process
- Implement a performance improvement plan if company policy allows for one
 - Give an employee a set time period in which to turn around the conduct at issue

HYPOTHETICAL

- Mary, a software engineer, complains to Human Resources that her supervisor, John, is sexually harassing her. The Company has a policy specifically prohibiting harassment based on gender or sex. After reviewing Mary's complaint, you arrange to conduct interviews of Mary, John and a third-party witness, Jane.

HYPOTHETICAL

- During Mary's interview, she claims that John has made inappropriate comments about Mary's clothing in front of Jane. She also tells you that John has asked her to go out on dates repeatedly, and that she keeps rejecting his invitations. Mary also gives you a copy of a text message that she claims is from John, which states: "hello gorgeous, want to go out to dinner with me tonight?"

HYPOTHETICAL

- You interview Jane, who is also supervised by John. Jane tells you that she has heard John make comments to Mary about her appearance, and Jane believes these comments are inappropriate for the workplace. She also informs you that Mary thinks that John is “creepy.”

HYPOTHETICAL

- You interview John. During the interview, he acknowledges that he has complimented Mary on her appearance and choice of attire. He also tells you that Mary flirts with him, and that every time he asked her out on a date, she had an excuse but “left the door open” to going out in the future. John claims that Mary never told him that she was not interested in dating him. You show him the text message that Mary gave to you, and he acknowledges that he sent it.

HYPOTHETICAL

- After you have completed the interviews, but before you reach a conclusion with respect to discipline, Jane contacts you and is very upset because John told her that he found out that she had spoken to Human Resources about Mary's complaint. According to Jane, John informed Jane that she was a "troublemaker" and should "watch out" because performance reviews are being conducted next month. As Jane's supervisor, John would conduct her performance review.

QUESTIONS?



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THANK YOU

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