

Disciplinary Actions and Terminations

Theory, Best Practices, Special Situations

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Today's Agenda

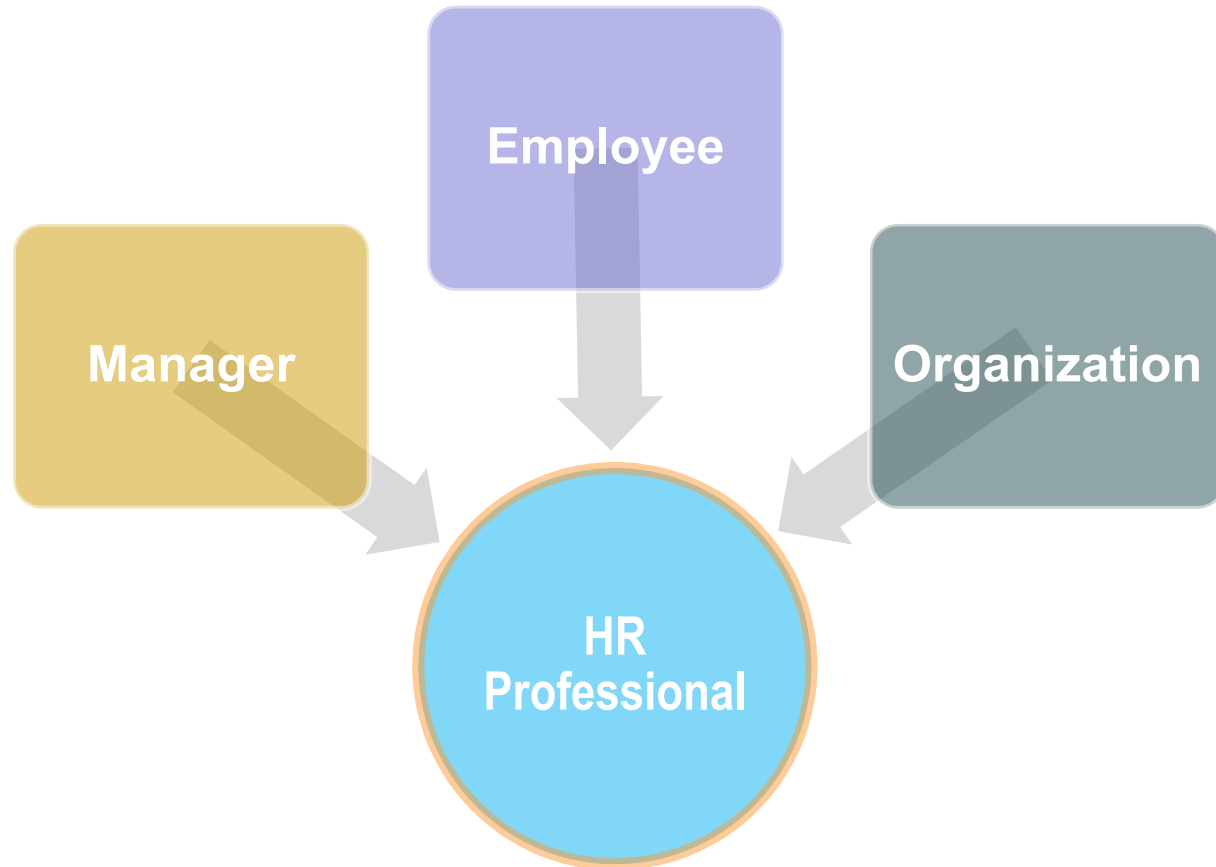
- **The HR Professional's Perspective**
- **The Elements of Due Process**
- **Disciplinary Actions**
- **Terminations – the Legal Perspective**
- **Special Situations**
- **Q&A**

Question

Which describes your situation best?

1. Managers often wait until they are completely frustrated with a person's performance or behavior to initiate disciplinary action.
2. Managers come to HR for advice in the early stages of performance/ behavior problems.

The HR Professional's Perspective



What exactly is “discipline”?

Discipline comes from the Latin word “to instruct, teach, train or learn”.

In later centuries it took on negative meanings and even connotations of punishment and deprivation....

Here, we will use the word in its original spirit.

What exactly is “discipline”?

The sole purpose for taking disciplinary action (often referred to as “corrective action”) is to teach or guide the employee:

- To improve performance
- To change behavior on the job

The end goal is to enable the employee to succeed on the job, thereby enabling the organization to meet its goals and fulfill its mission.

HR's Role: Guardians of the Process

- **Special responsibility**
- **Play by the rules**
- **HR's vantage point is unique:**
 - > **Uncover patterns**
 - > **Connect the dots**
 - > **Initiate Action for Improvements**
- **Opportunity to coach / build relationships**
- **Your reputation is on the line**
- **Credibility & Trust**

HR's Role: Guardians of the Process

Termination is not the final step of the Disciplinary Action system, but the *failure* of that system.

"When termination is required, what the organization is really saying is ... you're a good person and we are a good company, but our needs are different. We've tried several times to reconcile our differences, and we've failed. You need to find a different job, and we need to find a different person, someone who is right for us. It's a no fault divorce." Dick Grote

“Employment-at-will” concept

versus

Employees’ Constitutional Rights

The Due Process Clause

”nor shall any person ... be deprived of life,
liberty or property without due process of law”

How is due process relevant?

“Job as Property” Doctrine

The loss of employment has such a serious impact on a person’s life that individuals should not lose their jobs without the protection of “due process”.

Due Process in Employment

For the employee:

- Right to be informed of unsatisfactory performance
- Have a chance to defend oneself
- Time to improve before an adverse employment action

For the employer:

- Obligation to deal in good faith with employees
- Take corrective action measures based on “just cause”
- Business-related
- Based on clear, compelling, and justifiable reasons

1. Employee must understand:

- **Your expectations**
- **The consequences of failing to meet performance / behavior standards**
- **Known in advance!**

2. Consistent application of rules

- Predictable employer responses when a rule is violated
- Problems cannot be addressed on an ad hoc basis
- Failure to follow through on threatened consequences damages credibility

3. Action must be appropriate for the offense

- **Think through your responses carefully**
- **Be reasonable**
- **Be consistent**

➤ **TIP: Connect the dots!**

Link the level of response to the effects of the problem

(on the workplace, customers, product reputation, etc.)

4. Opportunity to respond

- Administering disciplinary action without allowing the employee a chance to give their side of the story is ***asking for trouble.***
- This honors an employee's right to be treated with respect.

5. Reasonable time to improve

- **Without allowing a reasonable time to improve, the disciplinary action will appear to be an artificial excuse to get an employee out of the organization.**

Characteristics of a Good Discipline System

- **Aims for a positive outcome**
 - > *Problems eliminated*
 - > *Relationships enhanced*
- **Utilizes substantive conversations**
- **Follows a structured process**
- **Limits subjective judgments**
- **Allows for some flexibility**
- **Time limits**

Show of Hands Please!

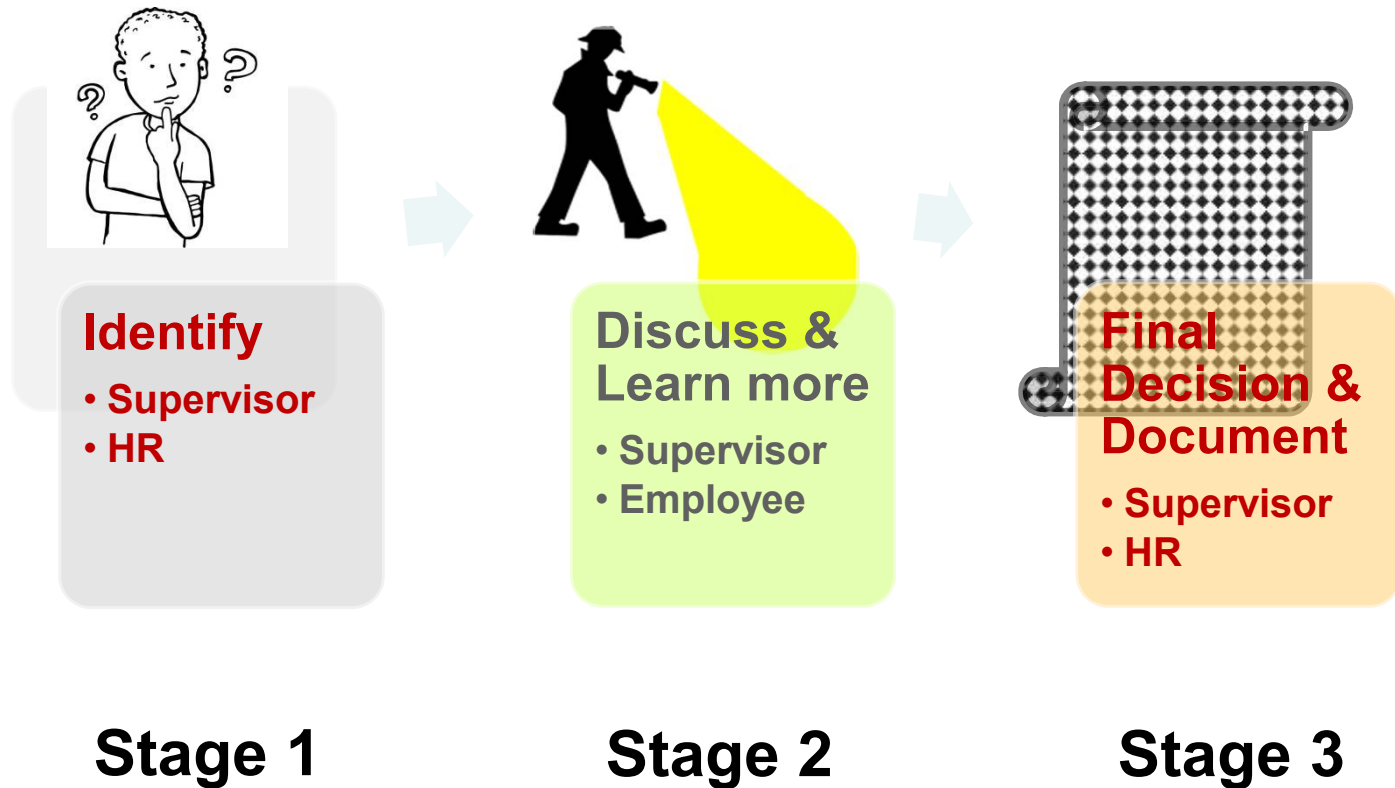
My organization has a written progressive discipline policy.

Yes

No

Not yet, it's under development

Disciplinary Action Process: Structure



Communication is fundamental

**The success of your
disciplinary action system
depends completely on having
high quality conversations
in your workplace.**

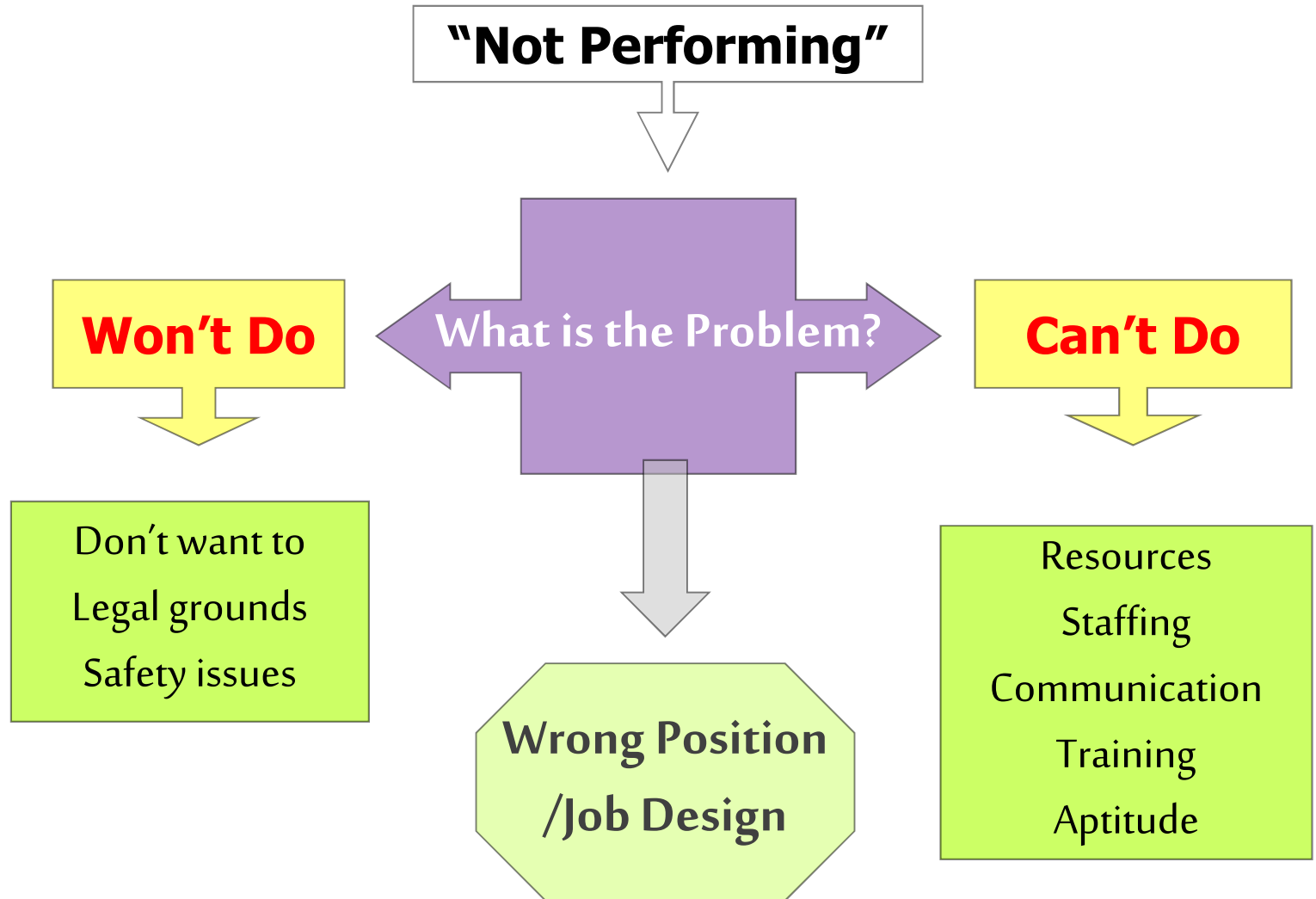


The Critical Step:

- Determine **IF** you actually have a problem
- Identify what the problem is
- Is this a “*can’t do*” situation?
- Is this a “*won’t do*” situation?

Consider this before talking with the employee, and revisit after the conversation.

Is Disciplinary Action Appropriate?



SIDEBAR: Coaching the Supervisor

Instead of saying **“this always happens” ...**

Ask yourself:

- **what can I do differently to get a better result?**

Instead of saying **“she won’t cooperate”**

(blaming), ask yourself:

- **What have I failed to consider?**
- **What am I missing here?**
- **How can I connect with her?**

Disciplinary Action Process: Conversations



Stage 2

Letting the Employee Speak

Start with:

- **There is a problem, and I need your help.**
- **State clearly the specific desired and actual performance. [need/ get/ difference]**

Then say:

- **Tell me about it.**
- **Is there something I should know?**
- **Is my understanding accurate?**

Letting the Employee Speak

- The goal is problem-solving, not accusation.
- This phase turns the responsibility for the conversation over to the employee
- Without raising their defensiveness.
- Manager's job here is to LISTEN.

Too often, managers lose their effectiveness in their coaching or disciplinary conversations because they talk too much.

Disciplinary Action Process: The Final Decision



Stage 3

Review the situation

- **Is disciplinary action appropriate?**
- **If not, how do we want to handle this?**
- **Review what management could have done differently**

Document

- **Investigation notes + supporting evidence**
- **Disciplinary Action Form**
- **Memo-to-File**
- **Action Plan**

5-step Process:

1.Coach & Counsel

2.Verbal Warning

3.Written Warning

4.Written Warning

5.Written Warning + Suspension*

***suspension if this is the 3rd written warning within 12 months**



- **Follows a specific order**
- **Always go to the next step, unless policy states otherwise**
- **Each step involves a minimum of two meetings with the employee**
- **Documents are “live” for 12 months**

- Documents remain in the personnel file
- Impact of written warnings **(6 month rule)**
 - Cannot post for another position
 - No transfer to another department
- Tighter policy for managers
 - Mandatory PIP after 1st written warning
 - Failure to successfully complete the PIP will result in a 2nd written warning and termination.

LINES OF AUTHORITY

- When can a supervisor or manager act independently?
Does the dept. head need to approve?
- Who makes the final decision to terminate?

HR's Role

- When does HR get involved?
- What is HR's role? To be advised, to act as a consultant, to approve?
- Approving what? Level of response, the text of the documentation, the timing


One-track system? Multi-track system?

- What if an employee has a different type of problem?
 - Do they move to the next step, or;
 - Does the process start all over?
- Some organizations maintain separate tracks for disciplinary action:
 - Attendance
 - Performance
 - Behavior / conduct
 - Safety

Potential problems with multi-track system

- **Introduces need to classify (i.e. use subjective judgment)**
- **Opens the door for charges of favoritism or discrimination**
- **“Gaming the system”**

Multi-track *versus* Single Track

		THREE TRACK SYSTEM			ONE TRACK SYSTEM
5-Step Process		Attendance	Performance	Conduct	All inclusive
1	Coach & Counsel	3/11/15	4/22/15	12/3/14	12/3/14
2	Verbal Warning	5/31/15	8/1/15	2/17/15	2/17/15
3	Written Warning	9/9/15		7/14/15	3/11/15
4	Written Warning			8/28/15	4/22/15
5	Written Warning				5/31/15
					

- Do you want to have an **appeals process**?
A second-level review?
 - CBA will include this
 - Guarantee of Fair Treatment
 - Peer Review
- Do you want to use **alternative measures** to deal with employees who do not improve?
 - Suspension without pay
 - Demotion
 - Decision-making leave + commitment letter upon return

Standards for Administering Disciplinary Action

- Documentation should be prepared & signed by all parties within **7 days** of the incident
- Include supporting evidence
- **Must be well-written, concise and specific.**
 - Use full name of employee
 - Dates must be in **mm/dd/yyyy** format
 - Include written comments from the employee
 - Acknowledge discussion of document with signature
- **Attach detailed description of the incident on a separate page if necessary**

- The purpose of your DA document is to memorialize the fact that a conversation was held, between the manager and employee, about the issue + that specific corrective action was agreed upon.
- Signatures indicate **acknowledgment** that this conversation took place, on a specific date.
- Refusal to sign does **NOT** invalidate

- **Take a careful look at the timing of any disciplinary action; ask:**
- **Has the employee exercised a protected right recently, such as:**
 - FMLA, military leave
 - Whistleblowing – complaints to OSHA etc.
 - Workers Compensation claims
 - Complaint to the Department of Labor
 - Complained of harassment
- **If yes, then your DA could appear to be retaliation. **Proceed with caution!!!****

- **An alternative you can use: MEMO to FILE**
- **Use when you want to capture the incident in writing, and the fact that you talked with the employee about it**
- **BUT do not want to place it on the DA 5-step track**
 - Special circumstances
 - Imperfect evidence
 - Too long gap between time of incident and the conversation

- **Take a careful look at time in position**
- **Has the manager been in the department less than one year?**
 - How well does he/she understand your policies?
- **Inherited problems from a previous manager?**
 - One option is to start over. Press the **RESET** button.
 - Inform entire department of policies / work rules and then document from then on.

- **Take a careful look at time in position**
- **Has the employee been in the position less than six months?**
 - Is it reasonable to expect competency at this point?
 - How well does he/she understand policies?
 - Is there a language problem that could have interfered with training effectiveness?

Other Timing Issues

- **What if you discover the problem long afterwards?**
 - Discuss with employee
 - Issue a “memo to file”
 - If severe violation, may issue formal DA
- **What if the employee is on vacation when you discover the problem?**
 - Investigate
 - Meet with employee upon return
 - Decide whether or not to issue DA

- **The Boiling Pot Problem**
- **The Avoidance Problem**
 - *Special skills*
 - *Long-tenured*
 - *Fear of emotional reaction*
 - *Dislike of confrontation*
 - *Social constraints*
- **The “Problem at the Top” Problem**
 - **Senior Executive**
- **The Mixed Message Problem**

Supervisor has the Wrong Mindset

- **Uses discipline as punishment**
- **Takes action in order to “build a case against a person”**
- **Dangerous frame of mind: you must fix this one!**

“HR MADE ME DO THIS”



More symptoms of the Wrong Mindset

- **Poor documentation habits**
- **Conflict with Performance Evaluation**
- ***“This person has been this way since the beginning ... and I’ve had it!”***
- **Take a look at their 30-day or 60-day evaluation and/or most recent performance evaluation**

Discipline, when used well, maintains positive relationships and respect in the workplace.

- Does not create adversarial relationships
- Partnership between employee & manager
- Generates positive outcomes: ***smooth operations***

When done poorly, risks negative outcomes:

- **Separation** (think of turnover costs!)
- **Employee withdrawal** (psychological or physical)
- **Bystander reactions**

101 Sample Write-ups for Documenting Employee Performance Problems: A Guide for Progressive Discipline & Termination, by Paul Falcone, American Management Association, NY 1999

Discipline without Punishment, *The Proven Strategy That Turns Problem Employees into Superior Performers*, 2nd edition, by Dick Grote, American Management Association, NY 2006

Wrongful Termination - In General

- The term "wrongful termination" does not refer to a specific law or regulation. It is a set of legal arguments used by employees and their attorneys to challenge a termination. Wrongful termination cases are exceptions to the employment-at-will doctrine.

Wrongful Termination Exceptions to Employment -At-Will Doctrine

- Public Policy Theory
 - > Employee terminated for refusing to commit a wrongful act
 - > Employee terminated for discharging public obligation (“whistleblowing”)
 - > Employee terminated for exercising a legal right or privilege (“retaliation”)

Wrongful Termination Exceptions to Employment-At-Will

- Implied Contract Theory
 - > Employer makes written or oral promise of specific treatment in specific circumstance
 - > Employee reasonably relies on promise
 - > Employer breaks the promise
 - > Employee is “injured”

Wrongful Termination Exceptions to Employment-At-Will

- Good Faith and Fair Dealing Theory
 - > Implied obligation in every employment relationship to act in good faith and fairly
 - Notice to Employee
 - Full and fair investigation
 - Decision based on legitimate business reason

Wrongful Termination Protected Class Discrimination

- A. Protected Classifications Of Employees
- B. Theories Of Discrimination
 - 1. Prohibited Conduct in General
 - Federal and Guam discrimination laws prohibit employers from making any employment decisions on the basis of an individual's membership or non-membership in a protected classification. Employment decisions include, but are not limited to: recruitment, hiring, assignment of work, training, compensation, benefits, evaluations of work performance, promotions, demotions, discipline, and termination.
 - 2. Disparate Treatment Theory
 - 3. Disparate Impact Theory
 - 4. Duty of Reasonable Accommodation
 - 5. Harassment Theory

- Other Related Claims Commonly Included In Wrongful Termination Lawsuits
 - > Detrimental reliance
 - > Defamation
 - > Fraud
 - > Infliction of emotional distress
 - > Assault and battery
 - > Invasion of privacy

- Other Related Claims Commonly Included In Wrongful Termination Lawsuits
 - > Intentional interference with contractual relations
 - > Negligence

- As the types of claims which employees or former employees can bring against employers proliferate, employers need to be aware of potential problem areas in the employment process. The following provides some suggestions that can be implemented to minimize an employer's risk.

1. Regularly Review your Personnel Policies, Forms and Employee Handbooks.

Written and oral representations to employees can create binding contractual obligations. Consequently, if the company wishes to preserve its ability to terminate employees at-will, it must take care to ensure that it does not make promises or other representations about tenure, terms and conditions of employment in personnel policies, employment forms and employee handbooks. The language in these materials should also comply with anti-discrimination and other employment laws.

Furthermore, it is not enough to review your policies, forms and manuals once. Labor and employment laws change frequently. Also, a policy or procedure which may have been adequate one year may no longer be practical the next year because of changes in the employer's operations. Consequently, regular updates of policies, forms and manuals are essential to prevent them from becoming obsolete.

2. Train your Supervisors and Managers.

Managers and supervisors are often well-versed in the operational aspects of their jobs but few are actually trained in personnel management. Consequently, it is essential for employers to provide this type of training to their managers and supervisor on a regular basis. Training should include information about the different labor and employment laws and the company's internal policies and procedures. Managers and supervisors should also be required to consult with the personnel department rather than guess on how to deal with a particular problem.

3. Be Consistent in the Application of Company Policies and Procedures.

Although policies and procedures are often treated as guidelines by employers, it is important that these "guidelines" be followed whenever possible. Inconsistent application of policies and procedures often result in claims of unfair and wrongful treatment by employees.

In order to be consistent, it is important for supervisors and managers to be familiar with the policies and procedures. Copies of policies, and/or the procedures manual should be given to the supervisors and managers and they should be instructed to refer to them before taking any employment action.

4. Take Special Precautions when Terminating an Employee.

Terminations are probably the most critical area for purposes of wrongful termination. The circumstances surrounding an employee's termination, and the manner in which he/she was terminated, could determine whether the employee files a lawsuit and the strengths of the employer's defenses in the event of a lawsuit. Consequently, employers should take the following steps in each termination:

a) Review the reasons for termination.

The termination should be reviewed by personnel or upper management to ensure that: (a) the reasons for the discharge are non-discriminatory; (b) the termination does not violate some public policy; and (c) no commitments or representations have been made to the employee, orally or in writing, which would restrict the employer's ability to terminate the employee.

b) Review the procedures leading to the discharge.

Again, personnel or upper management should review the procedure actually used by the manager or supervisor to ensure that it complies with the employer's established procedures. Consideration should be given to whether the employee was aware of the particular policy he/she violated and whether that particular policy has been fairly and consistently enforced by the employer. It is important to ensure that a complete and fair investigation of the basis for the termination was performed. It is also important to determine if other similarly situated employees have been terminated as well.

c) Control the manner of the termination.

Sometimes the terminated employees will sue because of the manner in which they were terminated (as opposed to the reasons for the termination). Consequently, employers should strive to conduct discharges in a fair and professional manner. The length of time and the manner in which an investigation is conducted should not be oppressive, harassing or outrageous. Confidentiality, whenever possible, is also important. Furthermore, employers should strive to explain the reason for the discharge to the employee, as completely as possible, at the time of the discharge.

d) Document the discharge process.

Internal documentation should be maintained on the reasons for the discharge and the discharge process. Any files or records used in the investigation, and any statements taken from witnesses, should be included with any memorandums on the termination. Also, any letters to the terminated employee regarding the investigation and termination should be drafted and reviewed to ensure that they are accurate and complete.

e) Statements regarding the termination.

Whenever an employee is terminated, it is common for the employer to receive numerous inquiries about the termination. Employers should respond very carefully to such inquiries to avoid defamation claims. In general, it should not be necessary for most employees to know the specific circumstances surrounding a coworkers discharge.

The employer may also begin receiving job reference checks regarding the terminated employee. These must be done carefully to avoid defamation claims as well. It is not uncommon for employers to limit information provided about former employees to their dates of employment and job positions.

Questions/Comments

