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Disciplinary Action: A Guide to Managing, Disciplining and Terminating Workers

By Anne DeAcetis

Every company wants professional excellence from its workforce. And most workers want to excel and have a positive relationship with their employer. But as HR professionals well know, some workers will fall short. And whether their quality of work is poor or they've violated company policy, HR will need to take the lead in disciplining those workers—up to termination.

The process, of course, can be uncomfortable. So it's critical that HR follow simple, clear guidelines from the very beginning of any disciplinary process. The right roadmap can do more than just keep emotions from overrunning a meeting. It can reduce the business risks associated with disciplining and terminating workers—and protect companies from costly court battles.

David Katz, Esq. and Richard Block, Esq. of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. visited TemPositions' HR Roundtable series on May 27, 2010 to clarify best practices for handling disciplinary actions. They **started their session with a rundown of recent employment law changes in New York State.**

Recent Changes in New York State Employment Law

Richard Block began by asserting that employment law is changing rapidly at both the state and local levels. He particularly wanted to bring attendees' attention to a new “bad boss” law currently pending (with momentum, as it has already passed the Senate) in the New York State legislature. If it passes, it will create an entire new category of actionable workplace events.

“Bad bosses” behave like tyrants. They're quick to humiliate their workers, and they behave rudely on a regular basis. Currently, workers can only sue if they are abused because they are members of a legally protected category. But “bad bosses” are what Block called “equal opportunity abusers.” They don't mistreat based on race, sex, age, religious affiliation, etc. And in the absence of a “bad boss” law, those suffering from general abuse have no legal recourse.

New York State finds the behavior to be rampant. Block, citing the pending bill itself, stated that 16-21% of workers have suffered “health-endangering workplace bullying” and that “bad boss” behavior is four times more common than sexual harassment.

The bill's description of abuse is noteworthy because it's so extraordinary broad. Impermissible behaviors include "repeated infliction of verbal abuse, such as the use of derogatory remarks, insults and epithets; verbal or physical conduct that a reasonable person would find threatening, intimidating or humiliating; or the gratuitous sabotage or undermining of an employee's work performance." **The bill even states that malice "may be inferred."**

Block believes the bill would have a serious impact on New York's practices as an "employment-at-will" state. Currently, a company can fire or fail to promote a worker for any reason—unless the reason is discriminatory. (The law also protects whistle-blowers and those who participate in some union activities.) But a "bad boss" law would enable workers to contest a wide range of workplace decisions—if they have ever been abused.

The legal ramifications for employers may be severe. More lenient judgments will order defendants to cease all abusive behaviors. But the courts will have the power to reinstate workers and even require that a "bad boss" be removed from a plaintiff's department or work area.

Plaintiffs may be awarded lost wages, compensation for emotional distress and attorneys' fees. Punitive damages could be as high as 10% of a business' total revenue. Damages are only limited if the worker doesn't suffer a "negative employment decision" (e.g., a lost promotion).

Block foresees that the bill will eventually pass. There is a movement toward "bad boss" laws across the country. And with these bills will come whole new areas of responsibility for HR.

Block recommended making plans to train managers on how to steer clear of abuse. Of course, he noted, it's healthier for any business to foster an abuse-free environment. A positive workplace results in higher productivity, reduced turnover—and fewer court battles. After all, workers who feel they've been treated with respect don't typically sue.

Other recent developments in New York State—important, though far less dramatic—include increases in the minimum wage. The hourly minimum wage is now \$7.25, and the minimum weekly salary for exempt employees is now \$543.75. Companies must advise workers of their pay rate and regular pay day at the time of hire (in writing).

Penalties for wage and hour violations have significantly increased. Employees can now recoup back wages and also receive compensatory, liquidated damages—up to 25% of back wages. It is now also easier for employees to file claims for willful violations of wage and hour law. Under a willful violation, an employer may have to pay double an employee's back pay.

Payroll deductions have become quite limited. The law dictates that payment must flow in one direction—from employer to employee—with few exceptions. In the past, a worker could receive a loan and pay it back through deductions from their paycheck. Today, if an employer wants to extend a loan, the worker will need to pay the company back by check, or in cash.

Several attendees raised questions about payroll deductions. What about un-accrued vacation time? Are deductions for MetroCards or TransitCheks permissible? One attendee stated that many of her employees live in company-owned properties and have asked for their rent to be deducted directly from their paychecks. Is the company wrong to honor those wishes?

In nearly every case, Block explained that the Department of Labor (DOL) is being very strict. Employers can deduct for taxes, employee benefits like health insurance and retirement plans, union dues...and little else. Companies with questions can call the DOL directly to discuss their specific circumstances.

Victims of domestic violence are now a protected category. If a worker experiences discrimination because they are a victim of domestic violence, they can file a claim. (Block noted that New York State is particularly sympathetic to discrimination victims.)

Health insurance for terminated employees and their dependents (under COBRA) has been extended from 18 to 36 months. And per the federal Patient Protection and Affordable Care Act (PPACA), businesses with more than 50 employees must provide space for female workers to nurse during the workday.

Commissioned employees are now entitled to their earned commissions whether or not they are employed when the commissions are scheduled to be paid. Detailed commission agreements are also required, and these include schedules for when commissions are due (upon sale, collection, etc.). But if a worker has earned a commission, it cannot be withheld because of termination.

Identity theft is a growing threat. So New York State passed a new law to punish companies that disclose social security numbers. A company will be liable, Block explained, if the numbers somehow escape their system. There are exceptions for some third-party administrators. But as a rule, companies should gather social security numbers only when absolutely necessary—and safeguard them closely.

Block counseled attendees to avoid including social security numbers on employment applications and other miscellaneous documents. Issue ID numbers or use only the last four digits of a social security number for ID purposes. And ensure that only a very limited number of HR professionals have access to the information.

Employee protection against human rights violations has also been strengthened. New York State has increased the amount of damages that a worker can collect for willful violations. A wronged employee can now collect between \$50,000-100,000 in damages.

With this New York State employment law update complete, the attorneys moved on to the topics of performance management, disciplinary actions and terminations.

Performance Management

Attendees agreed that they usually use performance management strategies to help workers succeed, support career development and foster a healthy, productive workplace. Block advised these HR professionals to also see performance management as preventative

care. Diligent, mindful practices reduce the number of workplace “surprises”—and lawsuits.

HR must ensure that the rationale behind every decision—whether to withhold a promotion, discipline or even terminate a worker—is clearly documented. In court, Block explained, your documents serve as your best witness or your worst. They can reveal that the company treated the worker fairly...or they can fail utterly to refute allegations of wrongful treatment.

Block shared a humorous list, “Top 10 Things You’ll never Hear an Employee Tell His/Her Boss.” While the items were funny (e.g., “If you give me more than one job to do, don’t tell me which is priority, let me guess”), they underscored the frustrations that workers feel when their managers are insensitive—and ineffective. HR must counsel managers to be considerate, reasonable, clear in their expectations and generous with feedback, both positive and negative.

Good managers are aware of all company policies, and their daily practices reflect this knowledge. They distribute work evenly and fairly. They give clear directions. They praise strong work when praise is due, and they also act quickly to point out problems and offer guidance. Good managers document everything accurately, and they communicate with HR.

Bad managers don’t inspire their workers—they motivate through intimidation. They may keep secret files because they don’t like HR “meddling.” They don’t express appreciation. They don’t communicate clearly. And they’re not honest in their documentation. Their subordinates will be the ones who say, “I never knew there was a problem” when they are disciplined.

Bad managers have inappropriate relationships with workers. Offenses range from showing favoritism—which sets the stage for discrimination suits—to indulging in affairs. Block was pragmatic, stating that the best companies can do is discourage romantic relationships. (Banning them is next to impossible, “given human chemistry.”) But HR must communicate the risks. Managers should be aware that sexual harassment suits often emanate from failed relationships.

There are two types of managers, Block concluded: active and reactive. Active managers are engaged with their team, lead by example and inspire their subordinates to perform well. Reactive managers wait until there’s a problem to communicate. Employees’ experiences with reactive managers are negative, because they only interact when there’s trouble. You’ll want to train all your managers, Block stressed, to be active.

Training from HR may not be welcome. Managers, by nature, want to be in charge and may chafe at being told they’re required to share files or information. But they may respond more positively if they’re told, “HR wants to be here so we can have your back.” Let managers know: HR will make sure every decision the manager makes can be defended by the company.

Once everyone is on the same side, performance management can be broken down into three core components: task-based feedback, performance evaluations and discipline.

Task-based Feedback

Managers should look for every opportunity to offer feedback to workers—rather than wait for annual reviews. If a worker does a good job, the manager should say so. If an expectation is unmet, the manager should address it immediately and provide additional instruction. They should also give the employee a chance to respond in the moment and share thoughts.

Block stressed that managers should only address one task at a time. Too much feedback—particularly if it's critical—can feel like an assault. But by doling out specific feedback on a daily basis, managers can develop better, more honest relationships with employees. And employees who receive negative performance reviews can't claim to be surprised.

Performance Evaluations

Performance evaluations are used to assess employees' work and to determine salary increases and bonuses. They chart a worker's progress against career goals, and they're often used to justify promotions. They help companies ensure they're getting the most from their workforce—and when they're not, to discover why.

To be effective in aiding both the worker and the company, performance evaluations have to be honest, clear and detailed. It's a mistake to view them as an administrative burden, Block warned. Permitting managers to dash off performance evaluations is counterproductive. If you're not clearly telling a worker how they're doing, how can you expect them to improve?

Evaluations, Block reminded attendees, are your best or worst witness in court. If a pattern of poor performance leads to a termination decision, a pattern of poor performance must be clearly evident in HR's records. If records are incomplete, a company's defense is weakened.

There are many common pitfalls. Employees must be advised in advance on what basis they'll be evaluated, and evaluations themselves need to be honest and considered. An evaluation that is 100% positive can be no more accurate than one that is 100% negative. Evaluations can't be vague, and they can't seem too subjective. And finally, they can't be verbal. It's critical that evaluations be completed in writing. They should then be kept on file in HR for the long term.

HR must train managers on how to complete performance evaluations properly—and in a timely manner. (A company's attitude toward its review process is easily interpreted, by both workers and courts, as a reflection of its attitude toward employees). Managers should also be discouraged from keeping private files. In the event of a lawsuit, all files will be subpoenaed.

Credible performance evaluations are filled out by someone with concrete, first-hand knowledge of the worker's performance. Ideally, representatives from two or more levels of management will complete evaluations. All criteria must be strictly job-related, and whenever possible, Block recommended using numerical ratings systems. Avoid providing

excessive space for general comments, which can encourage the evaluator to think subjectively.

Always include a statement on the form that preserves the company's "at-will-employment" status. The statement doesn't need to be fancy or even terribly long. But it's important to reiterate that no matter what the evaluation says—positive or negative—the company and the worker both retain the right to sever ties at any time.

Block recommended asking all workers to sign their evaluations. The signature need only signify that they've received a copy, not that they necessarily agree. (A refusal to sign does not invalidate an evaluation.) He also suggested including space for workers to share their feedback. What did they think of their own performance? And do they feel they were judged fairly?

A worker may not be happy with their evaluation. But they may be significantly mollified if they're given the chance to add their voice to the process.

Discipline

Block passed the speaking baton to colleague David Katz for the topic of discipline. But before doing so, he stressed that HR (and supervisors) must treat discipline as wholly separate from performance management. Performance management presents opportunities for coaching—to talk about what's going well as well as what needs improvement. To make disciplinary actions clear, Block advised, keep the focus razor-sharp. Discuss the problem and nothing else.

Discipline is unpleasant, Katz acknowledged. But it's sometimes necessary. Katz cited poor performance, theft, insubordination, violence, threats and anti-competitive activities as grounds for discipline. Companies can also reprimand workers for violating their code of conduct as outlined in the employee handbook.

A thorough and detailed handbook, he noted, can help a company avoid the need for a lot of discipline. The company should be clear on what activities are permitted and which are not. It should provide an overview of company disciplinary processes, including examples of infractions and the likely consequences.

If you decide to discipline, the best way to protect your company from liability is to be consistent. If an employee is chronically late, they must be treated as all others who have been chronically late. A reasonable person will not perceive discrimination if they've been treated exactly like everyone else—and perception of discrimination alone leads to many suits.

Several attendees raised questions about treating all employees equally. At one company, different department heads are known to have different attitudes toward lateness (one considers it a problem, the other doesn't). Katz acknowledged that company-wide consistency won't always be achievable. At minimum, a supervisor must treat all of their subordinates equally.

For initiating and following through on discipline, Katz recommended a progressive approach. Begin with a simple verbal warning: “This is a problem, and if it continues, there may be disciplinary action.” (Notice of this warning should be shared with HR in writing.) If the offending behavior continues, a written warning should follow. Next comes a disciplinary meeting, a final warning and if necessary, termination.

(If an employee’s behavior is egregious, Katz noted, progressive discipline is not necessary. An employee who becomes violent can be terminated immediately, at the company’s discretion, and would have difficulty proving the discharge was discriminatory.)

Written warnings must be specific. They should state the problem, the necessary changes in behavior and the outcome if the worker does not improve. Include details of previous warnings (e.g., “Your manager identified this problem in your last performance evaluation, and he/she issued you a verbal warning on [date].”) The letter should state that if the matter is not resolved, the company reserves the right to discipline the worker “up to and including termination.”

Don’t overreach with warning letters, Katz advised. Only discuss the actions for which the worker is being disciplined, and be very careful not to let emotions come into play. The purpose of the warning letter is simple: to notify the employee that there is a problem. This letter ensures they can’t claim, “I never knew I was doing anything wrong.”

Some companies put employees on probation. But Block interjected to say that he discourages clients from using probation as a tool. If a probationary period lasts 90 days and the employee reverts to the offending behavior on day 91, does that mean the process must start anew? Block finds that probations weaken a company’s “employment-at-will” position. It’s sufficient, in his view, to state that the worker must improve—with no timeframe.

If a written warning does not prove effective, a disciplinary meeting is the next step. At this point, HR must absolutely take the lead. Managers specialize in supervising workers in their daily activities. But when it comes to problems that could result in termination, HR professionals are the experts. Expect to script the meeting and lead it as it happens—in person.

HR, the employee and the employee’s manager(s) should all attend the meeting. (Witnesses are very important.) HR should provide the worker’s supervisor with a basic script to follow—and encourage them to rehearse it in advance. While HR leads the meeting, the worker’s most direct supervisor should do most of the talking.

The agenda for a disciplinary meeting is simple. The company must communicate the reason the worker is being disciplined, the expectations for improvement, the penalty (if any) and all possible future consequences. Katz recommended an even, matter-of-fact tone. Again, emotions are not appropriate—and it’s likely the employee is feeling enough discomfort already.

When the meeting is complete, give the employee a chance to respond. Most will leap at the opportunity to defend themselves or clarify misconceptions about their attitude or performance. Feedback from the worker is critical. If they don’t believe the company cares

about them, they won't feel motivated to improve. But be clear, Katz stated firmly, that there's no room for negotiation. "The employer sets the standard," he said, "not the employee."

Because disciplinary meetings are so emotional for workers, give the employee a chance to follow up in writing later, after they've had a chance to calm their nerves. But before they leave, ask them to sign a form stating they attended the meeting and understand the company's position—whether or not they agree. (Again, the event isn't invalidated if they won't sign.)

Well-planned, calmly-executed disciplinary meetings can go far to reduce liability risks, Katz explained. Often, under-performing employees who recognize they can't meet the company's expectations will decide to leave on their own, before being terminated.

Terminations

Katz then moved on to terminations—a transition that sent a chill around the HR Roundtable. Everyone agreed that terminations are the hardest part of working in HR. They are never comfortable to conduct, even when every appropriate policy has been followed to the letter.

Again, Katz pressed attendees to be consistent when making decisions. "Like offenses should receive like discipline," he stated. Misconduct that led to the termination must be thoroughly investigated. And once the investigation is complete, the discharge must take place immediately.

Because terminations are so stressful for everyone, it's important once again for HR to exhibit leadership and guide the process. First, ensure that everyone in management is in agreement. (It would be very damaging to have an employee later state, "I protested this decision until the end," in court.) The location, attendees and agenda should all be set by HR. Ensure the company's files are in order and that all documents support the termination decision.

Keep termination meetings short. Concisely inform the employee that they've been terminated and why. Be kind, but do not display emotion. Review the disciplinary process that took place leading up to the termination (as appropriate). Provide any documentation that the employee will need moving forward, like COBRA enrollment forms. And give them a chance to respond, though it should be made clear that the decision is final.

Decide in advance what will happen after the meeting. Some companies gather workers' belongings for them in advance; others allow workers to return to their desks (under supervision) to collect personal items. Prepare a plan for reclaiming company property like cell phones, laptops and credit cards. And ensure the employee does not have competitive lists or other information that they need to surrender before leaving the office.

There was some disagreement among attendees about the best time of day for terminations. If workers are terminated early, there's no danger they'll linger past business hours—but they'll need to endure a "walk of shame" in front of their peers. If they are terminated late,

they suffer less public embarrassment—but also lose the opportunity to say goodbye to co-workers.

Both attorneys advised attendees to worry more about the calendar date. It's insensitive, even cruel, to terminate a worker just before a holiday or on their birthday. "You want workers to focus on the fact that they were terminated," Block noted, "not the *way* that they were terminated."

They also strongly recommended asking every departing employee to sign a release. Not all workers will agree, Katz conceded. But companies that treat workers respectfully—even as they discipline and terminate them—will find that those workers do not want or plan to sue.

Keep releases simple and write them in plain language. They should state that the employee will not sue the company and may also include clauses on confidentiality, non-disparagement, etc. Offer incentives to sign: a reference, additional weeks on the company's health insurance plan, or a small severance payment. (Signing should be mandatory for those receiving executive severance packages.) Always give employees time to review the release with counsel.

Some attendees wondered if releases raise a red flag in court. They don't, said Katz—especially if every departing employee is asked to sign one. Signing in exchange for severance packages has become so common, it's not perceived by the courts as a bribe.

If an employee responds to a termination by alleging discrimination on the spot, companies must immediately "stop the clock." Ask the employee who behaved inappropriately toward them and on what dates. Find out what was said, and ask if there were any witnesses. Put the employee on a paid leave until the allegations can be properly investigated.

It's very dangerous for companies to dismiss accusations of discrimination that come up during the termination process. While it may be tempting to conclude that an employee is just blowing off steam, a judge may perceive the company's behavior as cavalier—and give more credence to the aggrieved worker's story.

If the company investigates thoroughly (documenting at every step) and finds that no discriminatory acts occurred, the employee may be convinced. If not, they may be mollified by a simple apology or modest severance payment. If the company does find evidence of discrimination, it must revisit the entire discipline/termination process and offer appropriate redress. Either outcome is preferable—and less costly—than a court case.

Managing workers' performance, disciplining them for misconduct and terminating them for cause are all serious tasks. And disciplinary actions and terminations can be quite emotionally taxing. As the attorneys concluded their talk, they agreed that companies that want to avoid these processes—and the lawsuits they spawn—should focus on maintaining a positive workplace. Be fair and be clear, they stressed. And absolutely, document everything.

“Foster an environment where people are treated with respect, dignity and civility,” Block stated in closing. “If you do that, you’re not going to have a lot of the problems that we get involved in as employment lawyers.”

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