

THE MANAGEMENT FILE

PREVENTING CLAIMS WHILE DISCIPLINING AND TERMINATING EMPLOYEES

Insight for business owners and risk managers provided by Brier Grieves Agency



Disciplining and terminating employees is an unpleasant task that brings high-risk exposures for employers. If you're not careful, disciplining or terminating a difficult employee could end up costing you. Employee lawsuits can be expensive—even catastrophic for smaller firms—to litigate. They are also time-consuming and emotionally draining, and they can create tension in your workplace.

What can you do to prevent lawsuits that result from this process? Gaining an awareness of the different types of employee claims and having objective company policies and procedures in place are key. Although you may not be able to prevent all claims, maintaining accurate documentation about all incidents related to the employee's disciplinary and termination action will bolster your case, whether the claim is handled at the company level or in court.

First Line of Defense: Objective Company Systems

Establishing a foundation of objective company systems can quell a claim before it happens. Employees are less likely to file claims if they feel they are treated consistently and fairly. This includes the following:

- **Well-defined Company Policies.** Well-defined employee policies are the backbone to a company culture where employees are treated fairly. Policies should cover topics such as harassment, retaliation and a company's code of conduct. An outline of procedures for company actions such as performance evaluations, performance improvement plans and the disciplinary process is also essential.
- **Employee Handbook.** Once a foundation of fair and impartial company policies is established, employers should communicate the policies to

employees through an employee handbook. If written properly, the handbook could prevent a lawsuit from happening or it could be a solid piece of evidence in the case of litigation.

Necessary for organizations of all sizes, the handbook outlines your expectations of employees and what they can expect from you. Topics such as family medical leave, dress code, work schedules, compensation, harassment policy and an employment-at-will disclaimer should be included and reviewed by an attorney or human resources department. An "employment-at-will" disclaimer gives the employer the discretion to terminate an employee at any time for a just cause. When you give new employees the handbook, have them sign an agreement to confirm receipt of the handbook, and keep copies in each employee's personnel file.

The handbook should be reviewed and revised regularly, especially when company policies change. Not only is it important to have a handbook, but it's critical to enforce the policies consistently and fairly among all employees.

- **Accurate Employee Files.** Maintaining up to date employee files, including copies of all performance evaluations and detailed reports of employee incidents, is imperative in the event of a lawsuit. All documents in the files should be truthful, accurate and written using plain, non-technical language.

If an employee disputes a disciplinary or termination action, he or she will be less likely to sue if there's a detailed paper trail to back up your decision.

Preventative Measures for the Disciplinary Process

Disciplining employees may be an unpleasant task, but

avoiding it could exacerbate the situation and lower the efficiency and morale of your workforce. Employees should be disciplined or terminated only for legitimate, job-related reasons. Under a disciplinary system, employers usually want employees to correct their problematic behaviors and continue on as productive members of the workforce.

Before disciplining an employee, conduct an unbiased investigation of the incident or problematic behavior. In some cases, the employee should be suspended to prevent further misconduct. After the investigation, follow these steps:

- Set a meeting with the employee to discuss the problematic behavior.
- Listen to the employee's side of the story.
- Inform the employee of future consequences if he or she does not improve.

Provide written documentation of the disciplinary action. Have the employee sign the documentation, or make note if he or she refuses to sign. Provide a copy to the employee.

- Follow up by acknowledging the employee's improvements. If the employee continues to violate company policies, consider subsequent disciplinary action or termination.

Preventative Measures for the Termination Process

Similar to the disciplinary process, the termination process should be objective and based on well-documented facts and details, including statements from the employee and other witnesses. It's usually not a good practice to fire someone on the spot; a comprehensive investigation should be conducted first. After a thorough investigation, if you determine an employee must be terminated, you should follow a fair protocol to avoid a lawsuit.

Types of Employee Claims

Employees can make internal, Equal Employment Opportunity Commission (EEOC) or Human Rights Campaign complaints, or file a lawsuit against the employer with a formal Complaint and Summons. Types of claims include the following:

Discrimination: According to the EEOC, an average of 100,000 discrimination charges are filed against employers annually. During the disciplinary or termination process, an employee from a protected class can allege that he or she is being treated worse for a reason relating to their protected class status than other employees. Protected classes are those based on factors including: race, color, religion, national origin, age, sex, familial status, disability status, veteran status and genetic information. While some states have broadly defined protected classes, other states' laws are very detailed, including protection for particular sexual orientations, marital status and political views.

Harassment: While discrimination claims are centered on mistreatment in official company actions, harassment claims revolve around interpersonal relationships in the workplace. These claims include verbal or physical harassment.

Retaliation: Recent changes to the Dodd-Frank Wall Street Reform and Consumer Protection Act, especially regarding the Whistleblower provision, could lead to an increase in the number of employees who will claim they've been disciplined or terminated in retaliation for whistleblowing on the company.

Wrongful Termination: Employees can file claims if they believe they were wrongly terminated for an illegal reason or for a reason that violates the company's policy. Some examples include breach of contract and constructive discharge.

Post-termination: Some employees file lawsuits after they've been terminated, claiming that the termination resulted in defamation, blacklisting or undue emotional distress.

Some sources say the best time to terminate employees is mid-week, as opposed to a Friday afternoon. Timing is key; whatever day you choose to terminate an employee, make sure it will minimize the risk of humiliation to all parties involved and will cause the least disruption to company operations.

Use these steps to prepare for the termination meeting:

- Gather copies of documentation, including information about COBRA and severance packages, for the employee.
- Compile a list of company equipment that the employee must return.
- Assess potential security issues.

Keep these points in mind during the meeting:

- Meet in a neutral location.
- Have one or two others present, including a representative from your HR department.
- Give a clear and consistent explanation as to why you are terminating the employee.
- Avoid talking too much during the meeting or making promises you can't deliver on, such as helping the employee look for another job.
- Treat the employee with dignity and respect during the entire process.
- Allow the employee to vent if he or she gets angry, but refrain from arguing about the decision.

After the meeting is finished, do the following:

- Collect company property from the employee before he or she leaves.

- Unless the employee was terminated for stealing or a violent offense, don't embarrass the employee by having them escorted out by security.
- Don't belittle the employee to other staff members after he or she leaves.

Be wary of statements that your company makes to the media and on social media sites, such as Facebook, about the terminated employee. You are not legally protected for statements that are not true or are made with intent to damage someone's reputation.

To avoid post-termination claims, it's also important to avoid impinging on the employee's future employment. Direct all reference checks from other employers to your human resources department, or simply confirm the dates of employment and the last position the employee held.

Another Line of Defense: EPL Insurance

Even when you think you've done everything to mitigate the risks, employee claims can still happen. Lawsuits—even if you aren't found liable—can be time-consuming and costly. Employment practices liability (EPL) insurance protects your company from costs associated with employee lawsuits.

Depending on the limits negotiated with the insurance carrier, EPL insurance provides coverage for defense expenses associated with the types of employee claims highlighted in this article.

Contact Brier Grieves Agency today to learn more about preventing employment-related claims and EPL insurance.