

# Progressive discipline: legal issues

Progressive discipline policies are not mandated by either state or federal employment laws. But legal issues often arise from the application of progressive discipline policies, including whether such policies can alter the employment-at-will status of employees; what happens when an employer promises progressive discipline but skips some of the outlined steps; and what employee discipline forms and checklists are necessary to maintain unbiased application of a progressive discipline program.

## 1. *Can a progressive discipline policy alter employees' at-will status?*

It could, if the policy is written in a way that limits the circumstances under which your organization may terminate employees. Make sure you include a statement that you have the right to use any level of discipline, up to and including termination. Make it clear that progressive discipline will not always be used; don't, however, limit the situations in which you may bypass progressive discipline.

Here are some examples of policy language that could get you into trouble and what you should use instead.

*Trouble:* The following reasons are grounds for termination.

*Legally sound:* The following are examples of grounds for termination, but employees may be terminated for any reason not listed.

*Trouble:* Employees will be terminated after the following three-step progressive discipline process has been followed.

*Legally sound:* Employees may be subject to the following three-step progressive discipline process, but any or all of these steps may be skipped depending on the circumstances.

## 2. *Even if a progressive discipline policy clearly states that steps may be skipped, what can be done to prevent an employee who is fired without benefit of progressive discipline from filing a discrimination charge?*

Consistency is the key. Even with a flexible policy, you need to make sure that it is applied consistently throughout the company. In other words, all employees who engage in the same type of offending conduct should be treated the same, unless there are legitimate business reasons for the different discipline.

Ensure you are able to document the reasons for skipping (or, as the case may be, repeating) steps in the progressive discipline process. It could come in hand if you're forced to defend why one employee was fired for damaging company property while another was only suspended for a similar infraction.

## 3. *What are the best ways to prevent breach of contract claims when a progressive discipline policy is provided?*

Besides stating that the company retains the right to skip steps and that discipline is up to the discretion of management, you should also include a clear disclaimer that reinforces the doctrine of employment at-will and negates the existence of an employment contract.

4. *What steps should supervisors and managers keep in mind when doling out discipline under a progressive discipline system?*

- Document verbal warnings and counseling. Then place these notes in employee personnel files. Avoid the practice of removing disciplinary actions from employee files after a year; without these records, you may get stuck at step one of the progressive discipline process even if an employee commits multiple infractions.
- Remember that discipline cannot be carried out in a vacuum. It must be tied to employees' prior warnings and performance reviews. Document your efforts by using a Discipline Documentation Notice.
- Allow employees to share their sides of the story. Be sure to document what they say.
- Let employees know what is expected of them. Explicitly state: "I expect that you will..." Then provide the employees with the tools necessary to reach the goal. The responsibility of shaping up then lies in the hands of the employees.
- Set deadlines. Employees must be provided a reasonable time period within which to correct the problem. Generally, you want to steer clear of issuing a warning at 9 a.m. and terminating the employee at 3 p.m.
- Spell out the consequences of inaction. Employees need to know that they will be subject to a specific adverse action if the problem addressed is not remedied.
- Skip steps only when warranted. It's not illegal to terminate an employee without running through your gamut of progressive discipline steps. But be sure that such extreme action is clearly deserved.