Discipline and discharge: 5 do's and don'ts

by Thomas I. Plotkin, Esq., Pepper Hamilton LLP

In a perfect world, employers would never have to discipline or fire their employees, and HR professionals could make decisions without the input of attorneys. Unfortunately, the real world is not perfect, and employers are often faced with the unpleasant task of disciplining or terminating employees. Although these decisions are necessary to make sure that employees are performing well, missteps can lead to costly litigation down the road.

Below are some do's and don'ts of employee discipline and termination that employers can follow to minimize potential risks.

DON'T discriminate

Employers may not discipline or terminate employees due to their membership in a protected class, such as race, color, religion, national origin, sex, pregnancy, disability, age (for those 40 or older) and genetic information.

Many states have created additional protected classes. For example, the Pennsylvania Human Relations Act (PHRA) protects familial status and ancestry. Beyond state law, cities and municipalities may also create protected classes. In Philadelphia, for example, the Fair Practices Ordinance prohibits discrimination on the basis of sexual orientation and gender identity, which the PHRA does not.

DO recognize disability

In addition to prohibiting discrimination on the basis of disability, the ADA requires employers to provide reasonable accommodations to employees with qualifying disabilities. To determine whether an accommodation is needed, employers and disabled employees must engage in an interactive process to discuss potential options for accommodations.

Although an employer is permitted to impose discipline on a disabled employee when it is unaware of the employee's disability, once the employer learns of an employee's disability, it must ensure that it engages in the interactive process to try to find a reasonable accommodation, if the employee needs one, before it considers further discipline or possible termination.

DON'T retaliate

In addition to refraining from discrimination, employers must also refrain from retaliating against employees who engage in lawfully protected activities, including asserting rights under one of the antidiscrimination statutes, assisting in the investigation of alleged discrimination or participating in legal proceedings relating to such allegations.

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In addition to anti-retaliation provisions in anti-discrimination statutes, such provisions also appear in other employment-related statutes, such as the Fair Labor Standards Act, the FMLA, the Occupational Safety and Health Act and the National Labor Relations Act (NLRA).

The NLRA specifically protects employees' rights to engage in concerted activity, including union activity. Among other things, that means that employers that discipline employees for engaging in union-related activities or activities taken for mutual aid or protection might run afoul of the NLRA if they don't consistently discipline for similar reasons. For example, reprimanding an employee for checking his personal email at work could constitute an NLRA violation if the employer normally permits employees to check their personal email and the employee in question was reading a union-related email.

Anti-retaliation provisions can also be found in whistle-blower protection laws that protect employees against retaliation for exposing an employer's unlawful activities.

Statutes with whistle-blower provisions include the Comprehensive Environmental Response Compensation and Liability Act, the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Affordable Care Act and the Sarbanes-Oxley Act.

DO document

It is in an employer's best interests to have meticulous documentation showing why it disciplined or terminated an employee.

In a discrimination case, if an employee shows that he or she suffered an adverse employment action and is a member of a protected class, then the employer must respond by articulating a legitimate, nondiscriminatory reason for its action. The better the documentation, the easier it will be to prove that nondiscriminatory reason.

Poor documentation that does not accurately reflect a situation can be incredibly harmful, potentially making it easier for an employee to prove that an employer's nondiscriminatory reason was a pretext for discrimination. For example, if an employer wants to terminate an employee for poor performance and there is no indication in the employee's personnel file that the employee has had performance issues or the documentation in the file is positive (such as an above-average performance evaluation), the employee could argue that the reason for his or her termination was not really performance, but a discriminatory reason.

DON'T hesitate to contact your attorney

These do's and don'ts are a good starting point, but every employer's business and employee situation is different. If you are unsure about a situation or want clarification on a specific point, be sure to contact your attorney. A quick consultation may be the difference between a small cost to adjust a company policy and expensive litigation.

Thomas I. Plotkin is an associate at Pepper Hamilton LLP and focuses his practice on representing employers in labor and employment matters. Tom can be reached at plotkint@pepperlaw.com or (609) 951-4166.

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