CARDINAL RULES OF TERMINATION

Discharge or termination of employment, the key employee rights issue of the 1990s, is justifiably referred to as "the capital punishment of the workplace." If it is not handled correctly, the disruptive impact that a disciplinary termination can have on employees and employers can be significant. These basic rules should be carefully followed before making a final decision to involuntarily terminate an employee for disciplinary reasons.

Rule 1: Never summarily discharge.

The first rule that every employer should follow is never to summarily discharge an employee regardless of how serious the misconduct may appear. Even when an employee is apparently caught red-handed violating a dischargeable offense rule, there is simply no reason to terminate on the spot. Appropriate discipline, including discharge, can be imposed following a disciplinary suspension that allows time for a thorough, careful investigation.

Even in circumstances where immediate discharge would appear to be in order, prudent employers will direct the employee to clock out and leave the premises. The employee will then be told that the matter will be investigated, and he or she will be notified shortly as to how it will be resolved. In the meantime, the employee is "suspended subject to discharge pending further investigation." This procedure gives the employer time to take the following steps:

- Allow time for all parties to cool down, so that an objective and dispassionate investigation may be done.
- Take into custody and examine physical evidence, such as drugs, alcohol, or stolen property.
- Obtain written statements from all witnesses, including the employee under suspension.
- Complete a thorough factual investigation.
- Examine discipline previously imposed on other employees who committed similar Infractions.
- If the employee is in a protected category, determine whether he or she has been the victim of disparate treatment or has been penalized by a rule that has a disparate impact on individuals in his or her protected category. Determine if the individual has been the recipient of demeaning remarks or comments related to his or her protected status.
- Review the employee's past work record and performance.
- Obtain the employee's account of what happened, including any defenses or mitigating circumstances he or she might advance.
- Have the appropriate decision making officer, official, or manager decide on appropriate
discipline.

- Review decision using the final filter process (see rule 5).
- Consult an employment attorney in questionable cases before final action is taken.
- Communicate final decisions to the affected employee in a calm, confidential and thoroughly professional manner.

By following these steps, employers can assure themselves that a thorough, dispassionate, and objective investigation will be done and that disciplinary action will be taken only after a systematic analysis and a full review of all the facts and circumstances bearing on the disciplinary decision have been completed.

If this process confirms that (1) a serious violation of company rules did occur, (2) discharge is the customary penalty for such infractions, and (3) no mitigating circumstances exist to justify a lesser disciplinary action, then the discharge should be finalized and the employee told of the decision as quickly as possible. If, on the other hand, the investigation reveals that the facts were not as first suspected, that similar offenses have in the past received lesser penalties than discharge, or that there are mitigating factors, then the suspension should be lifted and the employee returned to the workforce with the appropriate disciplinary entry placed in his or her personnel file.

In some instances, further investigation may disclose that no rule infraction occurred, that the employer's initial assessment was factually incorrect, or that the conduct in question simply does not justify disciplinary action. In those cases, employees should be returned to their former position and given back pay for the period of suspension, and all disciplinary references should be removed from their personnel files.

In short, by suspending the employee rather than resorting to immediate discharge, employers gain "breathing space" to deal with what appears to be serious misconduct. Although these procedures may be time-consuming and perhaps costly, they are prudent measures that could save the employer thousands of dollars in back pay and damage awards, legal fees, and other related legal costs. Once again, the proverbial "ounce of prevention" will prove to be a prudent investment.

**Rule 2: Get all the facts first to make sure your investigation is thorough, complete, and well-documented.**

Normally, the employee's supervisor, department manager, human resources director, or a member of the human resources staff investigates serious employee misconduct. Those members of management who are chosen to investigate should remember that their role is that of an investigator, not a prosecutor, and they should be open to evidence on both sides. The following list reflects the minimal steps that should be taken to ensure fair treatment during the investigation:
- Compile a thorough written report about all the facts surrounding the incident or incidents, including detailed statements from all witnesses. These should be signed and dated. Secure and safeguard all physical evidence.

- Review all relevant personnel and disciplinary records (both those of the employee under investigation and all similarly situated employees).

- Examine all documentation about the incident or incidents. Compare discipline given before for similar misconduct.

- Keep all statements, records and information confidential.

- Review the employee's entire personnel history.

**Rule 3: Conduct all employee interviews with care and deliberation.**

The Supreme Court in *NLRB v. Weingarten* (420 U.S. 251 (1975) held that employees represented by a collective bargaining agent are, under certain circumstances, entitled to have a representative accompany them during any investigatory interview provided they make a timely request for such assistance. An investigatory interview has been defined as an interview the employee could reasonably believe may lead to disciplinary action. The exact circumstances triggering this right, the waiving of this right, the extent of the designated representative's right to participate, and consequences of failure to accord such a right have all been the subject of numerous decisions by the National Labor Relations Board (NLRB) as well as the court. So too has the question of whether nonunion employees enjoy this same right. The board's current position on this issue is that nonunion employees are not entitled to such third-party representation.

Giving the employee under investigation an opportunity to be heard is an important aspect of any comprehensive investigation. Frequently, the employee will present an alibi or defense that the employer had not previously considered. No matter how "off the wall" such an alibi or defense may appear to be, it is important for the investigator to seriously consider its credibility, examine its reliability, and evaluate its legitimacy.

In interviewing the employee under investigation, adopt an investigative attitude and approach, not an accusatory or adversarial one. At this stage of the investigation, the interviewer should be open-minded and in search of the facts. If employees perceive that the interviewer has not prejudged the matter and is willing to listen to their side of the story, they will undoubtedly be more cooperative. On the other hand, if the employees believe that the investigator has already made up his or her mind, they will be much more defensive and much less likely to cooperate.

Once the investigator has gathered and reviewed the evidence; evaluated the sources; examined all relevant documentation including the employee's personnel file and work history; compared how other similar offenses have been treated in the past; and listened to the employee's explanation of the matter, it is time for the investigator to summarize the findings and make a
written recommendation. The written recommendation, in turn, should be carefully reviewed using the final filter process.

In following the above procedure, the investigator should be particularly careful to examine the facts from the employee's point of view and anticipate legal defenses or other justifications that the employee might assert during the interview or in the future. It must then be determined whether such excuses or justifications constitute a defense to the alleged misconduct being investigated.

Rule 4: Investigate promptly -- don't delay

If possible, an investigation of employee misconduct that may lead to discharge should be completed within 48 to 72 hours after the event or events giving rise to the investigation, and the employee should be told of the final decision within 24 to 48 hours thereafter. Of course, there may be situations when this timetable cannot be met, for example, if a key witness is unavailable or scientific testing must be done. However, the investigation should be done as quickly as possible. Unwarranted or unnecessary delay makes the investigation suspect and gives the impression that the employer is trying to build a case (when it doesn't have one to begin with) or that factors other than the merits of the case have influenced the outcome. Fairness to all concerned dictates that the investigation be started and completed quickly.

Rule 5: Always use the final filter approach.

Once the initial investigation is completed and termination is recommended, employers should conduct a final filter review. The purpose of the review is to analyze the investigator's findings and recommendations, determine if they are complete and accurate, and decide whether these findings and the recommendations that flow from them should be adopted, rejected, modified, or whether further investigation is needed before making a final decision.

The individual conducting the final filter review should not, if at all possible, have been previously involved in the investigation nor, if possible, should that person be involved in the direct line of supervision over the employee being investigated. In other words, this individual should be as unbiased and objective as possible and have a fresh outlook on the investigation and its outcome.

The duties of the "final filterer" include the following:

- Determine if the investigation is complete and returning the report and recommendations to the investigator if incomplete.
- Determine if any biases, intentional or unintentional, influenced the report and its recommendations.
- Examine the credibility of the witnesses and the accuracy of their statements.
- Evaluating all pertinent evidence bearing on the disposition of the case.
• Determine if the discharge is directly linked to a violation of written company rules or is otherwise sufficiently tied to violation of company policy for which termination is authorized.

• Judge the appropriateness of the punishment in light of the employee's entire work history and record.

• Ascertain whether the employee in question falls into a protected category and, if so, determining whether his or her rights have been violated in any way.

• Determine whether the recommended discipline comports with the discipline awarded other employees who committed the same or similar infractions. (In other words, see that no disparate treatment has been accorded the individual in question.)

• Determine whether the discharge violates any legal obligation owed to the employee in question, that is, ensure that the company's internal protections and procedures were afforded the employee, and that all company policies were complied with.

• Confer with the person who has final discipline decision making authority and inform him or her of the "final filterer's" recommended action (if the person making the final decision is someone other than the individual who conducted the final filter review).

Whenever the proposed termination involves close factual questions, possible allegations of disparate treatment of protected employees, or involves significant legal questions, it is prudent to legal assistance before finalizing any termination decision. An employment attorney can complement the final filterer and serve as a safety check to make sure ligation is complete and that all relevant information needed to make a legally sound decision has been obtained. Armed with a copy of the investigative report final 'filterer's recommendation, an attorney can help the employer evaluate whether the proposed discharge can be sustained if later challenged in court or elsewhere, or whether other disciplinary action might be more appropriate in light of applicable legal considerations. An employment attorney also can provide insight into other potentially troublesome considerations surrounding the proposed discipline, such as how the termination would affect employee morale or how it could serve as a basis for generating a class action lawsuit or possibly trigger union organizing activity. More important, an employment attorney can help evaluate the likelihood of subsequent legal action if the decision to terminate is carried out and can provide an assessment of the employer's chances of successfully defending itself against any such ensuing legal challenge.

This process can be eased by regular conferences between the employer and employment attorney. In this way can stay up to date on the employer's current employment policies and practices and the employer can get legal advice promptly. Employment attorneys, by virtue of their legal background and training and their experience with a broad range of employment legal issues, can provide employers with practical, common sense answers to help them formulate legally defensible disciplinary decisions. Thus, when a potential discharge case arises, a short telephone conference may be all that is needed for counsel to review the facts and give an
informed, sound recommendation that will protect the employees best interests.

**Rule 6: Pinpoint the basis of the discharge.**

Many employers fail to identify or articulate the reasons for termination. This mistake could be fatal. Employers sometimes cite reasons for a discharge that they cannot prove or substantiate, while at the same time overlooking provable reasons that would amply justify termination.

Most employers do not give the employee a written copy of the reason for their discharge. Instead, they orally communicate the basis for the discharge and then record it somewhere in the employee’s personnel file. This information is discoverable during an administrative investigation or lawsuit, and the employer should be prepared to defend its action on the basis stated.

**A corollary to Rule 6:** whenever possible, identify the specific rule or policy that the misconduct in question violates. The more specific the better. For instance, if the employee is terminated for absenteeism, spell out the specific provision of the absentee policy that was violated.

**Rule 7: Whenever possible, inform the employee in person.**

Once the final filterer has completed his or her assignment, with the aid of an employment attorney, if necessary, and the recommendation is to discharge the employee in question, the management official authorized to carry out the decision should be informed. This decision-maker might be anyone from the president of the company on down, but preferably should be a high-ranking executive in the organization. As stated earlier, this decision is so important and has such potentially serious consequences that only a high-level official should be allowed to exercise this authority.

The decision maker should review the entire record and consult with the investigator, final filterer, and, if necessary, the employment attorney. In rare cases, with the advice of counsel, the decision maker may wish to speak with the employee under investigation to verify certain aspects of the report or seek additional information before making a final decision. However, this reviewing process should not be unduly prolonged.

When the employee is told about the decision to terminate the employment relationship at least one other management official should be present. The reasons behind the decision should be explained as objectively and unemotionally as possible. This is not a time for personal recriminations, finger pointing, emotional outbursts, or long, strident harangues. The decision should be announced at the outset of the meeting, followed by a brief explanation of the basis for the employer's decision. The employer representatives should avoid being drawn into a debate or confrontation, and under no circumstances should the meeting become a fault-finding session or heated argument.

Frequently, after the decision has been communicated, the employee will want to take
issue with or challenge the employer’s action. While the employee should be given an opportunity to "state his or her case" and "blow off steam," he or she should not be allowed to embark on a lengthy diatribe. If the meeting appears to be getting out of hand, the decision maker should end the meeting by simply stating, “We're sorry you feel that way, but that is our decision.” There is no point in engaging in protracted discussion or debate. At this stage, the investigation has concluded. It has been fully reviewed, and the final decision made. The purpose of the termination meeting is simply to convey management's decision to the employee, not to rehash it.

The discharge meeting should conclude on a friendly note, with the management representative adding, "We're sorry your employment at the company had to end this way. We wish you well in the future," or a similar conciliatory closing remark.

At some point during the meeting, the employee should be told when to pick up a final paycheck and have his or her termination rights explained. A number of states have laws specifying that terminated employees are entitled to payment of wages earned within a specified period following termination. This may be as soon as the last workday or in some cases the next regular payday. In addition, some states have laws that treat accrued fringe benefits such as vacation, sick leave and other paid time off or benefits as wages that must be paid on termination. It is important to review those state requirements since many states impose stiff penalties for failure to comply. When employees collect their final paychecks, provide a complete written explanation of COBRA rights, severance pay, accrued vacation or sick leave or other fringe benefits to which the employee may be entitled.

There may be occasions when it is not advisable to meet personally with the employee in question to convey the termination decision. In cases where the employee has a history of violence or psychological problems or where threats have been leveled at company officials, it may be prudent to avoid a personal confrontation. Workplace violence is escalating at an alarming rate and there is no reason to trigger a potentially explosive situation by requiring a troubled employee or one prone to violent outbursts to attend a meeting where emotions will undoubtedly run high and matters could easily get out of control. In these instances, prudence dictates avoiding a face-to-face confrontation.

In these cases, counsel should be consulted to help draft a termination letter. Since this letter will undoubtedly be a critical piece of evidence in any post-termination legal challenge, it should be carefully drafted and accurately reflect the reasons for the discharge. The employee's final paycheck and a description of other benefits to which the employee may be legally entitled should accompany the letter, or the employee should be informed when the final paycheck and this information will be forthcoming.

Communicating the termination decision should conclude the matter. Thereafter, no management official should comment on the company's action, either with the discharged employee, other employees, the public, inquiring prospective employers, or other third parties. All inquiries should be directed to the individual assigned to respond to employment-related matters concerning current and former employees, and that individual should scrupulously follow the employer's established policy.
There is one possible exception to the general rule of maintaining a policy of silence following discharge. If the termination has caused unrest among the discharged employee's follow workers or if confusion or misinformation surrounds the discharge, the employer may wish to "set the record straight." In those circumstances, before communicating any information about the termination and the reasons behind it, the employer should first consult with counsel to properly phrase any communication on the subject. Otherwise, the employer may be providing the former employee with added ammunition for launching a legal attack.

To summarize, once the decision to terminate has been reached, communicate it in person quickly, tactfully, and dispassionately. Then pay the employee what he or she is legally owed, conclude on a cordial note, and discuss the matter no further, unless absolutely essential to alleviate employee concerns and then only after your communication has been cleared by counsel.

**Rule 8: Always use progressive discipline and keep appropriate documentation.**

Workplace disciplinary systems are grounded on the theory of rehabilitation, not punishment. By using appropriate disciplinary measures, employers try to send a message to errant employees and let them know their performance must improve or more serious consequences will follow. The employer's disciplinary measures should be constructive and they should be directed at letting employees know that their conduct or performance has slipped below acceptable norms and that improvement is both necessary and expected. If the employee heeds the constructive counseling, well and good. The caution signal will have accomplished its purpose, and a potential employment problem will have been averted. If the employer's counseling efforts go unheeded, stronger measures may have to be used to impress on the employee the seriousness of the situation and the need for immediate corrective action.

In a unionized setting, arbitrators are frequently called on to determine whether the grievant has been terminated for just cause. In fact, there are thousands of arbitration decisions defining what constitutes just cause, given the facts of the individual case. In determining the question of just cause, arbitrators frequently examine whether the principles of progressive discipline have been followed. These principles require employers to gradually increase the level of the discipline administered, until the employee is sufficiently put on notice that future transgressions will result in termination. Thus, employees are made aware that their conduct or performance is considered unacceptable and that they must improve or face the prospect of termination. If employees continue to ignore these warning signals, arbitrators generally uphold their discharge.

Although nonunion employers are not under any legal obligation to follow a just cause standard (unless they have imposed this standard on themselves by their written policies), they should follow these same principles. As is frequently the case, this is an instance in which legally acceptable practices and sound management procedures coincide. Encouraging employees to improve their performance through progressive discipline simply makes good business sense, particularly in light of the investment that the employer has already made in recruiting, hiring, and training the employee, to say nothing of the costs that would be incurred to hire a
Both government investigators and reviewing courts tend to uphold an employer's disciplinary action if it establishes a systematic foundation of counseling and warnings which clearly state that future misconduct would jeopardize the employee's continued employment. Such a warning notice is often given in a "last chance" letter, stating that the employee is being given one final opportunity to conform his or her conduct to acceptable norms of behavior performance, or face termination.

A last chance letter should contain a brief summary of the employee's disciplinary and performance history, recount previous attempts to inform the employee of the seriousness of the situation, and emphasize clearly the need for immediate reform. It should end by plainly spelling out that further misconduct or continued unacceptable performance will result in termination. Because a last chance letter is an important document that could play a key role in any subsequent legal contest, it should be reviewed by counsel before it is given to the employee.

A last chance letter should be personally delivered to the employee during a meeting called for this purpose, and another management official should witness its transmission. At this meeting, the seriousness of the situation should be forcefully reiterated and the employee should be asked to acknowledge that he or she understands that any further impermissible conduct or unsatisfactory performance will result in termination. This last chance meeting also gives an employer the opportunity to observe the employee's reaction to the ultimatum, and may indicate whether the employee will challenge subsequent disciplinary action. If a challenge appears likely, counsel should be consulted before any subsequent disciplinary decision is finalized.

Rule 9: When you are done with your homework, go for it.

The great financial costs and other serious consequences associated with improper and illegal employment termination decisions have been stressed. However, this discussion would not be complete without observing that sometimes an even more costly termination decision can be the one that is never made.

As expensive as an ill-advised termination decision could be, the decision to terminate an unsatisfactory employee may prove far less costly than continuing to employ someone whose performance is not only unacceptable, but whose continued presence in the workforce undermines employee morale and creates a bad example for others to follow. Some employees not only fail to abide by established rules of conduct or conform to established performance standards, but they also constantly denigrate the employer and its policies to anyone who will listen. They are not averse to letting it be known that the employer is giving them and the rest of the employees "a raw deal." These individuals can cause incalculable damage to an organization and must be separated for everyone's benefit. For some inexplicable reason, many employers delay confronting employees like this until it is too late. For instance, despite the fact that an employee like the one described may have a work history that would provide ample basis for disciplinary termination, many employers procrastinate. Instead of documenting the employee's failings and following progressive disciplinary principles, they drift along, reluctant to take the necessary action.
Later, after this chronically malcontent employee foments a union organizing campaign, instigates a vexatious OSHA complaint, files a spurious workers' compensation claim, or triggers other unwarranted charges with a government agency, the employer finally takes decisive action, only to find that it waited too long. When such a termination is later challenged, as it inevitably will be, the investigating agency will undoubtedly conclude that the real reason behind the discharge is employer retaliation because the employee exercised his or her legally protected rights. The investigator's conclusion will be bolstered by the fact that the employee's conduct before the discharge was no worse than it had been throughout his or her employment history. Since the employer had not acted to terminate the employee earlier, the investigator will undoubtedly conclude that the real cause of the termination could only be the employee's having engaged in legally protected activity and that any other reason cited by the employer is nothing more than a pretext. Consequently, once employees have engaged in some legally protected activity or exercised a legally protected right, their termination will be considerably complicated regardless of how bad their previous work record may have been or how justifiable termination might otherwise be.

Failing to separate this type of employee from the workforce at an appropriate time costs the employer considerable money in lost productivity, through both the employee's substandard performance and the poor example he or she undoubtedly sets for other employees. Of course, such individuals may challenge any decision involving their termination, regardless of when the decision is made. Yet, even though the termination decision may be very costly, in many instances failure to take timely and appropriate decisive action will be far more costly in the long run.

**Rule 10: Beware of the set-up.**

By this time, the reader is undoubtedly aware that after the termination conference, the next meeting with the ex-employee may well take place in an attorney's office. What most employers do not realize, however, is that in many cases employees have seen the handwriting on the wall and retained an attorney before their actual termination. Consequently, employers should become aware of telltale signs that indicate they are being set up. Requests by employees to see or copy their personnel records and possibly those of other employees, requests that the employer statements in writing, conversations focusing on the employee's protected status, detailed inquiries about disciplinary procedures or company policies and benefits, questions concerning comparative treatment with regard to other employees, and other similar actions may be indications that employees have been furnished with a detailed game plan to put the employer on the defensive. Employers are well advised to consult their own legal counsel once they determine this to be the case.

In setup situations, employers must follow exactly the same procedures with the problem employee as they do with everyone else. One of the worst things that an employer can do under these circumstances is to single out the employee in question for special attention or treatment. Such conduct will merely reinforce the employee's contention that he or she is being subjected to a double standard. If it can be established that the employee has been singled out for special treatment, the employer's motives will be impugned and subsequent disciplinary action will be
challenged on the basis that the "employer was out to get me." Plaintiff’s attorneys like nothing better than to portray their client as the victim of an employer inquisition or vendetta.

There is no reason to panic if it is discovered that an employee is laying a foundation to contest future disciplinary action. By following the procedures outlined earlier in this chapter, employers can achieve the same amount of success in defending against legal challenges by counseled employees as non-counseled ones. The key is to not overreact by making the employee a designated target. Instead, the employer should continue to apply to the employee in question the same rules and procedures that are applied to all other employees.

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