

# Staying Out of the Courthouse

## Best Practices for Employee Discipline



**UNDERWOOD**

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# Putting a <sup>GOOD</sup> Discipline Policy in Place Proactively

- Helps employees understand what behaviors are not acceptable in the workplace.
- When enforced consistently, serves as significant deterrent to unwanted or unlawful behaviors by employees.
- Can help prevent legal claims with a clear, consistent policy.



# Putting a <sup>GOOD</sup> Discipline Policy in Place Proactively

The policy should include:

- A written code of conduct or a list of unacceptable behavior.
- An acknowledgement for the employee to sign.
- Language specific enough to notify employees of what types of conduct are unacceptable, yet be broad enough to cover all unacceptable conduct that might arise.



# Progressive Discipline

- Consider outlining disciplinary states/policies in handbook.
  - Careful to not create a limitation on potential disciplinary options for certain conduct.

*Example: Employer may want to follow a progressive discipline approach, but putting this policy into writing might dampen the employer's ability to apply a more severe discipline when warranted.*

# Progressive Discipline

- The employer should always clearly reserve the right to apply any discipline, including termination, for any conduct.
- Smaller employees may benefit more from not including a progressive discipline policy.
  - For those consistently and more easily track employee discipline.
- If employment is at-will, the policy should emphasize that.
  - Avoid any language that can imply job security for specific behaviors.

# When No Policy Exists

## Minor Offense:

- Not addressed in policies – employee may not know behavior is unacceptable.
  1. Speak to the employee.
  2. Consider revising the policies.
  3. Move to formal discipline if the behavior is not corrected.

## More Severe Offense:

1. Formally discipline employee rather than simply speaking to them.
2. Employer should be aware of risks for terminating employee for behavior not covered in handbook.



# When No Policy Exists

Employer *may* impose less severe discipline for conduct not in handbook.

➤ Such discipline must be consistently enforced.

Keys to protection from liability:

1. Consistency.
2. Documentation.



# Evaluating Performance and Mitigating Liability

Employers often face difficulty evaluating a well-meaning employee who is simply not competent.

To eliminate some of these issues:

1. Probationary period with a performance review.

- If done correctly, an employee can be dismissed as necessary.

2. Performance reviews must be thorough, consistent, and honest.

*Example: A common problem – employers hesitate to offer honest, yet negative feedback to employees.*





# Evaluating Performance and Mitigating Liability

A good performance review includes:

1. Job expectations with constructive feedback.
2. Clear directions on improvement for poor or weakening skills.



# Discipline/Discharge Letter

- Employers should keep a written record of all discipline given to employees.
- Employees should be asked to sign the disciplinary notice (to show acknowledgement of receipt).
- Avoid inflammatory language, such as bias or discriminatory motives.

# Disciplinary Notice – Issuance

- Conduct an appropriate investigation.
  - Talk to witnesses about alleged conduct.
  - Examine relevant documents.
  - Interview the employee for his perspective.
- For employees protesting the disciplinary notice, encourage the rebuttal in written form and attach to the disciplinary notice.



# Termination – The Notice

In the termination/discharge notice, include:

- Name the employee to be terminated and state the notice is specific to termination.
- Confirm the termination date.
- Summarize HR benefits, such as severance package, when last paycheck is received, description of benefits, employee obligations to return equipment, etc.

# Termination – The Notice

In the termination/discharge notice, a common question is whether to include the reasoning for the termination.

- If the cause(s) for termination is well-documented and supported by evidence, it is usually beneficial to list.
  - Better to include policies violated by employee.
  - Detailing events leading to termination is preferred.
- Without the reasoning, an employee might guess as to why.
- Write the letter that you want them to show a potential attorney.

# Termination – Minimizing Liability

- Maintain confidentiality whenever possible.
- Employer should consider all legal requirements before terminating employee.
  - Consider final paycheck, COBRA benefits, etc.
- Any necessary parties should be present during termination, such as the direct supervisor of the employee.
- The message of termination should be clear to the employee.

# Termination – Common Mistakes

- Lack of preparation.
- Failing to define reason for termination.
- Engaging in an argument with employee.
- Sharing sensitive information with other employees.



# Waivers and Releases



- Employer must tread carefully.
- Must be carefully drafted to comply with the law.
- Certain legal claims cannot be waived by employees.
- Engage your attorney if a waiver and release is expected.



# Fair Labor Standards Act

Establishes and enforces minimum wage and overtime pay (private and public employees).

- A claim under FLSA cannot, generally, be waived.

*EXCEPTION:* Unless released pursuant to a bona fide dispute over hours worked or compensation owed.

- Why? To allow a settlement if an internal investigation into the number of hours or amount of pay has occurred.

# False Claims Act Claims

Allows a private person to file a lawsuit against individuals, businesses, and other entities that have defrauded the Federal government.

- Employer can do little to ensure FCA claim is released in severance agreement.
  - Key factor to determine validity of release is whether government has fully investigated employer's alleged fraud.
- Waiver of FCA claims in severance agreement not likely to be helpful.

# Title VII Claims & ADA

Title VII – prohibits employers from discriminating based on sex, color, race, national origin, and religion.

- Public and private employees with 15/+ employees.
- *Can* be waived in severance agreement.

# Age Discrimination in Employment Act

Prohibits discrimination against employees forty years or older based on their age.

- 1990 – Congress amended ADEA passing Older Workers Benefit Protection Act.



- OWBPA- Employee *cannot* waive ADEA acts unless waiver is knowing and voluntary.
- Certain requirements of waiver for “knowing and voluntary.”

# Age Discrimination in Employment Act

To be “knowing and voluntary,” waiver must:

- be part of an agreement between the employee and employer that is easy to understand;
- specifically refer to the ADEA;
- the waiver may not attempt to waive rights or claims that arise after the agreement is signed;
- the employee waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
- the employee is advised in writing to consult with an attorney before executing the agreement;

# Age Discrimination in Employment Act

To be “knowing and voluntary,” waiver must:

- the employee is given at least 21 days to consider the agreement, or if the waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employee is given at least 45 days to consider the agreement;
- the agreement states that the employee has at least 7 days after signing the agreement to revoke the agreement;

# Age Discrimination in Employment Act

To be “knowing and voluntary,” waiver must:

- if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer informs the employee in writing and in plain language, as to:
  - any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and
  - the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

# Family Medical Leave Act



Requires employers with 50/+ employees to provide 12 weeks of unpaid leave to eligible employees for birth, adoption, placement into foster care, or serious health condition of a child, spouse, parent, or employee.

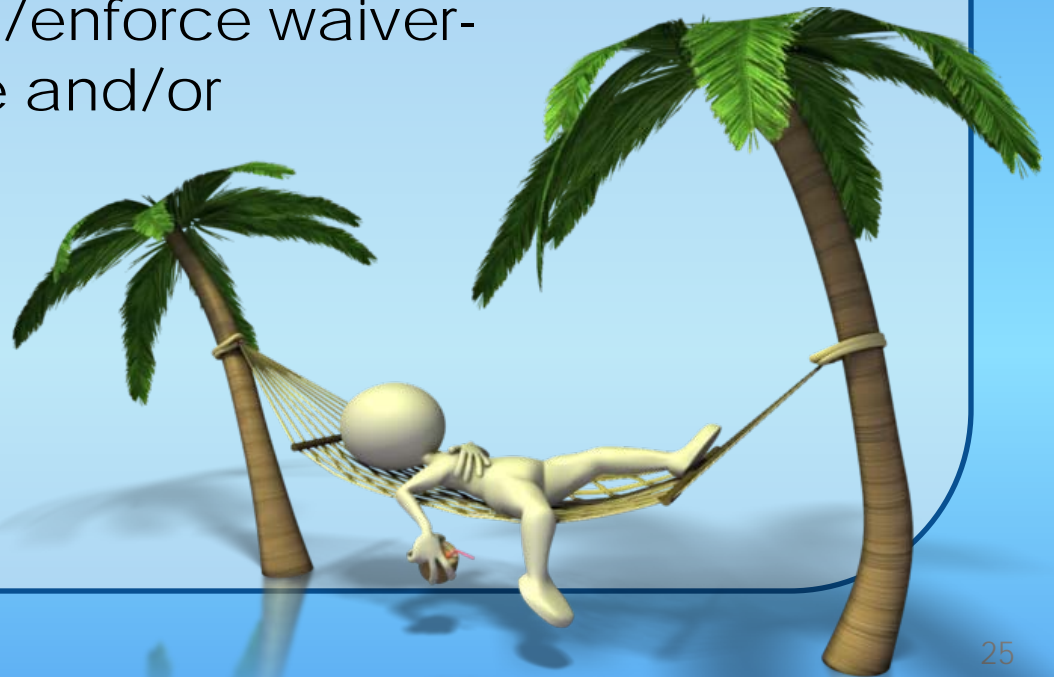
- Employees cannot waive their rights under FMLA.
- Current law – waiver of right to file retaliation claim can be included in severance agreement (5<sup>th</sup> Circ.).



# Unemployment Claims

An individual's agreement to waive or release the individual's right to benefits or any other rights under Texas Unemployment Compensation is not valid.

- Attempt to obtain/enforce waiver-punishable by fine and/or imprisonment.



# Future and/or Unknown Claims

Caution: A waiver or release may not include future claims or rights.

- Employee may waive or release existing claims and future claims arising from previous conduct.
- It is sufficient to clearly state all claims arising out of employment relationship and events that occurred therein are released and waived pursuant to the severance agreement.

# Enforceable Waiver – Consideration

To be enforceable waiver, consideration must be adequate.

- Anything of value employee is not already entitled to when terminated.
- Additional money and good references *can* be adequate.

# Enforceable Waiver – Knowing and Voluntary

Must be knowing and voluntary to be valid.

- Must show employee signed release that addresses claims at issue and received adequate compensation.



- Employee's claims will be barred unless employee can show release is invalid due to fraud, duress, material mistake, or release was knowing and voluntary.

# Conclusion

When offering and negotiating severance agreement:

- Plain and easy-to-understand language, and include disclaimer of reliance.
- Suggest employee consult with an attorney and you read over agreement with the employee.
- Give employee time to consider.
- Engage in negotiations, if the employee initiates.
- Offer consideration beyond what is required at termination.

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THANK YOU!

