

The Discipline Guide

A Manual for Getting Your
Employees Back on Track



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Help Them Get It Right.

On the surface, employee discipline sounds like yet another dry-as-toast HR subject.

Secretly, it's a superpower.

Following certain laws and statutes will support your decision-making process, but a good employee discipline process offers so much more.

Such a process gives us the opportunity to document performance and conduct issues, thus protecting our businesses in the long run, and helps sort issues that can be resolved and improved upon—thus bettering your employee and decreasing turnover—from those that can't.

Poor Performance vs. Poor Conduct

How do you differentiate poor performance from poor conduct? Let's start with some examples:

- ▶ Poor performance can be uncompleted work assignments, low productivity, or an inability to keep a reasonable pace based on length of time in the position or the pace of others in the same position. In essence, the employee is saying, "I can't complete the work" or "I can't change that behavior."
- ▶ Misconduct can be sleeping on the job, possession of weapons at the workplace, and, of course, harassment, discrimination, or retaliation. It can also mean less obvious behaviors—for example, being a poor team player, snapping at coworkers, or just plain-old being mean. In essence, the employee is saying, "I won't complete the work" or "I won't change that behavior."

Employers can sometimes address poor performance with training or guidance. In fact, many employees never get the feedback they need to know they are underperforming. Consider regular check-ins with direct reports, where you can discuss performance issues and offer support for their success.



Poor Performance vs. Poor Behavior (continued)

Misconduct requires behavioral change on the part of the employee, who may or may not be willing to change behavior.

Performance and conduct issues often require subjective judgment to resolve. For example, employee A claims that employee Z is discriminating against them. An investigation shows a problem exists. Employee Z claims their discrimination is based on not liking employee A and refuses to change their discriminatory (and illegal) behavior.

But of course, one can change discriminatory behavior, and saying one "can't" do so isn't a performance issue—it's a conduct issue, and possibly a liability issue.

Such issues require business owners to make judgment calls when they categorize, assess the severity of, and decide upon a response to disruptive behaviors. Such calls can be rough, but ultimately work in favor of a more harmonious—and less legally risky—work environment.

Absenteeism and Tardiness

Absenteeism and tardiness can be challenging to discipline. Written policies of company expectations and allowances for leaves and punctuality help you act consistently across your employee pool, while routinely tracking attendance can help prevent absences from becoming an issue.

Again, subjective judgment is frequently needed. Employees can experience chronic and excessive absences and tardiness for many reasons—some of which are not only legally protected, but also right and reasonable. Judging rightness or reasonableness can and should be influenced by an employee's length of service, dependability, and performance level within your company.

Absenteeism and Tardiness (cont'd)

Before taking any action, review the employee's history to see if any of the list items below apply. They may change your judgment on what kinds of absences you're willing or required to accept:

- ▶ If you have 5 or more employees: Families First Coronavirus Response Act
- ▶ If you have 20 or more employees: California New Parent Leave Act
- ▶ If you have 50 or more employees: California Family Rights Act/Family Medical Leave Act
- ▶ Paid sick leave under the Healthy Workplaces, Healthy Families Act (California)
- ▶ Child's school or childcare activity or emergency
- ▶ Jury duty or witness in a trial
- ▶ Military leave
- ▶ Domestic violence, sexual assault, stalking, or crime victim leave
- ▶ Drug and/or alcohol rehabilitation
- ▶ Firefighter, National Guard, Reserve peace officer, or emergency rescue personnel
- ▶ Pregnancy or other disability leave
- ▶ Workers' compensation injury or illness (now includes COVID-19)

Dishonesty

Dishonesty is a more straightforward problem.

Examples here include theft, or falsifying documents, including one's employment application, business records, or time records. Either have a written policy

regarding dishonesty or be sure to react consistently to it across your employee pool when you see it.

How to Discipline

Have you noticed that you keep seeing the words "reasonable," "appropriate," and "fair?" That's the standard when the subject is employee discipline.

Being consistently reasonable, appropriate, and fair when practicing employee discipline can help protect you from discrimination, retaliation, and unfair termination claims.

- ▶ **Reasonable:** The "reasonable person" is an objective by which the conduct of others is judged. This hypothetical person is an embodiment of how a typical community member would judge a situation.
- ▶ **Appropriate:** Fitting the work rules, performance standards, and penalties applied to others.
- ▶ **Fair:** In accordance with relative merit or significance, and consistent with rules, logic, ethics, and circumstances, especially in relation to others.

How to Discipline (continued)

In order to be reasonable, appropriate, and fair, your disciplinary process should give employees the opportunity to:

- ▶ Know their performance expectations and the consequences of not fulfilling them
- ▶ Expect management to act consistently and predictably when rules are broken
- ▶ Expect fair and fact-based discipline
- ▶ Have an opportunity to present their side of the story or a defense if necessary
- ▶ Appeal management's disciplinary decisions or actions if allowed by company policy
- ▶ Show behavioral or performance improvement, if time permits

Reasonableness as Part of Your Process

There are many helpful questions that will help you determine whether you are applying disciplinary decisions and actions in reasonable, appropriate, and fair ways. Ask yourself:

Work Rules or Performance Standards

- ▶ Is the disciplinary decision or action based on standard performance capabilities of other workers in the same or similar conditions?
- ▶ Does the employee in question work to the same standard as other workers in the same or similar position?
- ▶ Did you or management clearly communicate work rules or performance standards to the worker?

Circumstances

- ▶ Is there evidence the employee violated a rule or didn't meet the performance standard? Is it sufficient in comparison to similar disciplinary decisions and actions? Has it been documented?
- ▶ Can the worker be reasonably expected to meet performance standards? For example, has the worker been adequately trained? Have working conditions changed since the performance standard was set?
- ▶ Are there circumstances that might excuse the violation? For example, did the employee receive conflicting or incorrect instructions?

Penalties

- ▶ Is the disciplinary decision or action reasonable and appropriate in relation to the violation?
- ▶ Have other workers in similar situations received the same penalty? Lesser? More?
- ▶ Were other workers in similar circumstances treated the same?

Answers to some of these questions may understandably be beyond your personal experience. Consult with managers and supervisors as needed to gain clarity and perspective.

Progressive Discipline

Progressive discipline means increasing the severity of the response each time an employee violates policy. It begins with verbal warnings that give an employee time to modify performance or behavior; then proceeds through written warning, investigation, demotion, and ultimately to termination. Depending upon severity, you can move through the process as quickly as needed.

For example, theft or violence don't need all the steps mentioned above. A fair investigation and a written warning followed by termination on a repeat event are where some employers draw the line. For others, violence is a firing offense and there's a written policy telling employees so.

Use your best judgment and the history of the employee in question to determine what's reasonable, appropriate, and fair according to the situation.

Benefits of Progressive Discipline

The progressive discipline process serves as a helpful structure around which to assess, track, document, and make decisions upon employee disciplinary issues. It weights the employer/employee relationship as an important one.

Ideally, progressive discipline allows employees to receive criticism or feedback and make the best of it. They have a chance to show improvement or present a defense if needed. This is important for employee morale and can result in problem employees turning corners and changing for the better—once they understand their side of a story will be heard.

Knowing one's performance expectations and the consequences of not living up to them helps some people perform and behave better.

Finally, having a progressive discipline system that your company applies consistently allows workers to expect fair treatment and discipline based on facts, which equals a healthier workplace and better morale.

Concerns About Progressive Discipline

Progressive discipline policies tend to erode the at-will employment relationship and weaken an employer's right to discipline or terminate as they deem healthiest for their own workplace.

Our Advice

The at-will employment relationship has already been eroded by discrimination and retaliation statutes and case law. At this point, progressive discipline can serve to be a protection to your business, should you choose to use it.

If you choose to use progressive discipline, we advise you to create a written policy reserving the right to discipline as management decides appropriate, to follow statute and law as stringently and honestly as possible, and to consult an attorney as needed as you create and enforce your policy.

Discipline and Documentation

To be clear, you're not required to create documentation when you discuss disciplinary problems with or take disciplinary action against an employee. But documentation of issues, discussions, investigations, decisions, and actions are major character witnesses and your best defense in court should you receive a wrongful termination claim.

Supervisors and managers should record noteworthy incidents—such as those exhibiting an employee's ability or inability to perform a job, support offered from management, a quick temper, violent reactions—and any verbal warnings and performance discussions, even if the discussions seem informal.

The beauty of protecting your business and growing your employees this way is that your documentation doesn't have to be extensive. Record a reason for the warning or notice, corrections the employee should take, consequences of non-correction, and employee response. In most cases a few sentences and a date are all that's needed, and one form can have multiple functions.

For instance, download our [Employee Disciplinary Action form](#). A checkmark, a name, a sentence or two in a few sections, sign, date, and you're done. Fill it out digitally or print a hard copy.

The value of this kind of documentation can't be overstated, and the more consistent you are the more your employees will come to understand they're supported, and the better you will protect your business.

Issuing Cautionary Notices

Issuing cautions before taking disciplinary action is a choice you make as an employer, whether you choose to follow a progressive discipline model or not. But if you use verbal or written warnings with one employee, you're better off using them consistently with all employees.

See the sections on "How to Discipline" and "Progressive Discipline", and our Guide to Terminations' sections on At-Will Employment and Protecting Your Business Against Claims of Retaliation for more discussion. Use the [Employee Disciplinary Action form](#) to speed documentation.

Performing Investigations

For the wellbeing of your company and employees, and before taking any disciplinary action, you should thoroughly investigate and document alleged serious misconduct. You must verify the allegation is true before taking further action.

This means you, the owner, a supervisor, your HR professional, or a manager, must interview and question witnesses, the accused employee, supervisors, and managers—and document these interviews. The questioning is meant to elicit incident details that allow management to make fair disciplinary decisions based on fact.

Interviews are also held to allow an employee to defend conduct, which is crucial for their morale and in the case of a claim against your business.

Note that if your employee is union, they have a right

to have union representation present if they reasonably believe there will be an unfavorable outcome from the interview. Non-union employees may request a co-worker's presence, for which they may not be disciplined. You are, however, not obligated to grant such requests.

When preparing an investigation, consider the following steps:

- ▶ Investigate all persons who are reasonable sources of information
- ▶ Notify accused employees an investigation of the allegation is occurring, and they will have opportunity to respond to findings or offer a defense
- ▶ Determine the extent of the investigation by the seriousness of the incident and penalty
- ▶ Offer opportunity to correct behavior dependent on the seriousness of the violation

You may advise employees that investigations should remain confidential—but know that, despite understandable concerns that meeting details be private for the protection of those involved, workers do have the right to talk about what happens during said meetings.

Performing Investigations (cont'd)

Along the same lines, you can't promise confidentiality on your own part. During the investigation you'll interview involved parties, whose confidentiality you can't guarantee.

We have a [Record of Investigation form](#) to simplify the documentation of investigations for you, which you can download here.

Acting on Conclusions

Once you have finalized your investigation, given your employee an opportunity to respond, assessed facts, and concluded what they tell you, you may decide to move forward with disciplinary action.

If the decision is discipline and not termination, you'll have several aims:

- ▶ To act directly to correct the problem. Set up private and uninterrupted time with the employee to discuss conclusions. This person may well become a better employee for having had guidance early on.
 - ▶ To remain calm during the meeting. You don't need to engage emotionally in the situation; think of it as delivering facts, discussing options, and finding a way forward together. Remaining calm will help maintain your relationship with the employee.
 - ▶ To help the employee assume responsibility for change. Outlining the employee's disciplinary problem, the standard expected, and consequences if the behavior doesn't change could be helpful here.
- ▶ To document the meeting. Our [Employee Disciplinary Action form](#) is useful for this task.
 - ▶ To have the employee sign the documentation. Our form is worded so the signature is an acknowledgment of participation, not an admission of guilt, which enables employees to more willingly sign.
 - ▶ To record the fact that an employee refuses to sign, should they do so. A supervisor as witness to this record or refusal gets bonus points with a court or mediator.

Deciding to Terminate

If you decide the facts warrant termination, take some time to review the decision before committing to it. Revisit your company's at-will, progressive discipline, dispute resolution, or just cause termination policies before acting, and if you're in doubt, consult your legal professional.

Other items you might review are:

- ▶ Written contracts with the employee
- ▶ Union contracts
- ▶ Investigation documentation to ensure it follows your company's progressive discipline policy
- ▶ Lack of criticism—or lack of documentation of criticism—of performance or key behavior
- ▶ Promotions, reviews, and praise that tell a story different from that of the investigation
- ▶ Breach of contract implications, including oral contracts
- ▶ Policies requiring notice before firing
- ▶ Legal ramifications of not terminating the employee
- ▶ Reasons to forego following policy. For example, an employee who repeatedly comes to work intoxicated and endangers others with powered

equipment likely doesn't warrant review. They're a serious liability—consider termination, and if you're in doubt, consult legal counsel.

Visit our Avoid Discrimination and Retaliation Like the Plague section in our Guide to Termination to be sure you're adhering to federal and state law regarding protected classes of employees. And again, if you're in doubt? It's time for that legal professional we've mentioned above.

Once you've decided you're ready to carry out the termination, see our Guide to Employee Termination for next steps, including:

- ▶ Having the conversation with the employee in question
- ▶ Readyng the termination paperwork
- ▶ Readyng the final paycheck

Congrats!

If you've read this far, we're impressed!

HR isn't a thrill a minute, but it's what we do best. We hope we've made a complicated subject accessible and useful to you.

Look for companion pieces to this article to come in our Content Library.

Allevery is here to help.

We are dedicated to being a resource for you and for our community. If you found this article helpful, please share it with others in your local business network! And, of course, we're here to answer your questions.

**Please note this article does not constitute legal advice and is not a substitute for it. Before taking action, consult legal counsel if you're unsure about the consequences of your decisions.*

Need help figuring out the best discipline policy for your employees? We're here to help!

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