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BEST PRACTICES WHEN CONDUCTING EMPLOYEE DISCIPLINE AND TERMINATIONS

How to reduce liability under California law during difficult decisions as an employer.

By Anthony J. Zaller

Common misconceptions about employee discipline.

Working with employers are various sizes, backgrounds, sophistication, and industries, there can be a lot of confusion and simple misunderstandings about what constitutes employee discipline and how to properly document employee performance issues or discipline. Here are common misunderstandings about employee discipline and documentation:

Myth: If it was not a formal write-up put in the employee's file, then the action does not constitute disciplinary action.

There is no legal definition of what constitutes a write-up, nor is there a definition of what is required to be in an employee's personnel file. Therefore, recollections about verbal warnings, e-mails, letters, even notes on napkins can be evidence to support an employer's position that an employee was terminated because of performance issues. The key item employers need to remember is if the employee challenges the reason for the termination that there is support for the termination decision, either through testimony and/or documentation. The documentation can come in any form and does not have to be a formal write-up that is maintained in the employee's personnel file. However, this is not to say that employers can do away with formal employee reviews and write-ups, these are very good practices to maintain.

Myth: Verbal warnings do not have to be documented.

If there is no record of verbal warnings it is very difficult to prove at a later date that the employee had been counseled about the issue. Managers should always document a verbal warning in some manner, such as in a manager's log or even e-mailing themselves the specifics about the verbal warning. By preparing an e-mail and sending it to themselves, it creates a great time-stamped record that is excellent evidence should there ever be any litigation concerning a termination.

Myth: Employees have to sign disciplinary documents.

Some employers do not think a write-up for an employee is valid unless the employee signs the write-up, but this is not true. While it is a good policy to have some system that proves the employee was presented with the write-up, it is not required that the employee sign the document. Many times the employee will refuse to sign such documents because they do not agree with them. To alleviate this, some employers provide a line on the document that states the employee does not necessarily agree with the write-up, but is signing the document only to acknowledge receipt. Another method to avoid the argument that the employee never received the written warning is to email the employee. This creates a great record of when the warning was prepared and sent to the employee.

Myth: Employers have to follow a progressive disciplinary policy and cannot fire employees on their first offense.

While employers may choose to implement a progressive discipline policy that starts discipline with a verbal warning and progresses to a second or third written warning prior to termination. However, if using a progressive disciplinary system, employers should be careful to preserve the employee's at-will status and reserve the right to not follow the progressive disciplinary system at is sole discretion. As long as the employee is at-will, they can be terminated at any time, even after their first small infraction of a company policy.

Myth: Disciplinary documentation should be as broad as possible.

While write-up and counseling should address the overall issue that the employee needs to improve, employers need to avoid general statements without providing specific examples. For example, instead of writing an employee up for having a poor attitude, the employer should provide a specific performance issue. The employer should document the time, date and facts of the incident. Write ups should also list the conduct that is expected of the employee in the future.

Understanding severance pay and severance agreements

Severance pay is not required under California law. However, employers who have potential disputes with employees that are leaving employment should consider whether offering severance pay in exchange for a signed severance agreement containing a release of claims against the company may be useful in avoiding costly litigation. Here are answers to five common questions about severance:

1. Are employees entitled to severance pay?
No. If an employee is an at-will employee, and either the employer or the employee decides to end the employment relationship, the employer is not required to provide any type of severance to the employee.

2. If severance pay is not required, why would employers offer it?
There are a number of reasons that employers offer severance pay. If the employer's business has

slowed down and it needs to layoff employees, but the employer wants to cushion the effect of the layoff, severance can be offered. Also, if the employer believes that there is a potential dispute between it and an employee, the employer may choose to pay some severance in exchange of a release of claims by the employee in order to avoid any potential litigation. If done properly, an employee's acceptance of a severance agreement would effectively waive any and all claims that he or she may have against the company. If there is any potential for a dispute about any issues that arose during employment, entering into a severance agreement could be an effective way to avoid costly and time consuming litigation.

3. Does the employer have to pay the employee for a release of claims?
If the employer asks the employee to release all claims the employee may have against the company, generally there needs to be some consideration provided to the employee for the release of his or her rights. Consideration is a legal term, and very generally means something of value that each side agrees to exchange (this is a very oversimplified definition). In severance agreements, the consideration is usually, but is not required to be, some form of payment by the employer that is not already legally obligated to be made in exchange for the release of claims (i.e., an agreement not to sue) by the employee.

4. What terms are generally included in a severance agreement?
Here is a list of common terms included in severance agreements:

- A general release with a Civil Code section 1542 waiver releasing all known and unknown claims.
- Confidentiality
- No admission of liability
- No present or future employment
- Non-disparagement clause which can also set forth what job reference, if any, will be given to any prospective employers
- Return of company property and non-solicitation of customers clause

5. Are there any special considerations for employees 40 years old or older that need to be included in a release?
Yes. The Older Workers Benefit Protection Act (OWBPA) protects individuals 40 years old or older. The OWBPA provides that in order to release a claim for age discrimination must meet certain requirements. Some of these requirements include that the employee is advised to consult with an attorney, the waiver is easily understood, the individual is given at least 21 days to consider the agreement; and the individual is given at least 7 days following the execution of the agreement to revoke the agreement. The 21 day consideration period can be waived by the employee, but the seven day revocation period after the agreement is signed cannot be waived by the employee. Therefore, it is important to consider potentially not paying any money until after the seven day revocation period expires. If the employer is offering the release to a group or class of employees a longer consideration period and other requirements apply. It is highly recommended that employers receive the assistance of counsel to ensure that employees 40 years old or older effectively waive any rights under the OWBPA. For more information, the EEOCs' website provides a good explanation and some examples at:
https://www.eeoc.gov/policy/docs/qanda_severance-agreements.html#A

End of employment checklist

Many employers have new hire packets and hiring procedures, but just as important, and often overlooked by employers, is to have a process for departing employees. It is important to ensure an employee departing the company provides all items back to the company and is provided any legally required documentation, and is a good opportunity to take steps to address potential liability. Here are a few items that should be on California employers' separation checklist:

1. List of documents to be provided by employer.

Employers should have a termination packet of documents that it is required to provide to separating employees, such as:

- Notice of Change In Relationship
- COBRA and Cal-COBRA notices
- Health Insurance Premium (HIPP) notice

The Company should also consider generating its own forms requesting company property to be returned (such as laptops, parking cards, keys, etc…) from departing employees.

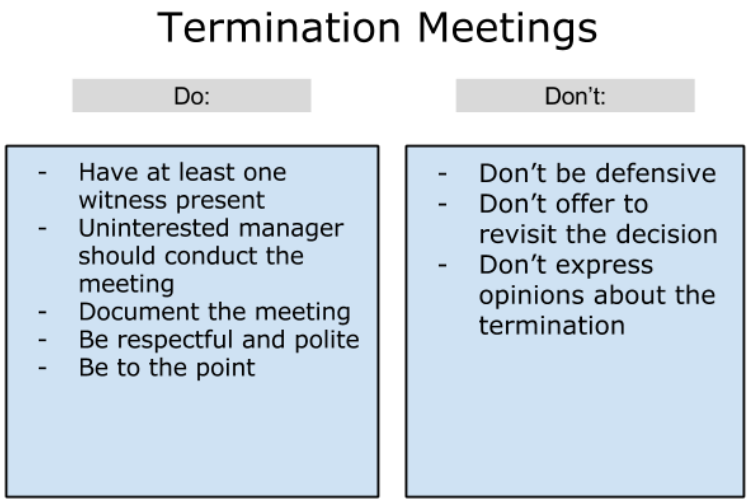
2. Ensure final paycheck is issued in accordance with the deadlines set by law.

The law generally requires the employer comply with the following deadlines for providing final paychecks:

- An employee who is discharged must be paid all of his or her wages, including accrued vacation, immediately at the time of termination. This does not mean that the company cuts the check and mails it to the employee, the check must be provided to the employee at the time of termination. See below for more details about when and where final checks have to be presented to employees.
- An employee who gives at least 72 hours prior notice of quitting, and quits on the day given in the notice, must be paid all earned wages, including accrued vacation, at the time of quitting.
- An employee who quits without giving 72 hours prior notice must be paid all wages, including accrued vacation, within 72 hours of quitting.
- An employee who quits without giving 72-hours' notice can request their final wage payment be mailed to them. The date of mailing is considered the date of payment for purposes of the requirement to provide payment within 72 hours of the notice of quitting.

- Final wage payments for employees who are terminated (or laid off) must be made at the place of termination. For employees who quit without giving 72 hours' notice and do not request their final wages be mailed to them, is at the office of the employer within the county in which the work was performed.

3. Evaluate the need for an exit interview.



Not every situation would warrant conducting an exit interview. If the separation is not amicable it may make the situation worse if conducted, or it may be an opportunity to separate on a better note. It simply depends on the situation. However, employers should consider whether it is needed to not and not simply have a policy not to conduct them.

4. Evaluate whether a severance agreement would be appropriate.

Under California law, severance is not required. However, employers can offer severance to employees for numerous reasons: there is a layoff and the employer wants to provide something to the employees, the company entered into a contract with an executive to provide severance if certain conditions were met, or the separation is high risk and there is potential litigation between the parties. If an employer offers severance payment to a departing employee, they should always have the severance agreement reviewed by an employment attorney to ensure that it contains a broad release of claims. See above for more information about severance agreements.

5. Have established protocol for references and disclosing why the employee left the company within the company itself.

Employers often establish that it will only confirm the title and dates of employment for former employees, and, if authorized by the former employee, the former employee's final pay rate. Employers do this to avoid potential claims for misrepresentation, violation of privacy, and defamation. If employers provide more information about former employees, it should be done very carefully with the guidance of employment counsel. Also, employers need to be careful about disclosing the reason for an employee departure within the company, as that may violate the former employee's privacy rights as well. Employers should remind employees and management not to disclose this information to people in the company that do not have a reason to know.