**SHRM Employment Law**

Module 11: Employee Discipline and Termination





Time:  2 minutes

Running time: 2 minutes

**Objective**: Introduce the topic of Employee discipline and termination.

**Description**:  Introduction to the topic and why it is important.

**Instructional Method**: Lecture/ice breaker

**Script:**

Employee discipline and termination are legally risky for employers because there is so much opportunity for discrimination and unfair treatment of employees throughout the process. However, employers can establish strong progressive disciplinary processes to protect the organization from wrongful terminations claims and unnecessary lawsuits.

**Facilitator Notes:**

Add your name or any other information to this slide in the subtitle.

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Time:  2 minutes

Running time: 4 minutes

**Objective**: Introduce the learning objectives.

**Description**: Show the objectives.  Answer any questions.

**Instructional Method**: Lecture

**Script**:

Here are the student objectives for this module:

* Define the key terms related to employee discipline and termination.
* Determine the appropriate laws to apply to given employment situations.
* Discuss the recommended steps for employee discipline.
* Distinguish between the various types of termination.
* Create a progressive discipline policy suitable for an employee handbook.

**Facilitator Notes:**

Use the objectives topics to create evaluation for the review.

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Time:  16 minutes

Running time: 20 minutes

**Objective**: Define key terms for employee discipline and termination.

**Description**: Identify and define key terms for employee discipline and termination.

**Instructional Method**: Game

**Script**:

Let’s play a game to define some key terms used in the compensation and benefits profession.

**Exercise**:  Key terms Game

**Note**: The winning group will have the most key terms listed correctly

15 Minutes

1. Put students into groups of 3 – 6
2. Have each group number a list from 1 – 21.
3. Read the definition of the term (note what number you read)
4. Have 1 student write the name (or number) of the term on their list.

3 minutes

1. Give students the answers.
2. The team with the most is the winner.

**Facilitator Notes:**

**Key Terms**

1. **At-will disclaimer**- “within the context of at-will employment, language included in a company handbook that makes it clear that the benefits described in the handbook are not intended to alter the at-will status of the company’s employees.” (Rassas, 2020, p. 576).
2. **Clear and conspicuous**- “standard used to determine whether a disclaimer (i.e., at-will disclaimer) is displayed in a manner that makes it enforceable. Relevant considerations include the placement of the disclaimer language (i.e., whether it is printed at the front of a company handbook or in a footnote) and whether the font is distinguishable from the remainder of the text” (Rassas, 2020, p.574).
3. **Consideration**- “benefit each party must receive to create a legally enforceable contract. For example, because a release agreement is a contract, both the departing employee and the employer must receive consideration to create a legally binding contract. In such an agreement, consideration may come in the form of the employee’s waiver of the right to file certain claims upon termination of employment in exchange for a severance benefit paid by the employer” (Rassas, 2020, p. 575..
4. **Constructive discharge**- “legal theory whereby an employment relationship ends based on the presence of working conditions that are so intolerable, a reasonable person would not be expected to continue to work subject to them. A constructive discharge is sometimes referred to as a compelled or forced resignation” (Rassas, 2020, p. 575).
5. **Due process**- Carrying out a disciplinary process in a fair and consistent manner with all employees.
6. **Duty of good faith and fair dealing**- Both parties in a contract must act in good faith.
7. **Employment at will**- An employer or employee can terminate an employment agreement at any time and or any reason where an employment contract or collective bargaining agreement does not otherwise prohibit it.
8. **Faltering company**- “employer that was seeking financial assistance during what would have comprised the 60-day required notice period under the WARN Act, which prevented the employer from being in a position to provide notice to its affected employees” (Rassas, 2020, p. 577).
9. **Implied contract**- A statement or actions by the employer that cause a contractual obligation with an employee.
10. **Just cause**- A sound business reason for employee discipline.
11. **Layoff**- A reduction in force of multiple positions that can be temporary or permanent nature.
12. **Mass layoff**- A layoff of 50 or more employees at one time in a qualifying employer.
13. **Probationary period**- A trial period of time at the beginning of employment where the new employee is evaluated for performance and fit and may be terminated or moved from probation at the end of the probation period.
14. **Progressive Discipline**- An employee disciplinary process with increasing consequences the more times the employee violates the rules.
15. **Promissory estoppel**- When an employer makes a promise about some aspect of employment that an employee depends upon and then withdraws it, the employee can file for promissory estoppel to make the employer live up to their agreement.
16. **Public policy exception**- A limitation to employment at will where an employer cannot terminate an employee for reporting illegal activities.
17. **Resignation**- Voluntary termination of employment on the part of the employee.
18. **Retaliation**- Taking adverse employment action against an employee for exercising some employee right or privilege.
19. **Severance**- Compensation paid to an employee to incentivize them to retire early.
20. **Suspension**- Time off from work without pay as the last step in a progressive disciplinary policy prior to termination.
21. **Unemployment benefits**- provides unemployment benefits to eligible workers who became unemployed through no fault of their own.

Diagram

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Time:  10 minutes

Running time: 30 minutes

**Objective**: Define the key terms related to employee discipline and termination.

**Description**: Define the key terms related to employment at will.

**Instructional Method**: Lecture

**Script**:

Employment at Will is a legal doctrine in the United States that essentially means employers can terminate employment at any time for any legal reason, and conversely, employees can also terminate their employment at any time without cause as well. State governments have the right to adopt or reject this doctrine and most have. Refer to the Paycom article [Which States are At-Will Employment States?](https://www.paycor.com/resource-center/articles/employment-at-will-laws-by-state/) for state-specific information.

Limitations to Employment at Will

Of course, there are limitations to this law. Employers can terminate employees for *legal* reasons only. Additionally, employers should include an ***at-will disclaimer*** in the employee handbook that ***clearly and conspicuously*** states that any benefits and policies outlined in the handbook do not alter the at-will status of employees subject to the following limitations.

**Facilitator Notes:**

*Discrimination*

Any termination should be related to job performance issues, and not protected characteristics. Recall from previous modules that employers may not discriminate on the basis of age (over 40), race, religion, national origin, sex, disability, religion, pregnancy, or color in any employment action, which includes termination. An employer cannot terminate an employee because they are pregnant or Hispanic.

*Retaliation*

An employer may not terminate an employee as ***retaliation***. For example, an employee threatens to file or files a charge of sexual harassment against her manager, so she is terminated in response to the claim of sexual harassment.

*Public Policy Exception*

Under the ***public policy exception***, an employer may not terminate an employee as retaliation for filing a complaint against the employer when others are at risk. For example, if an employee alerts OSHA that the employer is not following safety standards for disposing hazardous chemicals, the employer may not terminate them for this report.

*Promissory Estoppel*

If an employer makes a promise about any term of employment, and because of that promise the employee makes decisions and then the employer withdraws the promise, an employee can file for ***promissory estoppel***. For example, an employer offers an applicant a job across the country, and they accept, quit their current job, and move across the country. Two days prior to the start of the position, the employer pulls the offer at no fault of the applicant.

*Duty of Good Faith and Fair Dealing*

Under the terms of an employment contract, all parties to that contract should conduct themselves in ***good faith***. That is, they should live up to the terms of that contract to the best of their ability and not try to cheat or bring harm to the other party to the contract. A termination should not occur until the end of the employment contract period except as outlined in the contract.

*Implied Contracts*

***Implied contracts*** arise when an employer makes statements or takes actions that constitute a verbal agreement between the employer and employee. For example, a statement in an employee handbook that implies employees will go through a progressive disciplinary process prior to termination may have a case if the employer skips steps in the process to move directly to termination.

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Time:  5 minutes

Running time: 35 minutes

**Objective**: Determine the appropriate laws to apply to given employment situations.

**Description**: Determine the appropriate laws to apply to discipline.

**Instructional Method**: Lecture

**Script**:

Employee discipline is an inevitable fact of life in the workplace. From time to time, employees will behave in an unprofessional manner and violate employee policies and procedures. If the violation isn’t too severe, it is less expensive for employers to discipline and employee to correct the bad behavior rather than terminate the employee outright.

Employers must ensure that ***due process*** is followed. That is, disciplinary processes are applied to all employees fairly to avoid charges of discrimination. Managers must also ensure that their own unconscious bias does not influence the application of discipline to employees, and they are disciplining for ***just cause***. For example, if a manager tends to only discipline female employees, they may have mostly female employees, or they may have an unconscious bias against female employees.

One way employers can avoid charges of discrimination is creating and consistently using policies and practices with all employees (or classes of employees) to make corrective actions to poor behaviors.

Many employers utilize a ***probationary period*** with new employees. These typically last 30, 60, or 90 days and during that time the employee is essentially auditioning for the position. This gives both the employee and employer time to determine if the new position is a good fit for the employee and the organizations. At the end of the probation period, the employee is evaluated, and an offer of continued employment is made and accepted, or the employee is terminated.

If an employer uses a probationary period, the terms of the probation should be clearly spelled out and applied to all employees fairly to avoid claims of discrimination.

Chart, waterfall chart

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Time:  5 minutes

Running time: 40 minutes

**Objective**: Discuss the recommended steps for employee discipline.

**Description**: Discuss the recommended steps for employee discipline.

**Instructional Method**: Lecture

**Script**:

***Progressive discipline*** policies accomplish several things for employers and employees. First, they provide a documented path for improving employee behaviors. Employees know what to expect if they violate company policy, and employers have a system in place for correcting the behaviors that progresses in severity if the behavior continues. For the employer, a progressive discipline policy creates a necessary paper trail needed to justify termination of an employee who refuses to correct their behavior, in order to avoid paying unemployment claims.

While it may seem counterintuitive to go to the trouble of working through the stages of progressive discipline with an employee considering most of the states have at-will employment laws that enable employers to terminate an employee for any legal reason, the costs of replacing an already trained employee are high enough that employers typically find it more profitable to discipline than to replace, except in extreme circumstances.

Progressive Discipline processes typically have five steps that employers should follow in order except in extenuating circumstances.

**Ask**: What does each step look like in your workplace? What do you think it should look like?

**Facilitator Notes:**

*Counseling/Teaching Opportunity*

The first steps in a progressive discipline policy is to inform the employee that some behavior is unacceptable. The employee may not be aware their behavior is inappropriate and simply need to be taught the correct behavior. Others may know their behavior is inappropriate, but they are seeing if they can get away with it. Either way, the first responsibility of the employer is to counsel with the employee and inform them that the behavior is incorrect or unacceptable and teach them what the correct behavior is and outline a timeline for corrective behavior.

Managers should make a note of this conversation with the dates and outcomes. It does not have to be placed in the employee file at this time but should be documented. A good practice is to follow up with an email to the employee about what was discussed so that the conversation is on the record. If the employee immediately corrects the behavior, the notes about the counseling session never need to be placed in a personnel file.

*Verbal Warning*

If the counseling session does not result in changed employee behaviors, the manager should meet with the employee again and issue a verbal warning. The employee should be reminded about the initial counseling session where the offensive behavior was addressed and should be reminded that they have already been asked to take corrective action. The employee should be informed of the steps of the progressive disciplinary process and given a timeline for correcting the behavior (usually immediately).

Managers should also follow up with documentation such as an email to the employee to remind them of the detail of the discussion. However, this time both the initial counseling session notes as well as the verbal warning notes should be placed in the employee personnel file.

*Written Warning*

The third step in a progressive discipline policy is the written warning. This is a documented write-up of the employee behavior that will be permanently placed in the employee personnel file. The warning should outline the steps and conversations that have already taken place, identify the offending behavior, and outline a performance improvement plan that includes a timeline for behavior change as well as a follow-up date to ensure the employee is in compliance or move to the next step in the process.

*Suspension*

When the follow-up date arrives from the previous step, if the employee has not sufficiently changed the behavior, the fourth step is suspension without pay. The length of time can vary for the suspension, depending on the severity of the offense. Some employers call the suspension a “decision period” because during the suspension both the employee and the employer are taking time to determine if they want to continue the employment relationship. If the employee decides they do not want to change the behavior, they can choose to quit or be terminated.

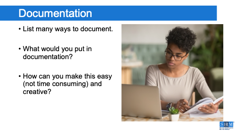
The terms of the suspension should be thoroughly documented and placed in the employee personnel file permanently.

*Termination*

The final step in the progressive discipline process is termination of the employee. By this point, the employee is well aware that their behaviors are inappropriate, and the employer has given them multiple warnings. The employer should document the termination conversation fully and place it in the employee personnel file to be used as evidence in possible unemployment and/or wrongful termination proceedings.

Escalation of Process

Some employee actions are severe enough to require that the employer escalate the progressive disciplinary policy. For example, while it would be common to put an employee through all five steps of the disciplinary process for the bad behavior of arriving late to work, an employer is perfectly within their rights to jump directly to termination in the event an employee physically attacks another employee in the workplace. The severity of the offense provides justification for stepping outside of the usual progression of discipline. The issue should be fully documented and placed in the employee personnel file.



Time:  2 minutes

Running time: 42 minutes

**Objective**: Discuss the recommended steps for employee discipline.

**Description**: Discuss the recommended steps for employee discipline.

**Instructional Method**: Lecture - Exercise

**Script**:

In the world of employee discipline, if it isn’t written down, it didn’t happen. Managers must thoroughly document every detail of employee discipline to protect themselves and the organization from charges of discrimination or wrongful termination. Using modern technology, it is easy to record conversations and keep detailed records, and good managers regularly use these tools to provide substantiation for disciplinary actions taken against an employer.

**Exercise**: Document

1. Put students into groups of 3 – 5
2. Have groups answer the questions on the slide.
3. Share responses.

**Note**: You can make this a game for the most detailed answers or the most answers.

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Time:  5 minutes

Running time: 47 minutes

**Objective**: Distinguish between the various types of termination.

**Description**: Give an example of each type of voluntary termination.

**Instructional Method**: Lecture - Discussion

**Script**:

Employers typically try to avoid unnecessary turnover of employees due to the high costs associated with recruiting, hiring, and training a new employee. While some types of turnover is avoidable, other types are a simple fact of doing business.

Voluntary termination is initiated by the employee and falls into several categories.

**Ask**: What are examples of each of these categories?

**Facilitator Notes:**

Voluntary types of terminations and the factors that influence them.

*Resignation*- Sometimes, an employee resigns a position when there is no problem, and the employee is on good terms with the employer. This can happen for any number of reasons such as a spouse changing jobs, so the family moves to another location, an employee decides to move due to family issues such as marriage, divorce, childbirth, sickness of loved ones, or death, or the employee simply decides to change jobs or careers.

*Job Abandonment-* When an employee simply stops showing up for work, it is considered job abandonment. The employee hasn’t provided notice that they were resigning, and the employer usually doesn’t know why the employee stopped coming in.

*Retirement*- Employees retire from working at various ages and after differing lengths of time employed with a particular employer. Most retirees provide timely notice to employers about their plan to retire so the employer has time to fill the position the retiring employee is vacating.

*Constructive Discharge- Constructive discharge* occurs when an employment situation is intolerable for an employee to continue working in, so they are forced to resign for their health and safety. An example of this would be a work environment where sexual harassment is so prevalent that a female employee cannot bear to come to work any longer and decides to resign.

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Time:  10 minutes

Running time: 57 minutes

**Objective**: Distinguish between the various types of termination.

**Description**: Give an example of each type of involuntary termination.

**Instructional Method**: Lecture - Discussion

**Script**:

Termination is initiated by the employer and the employee has no choice in the matter.

**Ask**: What are examples of each of these categories?

**Facilitator Notes:**

**Downsizing/Layoffs**- A layoff occurs as a result of reduced business need for employees. This can occur because of a change in the market for a product, a seasonal reduction in force, or permanent downsizing of an organization. Some layoffs are temporary, others are permanent.

As mentioned, it is sometimes necessary for an employer to take drastic measures to make a reduction in force due to business necessity. Because of the potential impact to a local economy as a result of a mass layoff, the federal government passed the [Worker Adjustment and Retraining Notification (WARN) Act](https://www.dol.gov/agencies/eta/layoffs/warn).

The WARN Act “helps ensure advance notice in cases of qualified plant closings and mass layoffs” ([U.S. DOL](https://www.dol.gov/agencies/eta/layoffs/warn)).

A WARN Notice is required when a business with 100 or more full-time workers is laying off at least 50 people at a single site of employment or employs 100 or more workers who work at least a combined 4,000 hours per week, and it a private for-profit business, private non-profit organization, or quasi-public entity separately organized from regular government.

Under the WARN Act, qualifying employers must provide employees with at least 60 days written notice of the date of a mass layoff.

Exceptions: If an employer is a ***faltering company*** that is trying to obtaining funding that would delay the layoff during the 60-day notice period; If an employer is dealing with unforeseeable circumstances that are out of the employer’s control; When the plant closing is a direct result of a natural disaster.

*Employee Selection*

When determining which employees to lay off, employers must ensure they are using non-discriminatory processes for selection. Some employers use a seniority process, so the last employee hired is the first layed off, which does not take protected categories into consideration, thereby protecting the employer from charges of discrimination.

*Early Retirement Incentives*

When an employer needs to make a reduction in force, one way this can be accomplished is through offering early retirement incentives to qualifying employees. In order to be in compliance with the [Older Worker’s Benefit Proctection Act of 1990](https://www.congress.gov/bill/101st-congress/senate-bill/1511), and [the Age Discrimination in Employment Act of 1967](https://www.dol.gov/general/topic/discrimination/agedisc), opportunities for early retirement must be entirely optional for the employee and there must be a financial ***consideration*** awarded to the employee as a part of the incentive. Examples of financial considerations are severance packages, pension enhancements, continued health insurance coverage, and perhaps additional benefits and compensation unique to the organization, such as stock options. The consideration must be substantial enough to incentivize the employees to retire early and provide adequate benefits that are comparable to those offered to younger employees.  
  
**Closing a business**- When a business closes permanently employees are terminated from employment.

**Termination for cause**- Termination for cause occurs when an employee is terminated for bad behaviors that have not been corrected through a progressive discipline policy and/or were so severe that immediate termination is necessary.

*Wrongful Termination*

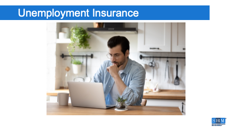
Wrongful termination occurs when an employee is terminated for an illegal reason.

**Discriminatory termination**- If an employee is terminated because they are a member of a protected category of persons, this is discriminatory termination. For example, if a female employee is terminated when she tells her supervisor she will need to exercise her Family Medical Leave Act rights to be off following the birth of her child and the supervisor gives her a bad evaluation and terminates her a month later, this would be discriminatory termination against a pregnant employee.

**Retaliatory termination**- Retaliatory termination occurs when an employee is terminated for reporting the employer for some inappropriate action or activity. An example would be terminating an employee who makes a report to OSHA about the company illegally dumping chemicals into the local water supply.

*End of a Contract*

Any time an employment contract ends, a termination of the employment relationship ends unless it is extended with a new contract.



Time:  3 minutes

Running time: 60 minutes

**Objective**: Define the key terms related to employee discipline and termination.

**Description**: Define Unemployment insurance.

**Instructional Method**: Lecture

**Script:**

Unemployment insurance provides unemployment benefits to eligible workers who became unemployed through no fault of their own.

Unemployment insurance is a joint federal/state program that is administered by the states but follow federal law. Persons who are laid off or terminated without cause should apply for this benefit.

Graphical user interface

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Time: 20 minutes

Running time: 80 minutes

**Objective**: Create a progressive discipline policy suitable for an employee handbook.

**Description**: Students will review the material creating the document detailed on the slide.

**Instructional Method**: Individual exercise, homework

**Script:** Let’s discuss a progressive discipline policy.

**Individual Exercise:**

1. Have each student write a policy.
2. Have students get into groups of 3-5 and discuss their policies.
3. Have students share with the entire class (optional)

**Discussion Prompts**

1. Have you ever been terminated from a job or had to terminate an employee? How did they handle it? Based on your analysis of this module, do you think they handled it legally? Why or why not?
2. Does your employer have a progressive discipline process? What does it look like? Do you think 5 steps are too many or too few?

**Case Law in the Spotlight**

* Barnett v. PA Consulting Group 715 F.3d 354 (D.C. Cir. 2013)
* Janet Cecelia Walthall. “EEOC, Allstate Insurance Settle Age Bias Suit for $4.5 Million.” Daily Labor Report 175 (September 14, 2009), A-13.
* Jankovitz v. Des Moines Independent Community, 421 F.3d 649 (8th Cir. 2005)
* Nelson D. Schwartz. “Easing out the Gray-Haired. Or Not.” New York Times (May 28, 2011), B1
* Older Workers’s Benefit Protection Act 29 U.S.C.S. § 631 (c)(1) (2018)
* Raymond v. Boehringer Ingelheim Pharmaceuticals, 653 F. Supp. 2d 151 (D. Conn. 2009)
* Varela v AE Liquidation, Inc. (In re AE Liquidation, Inc.) 866 F.3e Cir. 2017)

**State Employment Law Focus**

* What unemployment benefits does your state provide? Visit the [Unemployment Insurance Service Locator](https://www.careeronestop.org/LocalHelp/UnemploymentBenefits/Find-Unemployment-Benefits.aspx) to find out.

**Relevant Laws**

1. Age Discrimination in Employment Act of 1967 (ADEA)
2. Occupational Safety and Health Act (OSHA) of 1970
3. Older Workers Benefit Protection Act of 1990
4. Worker Adjustment and Retraining Notification (WARN) Act of 1988

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Time:  10 minutes

Running time: 90 minutes

**Objective**: Review main points in this module.

**Description**:  Be sure that students have a fun way to remember the material.

**Instructional Method**: Game – Review

**Script**:

Let’s see how much we remember about this module.

**Facilitator Notes:**

Review Exercise:  Create a fun game to review the material.  Remember to use the objectives to measure learning:

* Define the key terms related compensation.
* Determine the appropriate laws to apply to given employment situations.
* Appropriately classify employees as exempt or nonexempt.
* Discuss various aspects of the Fair Labor Standard Act.
* Describe the concept of equal pay and its impact on the workplace.

* Have each student submit a question on a piece of paper, crumple it up and toss it in a bucket (clean wastebasket), Instructor will then read them and give points to each team with the correct answer.
* Any game show – Family Feud, Jeopardy, $10,000 pyramid, Password, Tic Tac Toe
* Extra credit quizzes

There are many ways to review material virtually or in person.  Students can use their phones or computers to navigate to various online review websites.

A few are:

* Kahoot
* Quizlet