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Discipline and Discharge – Necessary Documentation

NBI Seminar
Human Resource Law From Start to Finish
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Goals:

- Communicate Expectations
- Have a Fair Process to Evaluate and Address Problems
- Limit Liability In the Event of Termination
 - No Contract Violation
 - Demonstrate Legitimate Business Reason

Putting A Discipline Policy in Place Proactively

Establish the “At-Will” Relationship

- Handbook
- Severance Policies
- Job Descriptions
- Annual Performance Reviews
- Job Applications
- Offer Letters
- Employment Agreements
- Restrictive Covenant Agreements
- Commission Agreements
- Equity Grants

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Assess Performance Management Tools

- Employee Handbook/Code of Conduct
- Performance review and compensation process
- Accurate Job Descriptions
- Actions Plans
- Management Training
- HR Support
- Manager Accountability
- Unions: Plan for the CBA Negotiation

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Adopt/Update Relevant Policies

- Attendance and Punctuality
- Standards of Conduct
- Discipline/Performance Reviews
- Workplace Safety
 - Prohibited Alcohol and Drug Use/Anti-Violence
- Interactions with 3rd Parties



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Be Sure Core Policies Are In Place

- Business Ethics
- Equal Opportunity/No Harassment
- Anti-Retaliation
- Legal Compliance
 - Foreign Corrupt Practices Act
 - SEC/Dodd Frank
 - Applicable Regulations (e.g., Healthcare, Pharma)
- Use of Company Technology/Property

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Discipline/Corrective Action Policy

- Purpose
- Applicability
- Examples of Unacceptable Conduct/ Performance
 - TIP: Be Clear- examples only, not exhaustive
- Process for Reporting, Investigating and Reporting Misconduct
- Consequences
- At-Will Statement

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Elements of Progressive Discipline

- Verbal Warning
- Written Warning
- Suspension
- Termination

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Progressive Discipline

■ Pros

- Insures “no surprises”
- Structure helps new/struggling managers, especially with documentation

■ Cons

- May limit ability to be proactive with termination decision
- Employees expect a 2nd/3^d Chance or to restart process with each new incident/issue
- Gives rise to breach of contract/wrongful discharge claims

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Probationary Periods

- Are they really needed?
- Caution: be clear that employment is not guaranteed during PP
- Be disciplined about what is promised at end of disciplinary period
- Address performance issues proactively

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What to Do When There Is No Policy Addressing An Offense

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The Same Process Applies

- Collect all relevant facts
- Give the employee an opportunity to respond
 - Address inconsistencies/claims of harassment or retaliation
- Be sure discipline is consistent with past practice
- Make a decision – promptly
- Document, Document, Document!

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Evaluating Employee Performance While Mitigating Liability

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Communicate Expectations

- Job description/responsibilities
- Ongoing, consistent and specific performance expectations
- Reiterate expected compliance with Company policies/code of conduct
- Follow-up in writing!

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Communicate with Credibility

- Listen and observe
- Be professional – not emotional
- Describe the behavior or situation, not your feelings about it
- Identify and address performance problems promptly
- Provide constructive feedback
- No favoritism
- Respect “personnel privacy”
- Be accessible and provide outlets for conflict resolution
- Be respectful -do not attack the person, or his/her personality
- Avoid intimidating tone or actions

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Be Clear, Complete And Consistent

- Use objective, specific language to describe problematic behavior
- Identify problems addressed in the past without improvement
- Focus on behavior, results and specific situations rather than generalities

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Demonstrate Fairness

- Focus on helping the employee succeed
- Give the employee credit and recognition for trying to make improvements
- Tell the employee what was done right as well as what went wrong

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Action Plans

- Clear and Specific Goals and Objectives
- Identify challenging, but attainable, targets
- Discuss with - and accepted by - the employee
- Provide Regular Feedback on Progress
- Specify Implications for Failure and Success



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What Goes in The Discipline/Discharge Letter?

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Oral v. Written Warnings?

- Consider significance of offense
- Repeated problem?
- What you have done in the past?



REMEMBER: Even Oral warnings should be documented: date, time and content of discussion

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Memorializing Oral Warnings

- Refer date/time and performance issue discussed
- Refer to prior discussions/memo if applicable
- Establish deadline/timetable/action plan for performance correction
- Confirm offer of constructive guidance/training to help improve performance
- Repeat repercussions if no improvement

The Written Warning

- Detail the relevant facts and incident/issue
- Identify applicable policies
- Explain the legitimate business reason for discipline/termination
- Cite to prior warnings/counseling
- Corrective action required
- Implications for lack of improvement, etc.
- Have employee acknowledge receipt and provide opportunity for comment
- Re-affirm at-will relationship
- Advise will be filed in Personnel File

The Termination Letter

- Be clear it is effective immediately
- Provide concise reason for termination
 - Memo to personnel file described above has full details
- Specify what is owed for salary, PTO, etc.
- Identify last date of benefits' coverage
- Do not apologize – implies fault
- NJ- no payment in lieu needed unless provided by policy/contract
- Address personal belongings

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Keep Your Investigation File

- Emails/statements from manager and/or witnesses about performance issues/misconduct
- Job Description/relevant training
- The problematic work product
- Emails/memos regarding prior counseling
- Customer/Third Party Complaints
- Security Reports
- Expense Reports, Pictures, Texts, Toll records, Phone Records

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At What Point Should Discharge Be Considered?

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Willful Misconduct

- Fundamentally contrary to core Company values
- Creates significant legal, financial, safety or reputational risk for the Employer
- Repeated disregard for prior directives

TIP: Delay dilutes necessity for termination

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What to Ask Before Making The Decision to Fire



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Key Question #1 (Is It Fair?)

- Were performance objectives clearly established and communicated to the employee?
 - Were employee's job description and performance expectations reviewed with the employee?
 - How long has employee been on the job?
 - Was the employee properly trained?
 - Did the employee misrepresent relevant skill sets or experience?

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Key Question #2 (Is This A Surprise?)

- What performance rating has the employee received in previous year's appraisals?
 - If the rating was "3" or "4", has the job or have the job expectations changed so as to account for the current level of substandard performance?
 - Where these changes communicated to the employee?
 - Is the deficiency a major or minor one?
 - Have the performance problems been documented?

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Key Question #3 (Consistent Treatment?)

- How does the employee's performance in this criteria compare to other individuals within the same team or unit?
- How have other employees on that team or unit with similar performance deficiencies been treated?

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Responding to Request for Accommodation

- Be aware of what may be a “request”
- Do NOT ask about medical information
- Focus on “how can I help you to do your job”
- Afraid of being perceived as insensitive?
 - OK to explain – “it’s not that I don’t care but I recognize laws to protect your privacy on medical information”

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Minimizing Liability When Discharging An Employee

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Legal Minefields

- What does “at-will” employment really mean?
- “Discrimination”
- “Retaliation” concerns
- “Harassment”
- Tort Claims
- Public Policy Claims

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Applicable Laws

- Title VII/NJ LAD
- Age Discrimination in Employment Act
- Americans With Disabilities Act
- FMLA/ NJ Family Leave Act
- Fair Labor Standards Act
- CEPA
- Workers Compensation
- USERRA

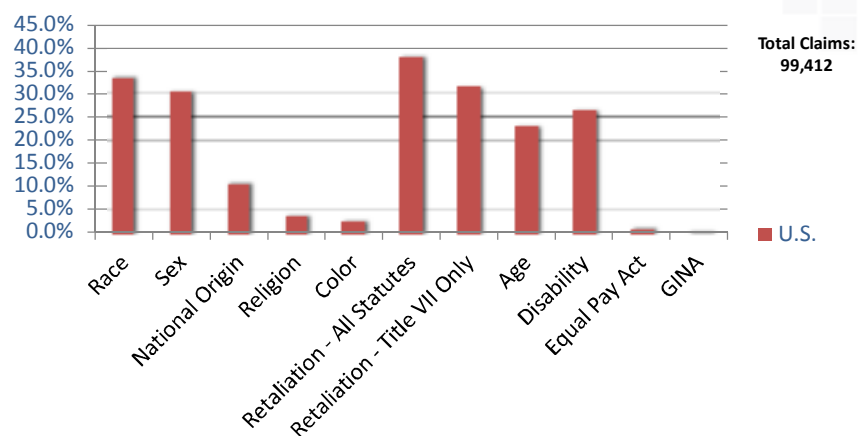
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Prohibited Discrimination

- On the basis of:
 - Sex
 - Age
 - Race
 - Religion
 - Sexual orientation
 - Disability
 - Any other protected characteristic

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2012 Claims



Source: <http://www1.eeoc.gov/eeoc/statistics/enforcement/charges.cfm?renderforprint=1>

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Components of A Retaliation Claim

- Protected activity
 - Complained about conduct employee reasonably believed was illegal
- or*
- Employee availed herself of protected right under a statute
- Employee subjected to an adverse employment action
- Causal connection exists between the protected activity and adverse action

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Real Life Examples: NJ Retaliation Claims

- 2009: \$2.4 Mill. awarded to former CFO who had raised objections to severance practices
- 2013: \$2.25 Mill. awarded to hospital med tech fired after raising concerns about staffing and his boss' credentials
- 2013: \$1.6 Mill. awarded against UMDNJ to Dr. discharged after she complained about discriminatory comments due to her gender/national origin

Attorneys' fees also awarded

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Triggers for Retaliation Claims

- Complaints of presumably unlawful behavior (e.g., harassment)
- Complaints of fraudulent or criminal practices
- Reports of deception of, or misrepresentation to, investors, shareholders, employees, patients, governmental entities, etc.
- Recent response to requests for statutory rights (FMLA, DOL, WC)

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Other Potential Claims

- Intentional Infliction of Emotional Distress
- Promissory estoppel, fraud
- Defamation
- Invasion of Privacy
- Interference with Prospective Economic Advantage
- Violation of Public Policy
- Conversion

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Performance Reviews: Problem Areas

- The undeserved “glowing” review
- The “personal attack” review
- When it’s a “surprise,” not a “review”
- Inconsistent appraisals
- Misleading “promises”
- Unclear/confusing/obtuse

Hypothetical

- Employee consistently fails to meet deadlines – makes frequent mistakes – spends significant time on eBay™
- Last 3 annual reviews rate employee as 3 to 4 on 5 scale
- Employee takes 2 month FMLA/Workers’ Comp. leave
- 2 months after return to work employee missed another deadline
- Manager has had enough – wants to terminate or reassign

Potential Retaliation Claim

- Disability (ADA)
- FMLA
- Workers' Compensation

Common Mistakes to Avoid During Discharge

Not Being Prepared

- Use Talking Points
- Have the termination letter ready
- Do with a witness
- Plan for discharge with dignity
 - Private room/opportunity for non-public exit
 - Avoid firing before major holidays/life events



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Not Citing The Real Reason for Discharge

- Undermines employer's credibility
- Important to be honest – and identify applicable policy violation/performance issue

Remember: In a discrimination claim – no reason or a “false” reason can lead to a finding of pretext

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The “I’m Shocked” Termination

- The termination should never be a surprise to the employee
- Juries are far less sympathetic to plaintiffs with a track record of poor performance



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The “Heat of The Moment” Termination

- Termination decisions should always be reviewed by other managers/HR before implementation
- Generally means that the discipline process/policies have not been followed



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The Passive-Aggressive Termination



Caution: Hiring replacement before terminating employee also implies lack of fairness

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Ignoring Claims of Retaliation/Discrimination

- Experience shows – issues do not “go away”
- Proactive Response Will Help”
 - Prevent an unwarranted termination
 - Limits exposure for possible exaggeration during litigation



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Failure to Document Decision-Making

- Juries find contemporaneous documents identifying the performance issues far more credible than “after the fact” witness testimony
- Memories fade – key witnesses are unavailable
- Failure to document implies cover-up

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Public Discussions About the Termination

- Respect that this is a confidential personnel decision
- Danger zones for exposure to defamation/tortious interference claims:
 - Need to shut down gossip/speculation
- Limit discussion to “E’ee is no longer working for/employed by E’er” and provide instructions as to how their duties will be distributed

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Waivers and Releases – Their Use After Termination

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Releases

- Limits liability and provides transition resources for impacted employees
- Will require additional payment and/or benefits as “consideration” for release of claims

TIP: If you have a policy or practice of paying severance/separation pay you need to be clear that any payment is conditioned on execution of a Release

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What Is Consideration?

- Must be in addition to anything of value to which employee is already entitled
- Examples: salary continuation, lump sum payment, COBRA subsidies, outplacement services
- Can not include:
 - Accrued PTO
 - Payments per prior severance policy
 - Guaranteed bonus, commission or equity grant

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Release/Waiver Agreements

- Where does the release agreement come from (and when was the last time it was revised?)



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Key Provisions of A Separation Agreement

- Not Conditioned on Release
 - DOT
 - Final Pay, Expenses, PTO Payout
 - Cessation of Benefits and eligibility for COBRA
 - Address Bonus, Commission, Equity Grants, etc.
- Separation Benefits
 - Explain Separation pay/benefits and when to be paid
 - Full and complete release of federal, state, local and common law claims and remedies
 - Be clear E'ee preserves rights to file/participate in agency charges
 - Reaffirm Restrictive Cov.
 - Non-admission/disparagement
 - Knowing and Voluntary acknowledgment

TIP: Agree that E'ee not entitled to any further payment/benefit

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Waiver must be “knowing and voluntary”

- Written and understandable
- Mention ADEA/LAD/CEPA
- No future waiver
- Can consult with a lawyer
- Supersedes oral promises
- E'ee understands is waiving important legal rights



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ADEA: OWPBA Compliance

- Applies to Employees 40 and over
 - Must allow for 21 days to review
 - TIP: Must be from Date of Receipt- Not Mailing
 - Must allow 7 days for revocation
 - NOTE: If group termination/RIF must provide 45 day review period and certain disclosures

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Examples of Unwaivable Claims

- Right to file agency (EEOC/DCR) claims
 - But can waive right to any awards
- Right to file an unfair labor practice charge under the NLRA
- FLSA Violations
 - But, can waive right to participate in a collective/ class action
- The OWBPA Review, Revocation and Group Notice Provisions

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What Not to Do When Presenting A Release

- Require E'ee to immediately sign and return
- Dissuade E'ee from consulting an attorney
- Tell E'ee that you would take the offer
- Accepting a release that the E'ee signs immediately without reflection or time to consult an attorney/family member

Questions?

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