

How to Effectively Warn and Fire Office Employees

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MIAMI — A “progressive discipline” system of warnings and suggestions for improvement before firing an underperforming employee maximizes chances of winning a wrongful termination lawsuit, according to a labor and employee attorney.

In addition, perform regular and honest performance evaluations and keep all employee documents under lock and key.

“I suggest to my clients that they do not fire someone until there is enough of a paper trail,” said Chad K. Lang, a labor and employee attorney practicing in Miami.

“Progressive discipline ... is about fairness. The No. 1 reason employees file lawsuits is they believe they were not treated fairly, regardless of how many warnings you gave them. They truly believe they are right,” Mr. Lang said.

There is no legal requirement for progressive discipline, but it will look “very fair to a jury.” It will be perceived as, “We gave them benefit of the doubt, they chose

not to listen, and we had to let them go.”

Avoid oral warnings about performance, Mr. Lang said. But if an initial warning is spoken, document it in writing afterward. Write, for example, I met with him on this date, we discussed this, and this is what I asked him to improve. E-mail is acceptable. For example, send an e-mail stating, “Thank you for meeting with me today. This is what we discussed.”

Subsequent warnings are more formal and always should be in writing, Mr. Lang said at a pediatric update sponsored by Miami Children’s Hospital.

Have a witness in the room when presenting an employee with a written performance warning, Mr. Lang suggested. “A lot of people do these in a closed-door situation.” The presence of a manager or supervisor is recommended, preferably one of the same gender as the employee in question to avoid allegations of sexual harassment before termination.

Link the written warning to prior oral discussions and require the employee to sign and date it. “A lot of times, people re-

member the signature but forget to date it,” Mr. Lang said. “They might counter-sue and say they signed it at different time.”

If an employee refuses to sign the written warning, note this, sign and date it, and have witness do the same. “The witness does not need to say a word. They are observers, so if it comes down to it, it does not become a ‘he said, she said’ situation.”

Employees also should sign an employee handbook acknowledgment form, Mr. Lang said. “An employee will most likely lie and say [she] never received it.”

A written company policy should state that these progressive steps are a guideline and, in some instances, there will be immediate termination, Mr. Lang said. The employee handbook should include an “at-will” employee policy. This implies there is no contract for you to keep them.

Honest, written performance evaluations for all employees are another protection against a future lawsuit, Mr. Lang said. “A lukewarm evaluation will not help

if you fire them for doing a poor job. If you are going to take the time to do these, tell the truth and be accurate.”

Many employers tie evaluation scores to salary and bonus pay. It will look inconsistent to a judge or jury, however, if an underperformer gets the same raise as another employee doing well. “If it goes to disposition, they will ask why you gave an underperformer a raise in the first place, and then why was it equal to someone you did not fire,” Mr. Lang said.

A final piece of advice is to have a specific document retention strategy in your office policies, Mr. Lang said.

“This is where lawsuits are won and lost nowadays.” It is advantageous, for example, to state that all e-mail messages are automatically deleted after 6 months or 1 year.

“Otherwise, a judge or jury can deem failure to preserve electronic records “willful spoliation.” “Adverse jury inference instructs the jury to assume the spoliation of documents presumes they were harmful to the defendant’s case.” ■

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