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by

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A LAWYER'S GUIDE TO DISCIPLINE AND DISCHARGE IN THE PUBLIC SECTOR

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TABLE OF CONTENTS

I. FUNDAMENTAL PRINCIPLES OF DISCIPLINE – SUMMARY FOR SUPERVISORS 1

A. THE THEORY OF DISCIPLINE. 2

B. THE FUNDAMENTALS. 3

C. PROGRESSIVE DISCIPLINE. 13

D. THE "JUST CAUSE" STANDARD. 14

E. DUE PROCESS CONSIDERATIONS. 14

F. DISCIPLINE AND DISCHARGE SUMMARY. 15

II. MANAGING EMPLOYMENT LAW CLAIMS – COST CONTAINMENT STRATEGIES 17

A. EIGHT REASONS TO AVOID LAWSUITS 18

B. COST CONTAINMENT STRATEGIES RELATING TO PREVENTATIVE RISK MANAGEMENT. 18

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I. FUNDAMENTAL PRINCIPLES OF DISCIPLINE – SUMMARY FOR SUPERVISORS

In advising public sector entities, it is important for lawyers to understand the fundamental principles that supervisors should follow in addressing employee discipline and discharge situations. The following is a summary of concepts that encourage supervisors to work to improve employee conduct, while at the same time ensure that the public sector employer is complying with applicable laws, many of which are unique to the public sector workplace.

Every supervisor faces potential disciplinary situations, sometimes too frequently, in the course of managing the job. The discipline meted out can range between a verbal warning on one hand and actual discharge of an employee on the other.

These decisions by supervisors who are empowered by their employer to administer discipline may have far-reaching effects. An employer may have to defend the discipline in a variety of forums which could be as informal as the early stages of a grievance procedure process or as formal complex and legal as a state or federal court proceeding. At that time, perhaps months or even years later, a supervisor may be asked to recall with some precision the facts surrounding a particular disciplinary action.

Additionally, employees, whether union or nonunion, are guaranteed certain protections under applicable law. Under certain factual scenarios, a supervisor's disciplinary action may violate these rights. Sometimes, an employee who is discharged may claim that the discharge was discriminatory. If the employee is a member of a protected class (race, creed, color, national origin, sex, age) which has statutory protection against employment discrimination under both state and federal law, a supervisor's disciplinary action may be challenged as violative of these rights.

Every supervisor in the workplace today should know that his or her actions in disciplining employees may be challenged. Indeed, the supervisor should approach each disciplinary situation on the assumption that the disciplined employee will challenge the discipline. It is crucial therefore, that a supervisor who is involved in the administration of discipline be mindful of ways (1) to avoid a challenge to the discipline if at all possible, and (2) to establish the defenses of his or her actions if they are challenged.

The material which follows will discuss those actions which a supervisor can take to achieve the dual objectives of properly and fairly disciplining workers while at the same time developing and preserving information on which the supervisor, or the employer, may rely in the future to justify, if necessary, the discipline imposed.

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A. The Theory of Discipline.

1. Workplace discipline involves the accomplishment of two objectives.

(a) To correct an employee's behavior which is unacceptable to management; and

(b) To document the employer's defenses and "build the employer's case." Which can later be defended if necessary.

Correcting an employee's unacceptable behavior is in reality a cost-savings device. In most cases, it is less costly for an incumbent employee to perform the job in a satisfactory manner than it is to hire and train a replacement. Therefore, changing "unacceptable behavior" to "acceptable behavior" should be the pivotal point of any disciplinary procedure. However, in those instances where the "unacceptable behavior" is unalterable, the same system should simultaneously create defenses on which the employer can later rely if the disciplinary action is challenged.

To correct an employee's behavior which management finds unacceptable requires two steps. First, the conduct which is unacceptable must be identified. Second, employees must be put on notice (have forewarning) that the identified conduct is prohibited and is a basis for discipline.

In most cases, prohibited conduct will be defined by the Employer's personnel rules, safety rules and procedures, or contained in a labor agreement. Sometimes there may be unwritten but well understood practices within a given operation or industry. Additionally, some conduct is so obviously prohibited that any reasonable and prudent working person is presumed to have knowledge of the prohibition. For example, a reasonable employee should know that it is prohibited to report to work under the influence of alcohol or drugs, or to engage in criminal activity whether at work or not.

The forewarning requirement is typically referred to in the employment situation as a "warning" or "counseling." Warnings, like suspensions without pay and discharge are a form of discipline. Warnings, however, are a lesser type of discipline than suspension or discharge but they are an important factor in evaluating discipline for subsequent offenses. Courts, as well as labor arbitrators, view warnings as an integral part of the industrial disciplinary process.

In one example, a court found that the employee was not wrongfully discharged and the employer did not breach any of the terms of the collective bargaining agreement, specifically because the employee's excessive absenteeism constituted good and sufficient cause for discharge and the employee had received warnings that he would be terminated if his absences continued. Likewise, an

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arbitrator may refuse to uphold the discipline because the supervisor's private conversation with the employee did not tell her that her behavior was improper and did not threaten or predict severe consequences for any further alleged violations.

2. **Elements of letters of counseling and reprimands.** The elements of a warning embody telling the employee what he or she is doing wrong and then stating the consequences of not changing that behavior. Telling an employee what is wrong or giving "notice" can be communicated in a number of ways which include posting the rules on a bulletin board, having them printed in an employee manual or including them as part of the labor agreement. Although such indirect communication may be acceptable, a supervisor should supplement it with a clear, direct and personal form of notice. A direct and documented conversation with the employee is preferred. To do less may look suspicious, while clarity may ease the defense of the discipline.

   The second element of a warning is advising the employee of the consequences of continuing such prohibited behavior: more severe discipline up to and including termination. Here, a supervisor should not mince words. It is inadequate for the supervisor to tell the employer that she will "be in trouble" or that he will have to "discuss it with the higher boss" or similar ambiguous statements which in the supervisor's mind may mean "discipline" but to an employee are inconclusive, particularly as to the consequences of their behavior. This latter aspect is critical to complete a valid warning because where an employee continues prohibited conduct after having been warned, the fact that he was warned stands against him.

   For instance, in another actual case, a court found the employer did not violate the collective bargaining agreement when it discharged the employee. The record reflected repeated efforts over a period of months to solve employee's problems short of discharge including conferences, oral and written warnings and admonitions, suspensions from daily work and a two-week leave of absence. Similarly, labor arbitrators require that employees who are disciplined be given both the notice and the advice of the consequences.

B. The Fundamentals.

1. **Valid warnings.** Warnings, like suspensions and termination, are a form of discipline. Letters of counseling are not, although these provide forewarning. Both counseling and reprimands are the building blocks upon which more severe discipline may be based. They may be verbal or written, and should be documented. In either case, a warning or counseling should contain the two required elements of (1) telling the employee what he or she is doing wrong and (2) the consequences of continuing such behavior. In many instances, the counseling may be given verbally. Where the situation calls for it, the supervisor should deliver the

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warning personally and face-to-face. Even though the warning is verbal, it is proper (and prudent) that it be documented thereafter. The critical message usually involves a description of conduct, behavior or poor performance and a statement of expectation and/or encouragement if appropriate. If the problem persists, discipline may be warranted.

Written warnings are simply written versions of verbal warnings and should contain the two required elements of a warning. Written warnings also should be given by the supervisor personally. Warnings should be prepared in advance to help guide the supervisor over the necessary points during the discussion with the employee.

Imposing discipline sometimes may make a supervisor feel uncomfortable because the situation involving an employee may be relatively minor and the supervisor is reluctant to escalate it by telling the employee that he or she could ultimately be terminated if the behavior does not change. Thus, a supervisor must first decide whether or not the incident or conduct requires discipline. If discipline is not required, of course, no discipline should be administered. However, if the situation does require discipline, albeit minor discipline, the supervisor must issue proper warnings.

Otherwise, at some future date, where the employee's behavior does not change and the supervisor attempts to impose more severe discipline including suspension or termination based on prior warnings, the supervisor may discover, to his disappointment, that the failure to issue proper verbal or written warnings earlier has undermined the strength of his position to administer and defend more severe discipline later.

Retention of documentation often is addressed by policy or labor agreement. Management's goal should be to retain discretion to remove material no longer deemed accurate, relevant or timely, and to keep performance documentation permanently, in the employer's discretion.

2. **Fair and impartial investigation.** A second fundamental in the disciplinary process is a fair and impartial investigation by management. A fair and impartial investigation conducted before a disciplinary decision achieves a number of objectives:

- The facts are obtained;
- Witnesses are interviewed;
- The employee has an opportunity to tell his/her side of the story;
- The employee's work record is considered; and
- The employee's past practices and past discipline in similar cases is considered.

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Every pre-disciplinary investigation should be directed towards establishing the facts of the situation without emotion. Under some circumstances, it may be necessary to have the investigation conducted by an uninvolved supervisor.

Also, investigatory and supervisory decisions (including the supervisor's choices as to what to do) should be based on the factors in the Seven Tests of Discipline, which should be considered if applicable but not applied rigidly:

(a) Was the employee adequately warned of the consequences of the conduct? The warning may be given orally or in written form. Exceptions to this requirement arise when the employee has committed a "Deadly Sin" in the workplace which constitutes grounds for swift discharge.

(b) Was the rule or expectation which the employee has violated reasonably related to the efficient or safe operation of the employer?

(c) Was the employee investigated adequately?

(d) Was the investigation fair and objective?

(e) Did the investigation produce evidence such that the rule violation can be proven? Is the charge consistent with the factual evidence?

(f) Has the employee been given treatment equal to that of others? Were the work rules and expectations applied evenhandedly and without discrimination? Has the employer failed to discipline others for the same infractions in the past, or has the employer disciplined others more lightly without justification?

(g) Is the intended penalty reasonably related to the seriousness of the proven offense and the employee's work record, as well as the supervisor's past practices in enforcing the rule?

3. **Interview Witnesses.** A fair and impartial investigation includes an interview of all witnesses. Statements by witnesses may help resolve and explain events which could settle the matter before any disciplinary action is taken. Witnesses may also corroborate or rebut the employee's statement of what happened. All statements by witnesses which may be needed to rebut the employee's version should be reduced to writing, and may be signed by the witness in appropriate cases, particularly those where civil liability could become an issue.

Understandably, some witnesses, particularly those who are close friends of the employee, or "brothers" or "sisters" in the same union, may be reluctant to give statements. Nonetheless, a thorough investigation should endeavor to secure written statements from

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every witness whose first-hand knowledge adds to the clarity and completeness of a determination of the facts.

The investigation should not be conducted by a charging party, an eyewitness or one involved in the events.

When interviews are tape recorded, no question will exist concerning what was said.

4. **Employee's past record.** A fair and complete investigation should also include a check of the record of the employee or employees involved. This is an important step because if a disciplinary decision is required, management should be influenced by what the employee's personnel record contains. Obviously, a first incident involving a long-time employee with a clean record will warrant a different and perhaps lesser discipline than in the case of a short-term employee whose record contains numerous warnings and other types of discipline. Further, a check of the record will alert the supervisors to any deficiencies in administering previous warnings which may "compromise" additional discipline.

5. **Employer's past practices.** A fair and impartial investigation should examine the employers past practices regarding similar incidents. This is critical because consistent treatment of similar kinds of situations can be used to establish a past practice or to defend the present discipline or (by the union or other adversary) to undermine the supervisors imposition of discipline. Past practices should be thoroughly investigated from a number of aspects including the practice on other shifts, the practice in other departments, and the practice at other facilities of the same employer.

6. **Get employee's story.** A crucial and indispensable element of a fair and impartial investigation is talking with the employee involved to get his or her story of what happened. This discussion is important for several reasons. Firstly, the employee's story may provide a perfectly plausible and acceptable explanation which resolves the entire matter short of discipline. Secondly, talking with the employee fulfills a due process requirement. Lastly, the discussion commits the involved employee to a position. This is important to prevent a subsequent change of position or change of story by the employee during a grievance meeting, or in an arbitration hearing.

   The employee's side of the story may be obtained in an investigatory interview, which is conducted as part of the investigation. It may be important to interview the employee to decide upon credibility issues, and to weigh any explanations that the employee may offer before a decision concerning the level of discipline is imposed. If a supervisor decides to do so, the employee may be interviewed with the union representative present and without prior due process notification. However, if no due process notice is given as required by the Loudermill and Tupper

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cases (discussed below), then, in addition to the fact finding interview of the employee, a subsequent due process meeting must be conducted prior to the imposition of discipline where required.

In any case where the decisionmaker who will impose discipline is not conducting the investigation, the person who does conduct the investigation should interview the employee.

It is also important to obtain the employee's version and point of view as part of a pre-disciplinary due process meeting. The purpose of such a meeting is not to obtain facts upon which the discipline may be based. Rather, the pre-disciplinary meeting is to afford the employee an opportunity to refute the conclusions of the supervisor and to explain any reasons the employee believes that no discipline should be issued or that the forms of discipline under consideration are inappropriate.

7. **Fifth Amendment Right to Counsel.** Employees do not enjoy a legal or constitutional right to have the assistance of counsel in an interview concerning performance of duty. The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." U.S. Const., Amend VI. Legal precedent has long recognized that the right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant. A long line of constitutional cases dates back to the Supreme Court's landmark opinion in Powell v. Alabama, 287 US 45, 77 L Ed 158, 53 S Ct 55, 84 ALR 527 (1932). More recently, in United States v. Gouveia, 467 US 180, 81 L Ed 146, 104 S Ct 2292 (1984), the Court explained thoroughly the longstanding interpretations of the Sixth Amendment which make clear that an employee has no such right.

Where an employee does not avail himself of a constitutional right to remain silent, none exists. The Fifth Amendment in relevant part provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const., Amend V. This prohibition not only permits a person to refuse to testify against himself in a criminal trial in which he is a defendant, but also "privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." Lefkowitz v. Turely, 414 US 70, 77, 38 L Ed 2d 274, 94 S Ct 316 (1973).

No case of which we are aware hold that Miranda warnings must be given by a supervisor as a prerequisite to an internal agency interview or report requesting procedure. No such rule may be asserted, for it is well recognized that government has a strong and legitimate interest in maintaining the integrity of the public service. A public sector employer has an overriding interest in compelling employees to answer inquiries which relate to their performance of duty. In addition, the Fifth Amendment privilege is not self-

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executing and must be invoked by an individual seeking to enjoy its protection. Minnesota v. Murphy, 465 US 420, 104 S Ct 1136, 79 L Ed 2d 409 (1984).

On occasion such inquiries may incriminate an employee in criminal wrongdoing. Obviously, a public employee does not lose his constitutional privilege against self-incrimination by virtue of having accepted public employment. While a public employee may assert the privilege to remain silent if he reasonably fears incrimination, the Fifth Amendment does not extend beyond that privilege. An employee who asserts the privilege may lawfully be ordered to speak truthfully.

No case of which we are aware holds that the Fifth Amendment embraces a right to effective assistance of counsel. The Fifth Amendment privilege and Sixth Amendment right to counsel are separate and distinct concepts which do not merge to create a right to counsel where only the privilege not to incriminate oneself exists.

Employees have a duty to fully and accurately answer questions as directed. When an employee asserts his constitutional privilege against self-incrimination, the public sector employer may demand that questions be answered without advice of counsel and in spite of his Fifth Amendment objection. However, any statements made by the employee under threat of discipline cannot be used against them in criminal proceedings. Garrity v. New Jersey, 385 US 493, 500 (1967); Lefkowitz v. Cunningham, 431 US 801, 97 S Ct 2132, 53 L Ed 2d 1 (1977).

It is also clear that once an employee is directed to answer potentially incriminating questions by submitting reports after asserting the Fifth Amendment privilege, though such an employee could not be prosecuted for the answers, he could certainly be disciplined based upon them. And, an employee directed to speak may be dismissed for failing to do so. Garrity, supra.

An employee may refuse to answer questions and face discipline for that choice. The fact that an employee must choose whether to talk or remain silent offends neither the Fifth nor the Fourteenth Amendment. Gniotek v. City of Philadelphia, 808 F2d 241, 245 (3rd Cir 1986) (police officers who faced dismissal and were subject to criminal investigation could be required to choose between responding to charges or exercising their Fifth Amendment rights.)

Statements voluntarily given by an employee may be utilized against the employee. An employee who cooperates in an investigation or interview and submits information voluntarily may be discharged for any misconduct he reveals. Womer v. Hampton, 496 F2d 99 (5th Cir 1974). As stated above, adverse disciplinary action or the basis for it generally is inadmissible in criminal proceeding.

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Statements made must be truthful. A related rule is that the privilege against self-incrimination never justifies the commission of perjury. "Our legal system provides methods for challenging the Government's right to ask questions – lying is not one of them." Bryson v. United States, 396 US 64, 72, 90 S Ct 355, 360, quoted at fn. 16, U.S. v. Friedrick, supra, at 394. The Garrity line of cases recognizes that untruthfulness may be punished with discharge. See also, LaChance v. Erickson, 522 US 262 (1998) holding that due process does not preclude discipline against an employee who is compelled to speak and makes false statements to defend against charges of job-related misconduct.

8. **Cases Related to Immunity And IA Investigations.**

(a) Concepts:

(1) Transactional immunity: When a witness is immune from prosecution for any offense to which the immunized testimony relates.

(2) Use and Derivative use immunity: When a witness is not immune from prosecution but the state may not use the immunized testimony in a prosecution of the witness or any of its direct or indirect fruits.

(3) Use immunity: State may not use the immunized testimony in a prosecution of the witness but may use evidence obtained through information contained in the testimony.

(b) Applicable U.S. Supreme Court Cases.

(1) Garrity v. New Jersey, 385 US 493 (1966): First of long line of cases dealing with immunity and the fifth amendment and stands for the proposition that "information obtained from public employees during investigations after a threat of discharge was compelled and could not be used in a subsequent criminal proceeding against them." In this case the appellant was a police officer in New Jersey who was under suspicion of criminal activity. The police officer during an investigation by the Attorney General of New Jersey was asked questions relating to the charges and was told (1) that anything he said might be used against him in any state criminal proceeding; (2) that he had the privilege to refuse to answer if the disclosure would tend to incriminate him; but (3) that if he refused to answer he would be subject to removal from office. The officer answered the questions and over his objections, some of the answers given were used in a subsequent prosecution. **No immunity was granted during the investigation stage as New Jersey had no immunity statute applicable.**

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The court ultimately held that the statements were inadmissible as the choice given the defendant was to either forfeit his job or incriminate himself. Therefore, the statements of the defendant were coerced and violated the Fifth Amendment.

(2) **Gardner v. Broderick, 392 US 273 (1968):** Appellant, a police officer, was subpoenaed by and appeared before a grand jury which was investigating alleged bribery and corruption of police officers and was advised that the grand jury proposed to examine him concerning the performance of his official duties. He was advised of his privilege against self-incrimination, but was asked to sign a "waiver of immunity" after being told that he would be fired if he did not sign. He refused to sign a waiver and was discharged solely for his refusal. **The Supreme Court held that "if the police officer had refused to answer questions directly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, per Garrity, the privilege against self-incrimination would not have been a bar to his dismissal. Therefore, in the instant case his dismissal was invalid since it was predicated upon his waiving immunity from criminal prosecution."**

(3) **Lefkowitz v. Turley, 414 US 70 (1973):** New York statute required public contracts to provide that if a contractor refuses to waive immunity or to testify concerning his state contracts, his existing contracts may be cancelled and he would be disqualified from further transactions with the State for five years. Appellants were New York architects who were summoned to testify before a grand jury investigating various criminal charges. They refuse to sign waivers of immunity whereupon they were disqualified from future contracts in the city of New York. **The court held that the Fifth Amendment applies not only to a criminal prosecution but also privileges a person not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings. Therefore, in any of the above contexts, a witness protected by the privilege may rightfully refuse to answer unless and until he is protected against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case. Absent such protection, if he is nevertheless compelled to answer, his answers are**

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inadmissible against him in a later criminal prosecution and will be suppressed.

(4) **Kastigar v. United States, 406 US 441 (1972):** Important in that the court is confronted with issue of whether for **federal** purposes, a witness may be compelled to testify against themselves in a criminal setting (before a grand jury) when they are only offered use and derivative use immunity. Or, is it necessary to grant transactional immunity. The court, inter alia, asserts that the Fifth Amendment privilege **can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory**. However, they go on to indicate that use and derivative use immunity is sufficient and transactional immunity is not required.

(5) **Uniformed Sanitation Men v. City of New York, 392 US 280 (1967):** Appellants were sanitation employees who were being investigated for possible criminal activity. They were summoned before a grand jury and asked to sign waivers of immunity which they refused to do. The employees were dismissed from employment on the sole ground that they had refused to sign waivers of immunity from prosecution. Relying on the rationale of the Broderick decision, the court held that the dismissals were unlawful in that the appellants were discharged for refusal to expose themselves to criminal prosecution. Importantly, the court went on to state that "**if New York had demanded that the petitioners answer questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the constitutional privilege, and if they had refused to do so, this case would be entirely different. In such a case, the employee's right to immunity as a result of his compelled testimony would not be at stake.**" In such a case, the petitioner's being public employees, "**subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights.**"

(6) **Immunity as a Matter of Law.** A few federal cases have implied that it is not necessary for an affirmative grant of immunity to be proffered to the witness. Instead, they recognize the concept of immunity as a matter of law. These courts reason that the privilege against self-incrimination affords a form of use

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immunity which attaches automatically as a matter of law when a public employer compels incriminating statements. The logic runs as follows: The Supreme Court has already held that the threat of being fired is sufficient to constitute compulsion of the statements. Garrity, 385 US at 497. As a matter of law then, compelled statements cannot be used against their maker in a criminal proceeding. Kastigar, 406 US at 453. Therefore, as a matter of law, the statements cannot be used regardless of whether immunity has expressly been granted by an employer.

9. **Documentation.** Finally, the investigation must be preserved by "documentation." Documents are evidence. Evidence is required to convince arbitrators and courts that the employer's discipline was "just."

Every document should be created with three ideas in mind:

(i) It should be timely;

(ii) It should be permanent; and

(iii) It should be relevant accurate and complete.

"Timely" means contemporaneous, preferably the same hour, certainly the same day, but never more than several days beyond discovery of the event. Timely documents are more accurate regarding the facts than those created from memory at a much later time. Documents prepared "after the fact" may raise questions of credibility. A supervisor should never create a document "retroactively" for the purpose of defending his position regarding imposed discipline. When documentation is written "late" it should reflect when, where and why it is written late.

"Permanent" means documents be typed or written in ink so as to withstand subsequent allegations that their contents have been altered. Copies should be distributed and retained as appropriate under company policy.

The "completeness" of the document is critical. Documents which are incomplete or inaccurate will raise more questions than they will answer regarding a supervisor's reasons for discipline. Where several documents are related, they should be retained together. Physical evidence, e.g., damaged parts, is complete in itself and should be preserved along with explanatory documents.

10. **The discipline must fit the crime.** A final "fundamental" of the disciplinary process requires, where discipline is actually needed, that the discipline must not be disproportionate to the crime. The degree of discipline that is, a verbal warning/counseling, written reprimands, disciplinary suspensions or termination, can only be decided upon completion of the fair and impartial investigation

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previously discussed. In many cases, the investigation itself may be completed expeditiously and a disciplinary decision rendered. In other cases, the investigative process may take several days and involve meetings with higher management and perhaps discussion with counsel.

Fashioning appropriate discipline should be done in an atmosphere of cool meditation. No discipline should be imposed from an emotional basis or while the supervisor and employees are upset. Further, because the objective of discipline is to change an employee's unacceptable behavior, discipline, when imposed, should not be punitive. Indeed, fashioning the proper discipline should involve a balancing of the seriousness of the infraction with the employees overall record. Supervisors considering the imposition of severe discipline such as suspension or termination should proceed cautiously, because the higher the stake (ultimately the employee's job itself), the more likely the employee and the union will challenge the disciplinary decision.

C. Progressive Discipline.

A progressive discipline scheme involves warnings and other discipline of increasing severity up to and including termination. The progression is intended to put the employee on notice that his job is in jeopardy and give every opportunity to the employee to change the behavior which is unacceptable.

Generally, progressive discipline would proceed as follows:

1. Letter of counseling, non-disciplinary, and the typical starting point for minor offense;

2. Verbal reprimand documented in writing;

3. Written warnings/reprimand;

4. Suspension without pay;

5. Other discipline, such as demotion or salary reduction in appropriate cases; and

6. Discharge.

A progressive system, however, should not be mechanically applied, and there may be certain situations in which immediate discharge or a higher level of discipline is appropriate.

Where severe discipline including discharge may be appropriate, supervisors should first consider imposing an unpaid pre-disciplinary suspension. This involves suspending the employee with pay, not for an indefinite period, but long enough to give both sides time to "cool off" if necessary, and provides an atmosphere in which a fair and impartial investigation may be conducted with pay and during administrative leave.

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Upon completion of the investigation, if discharge is not warranted, the employee may be instructed to report to work at his next normally scheduled time. However, where discharge is appropriate, a suspension permits management to assess the strength of its case and the appropriateness of discharge. Thereafter, the employee can be discharged with appropriate due process where required.

D. The "Just Cause" Standard.

The usual standard which an employer must meet in disciplinary situations involving union represented employees is one of "just cause." Even when the labor contract is silent, arbitrators without exception read the "just cause" standard into the contract as necessarily implied from seniority and grievance and arbitration provisions. Proof of disciplinary action for "just cause" must be particularly clear. An employer must show by the greater weight, or clarity of the evidence, that the disciplined employee was guilty. Thus, the "just cause" standard, simply stated, is one which requires the employer to prove what it alleges the employee did to deserve the imposed discipline. The employer's "failure to prove" will lead arbitrators to the conclusion that the discipline is not supported by "just cause."

Proof generally is not "beyond doubt." Rather, the supervisor and arbitrator look to clear evidence and generally discuss standards such as "preponderance of evidence" or "clear and convincing evidence." In doing so, it is appropriate to consider all circumstances and to evaluate credibility of the witnesses.

The burden of proving "just cause" especially for discharge, is generally recognized to be on the employer. To justify the disciplinary action, an employer must show that the misconduct of the grievant warranted the discipline invoked. Although the degree, or quantum of proof, required of management is often dependent on the severity of the offense charged, some arbitrators in discharge cases involving insubordination and misconduct workmanship and absence from work, apply the "preponderance of evidence" standard in deciding issues in dispute. A conclusion on "just cause," however, is likely to be determined on a case-by-case basis using the merits and factual circumstances of the case.

E. Due Process Considerations.

An employee may not be discharged or suffer a reduction in regular remuneration (suspension without pay or demotion) if the employee enjoys a property right in their job, otherwise referred to as "an expectation of continued employment." Such an expectation is based, among other things, on a "just cause" provision in a labor contract, a contract of employment, or a statute, ordinance or rule which creates a property interest in retaining the job.

If a property right in continued employment exists, then the Constitution requires that that property right not be reduced or taken away without "due process." Due process is an opportunity to be heard at a meaningful time and in a meaningful manner. Certain minimal due process requirements

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must be met before a demotion, suspension or discharge decision is made; post-termination due process must be afforded thereafter.

It is important that every supervisor understand the rules relating to pre-termination due process established by a decision of the United States Supreme Court in Cleveland Board of Education v. Loudermill, 105 S Ct 1487 (1985), and the Oregon Supreme Court in Tupper v. Fairview Hospital, 276 Or 657 (1977). These cases hold that a public employee who enjoys an expectation of continued employment (that is, a non-probationary employee who is entitled not to be discharged except for "just cause" for example) is entitled to an oral or written notice of the charges against the employee, an explanation of the employer's evidence, and an opportunity to present his side of the story.

The pre-disciplinary meeting may be conducted before any person having the authority to make or effectively recommend the final decision. At a minimum, the employee is entitled to notice of the charges, to be informed of the kinds of sanctions being considered, and to an informal opportunity to refute the charges orally or in writing.

To the extent post-disciplinary and post-termination due process procedures are provided for in the employer's policies or a grievance article in a collective bargaining agreement, these procedures generally should suffice to satisfy the constitutional due process requirements. However, these should be followed carefully, if applicable.

F. Discipline and Discharge Summary.

Every supervisor who has authority to discipline employees must remember that the disciplinary action - particularly discharge - may be challenged. A challenge cannot be successfully rebutted if the disciplinary procedure used was punitive, inconsistent or discriminatory. It is crucial therefore, that the disciplinary fundamentals set forth above are followed from the earnest stages of discipline.

1. Federal Statutes.

The following are some of the federal statutes that may be raised by an employee who has been disciplined or discharged:

- Discrimination on the basis of race, color, sex (including pregnancy), religion or national origin under Title VII of the Civil Rights Act of 1964 ("Title VII");
- Retaliation against protected activity (i.e. opposition against or participation in a charge of unlawful employment practices under Title VII);
- Discrimination on the basis of age (i.e. 40 years of age and older) under the Age Discrimination in Employment Act of 1967 ("ADEA");
- Discrimination on the basis of disability under the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 ("ADA");

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- Discrimination against Vietnam-Era and certain disabled veterans by covered federal government contractors under the Vietnam Era Veteran's Readjustment Assistance Act of 1974 ("VEVRAA");

- Retaliation for whistle-blowing or reporting suspected employer violations of safety and health standards under numerous statutes, including the Occupational Safety and Health Act of 1970 ("OSHA");

- Retaliation for filing a claim for any benefits under the Fair Labor Standards Act ("FLSA"); and

- Interference, restraint or discrimination against persons on the basis of their union preferences or concerted activity under the National Labor Relations Act ("NLRA").

2. Disciplinary Action Checklist.

Following is a Checklist for Taking Disciplinary Action which could be used as a reminder of these concepts if (and when) it becomes necessary to address this issue in the future:

☐ Did the employee have notice of:

(a) The applicable procedure, policy, work rule or expectations?

(b) The employer's dissatisfaction with job performance?

(c) The potential consequences of his/her conduct?

☐ Have the facts been investigated and reviewed objectively?

(a) Investigations should be conducted promptly.

(b) The investigation should be kept confidential to the extent possible.

(c) If the supervisor is also a witness, use an impartial investigator.

(d) Obtain and consider all relevant information.

(e) Have an impartial party review the findings and conclusions.

(f) Interview witnesses separately

☐ Has the investigation and the facts been documented in writing?

☐ Has the employee had an opportunity to comment on both the:

(a) Substantive allegation; and

(b) The proposed penalty?

☐ Has the employee requested representation at the investigatory interview?

(a) Is there a reasonable basis to believe that discipline may result?

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(b) Is the purpose of the meeting to obtain facts that the company might consider in determining whether to access discipline?

(c) Has the employee requested or given any indication that they may want a union representative present?

(d) If in doubt, allow the employee to obtain union representation within a reasonable period of time, if requested.

☐ Can the employer prove the conduct in question?

☐ Is there a valid job-related reason for taking the contemplated disciplinary action against the employee (i.e., was the employer's rule reasonably related to an orderly, efficient and safe operation?).

☐ Has the employee's overall work record been reviewed?

☐ Is the recommended action consistent with prior actions where the circumstances have been similar?

☐ Is the recommended action consistent with the employer's handbook, policies, practices, and procedures?

☐ Has progressive discipline been followed, if appropriate?

☐ Are there any mitigating factors which warrant a lesser form of disciplinary action?

☐ Is there the possibility of a resignation or severance pay in exchange for a release?

☐ Is the degree of discipline reasonably related to:

(a) the seriousness of the offense; and

(b) the employee's work record and years of service?

☐ Does the employer have any obligation to notify the proper authorities of possible criminal violations?

☐ Has the employee cooperated with the investigation? If not, start the process over to determine if disciplinary action is warranted on this additional ground.

II. MANAGING EMPLOYMENT LAW CLAIMS – COST CONTAINMENT STRATEGIES

Legal issues impact businesses with increasing frequency and magnitude. There are a larger number of federal and state law statutory schemes that regular the employment relationship, which are enforced by a host of state and federal agencies. In addition, common law concepts such as defamation, privacy, wrongful discharge and contracts of employment-at-will create legal obligations enforceable through litigation. When a collective bargaining agreement applies, additional obligations are superimposed upon the regulatory framework. For

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public employers, additional statutory and constitutional laws provide an umbrella of even greater procedural and substantive employee rights and employer duties.

Legal advice and representation has become a necessary and increasing cost of effective management. This outline is intended to present considerations for the cost-conscious employer.

A. Eight Reasons to Avoid Lawsuits.

Being a defendant is not fun. Impacts defendants talk about most are:

1. Claims experience and insurance costs are affected adversely.

2. Negative public relations effect on the employer or political consequences for a public entity.

3. Staff time and effort required to prepare for and defend the suit.

4. Consequences of being named individually (such as liens, time, credit, uninsured claims and limitations on coverage).

5. Publicity for the individual, judgment and criticism.

6. Personal time and annoyance.

7. Preparation time for each witness and decision-maker.

8. Stress. Worry about ultimate outcome. Performance anxiety at deposition and trial.

9. Cost Containment Strategies.

B. Cost Containment Strategies Relating to Preventative Risk Management.

1. **Don't Assume.** Know what you don't know. Time and again, claim outcomes are determined by those unconscious of the implications of management choices. Know the laws and compliance issues which arise and understand the situations in which they occur. Ask for advice and expert opinion, and use pre-loss legal resources.

2. **Don't Be Arrogant**. Insurance protects honest errors, mistakes and negligence. There is no room for insureds who adopt the attitude, "I can do what I want. That's what I buy insurance for."

3. **Be Wary.** Identify times to ask. Understand the kinds of situations to be wary of. Get help, or an affirmation that your choices and objectives are optimal by relying on ready resources and legal counsel who regularly handles similar matters. Seek help

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whenever issues arise that impact someone adversely, raise a question of dissatisfaction, or have legal implications. For example:

- Contracts of employment.
- Personnel policies development and periodic review.
- Managing performance of chronic poor performers.
- Imposing discipline likely to be challenged.
- Acting toward an employment termination or demotion.
- Responding to demand letters.
- Responding to letters from an enforcement agency, such as BOLI, EEOC, DOL or OSHA.
- Investigating a significant event with liability exposure, such as hostile work environment, harassment, violence, or employee misconduct likely to lead to discipline.
- When an employee raises an issue of differential treatment, particularly when it involves an employee in a protected class.
- When a valued, long-term employee's performance deteriorates or the employee talks of resigning for unexplained personal reasons.

NOTE: Be cautious and seek help whenever you know there is something you don't know.

- When factors of physical ability or perceived substance abuse are related to a personnel action, including change of duty or working conditions.
- When an employee has requested accommodation or special treatment for reasons protected by law.
- When romantic relationships between employees exist.
- When layoffs are planned.
- Union organizing campaigns from the outset, at the earliest time union activity is suspected.
- Preparation of grievance responses at each step.

4. **Provide Training to Managers and Supervisors.** While it may be true that a little knowledge is a dangerous thing, no knowledge is worse. That you know you have to call a doctor is no excuse not to

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learn CPR/first aid. Training relevant to an employee's duties and responsibilities should be provided regularly.

5. **Employ Sound Hiring Practices**. Employer vulnerability is the same for all applicants. Therefore use sound hiring practices.

   - Be clear, regarding terms and conditions of employment, expectations and requirements. You can be liable for the employee's behavior on the job.
   - Interview and selection process must adhere to EEOC guidelines. Be sensitive to the questions which can lead the applicant to assume that the answer provided a prohibited reason NOT to hire the applicant. Don't ask if you don't want to know. For example, avoid topics of disability, health and age, birth date or year of graduation.
   - Once an employer has applicant information, it has the burden of proving what was done with the information and why it had to have the information.
   - Involve persons who can interview appropriately, conduct interviews fairly, and document them accurately and reliably.

6. **Hire the Right Person.**

   - Conduct a background investigation appropriate for the position. Consider whether to:
   - Obtain a criminal history.
   - Inquire of references.
   - Inquire of prior employers.
   - Interviews should explore fitness and suitability, and all related issues, as should questions of others. Inquire about:
   - Past performance.
   - Problems interacting and cooperating.
   - Diversity and tolerance issues.
   - Authority and control issues.
   - Propensity to violence.
   - Design questions, questionnaires, and applications based on job requirements and valid predictors for success on the job.

7. **Have A Current Policy Manual.** Your policy manual should be reviewed and approved by an expert, and revised and updated periodically. Some think they are better off if there is nothing in writing. Not so.

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A policy manual that puts employees on notice of unacceptable workplace behaviors affords protection.

Statements of expectation, rules, and procedures that explain legal requirements provide guidance, and serve as a source of right answers.

Well-written and correct, current and up-to-date policies are the goal. Periodic review will help to identify wrong or illegal policies.

8. **Conduct Active and Preventative Risk Management Review.**

- A complaint process should culminate at the level of the organization to be named in any claim.
- Consider a legal audit to discover whether policies and practices most effectively address issues which could lead to liability. Focus on:
- Contracts of employment; "at-will" employment.
- Corrective action, discipline and discharge.
- EEO and harassment.
- Injured workers/disability/reasonable accommodation leaves and related practices.
- Reinstatement rights.
- Wage and hour practices.
- Toxic substances in the workplace.
- Blood-borne pathogens.
- Substance abuse.
- EAP referral procedures.
- ADA considerations.
- Records retention practices.
- Hiring practices; background checks, FCRA.

9. **Safety Program.** Have a safety and loss control program involving a written loss and safety plan and policy, an employee safety committee, safety audits, hazard communication and control, complaint procedure, PPE (as appropriate), and first aid training.

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