Employee Discipline and Termination

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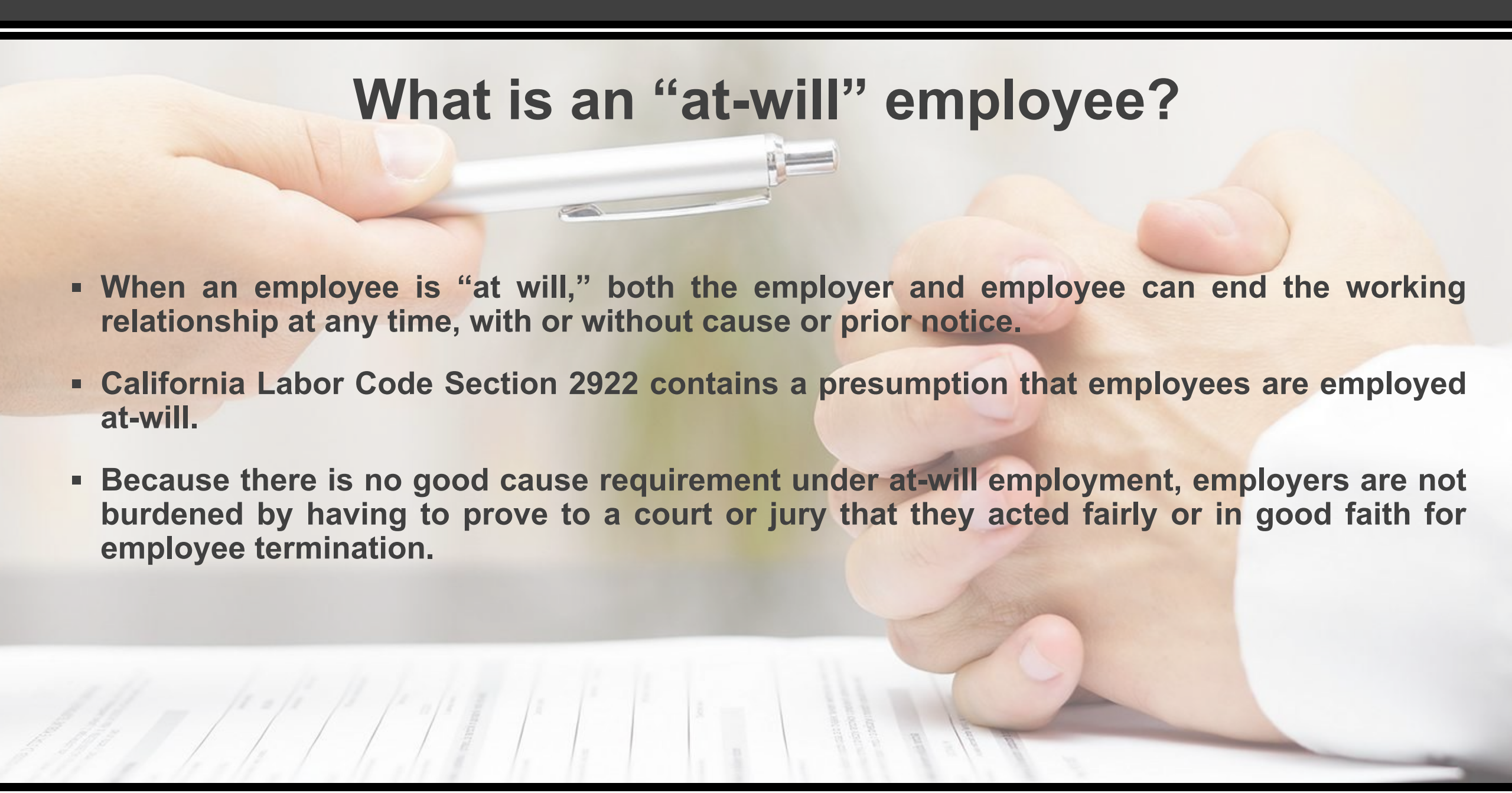
Creating an “At-will” Employee Relationship

What is an “at-will” employee?



- When an employee is “at will,” both the employer and employee can end the working relationship at any time, with or without cause or prior notice.
- California Labor Code Section 2922 contains a presumption that employees are employed at-will.
- Because there is no good cause requirement under at-will employment, employers are not burdened by having to prove to a court or jury that they acted fairly or in good faith for employee termination.

Employers must clearly preserve the “at-will” employment status through relevant documents, handbooks, and manuals

- Employers must be able to show that they have expressly preserved and maintained at-will employment for their employees in order to retain the freedom to terminate employment without cause.
- To preserve at-will employment, employers should include clear and explicit disclaimers/statements of the at-will status in all relevant employment documents. These include, but are not limited to the
  - employment application;
  - employment offer letter and signing of an employment-at-will acknowledgement on the first day;
  - employee handbook;
  - employer’s policy and procedure manuals.
- Benefits of providing clear and explicit disclaimers:
  - Prospective employees understand and are fully aware that the employment opportunity is at-will;
  - Employers can avoid breach of contract and wrongful termination claims from terminated employees.

Additional tips on preserving the "at-will" employment status

- Avoid using rigid progressive discipline policies (i.e., disciplinary rules that cannot be changed or varied, which therefore make them severe).
- Instead, provide language in policies indicating that wrongful conduct and violations "may" lead to disciplinary action, up to and including termination of employment.
- Advise and train managers and supervisors to use cautious language when discussing a job opportunity with employees, potential employees, and applicants.
  - For example, avoiding language that provides employees or prospective employees assurances of job security, promises, or other implied language may jeopardize an at-will employment status.

California laws differ when the employee is not “at-will,” but rather, has “for cause” or “good cause” status

- The standard for termination is different when an employee can only be terminated “for cause,” as opposed to “at-will.”
- When employment is “for cause,” the employer needs a good reason for terminating the employee.
- Under California law, good cause exists when the employee fails to perform the responsibilities of the job.
- The Supreme Court of California has defined “good cause” as a “fair and honest cause or reason, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual” (*Cotran v. Rollins Hudig Hall Intern., Inc.*,(1998), 17 Cal.4th 93).
- Therefore, good cause should be supported by substantial evidence, oftentimes gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond.

The NLRB and At-Will Employment

- The National Labor Relations Board (NLRB) disproves of employer policies that may tend to interfere with an employee's right to engage in concerted activity under Section 7 of the National Labor Relations Act.
- The NLRB found in a case that a provision stating that an employee's at-will status could **never be modified or changed in any way is unlawful** because employees have the right to decide to be represented by a union, and most union labor agreements contain a clause requiring just cause for termination.
- The NLRB later issued advice memoranda, providing guidance to employers who want to draft employment at-will disclaimers, advising that disclaimers are lawful so long as there is no language asking employees to refrain from seeking to change their at-will status or to agree that their at-will status could never be changed.

Alternative Dispute Resolution/Arbitration Provisions

- Under an arbitration agreement, the employer and employee enter a contract in which they agree that if a dispute arises, they will submit the dispute to a third-party arbitrator, rather than the courts.
- Arbitration agreements and arbitration agreement provisions are commonly part of employee contracts and employee handbooks. Employers are encouraged to include arbitration provisions in employee contracts.
- The benefits of including arbitration agreements as part of employment are:
  - Confidentiality: arbitration proceedings are confidential and private, whereas court proceedings are public.
  - Quick and efficient: arbitration proceedings are faster, more efficient, and less costly, whereas litigation may persist far longer—even years.
  - Final and binding (generally) - with the exception of certain limited circumstances, arbitration results in an award and resolution that is final and binding, and generally cannot be appealed or overturned.

Alternative Dispute Resolution/Arbitration Provisions: AB 51

- Employers should keep in mind that under AB 51 and California Labor Code Section 432.6, employers are **prohibited from requiring employees and applicants to agree to arbitration as a condition of employment**.
- Applicants or employees are not obligated to waive any right, forum, or procedure for violation of the Fair Employment and Housing Act (FEHA) or the Labor Code as a condition of employment or continued employment, or receipt of any employment-related benefit.
- The law does not prohibit arbitration of employment claims but makes clear that any agreements to arbitrate must be voluntary.

Employers Should Implement and Provide Employee Handbooks

- While not required by state or federal law, an employee handbook is extremely beneficial to employers, by
  - establishing clear expectations for employees,
  - stating the employer's legal obligations, and
  - defining employee rights.
- Employee handbooks can help protect against employee lawsuits and claims, such as wrongful termination, harassment, and discrimination.
- Employers with locations in more than one state should provide separate handbooks for each state or a regional handbook with state law differences attached as addendums, since employment laws will vary.
- Employee handbooks should also reaffirm that employment is at-will in order to avoid implying an employment contract or good cause employment.

Employee handbooks allow employers to…

- Clearly and comprehensively outline key company/business policies; introduce employees to the company/business's culture, mission, and values.
- Inform on an employee's rights relating to work, pay, benefits, and the workplace.
- Define the employer's expectations and requirements, including what actions will be taken if the employee fails to comply.
- Ensure the employer's compliance with federal and state laws, including harassment, discrimination, retaliation, and compensation laws.
- Provide guidance for which employees can turn to when they have questions, concerns, or need information.
- Help defend against employee claims by
  - proving the employer exercised reasonable care towards its employees;
  - indicating the employee was aware of, and had time to familiarize with, the employer's policies and the terms and conditions of employment (demonstrated by the employee's signed signature and acknowledgement); and
  - becoming a powerful document for lawsuits or investigations, should conflict arise.

Discipline and Termination

Termination: an overview

- While California is generally an at-will state for employment purposes, providing employees with an “at-will” status does not excuse **unlawful termination (or discipline),** and employers are prohibited from masking employee termination by unlawful means merely because an employee has an at-will status.

At-will employees can only be terminated for lawful reasons

- Under California law, wrongful termination occurs when an employment agreement is ended by the employer in violation of the employee's legal rights.
- "While an at-will employee may be terminated for no reason, or for an arbitrary or irrational reason, there can be no right to terminate for an unlawful reason or a purpose that contravenes fundamental public policy." (*Yau v. Santa Margarita Ford, Inc.* (2014), 229 Cal.App.4th 144)

The lawful termination of an at-will employee

- Termination can be for any reason that is legal, which limits an employer's absolute right to terminate an employee.
  - Many state and federal laws (e.g., FEHA, Title VIII) limit and explicitly prohibit an employer's absolute right to terminate employment.
  - For example, termination based on **protected class, status, activity**, harassment, discrimination, or retaliation violate an at-will employee's legal rights which may create a wrongful termination claim.
  - The *McDonnell Douglas* burden-shifting analysis/standard: termination decisions should be based on legitimate, non-discriminatory business reasons.
    - Once the employee plaintiff makes a prima facie case by demonstrating a claim of retaliation, harassment, or discrimination, the burden of production shifts to the defendant **employer to articulate a legitimate, nondiscriminatory reason for the employment action**.

Unlawful Termination under FEHA

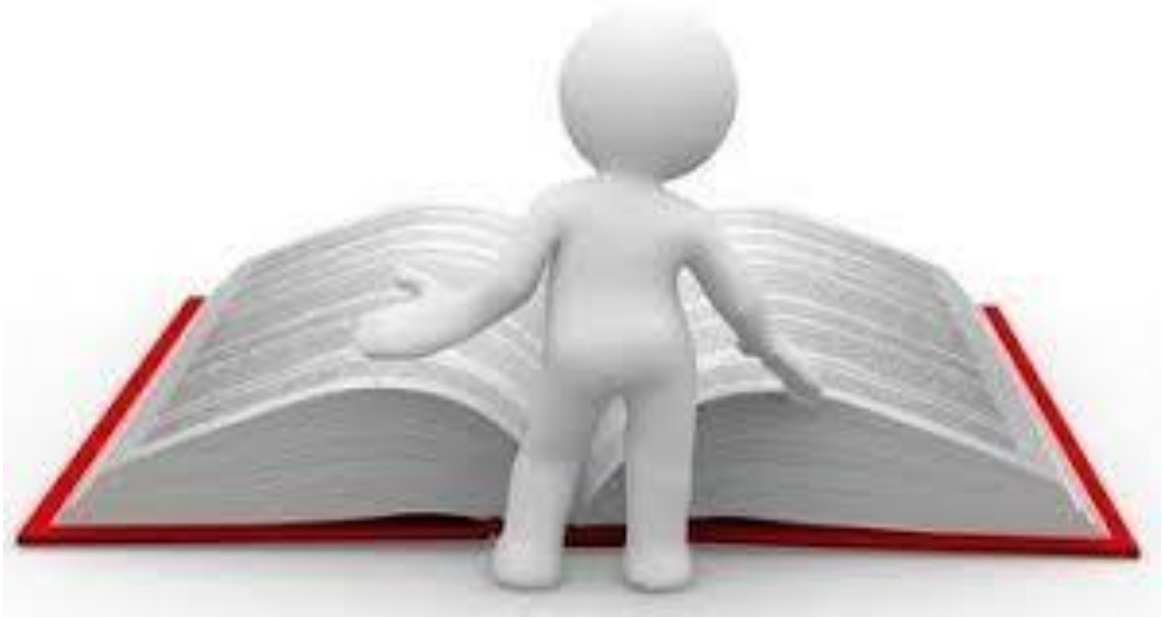
The Fair Employment and Housing Act (FEHA) identified specific bases for termination which are considered illegal and unlawful under both California and federal law:

- Age discrimination;
- Criminal conviction discrimination;
- Disability discrimination;
- Ethnicity discrimination;
- Family responsibility discrimination;
- Gender/sex discrimination;
- Hostile work environment;
- Medical condition discrimination;
- Military status discrimination;
- National origin discrimination;
- Pregnancy discrimination;
- Race discrimination;
- Religious discrimination;
- Sex-stereotyping discrimination;
- Sexual harassment;
- Sexual Orientation Discrimination;
- Transgender discrimination;
- Political affiliation;
- Constructive termination – hostile work environment;
- Retaliation for workplace health and safety complaints;
- Retaliation for complaining about unpaid wages or overtime;
- Retaliation for reporting Labor Code violations, such as failure to provide meal or rest breaks;
- Retaliation against health care workers for reporting patient safety concerns; or
- OSHA retaliation.

NOTE: Although the basic principles regarding harassment under FEHA are generally the same as under federal law, the FEHA anti-harassment provisions apply more broadly, by covering employers with one or more employees, protecting independent contractors, and extending personal liability to individual supervisors.

How employers can protect themselves to comply with California termination laws

- Implement, develop, and follow logical, consistent employee termination policies for different kinds of employment termination situations.
- Make sure these policies and termination strategies are compliant with California and federal employment laws and avoid public policy violations in order to reduce the risk of exposure to wrongful discharge liability and the risk of possible misunderstandings.



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Tips for employers on how to protect against wrongful termination lawsuits

- The process in avoiding a wrongful termination lawsuit begins before an employee is actually terminated.
- Employers should:
  1. Establish at-will employment relationship (consider arbitration).
  2. Establish and use a legally compliant and consistent policy on how to deal with employee conduct and performance
  3. Make sure there are no miscommunication or other errors in any part of the employment process. This may include, but is not limited to:
     - The job application and interview process
     - The contents within the employee handbook and performance reviews
     - The workplace environment

Considerations for a lawful termination process

- **Keep any relevant written records, including written records of prior discipline.**
  - Establishing written documentation and warnings are necessary, even for “at-will” employees, because keeping written documentation of an employee’s performance, misconduct, or other related observations can protect an employer from discrimination, retaliation, and wrongful termination claims.
  - While the burden of proof is generally on the employee in lawsuits, employers will oftentimes be required to prove that they had a good or otherwise lawful reason for terminating an employee.
- **Keep documentation of an employee in a personnel file, and make sure to review it prior to an employee’s termination.**
  - Keeping organized files with notes on an employee reduces risk, confusion, and potential violations by providing explanations that can prevent unlawful termination claims.

Considerations for a lawful termination process: continued

- Document the termination at the time that it has occurred.
  - Oftentimes, it takes time to effectuate the termination process.
  - When termination cannot happen immediately, there is risk that other concerns or issues involving the employee can take place within that timeframe—such as suffering a work-related injury, medical leave, or a harassment complaint.
  - Therefore, documenting (with as much as detail as possible) a termination decision protects the employer against accusations which may give rise to an unlawful discharge claim, based on some other reason that may have occurred during the termination process.
- Provide the actual reason for termination that are supportable and fully accurate

Disciplinary Action: An Introduction

- Employees are generally required to follow an employer's policies and company/business regulations.
- When an employee engages in wrongful conduct or behavior, or violates certain policies and procedures, it may become necessary to take proper corrective measures.
- The type of discipline can range from the mild to the severe, depending on the violation. The form of discipline can range from verbal warnings to restricting employee privileges, disciplinary reviews, and termination.
- Some examples of issues that may require disciplinary action are unsatisfactory job performance; violation of policies; failure to comply with business procedures; or unacceptable personal conduct.
- The goal of the disciplinary action should not necessarily be to punish the employee, but rather, to ensure compliance and maintain a positive and productive work culture.

Types of Disciplinary Action

- There are various types of disciplinary action an employer may take, and the best type of action will depend on the specific situation. Some examples of types of disciplinary action are:
  - Oral or written warnings
  - Suspension with pay
  - Suspension without pay
  - Trainings
  - Demotion or departmental transfer (i.e., for unsatisfactory job performance)
  - Termination

What should an employer do before taking disciplinary action?

- Establish policies and procedures that create a uniform, consistent, and organized manner in handling employee discipline.
- The goal of the policy and procedures should be to identify issues that may arise in the workplace, different types of disciplinary action, and what behaviors, mishaps, or wrongful conduct would require disciplinary action.
- The policies should provide the employee with notice of misconduct and failure to perform that will result in disciplinary action.

General Goals an Employer's Policy Should Have

1. To maintain a set of standards for performance and behavior that is reasonable, fair, and equitably applied;

2. To communicate standards for employee performance and behavior that support the employer's mission and values;

3. To prescribe corrective action and outline disciplinary measures to be taken when employee performance or behavior is not reaching expectations and requirements; and

4. To provide affirmative feedback when the employee's performance or behavior changes with the goal of meeting expectations.

Make sure employees understand your expectations before considering disciplinary action

- Employers and supervisors should clearly communicate to the employee and approve that the employee clearly understands what is expected of him or her in the workplace.
- Employers should make sure their expectations of their employees are reasonable and clearly stated, such as within the employee's job description, employee handbook, and company policies and procedures.
- Employers should ensure that employees have access to and knowledge of:
  - Applicable law
  - Policies and Procedures
  - Professional development or other learning and training opportunities, if applicable, and
  - A safe and professional work environment that promotes an employee's ability to carry out assigned job duties and responsibilities.

Workplace Investigations

- Under California and federal law, complaints involving discrimination or harassment may require the employer to conduct a prompt, thorough, and impartial investigation.
- California courts and California's Fair Employment and Housing Commission (FEHC) require employers who receive complaints to investigate promptly and take appropriate remedial action.
- Additionally, investigations may become necessary for potential or actual violations of company policy, and complaints related to policy, employee violations of policy and procedures, and broader issues arising in the workplace that require investigations.

What are workplace investigations?

- A workplace investigation is conducted when there is credible information that there may have been wrongdoing, wrongful behavior, misconduct, or ethical failures/slip-ups/violations within the workplace.
- Investigations can help the employer identify and resolve internal problems before they become widespread by hiring or using a neutral person to fact-find on the matter or complaint.
- Workplace investigations are an important aspect of an ethical, functioning, and organized business.
- Employers would benefit from developing a guide or policy that outlines specific protocols or measures that are taken when an employee raises a complaint relating to the workplace or its people.
- A guide or policy would make it easier for an employer to follow a complaint process from start to finish using an organized method, therefore creating a uniform and consistent manner of handling conflict or wrongful conduct in the workplace.

Brief tips on workplace investigations

- Listen attentively to the employee's allegations.
- Take any immediate action or reasonable steps necessary to protect the complainant – this may become necessary even before commencement of an investigation depending on the situation.
- Provide a thorough, fair, and complete investigation. Part of the success of an investigation is making sure the appropriate investigator is chosen for the job (this person must be a neutral, knowledgeable, and an impartial third party).
- Draw reasonable and good-faith solutions based on the results of the investigation, inform both parties of the investigation results, and communicate this information to all parties involved. Make sure there is a clear understanding of the results and outcome.
- Take appropriate corrective action and remedial measures to protect the complaining employee, enforce anti-harassment policy, and make any necessary changes to policies to further improve workplace conditions and to promote a healthy workplace environment.
- Employers may want to consult with an experienced attorney when confronted with a harassment complaint or allegations.

Documentation

- Employers will benefit from making sure their business practices involve documentation.
- Documentation and notetaking of an employee's alleged performance deficiency, behavior, violations, and accomplishments may later on provide guidance when disciplinary action becomes necessary.
- Documentation will allow for assessment of the employee's conduct leading to potential disciplinary action, and for a more accurate decision-making process for the employer.
- *Note:* like many workplace assessments, a workplace investigation may become necessary, and documentation should include any fact-finding activities, discussion with the employee and other relevant parties, or witnesses, analyses and determination of findings, and follow-up corrective or remedial actions.

Documenting general performance evaluations

- Performance evaluations are a type of review that occur when an employer provides feedback to an employee about their work performance.
- While performance evaluations are not mandatory, it is a good business practice for employers to conduct work performance evaluations of their employees, which provides feedback, notes, and documentation of both positive and negative aspects of the employee's performance.
- Document both positive and negative elements of employee performance. Failure to reference negative performance or failure to perform can diminish the validity of the evaluation.
- Employers should be aware that in providing performance evaluations, they must comply with relevant California and federal law.
- These laws include worker's privacy infringement, federal and state anti-discrimination laws under Title VII, Equal Pay Act, Americans with Disabilities Act, laws that may have a disparate impact on work performance evaluations, any applicable breach of contract laws, and negligence in performing the workplace evaluation that wrongfully led to an employee's discharge.

Documentation: continued

- Additionally, warnings, Performance Improvement Plans (PIP), or other types of final warnings and termination notices should be documented, with as much detail as possible, showing an employer's reasoning for the steps and actions taken.
- Like many workplace assessments, when a workplace investigation becomes necessary, documentation should include any fact-finding activities, discussion with the employee and other relevant parties, or witnesses, analyses and determination of findings, and follow-up corrective or remedial actions.

Severance Agreements

- A separation or severance agreement is a contract that an employer may ask an employee to sign when the employee is terminated from employment. Severance pay is often offered in exchange for an employee's release of legal claims against the employer.
- A release of claims option will allow employers to avoid litigation in the future with the employee and may cause the employee to disclose litigation intentions.
- Severance contracts that contain a release of all claims against an employer in exchange for severance pay or other benefits are legal, enforceable, and binding when compliant with California law.
- However, an employer cannot require an employee to release their claims in exchange of payment for hours already worked or benefits already owed to the employee.

Severance Agreements: SB 331

- SB 331's "Silenced No More Act" imposes restrictions on severance and settlement agreements.
- Under SB 331, an employer is prohibited from including provisions in the separation agreement that prevents the disclosure of "information about unlawful acts in the workplace" including information related to harassment, discrimination, retaliation, or any other conduct that would be considered unlawful.
- Separation agreements must clearly communicate to the employee that he or she has the right to consult an attorney regarding the agreement and at least five business days to consider the separation agreement.
- An employee may sign the agreement earlier so long as the employee's decision is "knowing and voluntary" and is not induced by the employer through fraud, misrepresentation or a threat to withdraw or alter the offer.

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