

**EFFECTIVE EMPLOYEE DISCIPLINE
(OR: HOW TO FIRE AN EMPLOYEE WITHOUT GETTING SUED)
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One of the most unpleasant tasks for a business owner is confronting the non-productive or misbehaving employee. Employees are a company's most valuable resource but they can also be a sinkhole of wasted costs, time and resources if the "rotten apple" isn't quickly pruned. Here are some approaches to consider when handling the employee in need of counseling or discipline.

Why can't I just fire the bum?

Minnesota, like most states, still employ the "at-will" rule of employment law, meaning that an employer can terminate an employee at any time for any reason so long as it is not an unlawful or discriminatory reason. You should be sure that your handbooks or employment offer letters clearly state that the employment offered is "at-will" to preserve your discretion to terminate unsatisfactory employees. However, even under the "at-will" rule, there are good reasons have a process in place to counsel and discipline employees prior to pulling the trigger on a termination.

The first is simply the need to find and keep good employees. That is still one of the biggest challenges for any business. Most people want to succeed at what they do, but sometimes they need feedback and direction to get there. The first assessment you should make is whether the employee in question has the ability to succeed. If you think they do, a process of counseling that gets the employee to clearly buy into your expectations can be extremely effective.

For those employees who cannot be salvaged, documentation is the key to avoiding the cost of litigation. While you have the right to terminate an employee "at-will," state and federal laws protect employees from discharge as a result of unlawful discrimination and whistle-blowing in a variety of situations. Think of it in this way. You want to have an employment file that is so clear and convincing that the termination was for good cause, that if it is reviewed by a lawyer for the employee, the lawyer is convinced to skulk off and look for easier hunting grounds without even starting a fight.

Using a Performance Improvement Plan

The single most effective tool both for improving the performance of an employee as well as documenting their misdeeds, is a Performance Improvement Plan ("PIP"). Whether formal or informal, a plan that identifies how an employee can succeed in your company is the key to effective management. You should be able to communicate to your employee (1) what your expectations are for their performance; (2) what happens if they don't meet those expectations; and (3) what the time frame is that you will be using to measure their ability to succeed. As a part of this process, make sure you identify how you will support them in their efforts and what they can use for resources if they run into problems or have questions.

The most effective approach when an employee has veered off into a problem area is to reduce a PIP to writing and have the employee sign it. This is different than a disciplinary warning. A PIP is a form of "contract" the employee is making that he or she will take the steps set forth if the employee signs off on the PIP agreeing to perform in a certain fashion, there is a significantly

higher probability they will do so in comparison to simply issuing a “warning.” Moreover, if the employee doesn’t fulfill the agreement, the PIP is a very strong indicator that you had “good cause” for discipline or termination. It reflects a clear statement by the employee that he or she knew and agreed these were reasonable standards to meet and what the consequences would be if they didn’t. Generally, PIP’s are very persuasive with courts, agencies and even plaintiffs’ lawyers.

Documentation of any kind is valuable

An absolute key to limiting potential liability is to make sure that issues that arise are documented. Obviously a PIP is a great form of documentation. However, simpler and less elaborate documentation can be just as valuable. Emails and electronic communications to the employee, his supervisor or just notes to yourself can be effective. A note that you talked to the employee on a certain day and that this was said is much more persuasive than having to just rely on your memory. A series of short communications over things you might otherwise forget or not be able to recall in sufficient detail can build a clear record of the conduct of the employee. There is nothing your lawyer will like less, and a plaintiff’s lawyer will like more, than an employee file that has no documentation to support what you claim was the offending conduct. Again remember, it doesn’t have to be formal and it doesn’t have to be fancy, it just needs to be an understandable statement of what occurred.

Using a waiver and release

The surest way to avoid getting sued is to have an employee sign an agreement that they will not do so. If you are in a position where you are terminating an employee who may be likely to sue, it is well worth it to consider putting together a severance package and Waiver and Release Agreement. The cost of a few weeks or months of severance is generally far less than the costs of defense to a discrimination charge or lawsuit. Be sure to have your release forms reviewed by your legal counsel to ensure they comply with the requirement of state and federal law because there are a number of technical legal issues involved in releasing employee claims. Generally an employee must be given a period of time to consider whether or not to sign a release after it is offered to him or her, and then after it is signed, a period in which they can revoke the agreement and preserve their right to sue. You do not want to issue any severance payments until after these time periods have run out.