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Discipline Issues By: Louis P. DiLorenzo¹

Recently, I hosted a webinar for a national business organization concerning discipline issues. I have listed a few of the questions posed by listeners and thought that the questions and answers might be useful to you as you face similar discipline issues.

Question: If someone has recently engaged in protected activity under state or federal law, can they still be subject to discipline for improper conduct or performance?

Answer: The simple answer is yes, however, special care must be taken in such situations. If discipline is given out in such circumstances, care should be taken to insure that the employer can prove that the same discipline would have been taken regardless of whether the employee was or was not involved in such conduct. If the employer cannot do so, then it should either select a level of discipline that it can safely defend or limit the damage exposure.

Question: Is it ever appropriate to solicit input from the employee concerning appropriate discipline?

Answer: It is not usually appropriate to do so. However, there may be situations, particularly harassment cases, where it makes some sense to share information concerning the action taken. In this way, the "victim" knows that steps were taken and is made aware that if there are further incidents, they should be reported. It is not advisable to negotiate with the "victim", but good communication with the "victim" as to the status of the investigation and any decisions made concerning actions taken are important. Such communication can avoid litigation by the victim based on the erroneous assumption that no action or insufficient action has been taken in response to the complaint.

Question: If in the past a company has imposed lenient penalties for certain offenses (e.g., sexual harassment), how does it change this past practice going forward?

Answer: The best way to change this type of situation is to communicate with the employees the employer's new expectations. This might be done by a rule change, a written communication explaining the change and the reasons for it, a posting, negotiating the change with a union if a collective bargaining relationship is involved, meetings with employees, notice on a pop up screen, etc. The purpose is to forewarn the employees, the union if necessary, of the probable consequences of their actions if they engage in such conduct. By republishing the rule and the intended penalty it destroys the previous practice and any expectations of how the matter is to be treated prospectively.

Question: Can employees be disciplined for off-duty conduct?

Answer: The short answer is yes. However, there are many considerations that should go into such a decision. The single most important consideration should be whether the conduct impacts or could impact the employer's interests. Does it affect the good will of our business or indicate the employee is not fit to work for the organization. Most labor arbitrators, for example, impose a requirement that there be some nexus between the off duty conduct and the job. A bank teller convicted of shop lifting and a teacher involved in child pornography are easy examples. If the conduct is criminal, New York has an ex-offender law which prohibits a refusal to hire someone or terminate them, due to a prior conviction, unless there is a nexus. Also, it is illegal to fire someone due to an arrest, that has not resulted in a conviction. It is not illegal, however, to conduct an investigation as to whether someone has engaged in conduct that indicates their continued employment is not appropriate, even if there is an arrest pending. For that reason, employers should conduct their own investigation into the off duty conduct and make the employment decision irrespective of the criminal arrest or outcome of the criminal proceeding. It is usually a mistake to suspend someone pending the outcome of the criminal proceeding. There is also an Labor Law statute, Labor Law section 201-d, which protects employees engaged in lawful off duty conduct which does not materially conflict with the employer's interests. Activities such as union activity, recreational activity, lawful use of consumable products and political and other free speech activities are protected. Of course, off duty conduct ignored by an employer could expose the employer to liability to third parties for foreseeable danger and risk to third parties served by the employer. For example, a customer service counter represented convicted of assault off duty, may expose an employer to "negligent retention" when the employee assaults a customer during a work related argument. Given all these competing considerations, care should be taken when an employer learns of an employees off duty misconduct.

Be careful out there!

(Footnotes)

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