

HIRING, FIRING AND DISCIPLINING OF EMPLOYEES
IN A MEDICAL OFFICE

October 15, 2005

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HIRING

Title VII, the ADA and the ADEA all prohibit discrimination by employers in their hiring practices. Any private employer with more than 15 employees (Title VII, ADA) or 20 employees (ADEA) must be careful in how it advertises, interviews and fills job positions to avoid claims of unlawful discrimination.

I. Initial Hiring Steps

Job Description

Writing a job description will not only assist the employer in refining what skills a particular job will require but it can also establish objective criteria that can screen applicants and be used as evidence should an unwarranted claim of discrimination be filed. The job description should focus on the specific skills required for the position, rather than the personal attributes an employer may be looking for. The employer should consider what the essential functions of the job are and should list them. This will be helpful should a claim be brought against the employer under the ADA since disabled persons must demonstrate that they would have been able to perform the essential functions of the job with or without accommodation.

Job Advertisements

After writing a job description outlining the specific skills required for the position, the advertisement posting the available position should be worded similarly to the job description. Advertisements and job descriptions should be written in gender-neutral terms and avoid language that may suggest age bias. For example, many employers advertise openings by requiring a certain number of years of experience. Although common, it can lead to ADEA charges when there is a cap on the number of years of experience or reverse age discrimination claims when the number of years of experience required is high. Instead, the employer should list the specific type of skills that they expect a person with the desired (but unlisted) number of years experience would possess. Age bias can also be inferred based on the way that the employer characterizes itself. An advertisement by a “young, energetic firm” may infer that older candidates are not desired. All job advertisements should include a non-discrimination, equal opportunity employment statement to clearly refute any inferences or perceptions of bias or discrimination. Advertisements should be made either publicly or posted. Job openings that are filled by word of mouth invite claims that the employer selectively invited potential applicants and therefore engaged in discrimination.

Job Applications

Applications should contain a statement that the company is an equal opportunity employer, as well as a statement confirming that any falsifications of the information on the application is grounds for disciplinary action, up to and including termination. The application should contain a statement that the employee understands that the employment offered is "at will" and that such relationship can only be modified by written agreement signed by both the employee and an authorized officer of the company. The application should also require the applicant to provide written consent and release of liability for the employer to contact former employers, schools and references. Moreover, an agreement not to reveal trade secrets or confidential information that the candidate learns during the application and interview process may also be included.

It is important to verify the statements made by a candidate in his or her application for employment and resume. Employers should make sure that when seeking background information on a job applicant, the information sought is relevant to the job. Generally, information listed on a prospective employee's resume will be considered relevant. As most employers know, incidents of resume fraud are common, so employers should not hesitate to request educational transcripts, certifications and other proofs of qualifications from an applicant. However, make sure that such requests are directed to all similar situated applicants and not targeted to one particular group.

II. Preparing for and Conducting Interviews

Innocent questions during interviews can often result in employers having to defend charges of discrimination filed with the EEOC and various state agencies, including the Human Rights Commission and the Attorney General's Office. When charges of discrimination are filed, the burden of proof usually falls on the employer to show that all preemployment questions are job-related and not discriminatory. If discrimination is found, an applicant may be awarded damages, including a job offer, attorney costs, and other benefits. Following enactment of the Civil Rights Act of 1991, successful claimants may also demand jury trials and receive compensatory damages (i.e., money paid for emotional pain and suffering) of up to \$300,000, depending on the employer's size, and punitive damages, plus legal fees and money for expert witnesses who testify at the trial. Thus, employers face lost productivity, poor publicity, and expensive legal fees costs and verdicts for sloppy pre-employment interviewing techniques.

Interview Tips

Employers should have a planned outline of questions that will be asked of every applicant. All questions should be job-related. Questions regarding a person's experience, skills, motivations and interests are permissible. Questions regarding a person's age, marital status, race, religion, national origin, immigration status, disability, citizenship are prohibited. The employer should decide who is going to conduct interviews and have at least two persons available to avoid he said/she said disputes. The interviewers should be instructed not make statements regarding the likelihood of a person being hired at the interview or make any guarantees or statements regarding the length of employment for the position. Interview notes should be maintained separately from the application and resume and should focus on job-related information learned during the interview. The notes should never contain any references to an applicant's race, age, sex, national origin, etc.

Permissible Interview Questions

Employers may do a wide variety of things to evaluate whether an applicant is qualified for the job, including the following:

- * Employers may ask about an applicant's ability to perform specific job functions. For example, an employer may state the physical requirements of a job (such as the ability to lift a certain amount of weight, or the ability to climb ladders), and ask if an applicant can satisfy these requirements.
- * Employers may ask about an applicant's non-medical qualifications and skills, such as the applicant's education, work history, and required certifications and licenses.
- * Employers may ask applicants to describe or demonstrate how they would perform job tasks.

It is important however that the employer ask these types of questions to all applicants.

Inappropriate/Suspect Questions

Below are examples of interview questions that could cause a company to be liable for an employment-related claim:

- * What is your maiden name so that I can check your references?

Asking for a female's maiden name can discriminate against her on the basis of marital status and potentially on national origin. A permissible question would be to ask the interviewee if she has used any other names in the past (not necessarily due to marriage) that will allow your company to verify the candidate's past or experience in education.

* How old are you? What is your birth date? When did you attend/graduate from high school?

These questions could violate the Age Discrimination in Employment Act ("ADEA"). Generally, there is no problem asking the candidates the year of college graduation because individuals can graduate from college at any time in their lives, so there is no way to determine a person's age. But, by asking when someone graduated from high school, a year of birth could be readily determined as most people graduate from high school around 17 or 18 years of age.

* Where were you born? Are you a U.S. citizen? Where did you learn to speak Spanish? What is your first/native language?

These questions run afoul of laws designed to prohibit discrimination based on national origin, birth place and citizenship. Employers are cautioned to ask the candidate to submit verification of legal right to work in the United States *after* they have made an offer of employment to the candidate. Employers may state that proof of the applicant's legal right to work will be required if hired. Employers are also permitted to ask whether an individual can speak a foreign language, but asking how the applicant learned to speak that language tends to require the individual to reveal his/her national origin.

* Are you married? Are you pregnant? Are you planning on having children in the next few years? Can you make adequate provisions for child care?

These types of inquiries tend to adversely impact women and should be avoided at all costs. If an employer is concerned about whether the candidate can comply with overtime demands or travel expectations, then the interviewer should ask the candidate if he/she knows of any reason why he/she could not meet those requirements.

* Will your religion prevent you from working weekends?

Such a question discriminates on the basis of religion. An alternative way to find out this same information would be for the interviewer to tell the candidate that weekend and holiday work is often required and to ask the candidate if that is acceptable as a condition of employment.

*What is your height and weight?

Questions about an applicant's height or weight may be asked, but only if height or weight is a bona fide occupational qualification that is demonstrably related to safe and efficient job performance.

* Have you ever been arrested?

It is allowable to ask a candidate if he or she has ever been convicted of a felony (typically, this information is found on an employment application), but this question must be accompanied by a statement that a conviction will not necessarily disqualify a candidate from consideration for the job. The EEOC has determined that asking an individual if they have ever been arrested, however, is not an appropriate question because it has a disparate impact on minorities.

*What is the name, address and *relationship* of relative or other individual to be notified in case of accident or emergency?

This question can seek information regarding a person's sexual orientation, national origin, etc. Employer should state that the name and address of an individual to be notified in case of an accident or emergency will be required upon hire.

* What kind of discharge did you get from the military?

Any questions regarding military service must be limited to relevant skills acquired during service and duties performed.

* Have you ever declared bankruptcy or had your wages garnished?

Courts have held that this question has had an adverse impact on minorities. It is very difficult to come up with an alternative acceptable question. However, employers can make employment offers contingent upon credit checks provided that applicable state and federal laws are followed and good credit is necessary to perform the essential job functions of the job.

III. Hiring Questions & Issues under the ADA

* Are you disabled? Do you have any previous major medical problems? Have you ever filed for workers' compensation? How many days were you sick last year? Have you ever been treated for alcoholism for mental health problems?

The ADA requires businesses with fifteen or more employees to make their facilities accessible to the physically and mentally disabled and affirmatively prohibits discrimination on the basis of disability. The ADA mandates that companies cannot exclude qualified persons from a job if the person can perform the "essential functions" of the job either unaided or with "reasonable accommodations". An alternative to these questions would be to describe the essential job functions to the candidate and then ask the individual whether he/she is capable of performing the job function.

Pursuant to the EEOC, employers are allowed to ask questions before an offer of employment is made concerning reasonable accommodation only if:

- a. The employer reasonably believes the applicant will need reasonable accommodations because of an obvious disability;
- b. The employer reasonably believes the applicant will need reasonable accommodations because of a hidden disability that the applicant has voluntarily disclosed to the employer; or
- c. If an applicant has voluntarily disclosed to the employer that he or she needs reasonable accommodations to perform the job.

While the EEOC permits employers to obtain relevant information in the above situations, it cautions that an employer's queries may only be made in limited circumstances. Aside from the above listed exceptions, an employer may not ask questions on an application or in an interview about whether or not an applicant will need reasonable accommodation for a job.

Under the ADA an employer may ask disability-related questions and require medical examinations of an applicant only after the applicant has been given a conditional job offer. This helps ensure that an applicant's possible hidden disability (including a prior history of a disability) is not considered before the employer evaluates an applicant's non-medical qualifications. An employer may not ask disability-related questions or require a medical examination pre-offer even if it intends to look at the answers or results only at the post-offer stage.

If a post-offer question or examination screens out an individual because of a disability, the employer must demonstrate that the reason for the rejection is "job-related and consistent with business necessity." In addition, if the individual is screened out for safety reasons, the employer must demonstrate that the individual poses a "direct threat." This means that the individual poses a significant risk of substantial harm to him/herself or others, and that the risk cannot be reduced below the direct threat level through reasonable accommodation.

Disability Related Questions

A disability-related question is one that is likely to elicit information about a disability. This includes directly asking whether an applicant has a particular disability. It also means that an employer cannot ask questions that are closely related to disability. However, if there are many possible answers to a question and only some of those answers would contain disability-related information, that question is not "disability-related."

* May an employer ask whether an applicant can perform the job?

Yes. An employer may ask whether applicants can perform any or all job functions, including whether applicants can perform job functions "with or without reasonable accommodation."

* May an employer ask applicants to describe or demonstrate how they would perform the job (including any needed reasonable accommodations)?

Yes. An employer may ask applicants to describe how they would perform any or all job functions, as long as all applicants in the job category are asked to do this.

* May an employer ask a particular applicant to describe or demonstrate how s/he would perform the job, if other applicants aren't asked to do this?

When an employer could reasonably believe that an applicant will not be able to perform a job function because of a known disability, the employer may ask that particular applicant to describe or demonstrate how s/he would perform the function. An applicant's disability would be a "known disability" either because it is obvious (for example, the applicant uses a wheelchair), or because the applicant has voluntarily disclosed that s/he has a hidden disability.

*May an employer ask applicants whether they will need reasonable accommodation to perform the functions of the job?

In general, an employer may not ask questions on an application or in an interview about whether an applicant will need reasonable accommodation for a job. This is because these questions are likely to elicit whether the applicant has a disability (generally, only people who have disabilities will need reasonable accommodations).

Example: An employment application may not ask, "Do you need reasonable accommodation to perform this job?"

Example: An employment application may not ask, "Can you do these functions with ___ without ___ reasonable accommodation? (Check One)"

Example: An applicant with no known disability is being interviewed for a job. He has not asked for any reasonable accommodation, either for the application process or for the job. The employer may not ask him, "Will you need reasonable accommodation to perform this job?"

*May an employer ask whether an applicant can meet the employer's attendance requirements?

Yes. An employer may state its attendance requirements and ask whether an applicant can meet them. An employer also may ask about an applicant's prior attendance record (for example, how many days the applicant was absent from his/her last job). These questions are not likely to elicit information about a disability because there may be many reasons unrelated to disability why someone cannot meet attendance requirements or was frequently absent from a previous job (for example, an applicant may have had day-care problems).

*May an employer ask applicants about their certifications and licenses?

Yes. An employer may ask an applicant at the pre-offer stage whether s/he has certifications or licenses required for any job duties. An employer also may ask an applicant whether s/he intends to get a particular job-related certification or license, or why s/he does not have the certification or license. These questions are not likely to elicit information about an applicant's disability because there may be a number of reasons

unrelated to disability why someone does not have, or does not intend to get, a certification/license.

*May an employer ask applicants about their workers' compensation history?

No. An employer may not ask applicants about job-related injuries or workers' compensation history. These questions relate directly to the severity of an applicant's impairments. Therefore, these questions are likely to elicit information about disability.

*May an employer ask applicants about their current illegal use of drugs?

Yes. An employer may ask applicants about current illegal use of drugs because an individual who currently illegally uses drugs is not protected under the ADA (when the employer acts on the basis of the drug use).

*May an employer ask applicants about their lawful drug use?

No, questions about current or prior lawful drug use are likely to elicit information about a disability, and are therefore impermissible at the pre-offer stage. For example, questions like, "What medications are you currently taking?" or "Have you ever taken AZT?" certainly elicit information about whether an applicant has a disability.

*May an employer ask third parties questions it could not ask the applicant directly?

No. An employer may not ask a third party (such as a service that provides information about workers' compensation claims, a state agency, or an applicant's friends, family, or former employers) any questions that it could not directly ask the applicant.

What is a Medical Examination?

A "Medical Examination" is defined as a procedure or test that seeks information about an individual's physical or mental impairments or health.

At the pre-offer stage, an employer cannot require examinations that seek information about physical or mental impairments or health. The following factors are helpful in determining whether a procedure or test is medical:

- (1) Is it administered by a health care professional or someone trained by a health care professional?
- (2) Are the results interpreted by a health care professional or someone trained by a health care professional?
- (3) Is it designed to reveal an impairment or physical or mental health?
- (4) Is the employer trying to determine the applicant's physical or mental health or impairments?
- (5) Is it invasive (for example, does it require the drawing of blood, urine or breath)?
- (6) Does it measure an applicant's performance of a task, or does it measure the applicant's physiological responses to performing the task?
- (7) Is it normally given in a medical setting?
- (8) Is medical equipment used?

In many cases, a combination of factors will be relevant in figuring out whether a procedure or test is a medical examination. In some cases, one factor may be enough to determine that a procedure or test is medical.

Example: An employer requires applicants to lift a thirty pound box and carry it twenty feet. This is not a medical examination; it is just a test of whether the applicant can perform this task. But, if the employer takes the applicant's blood pressure or heart rate after the lifting and carrying, the test would be a medical examination because it is measuring the applicant's physiological response to lifting and carrying, as opposed to the applicant's ability to lift and carry.

Physical Agility Tests

*May an employer require applicants to take physical agility tests?

Yes. A physical agility test, in which an applicant demonstrates the ability to perform actual or simulated job tasks, is not a medical examination under the ADA.

Example: A police department tests police officer applicants' ability to run through an obstacle course designed to simulate a suspect chase in an urban setting. This is not a medical examination.

*May an employer require applicants to take physical fitness tests?

Yes. A physical fitness test, in which an applicant's performance of physical tasks, such as running or lifting, is measured, is not a medical examination.

However, if an employer measures an applicant's physiological or biological responses to performance, the test would be medical.

Example: A messenger service tests applicants' ability to run one mile in 15 minutes. At the end of the run, the employer takes the applicants' blood pressure and heart rate. Measuring the applicant's physiological responses makes this a medical examination.

IV. Drug and Alcohol Testing

Private Texas employers may implement illegal drug testing programs for applicants and employees. An employer may test for drugs at the time of employment, during the employment for cause, post-accident, upon reasonable suspicion, as part of some regular program or event, or on a random basis.

Under the ADA, employers are limited in their ability to conduct alcohol testing programs, which are defined as medical examinations. Employers may not conduct alcohol testing for applicants prior to an offer of employment. Employers may conduct alcohol testing for applicants on a post-offer, pre-employment basis (extended offer of employment contingent on alcohol test results), but only if the testing is always conducted for those individuals in this category (cannot selectively test). Employers cannot subject its employees to periodic alcohol testing unless such testing is job-related and consistent with a business necessity. This means that the employer must have a reasonable belief based on objective evidence that an employee it wishes to subject to the alcohol testing will be unable to perform the essential functions of his or her job or will pose a direct threat. Employers may maintain and enforce rules prohibiting the use of alcohol in the workplace and may conduct alcohol testing if it has a reasonable belief that an employee is under the influence or has been drinking during work hours.

Drug and Alcohol Policy.

An employer that wishes to conduct drug and/or alcohol testing should have an established policy. To avoid claims of discrimination or wrongful termination, an employer must ensure that it neutrally applies its policy and actively enforces the policy for all employees. Any drug and alcohol policy implemented must be clearly communicated to the employees, including a detailed description of the procedures that will be used to carry out the policy, the substances that will be tested, the cut-off levels for positive and/or negative results, the consequences for positive results, and the written

steps of the chain of custody procedures for drug testing (prior to testing). The policy should provide that the employer will acquire written consent of an employee prior to testing, have the test performed by a reputable lab within an established chain of custody, follow up an initial positive result with a more accurate confirmation test, and keep all results as confidential as possible. Only those persons involved in an employment-related decision based on any test results should have access to this information. Further, violations of a written drug-free workplace policy constitutes misconduct so as to disqualify a former employee from unemployment benefits if the policy meets certain requirements and was followed by the employer. To establish that an employee's positive drug test result constitutes misconduct for unemployment purposes, an employer must present: (1) a policy prohibiting a positive drug test result, receipt of which has been acknowledged by the employee; (2) evidence to establish that the employee has consented to drug testing under the policy; (3) documentation to establish that the chain of custody of the employee sample is maintained; (4) documentation from the drug testing laboratory to establish that an initial test was confirmed; and (5) documentation of the test expressed in terms of a positive result above a stated test threshold.

V. After the Selection Process

Conditional Job Offer Inquiries, Tests, Examinations

After giving a job offer to an applicant, an employer may ask disability-related questions and perform medical examinations. The job offer may be conditioned on the results of post-offer disability-related questions or medical examinations.

At the "post-offer" stage, an employer may ask about an individual's workers' compensation history, prior sick leave usage, illnesses/diseases/impairments, and general physical and mental health.

If an employer asks post-offer disability-related questions, or requires post-offer medical examinations, it must make sure that all entering employees in the same job category must be subjected to the examination/inquiry, regardless of disability and any medical information obtained must be kept confidential.

*At the post-offer stage, may an employer ask all individuals whether they need reasonable accommodation to perform the job?

Yes.

*If, at the post-offer stage, someone requests reasonable accommodation to perform the job, may the employer ask him/her for documentation of his/her disability?

Yes. If someone requests reasonable accommodation so s/he will be able to perform a job and the need for the accommodation is not obvious, the employer may require reasonable documentation of the individual's entitlement to reasonable accommodation. So, the employer may require documentation showing that the individual has a covered disability, and stating his/her functional limitations.

Example: An entering employee states that she will need a 15-minute break every two hours to eat a snack in order to maintain her blood sugar level. The employer may ask her to provide documentation from her doctor showing that: (1) she has an impairment that substantially limits a major life activity; and (2) she actually needs the requested breaks because of the impairment.

Rejection/Offer Letters

Employers should have a consistent process for notifying applicants if they have or have not been hired. Usually, rejection letters do not present much of a liability risk unless the employer is careless and includes a legally impermissible reason for the rejection. Employers should send rejection letters that do not state any particular reason for the applicant's rejection. The employer, however, should retain information about the applicant in its internal files so that if a rejection is challenged, the legitimate non-discriminatory reason for the rejection can be provided.

In contrast to rejection letters, offer letters have been a significant source of claims. Employers should carefully review the language in their offer letter and delete any language creating any expressed or implied contractual obligation. The offer letter can also be used to confirm that the employment being offered is employment on an at will basis and that the employment relationship is not governed by any contractual provisions.

VI. Arbitration Agreements

Employers should consider making an arbitration agreement as a condition for that person's application even being considered or as a condition for an offer of employment. The arbitration agreement would essentially be a promise from the employee to submit all employment disputes to arbitration. These types of arbitration agreements have been upheld by Texas courts for at-will employees under certain circumstances, thereby

permitting employers to avoid litigation. The arbitration agreement could specify the rules, procedures and deadlines for adjudicating the dispute and minimize the amount of time, expenses and trouble that the employer would otherwise experience had the dispute been adjudicated in court. The enforceability of such arbitration agreements will depend on several factors; employers considering an arbitration agreement should consult with an attorney for assistance in preparing the most favorable agreement for the employer that will be enforceable in a Texas court.

EMPLOYEE DISCIPLINE

VII. Benefits of an Employee Disciplinary System

The implementation of a disciplinary system in any employment or business setting serves several purposes. The first role of such a system is to encourage the company's employees to conduct themselves and to perform their tasks in ways that enhance or further the services that the company provides, and the work environment that exists at the company day in and day out. The disciplinary system is in place to call attention to, and if necessary enforce, the company's business or personnel policies. These policies, in turn, should be created and modified from time to time in order to address particular issues that are significant to the individual company, such as punctuality, absenteeism, carelessness, or job specific tasks and requirements.

The second role or aspect of the disciplinary system is the creation of fair and understood guidelines within which company rules and policies will be enforced. A graduated, predictable system of disciplinary procedures enhances the effectiveness of personnel policies by providing interim steps that are more likely to be taken. These interim steps serve to maintain the understanding on the part of the employees that company rules will be enforced, and so must be observed, while not demoralizing the employee to the point where they're no longer motivated to try and be a good employee.

The third beneficial effect of a good disciplinary policy is that it often boosts the morale of other employees. It's true that the employee you discipline is not likely to enjoy a morale boost, but the rest of your workforce will. Other employees do not like to see a coworker getting away with poor, unproductive behavior while they work thanklessly at their jobs. And, if the problem employee is allowed to misbehave without suffering any consequences, others in the workforce will soon realize that they can get away with slacking off, too.

Finally, a properly designed and implemented disciplinary system should result in the creation of documented history of an employee's performance or nonperformance that can be used at a later date as evidence to substantiate the motivation behind a significant adverse employment action, such as a termination, demotion, or suspension without pay.

Essentially, an effective disciplinary system should help a business retain employees and keep them functioning well on behalf of the company, but also provide some amount of protection in the event that a disgruntled employee, or former employee, tries to bring a legal action against the company for what the employee claims was an unfair and adverse employment action.

The Example of Absenteeism

Absenteeism is what happens when, on a workday, an employee decides that there is some place else he or she should be rather than at work. These absences can result from a range of events like illnesses to absences for personal reasons and family concerns. Occasional or infrequent absences are generally not a major problem. On the other hand, chronic absenteeism, where the occurrences are continued and repeated, can cause significant problems regardless of the justification for the absences. Unscheduled absences play havoc with the employer's productivity and personnel management, while also significantly eroding the morale of the present workers who typically have to shoulder the additional workload left behind by the absent employees. Plus the employer frequently ends up having to pay the person for not working.

The most effective way to deal with the problem of absenteeism is through an attendance policy that is part of your Employee Handbook, and the enforcement of that policy through a graduated or progressive disciplinary system.

VIII. Elements of an Effective Disciplinary System

An employer's primary defense against poor employee performance or conduct, such as chronic or excessive absenteeism, is the development of clear company personnel policies or rules, and the enforcement of those rules through the implementation of a disciplinary system. The goal of such a system is to maximize employee performance while attempting to promote fairness for all employees and maintain overall work efficiency. This system can also help an employer create a consistent approach to managing and documenting employee performance and conduct issues. Finally, to be effective the system, and the rules it enforces, have to be communicated clearly, and

probably often, to the employees and to their supervisors who are charged with their implementation.

A clear and effective disciplinary system should be fair, flexible and preventive and should encompass the following key elements:

- Clear, straightforward guidelines;
- Instructions for managers in tracking employee performance and infractions;
- Policies that define and explain job performance and workplace conduct that will result in discipline;

- Distinguishes between excused conduct, (such as an employee's absence due to reasons outside their control such as injury, death in the family, illness) and unexcused conduct (such as absences without proper authorization that are within an employee's control);
- Provides for and requires open communication;
- A time line or plan of action for addressing problem behavior or performance; and,
- Provides a clearly demarcated and graduated system of escalating disciplinary actions, culminating in termination.

Considerations In Writing A Disciplinary Policy

The goal in writing an effective disciplinary policy is to give your employees clear notice of the consequences of poor performance or behavior. With this said, the policy should also make a provision for a deviation from the disciplinary regime in special circumstances arise. For example, even though you may generally follow a policy of progressive discipline (in which a first offense is met with a verbal warning, a second offense with a written warning, and so on), you should always reserve the right to immediately fire an employee who engages in particularly egregious misconduct. You'll also want to avoid any hint of a promise that employees will not be fired unless they engage in specific misconduct-you may find that your employee's dream up types of conduct you never considered, or that you have to fire employees for reasons entirely separate from their performance (an economic downturn or office closing, for example).

Most often, the type of employee conduct that warrants discipline results from unacceptable behavior or performance, or the violation of the company's policies, practices or procedures. However, discipline may be issued for conduct that falls outside of those identified areas. This is why you should include the possibility of accelerated discipline so that the employer need not always resort to progressive discipline, but may

take whatever action it deems necessary to address the issue at hand. This may mean that more or less severe discipline is imposed in a given situation. Likewise, some company policies such as sexual harassment or other forms of discrimination may contain their own specific disciplinary procedures. For example, you probably wouldn't want to, and it probably would not be prudent to, simply write up or verbally warn an employee after he or she threatened physical violence against another employee.

A Progressive, Positive Approach to Discipline

In addition to developing and maintaining well written workplace rules and personnel policies, applying the disciplinary policy progressively and consistently is crucial. This disciplinary program gives employees specific feedback, timelines, and action plans for improvement. It also requires supervisors to confront employee misconduct and document the disciplinary proceedings.

The first and probably most important aspect of this process is careful and thorough documentation. Employees are often supervised by more than one manager; documentation makes it easier to track behavior and performance, and to determine exactly what the next level of discipline needs to be. Most importantly, consistent documentation is instrumental in helping to establish that applied discipline (if necessary) was justified, and not retaliatory. Disciplining employees is often an unpleasant and unfortunate aspect of a supervisor's job, but doing it right and consistently is also one of the most important parts of the supervisor's job.

Progressive discipline is a multi-step process, which may include the following steps:

-Oral counseling – sitting down and meeting with the employee and relating in detail what went wrong and what needs to happen so that the employee will comply with the company's expectations. Documentation of the oral counseling session should be placed in the employee's file, including the reason for counseling, the date and time of the meeting, and who was present. Having a witness other than the supervisor is recommended.

-First written warning. If the outlined goals, results and performance from the verbal counseling do not produce the desired behavior, the next step in the progressive discipline process is to issue the first written warning. The warning should detail in writing, the behavior behind the violation, the specific policy or regulation involved, and the corrective measures that need to take place. The date and time the written warning was administered should be recorded along with the

employee's signature, the manager's signature and the signature of the human resources official as well. It is often difficult to get the employee to sign off on the write-up, but getting the signature can be extremely important down the line when the employee claims that the documentation was created later to cover up some discriminatory or retaliatory motive.

-Second written warning. It may be appropriate to administer a second written warning. The unmet expectations should be outlined in writing and clear and specific goals for improvement need to be developed and thoroughly discussed.

-Final written warning. This written warning should clearly emphasize and explain that the policy violation and actions are one step away from termination if the behavior is not corrected immediately and effectively.

-Suspension; and/or

-Termination

Examples Of Conduct Subject To Discipline

Here are some examples of conduct that typically gives rise to disciplinary action. Offenses warranting disciplinary action can generally be divided into two groups:

1. Infractions calling for penalties aimed at correction but which can lead to more severe progressive discipline if not corrected.

-Tardiness;

-Unauthorized absence or early departure;

-Careless workmanship;

-Horseplay, swearing or other inappropriate behavior for the medical office setting; and

-Violation of Company dress code.

2. Infractions calling for more serious penalties, including discharge. These infractions include, but are not limited to:

-Stealing Company property;

-Offensive physical contact with any person, insubordination or refusal to obey a legitimate order or instruction;

- Consuming alcohol, non-prescription drugs or illegal substances on the job, or arriving at work under the influence of alcohol, non-prescription drugs or illegal substances;
- Intentionally damaging Company property;
- Violating Employee Codes of Conduct or Ethics;
- Violation of confidentiality rules governing patient health information;
- Possession of any sort of weapon on Company premises without prior written approval;
- Safety violations; and
- Illegal conduct on the job.

Tailoring Your Own Disciplinary Policy

The disciplinary system or policy just described is only one form of a progressive policy. With the knowledge that each employer has of his or her own business, the employer can customize the disciplinary system to allow less tolerance of certain misconduct or work rule violations that are particularly important to the employer's specific operation. If there are particular duties or tasks that are more central to the core of the company's operations, those can be identified and the disciplinary policy should state that only two or perhaps three infractions in these areas will be tolerated before termination.

One of the issues that may arise under the system described above, where the employee gets one oral and three written warnings before suspension or termination, is what to do about an employee who accrues all of the warning strikes against him or her and then goes for a long period without any other infractions. For example, what do you do if an employee gets their final written warning and then performs well for a year or more at their position? If the employee has truly turned their performance around most employers won't want to let them go. The way to deal with this type of situation is to include a provision in the disciplinary policy that negates the effect some of the warnings the employee has received if the employee goes a specific time without incurring any more disciplinary action. Employees could lose one warning every six months or two warnings a year, or at whatever rate the specific employer thinks would work with his or her business. The advantage of having a policy that makes this accommodation is that it allows you to explain why you fired one individual who ran through the disciplinary process with successive violations, while you did not fire another employee who obtained the same number of violations but over a much longer period of time.

Applying The Disciplinary Policy

Once you know that an employee has violated the company rule, you will have to dispense some of the discipline that you promise to your policy. Here are some guidelines to follow in that process.

Don't procrastinate. Once you have determined that discipline is in order, set up a meeting with the employee right away. The sooner you place the employee on notice, the sooner he or she will know that it's time to try harder-and the sooner you will know whether the employee will actually improve or whether you have to start considering other options.

Keep it private. Schedule a meeting with your employee to discuss the problem in an office or other separate location. As mentioned above, when possible all discipline should be imposed with a witness present at the meeting; but this should be the only exception to the private discipline rule. Make sure you can meet in a private place, away from eavesdropping coworkers and office gossip. Publicizing the fact that a particular individual is being disciplined can often add to the difficulties that employee is having, aside from the issue for which he or she is being disciplined. It is often helpful to give some consideration to the particular functioning of your office when arranging a disciplinary meeting in order to lower the obviousness and profile of the occurrence of the event. Ask any employee to meet with you during a particular time. Often this gives the employee the opportunity to interrupt his or her work and step away with as little notice as possible.

Be honest. While your natural tendency may be to accentuate the positive, now is not the time to indulge it. The purpose of this meeting is to notice and improve poor behavior. You must tell the employee precisely what the problem is, what steps he or she must take to be corrected, and the consequences of failing to do so. It is a good practice to point the employee to any written work rules he or she has violated, as well as the disciplinary policy that you are following during the meeting; this will add to the "firm but fair" nature of the disciplinary action.

Be respectful. Even bad news is best delivered with respect. Let your employee know that you want him or her to improve, and that you will help if you can. Set aside enough time for the meeting so that the employee will have an opportunity to respond. Make sure to listen to your employee's concerns; it may be the performance problem is the result of a misunderstanding or could be easily corrected if you work together.

Write it down. In addition to any written warning or other document provided to the employee, document the events and details of every disciplinary meeting, action or

discussion with each of your employees, and place that in the employee's personnel file. In the case of a written warning, be sure and give the employee a copy of the warning and ask him or her to sign it to acknowledge receipt. The presence or absence of these types of records are what may determine how well the employer can defend against a lawsuit in the event an employee chooses to sue the company for employment related misconduct.

Follow up. If you tell your employee that you must see improvement by a certain date, make sure to follow up. Check with your employee or their supervisor periodically to make sure everything is proceeding smoothly.

IX. Examples of attendance control policies.

Two common types of absenteeism/attendance policies are no-fault type of attendance policies and leave time or paid time off policies.

No-fault policy.

One type of absence control policy is the no-fault attendance policy. Under a no-fault attendance policy, absences are categorized on the basis of frequency, and absenteeism is regulated by recording each absence as an "occurrence." This type of policy lumps absences due to illness in with absences for other reasons without distinction. When the total amount of occurrences exceeds a specific number, disciplinary action is taken. For example, five occurrences may result in a verbal warning, seven occurrences may result in a written reprimand, and eight occurrences may result in a final written reprimand. The ninth absence results in termination.

This type of policy can also be set up on a "point" system that incorporates tardiness as well. For example, the policy could provide that employees receive 1/2 point for each instance of tardiness, one point for each absence, plus an extra 1/2 point for failing to give notice of tardiness or absence. A policy of this type usually involves a set series of warnings at intervals, such as verbal warnings after five points, first written warning after seven points, second written warning after 10 points, final written warning after 15 points, and termination for 18-20 points within a 12 month period. This scheme can be varied to allow fewer absences or parties depending upon the particular company's ability to tolerate worker absences.

The no-fault or point system attendance policy has the advantage of being easy for the employer to administer. The downside, or at least one of them, is that the employee may be improperly incentivized; the employee may come to work sick, or so totally

distracted by some personal matter that they cannot focus effectively on work, simply because they have either used up all of their allotted absences or are trying to save up absences to be spent on some future event that wouldn't otherwise be excused.

Paid time off.

Leave time, or paid time off, is time off an employer provides for which an employee still receives their regular rate of pay. Under this system, employees generally may accrue days off and proceed to spend the time off they have available. Leave time has become an attractive recruitment tool for employers. Leave time is offered by employers in various forms: vacation days, holidays, personal leave, and sick leave. Leave time policies are critical in that they provide the employees with a structured and acceptable method for taking time away from work. Unfortunately, paid leave time can be an expensive benefit for an employer to provide; some smaller employers simply cannot provide much in the way of paid time away from work. In order for a paid leave system to work efficiently and effectively, a well-written, well-developed plan is essential.

Managing the paid leave plan should ultimately be the responsibility of both the employee as well as the employer. Making the employee understand that he or she can exercise some control over their leave time, and thereby spend the leave time the way they choose, can add to the effectiveness of the absence control policy by focusing the employee's attention on the benefits of controlling their own absences. Finally, leave time or paid time off plans work most efficiently if the following considerations are included in the development:

- The paid time off plan has a range of flexibility for both the employer and the employee;
- Clear, written instructions are developed and outlined in advance; and
- Specific instructions for handling matters such as leave requests or notices in emergency situations, including a clear definition of what constitutes an emergency.

Probably the most effective approach to controlling absenteeism is a combination of flexible leave time provided to the employee along with an escalating disciplinary regime like the one used in the no-fault policy. Under this approach the employer provides a certain amount of paid leave time. This leave time can be broken down into categories, such as sick leave and vacation or personal time, or simply be set as a block. When an employee is absent, if the absence is "excused" the absence is charged against the block of paid leave and the employee is compensated even though he or she missed

work. If the absence is "unexcused" the absence, the employee is not paid for this missed day. Also, the absence is recorded and tallied against the permissible number of such absences; once the unexcused absences reach a set point the employee is subject to escalating discipline up to the point of termination once the number of such absences reaches a preset level.

Examples of attendance policy violations include:

- Number of absences, number of tardies, or number of early departures, which exceed the attendance policy guidelines;
- Failing to secure permission from the appropriate member of management for leaving early or coming in late;
- Failing to provide advance notice of an absence when circumstances show that such notice was clearly possible;
- Failing to properly report an absence; and
- Failing to submit proper medical certification, when required.

X. Special issue: Addressing reports of harassment or discrimination.

If an employer receives a report of an incident of harassment or discrimination, the employer may have the opportunity to preserve an affirmative defense against an oncoming lawsuit if the employer response properly to the report. In many cases, if an employer acts promptly to investigate reports of harassment or discrimination and then takes appropriate steps to prevent the continuation of the offending conduct the employer might not be found liable to the employee in the event set employee files lawsuit alleging discrimination or harassment. This does not apply in situations where the person accused of harassing or discriminating is the employee's supervisor or a supervisor with authority over the employee. However, there are still many situations out there that arise where this defense is available if the employer takes the proper action.

The general requirements for raising this defense are (1) that the employer have a written and publicized policy prohibiting discrimination or harassment, and (2) that once the employer receives a report of such conduct the employer promptly investigates the incident and takes action, disciplinary or otherwise, reasonably calculated to address and resolve the issue. If the employer determines through investigation that the complaint has some basis in fact, the employer must take disciplinary action against the offending actor. Naturally, in this situation documentation of the investigation and the actions taken will be crucial to effectively asserting this defense.

If the employer's investigation reveals that the situation is really one of conflicting personalities or personal dislike, rather than a form of the prohibited harassment or discrimination, the employer must still take steps to address the issue and minimize the effects of the personality conflict. If the employees can be feasibly separated by time and/or space this is often the best choice. However, there are times when changes like this are simply not possible, especially in small to midsize offices.

XI. Special issue: Attendance-related discipline under the ADA, FMLA and Workers Compensation Laws

There was a point in time in the past where employers historically faced few obstacles in their efforts to implement attendance control policies and mechanisms aimed at regulating and limiting employee absences. Forget that time. It has become increasingly important that employers develop and implement attendance policies in a way that ensure compliance with the Family Medical Leave Act "FMLA," the Americans with Disabilities Act "ADA" and the Texas Workers Compensation Act "TWCA". With the substantial limitations imposed by these statutes, primarily anti-retaliation provisions, managers have often avoided diligently enforcing attendance policies and workplace regulations due to the fear of liability under the FMLA, ADA or TWCA. Although complex issues are involved in complying with these federal laws, they do not shield employees from adhering to attendance policies and procedures. While the legal complexities and potential liability created by the FMLA, ADA and TWCA may appear to render an employer's attendance control efforts more challenging, it does not render them futile. As businesses and organizations strive to manage attendance problems and absenteeism, there are several steps through which attendance control can be effectuated in a manner consistent with these statutes. More generally, employers covered by all of these laws must take care to create, and more importantly enforce, attendance policies in a manner consistent with each of these laws.

The scope of coverage for each of these laws differs, so some employers may be covered by the ADA and TWCA, having only 20 or 30 employees, but not the FMLA, which requires 50 employees to trigger coverage. The ADA applies only to employers with 15 or more employees, and extends to all job applicants and employees of covered employers. The FMLA however, covers only employers with 50 or more employees, and protects employees who: (1) work at any site where the employer employs 50 people within a 75 mile radius; (2) have been employed by the employer for at least 12 months; and (3) have worked at least 1,250 hours in the 12-month period immediately preceding the request for leave. The TWCA applies to any employer who seeks the protection of

the "Workers' Compensation bar"² by being a "subscriber" under the Act and providing Workers Compensation insurance to its employees.

Second, the ADA applies only to employees who are disabled themselves (employees are not ADA protected by virtue of having a close relationship with a disabled family member), while an employee's FMLA rights are triggered by serious health conditions of both the employee themselves and also that of the employees' close family members, such as a spouse or a child. The TWCA non-retaliation provision applies to any employee of a subscriber who files a workers compensation claim, or as a participant or witness in another employee's claim for workers' compensation insurance. Because the coverage and rights afforded by these statutes differ, the first step in any case involving health related attendance issues is to determine whether the particular employee in question is governed by one or more of these laws.

The Americans with Disabilities Act protects "qualified individuals with a disability" from employment discrimination on the basis of that disability. To be considered "disabled" under the statute, an individual must either: (1) have a physical or mental impairment that substantially limits one or more major life activities; (2) have a record of such impairment; or (3) be regarded as having such an impairment. To be deemed a qualified individual with a disability, one must be able to perform the essential functions of one's job, with or without reasonable accommodation. 42 U.S.C. § 12112(a) (1994).

Excessive absenteeism and the ADA have a particular connection that often challenges for the employer. Because the ADA protects a qualified individual with a disability who can perform the essential functions of a job with or without a reasonable accommodation, from an attendance management standpoint, a critical issue often confronting many employers is whether an employee with chronic absenteeism is able to perform the essential functions of his/her job. If so, then the employee is properly classified as a "qualified individual" under the ADA. An employer may be compelled to suspend, or otherwise modify, its attendance policies with respect to an employee who is a "qualified individual" as a reasonable accommodation to that employee, unless the employer can make a showing of "undue hardship." If the employee is deemed unable to perform the essential functions of the job, however, then he/she will not be considered a "qualified individual." If an employee's attendance record is poor, and if regular attendance is an essential element of the job, then the employee will likely not be deemed a qualified individual with a disability; in this case the ADA does not require the employer to provide any accommodation to the employee. Rather, the employee may be

² The rule under the Texas Workers Compensation Act which prohibits an injured employee from suing his employer as long as the employer has provided the employee with workers compensation insurance.

bound to adhere to the applicable attendance policies in the same manner, and to the same extent, as any other employee. Adjustments to attendance policies that may be required as a reasonable accommodation include modification of work schedules; allowance of flexible leave; use of accrued paid leave to cover disability-related absences; or provision of additional unpaid leave to a disabled employee.

The FMLA permits an employee to take up to 12 weeks of unpaid leave due to (1) the birth, adoption or placement for foster care of a child; (2) a serious health condition of a covered relative; or (3) the employee's own serious health condition. 29 C.F.R. 825.114. Employers may require employees taking intermittent or reduced leave to transfer temporarily to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than the employee's regular position. 29 C.F.R. 825.204.

It is well known that FMLA absences are protected from discipline or retaliation. However, contrary to what many employers believe, employees requesting or taking FMLA leave do not receive absolute protection or immunity from termination. When an employee refuses to follow a company's procedures that would qualify the employee for FMLA leave, the employee may be subjecting himself to disciplinary action for violation of this policy and not for the FMLA leave.

Likewise, the Texas Labor Code §451.001 prohibits an employer from firing or discriminating against an employee because he or she filed a claim for workers compensation due to an on-the-job injury, hired a lawyer regarding such a claim, or testified in a proceeding regarding a workers' comp claim. But the Act does not immunize an employee whose attendance is affected by their injury or treatment from the consequences of violating the employer's attendance/absenteeism policy.

By educating themselves on the boundaries of the ADA, FMLA and TWCA employers can not only ensure that their employees receive the leave required by law but that the available leave is not abused. Employers who become familiar with the applicable notice requirements, certification rules, transfer options, and scheduling guidelines can minimize the disruption to the workplaces caused by medical or family leave, and avoid unnecessary and costly accommodations to disabled employees who are not otherwise qualified to perform their jobs. Through structured, consistent efforts, employers can maintain control over employee attendance, and do so in a manner that is consistent with federal law.

Policy and Enforcement Considerations

The key to avoiding running afoul of these statutes is for the employer to see that the policy provisions and any enforcement or disciplinary elements are directly tied to the punishment of specific and facially neutral requirements, such as reporting requirements or provisions differentiating between excused and unexcused absences.

The second key element to avoiding trouble with these statutes is consistent enforcement. An employer will have a much easier time defending a disciplinary measure taken against a person covered under one of the statutes if the absence control policy has been consistently enforced against other employees especially including individuals who do not fall under the protection of one of these three statutes. If a disgruntled employee can show an agency or a court that an employer has looked the other way when an employee not covered by the ADA, FMLA or TWCA violated the absence control policy while the complaining employee was disciplined for the same transgression, that employer is going to have an uphill battle.

Absence policy provisions that require employees to report in regularly while out on medical leave, or that require a doctor's excuse for an absence or a release to work in appropriate situations, are neutral and may be enforced up to and including termination without violating any of these three statutes. Policies limiting absences for illness to six months are valid as well. Under the FMLA the employer may require a certain amount of communication between the employee and the company but this communication cannot rise to the level of harassment. Also, in cases where an employee takes leave under the FMLA as result of the serious medical condition of another family member, the employer may not be able to compel that employee to present a doctor's excuse or other communication from a physician since that excuse or communication would be related to the medical condition of the family member, be governed by HIPAA and be confidential.

The ADA requires that employers make reasonable accommodations for employees with disabilities who could, with reasonable accommodation, perform the essential functions of a particular position, unless the accommodation would result in "undue hardship" to the business. An employer might need to consider the requirements of the ADA if they have an employee who is covered by the ADA and his health condition contributes to the employee's absenteeism. If this set of circumstances arises the employer will need to see if there are any reasonable accommodations that the employer could make which would help bring the employee back into compliance with the policy. Depending on the situation it might be possible for the employer to permit the employee to modify his or her work schedule, or to work at home in order to reduce the number of days the employee is actually not "at work." Also, a leave of absence to obtain

treatment that is likely to allow the employee to perform the essential functions of the job after a limited, predictable period of time may well be a reasonable accommodation under the ADA. This is simply an example, and employers will need to be vigilant for situations involving employees with known or observable serious health conditions.

XII. Administrative Guide

It is important to make the distinction between the disciplinary system and policy contained in the employee handbook and provided to the employees, and guidelines provided to supervisors and administrators designed to assist them in making the types of considerations discussed in this paper and in implementing the policy correctly. The handbook given to the employees need only outline the terms of the company's personnel policies, work rules and the disciplinary policy which governs what will happen if the employee does not comply company's rules. This employee handbook should not contain a description of the considerations and potential dangers surrounding enforcement activities by the supervisors. A guideline for supervisors and administrators should be kept separate from the general employee handbook. Otherwise you run the risk of arming your employees with knowledge about dangers, special considerations and potential pitfalls in the disciplinary and/or termination process.

It is a good idea to work up an administration guidebook that educates administrators and supervisors on the issues surrounding the personnel policies and disciplinary system, as well as how to prepare for and perform each stage of the disciplinary process. However, such guidebooks should be kept as a resource in the administrative office so access to them can be controlled; supervisors should then be encouraged to review the guidebook on a regular basis and any time they are preparing for a disciplinary measure.

XIII. Assertive Supervision: Suggestion Boxes, Job Redesign, Incentives, Education, etc.

In addition to the regulation and modification of workplace performance and behavior through personnel policies and a disciplinary system, employers can engage in practices that focus the employees' attention on the issues of job performance and workplace behavior, and that get them personally interested or invested in the concept and involved in the process. Employees can be informed through postings or, better yet, through meetings that the employer wants to performance and behavior problems overall, and further wants to involve the employees in the process. The employer can solicit

comments about problems in working conditions or areas of the work environment that can be improved with the goal of verifying these problems and attempting to make improvements. Comments from the employees can be sought in open discussion with the employees or through the use of suggestion boxes and approaches of that type.

There are typically two positive elements to this type of approach. First, the employer is gathering objective data directly from the individuals to be influenced by the process. Second, the mere fact that the employees are being asked their opinion and to participate in the project can have a positive effect. However, if an employer initiates this approach but does not make a genuine effort to implement changes or improvements, the plan is likely to backfire and result in the greater separation between the employees and the company.

Office meetings can often be a good way to promote positive behavior and attitudes in to reinforce workplace rules and performance goals. When meetings are held it is often most productive to address these issues in a generic fashion, rather than through references that identify specific individuals. It is good for everyone in the office to be reminded from time to time about the importance of specific rules and guidelines. This approach can also help to further the idea of the office employees as a team, rather than singling out one or more individuals for specific discussion and correction.

A related approach involves the idea of engaging the employee in the process of workplace improvement and the enhancement of productivity by evaluating whether job or redesign for an individual, group or class of employees is possible and would have a beneficial effect on job enjoyment or satisfaction by the employees. An increase in job satisfaction and workplace participation can often stimulate the kind of attitude in the employees that results in renewed dedication to the company, often yielding benefits such as less tardiness and fewer absences from the workplace.

TERMINATION

XIV. The Decision To Terminate

Termination should always be the final step in an employer's application of progressive discipline. To ensure that discharging an employee is the appropriate course of action, termination decisions should be carefully reviewed before being implemented. At the time of actual termination, the employee should also be told the specific reason for the termination. If the employee is being discharged for poor work performance, the unsatisfactory performance should be set forth and explained in detail. In confirming

termination decisions, managers should consider the severity of the employee's actions or policy violation(s) which led to the possibility of termination, the employee's work history with the organization, and how consistently disciplinary problems for similar actions have been handled in the past. This method of review provides the employer with a system of checks and balances and can prevent questionable termination decisions that may result in litigation.

However, the more each individual termination appears to turn on a constellation of facts and circumstances specific to the particular employee, the less help these prior terminations may end up being in the defense against a future charge of discrimination by a disgruntled employee. As harsh as it may seem, the employer gets the most protection from an absence control policy when that policy is strictly enforced and employees are terminated in accordance with the policy with little or no consideration being given to the employee's other qualities or job performance. This essentially means that an otherwise good employee must be terminated when their absence conduct reaches the termination threshold under the policy, just the same as otherwise poor employees would be. Since most employers want to try and keep "otherwise good" employees, these employers start looking for reasons too avoid termination. Each employer simply needs to realize that the more often this is done the more they increase the risk of an expensive and potentially successful retaliation or discrimination claim in the future.

XV. Special Considerations for the Termination Process.

The primary considerations that need to be made before terminating an employee for violation of an absence control policy revolve around ensuring that as much as possible has been done to prepare a defense against a potential lawsuit by a disgruntled employee alleging violation of the provisions of Title VII, the ADA, the FMLA, or the TWCA . The employer should make sure that the transgressions of the employee being terminated have been adequately documented.

Verify consistent enforcement of policy. The employer should verify that there have not been other employees who have engaged in the same course of conduct and have not been terminated. If this circumstance does exist the employer will need to carefully scrutinize the reason this particular employee should be/will be terminated at this time. It is also important that the appropriate supervisor(s) make the formal decision to terminate. Deviations from the established procedure and hierarchy may create a foothold for a subsequent claim by the employee; this is especially true if a supervisor with a bad history with the employee makes the decision to terminate the employee but was not truly the appropriate person to make this decision.

Create a writing. Next, a writing should always be created that will be given to the employee stating the reasons for the termination and, if possible, a copy of the same writing should be signed by the employee and retained in his or her personnel records. Finally, at least one or more witnesses should be present during the termination process.

The reason for the termination must be tied to the neutral, nondiscriminatory absence control policy provision and its violation by the employee. No reference should be made at any time regarding the reason(s) or explanation(s) the employee has given for his or her transgressions which contributed to, or resulted in, the termination. A stray remark about the employee's job injury, serious health condition, disability or prior complaint about unfair treatment or harassment anywhere in the process is completely unnecessary and will become the centerpiece of the employee's lawsuit should they choose to go that route. The employer should have created an absence policy that neutrally defines or identifies the violations that result in termination, and the language of the policy should be used in the termination process.

FMLA and ADA issues. With regard to the termination of an individual where the individual to be terminated has taken time off under the FMLA, employers need to remember that no FMLA-covered absence may be used as the basis for any kind of disciplinary action; this means that FMLA leave or absences cannot be counted toward total absences and "point" or "no-fault" system. The same consideration should probably also be made in situations where the individual is covered by the ADA. If such an employee has experienced absences related to his or her disability that help put the employee over the permissible number of absences, the employer should accommodate those disability-related absences if they do not pose an undue hardship to the employer, and served to help the employee regain fitness for duty. See *Cehrs v. Northeast Ohio Alzheimer's Research Institute* 155 F.d 775 (6h Cir. 1998).

As mentioned in the section above discussing disciplinary considerations, when dealing with an employee covered by the ADA, FMLA or TWCA, employers should strive to and avoided mentioning or referring to the employee's condition or injury covered by the statute during the termination process. The focus of discussion should at all times remain on the employee's infraction or transgression of company rules, or other facts or circumstances, which require the termination of the employee.

Executing the termination and potential dangers. With all this being said, some very practical advice about the termination process involves the timing of the actual communication with the employee. First, once the decision to terminate an employee has been made the act should be carried out as soon as possible. If the employee learns of his or her imminent discharge it gives that employee the opportunity to throw a wrench in the

works. One such wrench would be for that employee to make a report to the employer, or an outside agency, of an instance of discrimination or retaliation prohibited under the various laws discussed in this paper. This "discrimination or retaliation" can have been directed at the employee themselves or at another employee and simply observed by the employee to be terminated; the effect is the same.

If this report is made and then the employer terminates the employee, the temporal juxtaposition will give rise to a presumption that the termination was in response to the report. This, of course, will support a claim for retaliation by the employee even if the alleged conduct reported by the employee does not ultimately turn out to be a valid instance of discrimination or retaliation. In a case like this, the employer will be forced to delay the termination of the employee while an investigation of the reported, alleged discrimination or retaliation is conducted. This results in a most uncomfortable period of time, and one during which many hijinx may ensue.

Next, and with the scenario laid out above in mind, when the employee is called in for the specific act of termination the supervisor conducting the termination should state to the employee- before there is time for the employee to say anything or any conversation to take place, that the employee is terminated. Then the supervisor can go on to lay out the details and justification for the employment action after that. This preemptive statement of the termination prevents the possibility of the employee making a statement to the effect that he or she has a disability, needs to request some FMLA leave, or has seen or experienced something that "looks like discrimination." Granted, if this happens the employer will be able to produce evidence that the employee was going to be terminated before this information was transmitted by the employee, but the timing of the action will look very bad; the employee can argue that he or she was only going to be disciplined or warned, but that after the employee made this statement the disciplinary action was suddenly changed to a termination. This may seem overly cautious, perhaps paranoid, but both of the above some are quite possible and can set the stage for expensive litigation.

XVI. Issues Concerning Texas Workforce Commission Unemployment Benefits

Although an employee at-will may generally be terminated for any non-illegal or nondiscriminatory reason, with or without cause, employers should be aware that the Texas Workforce Commission does not apply the same standard in determining whether a former employee is entitled to receive unemployment benefits.

An employee terminated by an employer is not disqualified from benefits unless the employer can demonstrate that the employee engaged in work-related misconduct.³ Misconduct is defined by the TWC as mismanagement of a position of employment by action or inaction, neglect that jeopardizes the life or property of another, intentional wrongdoing or malfeasance, intentional violation of a law, or violation of a policy or rule adopted to ensure the orderly work and the safety of employees. Misconduct does not include an act in response to an unconscionable act of an employer or superior. The TWC also does not consider inability or incompetence to be misconduct. An employer who discharged an employee due to their inability or incompetence to perform what was expected of them should be able to demonstrate how such inability or incompetence constitutes mismanagement, neglect that jeopardizes the life or property of another, or violations of laws or policies adopted to ensure orderly work and safety.

When an employer receive notice that a former employee has filed for unemployment, it is important that the employer does not miss the protest or appeal deadlines that are established in the notice. In submitting a protest, the employer must produce any documentation that supports the reasons given for discharge. Employers should also immediately request a copy of any statements or documents submitted by the claimant in order to assist them in responding to the claim. If the claimant was discharged, the employer has the burden to demonstrate that the claimant is disqualified from receiving benefits. The TWC will want to see evidence that the claimant knew or should have known, before discharge that their job was in jeopardy. Evidence of written or verbal final warnings or policies warning of dismissal for certain violations are helpful to the TWC. The TWC will also want to see evidence that the claimant was not singled out for discharge and that the discharge occurred due to a specific act of misconduct that occurred near in time to the discharge date. The TWC expects for employers to be able to demonstrate that it followed its progressive discipline policy and that it confronted the claimant with the reason for discharge and gave them a chance to explain their side of the story, if possible. The TWC will also expect to see that the employer alerted the claimant of any work performance issues and gave the employee the opportunity to cure such problems.

³ Other reasons for disqualification aside from misconduct include if the claimant voluntarily left work, the claimant left work as a result of a labor dispute, the claimant is receiving compensation from worker's compensation for disability, the claimant left work to attend an educational institution or the claimant left work because he or she refused to treat individuals with communicable diseases.

XVII. Payday Law Issues

Final Pay

The Texas Payday Law regulates the timing of the final paycheck in section 61.014 of the Texas Labor Code. If an employee is laid off, discharged, fired, or otherwise involuntarily separated from employment, the final pay is due within six (6) calendar days of discharge. If the employee quits, retires, resigns, or otherwise leave employment voluntarily, the final pay is due on the next regularly-scheduled payday following the effective date of resignation. "Mutual agreement" separations are generally regarded as involuntary, although that result is not inevitable and ultimately depends upon a close look at all the events and circumstances leading to the work separation. Whether a work separation is voluntary or involuntary is determined according to existing rules for deciding the nature of the work separation in unemployment compensation cases. Basically, if the employee initiates the work separation and leaves while continued work is still available, the work separation is voluntary. If the employer initiates the work separation, i.e., the employee has no choice but to leave at a certain time, the work separation will be considered involuntary.

Final Pay for Commissions and Bonuses

A common problem is that of what happens with an employer's duty to pay commissions and bonuses once an employee has left the company. The answer depends upon the terms of the commission or bonus agreement. A good agreement will avoid the risks of ambiguity by clearly setting out how commissions are earned, when and under what circumstances they are paid, and what happens to commissions from sales in progress at the time of work separation. Similarly, a bonus agreement should specify exactly how a bonus is earned, when it is paid, and what happens to a bonus that is not determined or paid out until after an employee has left the company. If the commission or bonus agreement provides for payment of commissions and bonuses in any way after an employee has separated from employment, the deadline for such a payment would be based upon the wording of the agreement.