

CARLETON COLLEGE

SUPERVISOR TRAINING

**WHAT DO SUPERVISORS AND MANAGERS
NEED TO KNOW ABOUT
WAGE AND HOUR ISSUES?**

**WHAT DO SUPERVISORS AND MANAGERS
NEED TO KNOW ABOUT
EMPLOYEE EVALUATIONS AND
DISCIPLINE AND DISCHARGE?**

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I. WHAT DO SUPERVISORS AND MANAGERS NEED TO KNOW ABOUT WAGE AND HOUR ISSUES?

A. FLSA CLASSIFICATION: THE WHITE-COLLAR EXEMPTIONS¹

The general rule under federal wage and hour laws is that employees are entitled to receive the minimum hourly wage and overtime at a rate of 1½ times the employee's regular rate of pay for hours worked in excess of forty hours in a workweek. These provisions do not, however, apply to employees employed in a "bona fide executive, administrative or professional capacity." Employees who are excluded from the overtime pay provisions are "exempt," while employees entitled to overtime pay are "nonexempt."

The executive, administrative, and professional exemptions are known as the "white-collar" exemptions. Each consists of two major components:

SALARY requirement, concerning the form of compensation.

and

DUTIES test, which requires the employee to actually have duties and responsibilities that comply with the substantive requirements of the exemption.

1. Salary-Basis Test

The first requirement to satisfy any of the three white-collar exemptions is that an employee must be paid on a "salary basis." The primary test for whether an employee is paid on a salary basis is whether (1) he or she is paid a predetermined salary; (2) on a weekly or longer basis; and (3) regardless of the number of hours worked. The third criterion requires only that the employee generally not be subject to pay deductions ("docking") for time away from work lasting less than a full week. Circumstances in which pay deductions are permitted for exempt employees are discussed later in these materials.

2. Duties Tests

The following tests are used to determine whether salaried employees satisfy the substantive duties requirements to be "exempt."²

a. "Executive" Employee Duties Test.

- (i) The employee must customarily and regularly supervise at least two full-time employees (or multiple part-time

¹ This outline is a general summary of a complex area of law, and should not be relied upon as legal advice. For advice on specific problems or questions, consult an attorney.

² These tests, which the U.S. Department of Labor calls the "short" tests, are applicable so long as employees receive compensation of at least \$250 per week (roughly \$13,000 per year).

employees whose hours equal that of at least one full-time employee).

(ii) The employee's primary duty must be management of a customarily recognized department or subdivision of the employer.

(a) It is a general rule that a primary duty means the major part (over 50%) of the employee's time. Time alone is not the sole test, however.

(b) A customarily recognized department or subdivision usually has a title.

(c) Examples of "management" duties:

(1) interviewing, selecting, and training employees

(2) setting and adjusting rates of pay and hours of work

(3) directing work of employees

(4) keeping production or sales records of subordinates for use in supervision

(5) evaluating employee performance, efficiency, and productivity for the purpose of recommending promotions or other changes in status

(6) handling employee complaints and grievances

(7) disciplining employees

(8) planning work and making decisions about techniques and methods of work

(9) distributing work among employees

(10) deciding on types of merchandise, materials, and supplies

(11) providing safety for employees or property

(d) Examples of non-exempt duties:

- (1) Performing the same kind of work as the employees that the individual supervises.
- (2) Performing any production work that is not a part of supervisory duties.
- (3) Making sales, replenishing stocks, or returning stock to shelves (unless for supervisory training purposes).
- (4) Performing routine clerical duties, such as bookkeeping, billing, filing, or operating business machines.
- (5) Keeping records on employees who are not under the individual's supervision.

b. "Administrative" Employee Duties Test.

- (i) The employee's primary duty must consist of performing office or non-manual work directly related to management policies or general business operations.
 - (a) Work directly related to management policies or general business operations includes work performed by white-collar employees engaged in "servicing" a business in one of the following ways: advising the management; planning; negotiating; representing the company; purchasing; promoting sales; and business research and control. Examples of positions in which employees often perform work directly related to management policies or general business operations include: staff tax experts; personnel directors; labor-relations directors, and office managers.
 - (b) Work directly related to management policies or general business operations, which qualifies for the administrative exemption, is distinguished from "production work," which does not qualify for the exemption. The essence of administrative work is running the business, while production work consists of the day-to-day carrying out of the business' affairs. Employees can be engaged in production work even where the employer is in the service rather than manufacturing business.

- (ii) The primary duty must include work requiring the regular exercise of discretion and independent judgment on matters of significance.
 - (a) The exercise of discretion and independent judgment involves the comparison and evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered.
 - (b) This requirement is not satisfied by the application of knowledge in following prescribed procedures, determining which procedure to follow, or determining whether specified standards are met.
 - (c) The employee's authority to make an independent choice must be free from immediate supervision, but need not be unlimited or completely immune from review or override.

c. "Professional" Employee Duties Test.

- (i) The employee's primary duty must consist of work requiring advanced learning OR original and creative work in a recognized artistic field OR must work as a certified teacher.
 - (a) Work requiring advance learning is work that requires knowledge of an advanced type in a field of science or learning, which is customarily acquired by a prolonged course of specialized intellectual instruction and study.
 - (b) The U.S. Department of Labor's regulations provide that the requisite knowledge generally cannot be attained at the high school level, and most often requires at least a four-year bachelor's degree. The required instruction and study must be "specialized," rather than "general," and the advanced degree must be a standard (if not universal) prerequisite.
- (ii) The employee's work must require the regular exercise of discretion and independent judgment OR invention, imagination, or talent in a recognized field of artistic endeavor.

(iii) Examples of Positions that Ordinarily Satisfy the Professional Employee Duties Test:

- (a) Medicine and dentistry.
- (b) Law.
- (c) Architecture.
- (d) Nursing.
- (e) Accounting.
- (f) Engineering.
- (g) Teaching (in primary, secondary, and post-secondary levels).
- (h) Actuarial computation.
- (i) Physical, chemical, and biological sciences.

d. "Computer Professional" Duties Test.³

- (i) The employee's primary duty must consist of one or more of the following:
 - (a) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
 - (b) The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
 - (c) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
 - (d) A combination of the above duties, the performance of which requires the same level of skills.

³ Employees can qualify for the computer professional exemption even if paid on an hourly basis, if they are paid at least \$27.63 per hour.

- (ii) The employee must have achieved a high level of skill and proficiency that allows him or her to work independently and generally without close supervision. This level of expertise and skill is generally attained through a combination of education and experience in the field. Unlike with the standard "professional" exemption, there is no requirement that the employee have a particular academic degree, licensure or certification.
- (iii) This exemption does not include employees engaged in the operation of computers, or in the manufacture, repair, or maintenance of computer hardware and related equipment.

B. COMPENSATING NON-EXEMPT EMPLOYEES

1. Overtime Pay Requirements

a. General Rule

Unless an employee is specifically exempt from the overtime requirements of federal wage and hour laws, hours worked in excess of 40 in any workweek are overtime hours and must be compensated at a rate of not less than 1½ times the employee's regular rate of pay. The federal law does not impose any maximum on the number of hours an employee may work in any workweek, so long as he or she is compensated at the overtime rate. In limited circumstances, overtime is based on a maximum number of hours other than 40.

Federal laws do not require, as a general rule, that employees be paid overtime compensation for hours solely because they are in excess of eight per day or solely because they occurred on Saturday, Sunday, a holiday or a regular day of rest. However, some state laws require overtime compensation in these circumstances. In addition, employers may, by custom or contract, assume obligations to pay overtime premiums for these hours.

b. Determining the Workweek

Under federal law, each workweek is a fixed and regularly recurring 168-hour period. Each week stands alone for purposes of computing overtime, but need not coincide with the calendar week. Different groups of employees may have different workweeks. The workweek may only be changed if the change is intended to be permanent and is not intended to evade overtime laws. Employers are not permitted to "average" an employee's hours over two or more weeks.

c. Payment of Overtime

The general rule is that overtime compensation earned in a particular workweek should be paid on the regular payday for the period in which the workweek

ends. However, payment may be delayed where "reasonably necessary" for the employer to compute and arrange for payment, but should not be delayed beyond the next pay day.

d. The "Regular Rate"

The regular rate is a rate per hour upon which overtime is calculated. However, this does not require that employers compensate employees on an hourly basis. Rather, earnings may be provided on a salary, commission, or other basis, so long as pay covering each work week equals or exceeds the minimum wage standard. The regular hourly rate is determined by dividing total remuneration (except statutory exclusions) in any workweek by the total number of hours actually worked in that workweek for which the compensation was paid.

The "regular rate" includes on-call pay, shift differentials, and some bonuses. The "regular rate" does not include: payments for infrequent or unpredictable periods when no work is performed due to vacation, holiday, illness, or other similar cause; payments for expenses; most employer-paid benefits; and overtime pay.

e. Calculating Hours Worked

Under the federal wage and hour statutes, employees must be compensated for all "hours worked," which includes all hours an employee is "suffered or permitted to work." As a general rule, this means that employees must be paid at least the minimum wage for: all time during which the employee is required to be on duty, or on the employer's premises, or at a prescribed work place; and all time during which an employee permitted to work, even if not required or even authorized to do so. Thus, working time not only includes time spent in active, productive labor, but also time given by the employee to the employer which is nonproductive time.

Examples of nonproductive time for which an employee may, under certain circumstances, be entitled to compensation include: waiting for work, remaining on-call, traveling on the employer's business, or to and from workplaces, and some rest or meal periods.

- (i) Statutory Exceptions from Hours Worked. Under the Portal-to-Portal Act, some travel and other preliminary and postliminary activity (i.e. performed prior to or after the workday) are not compensable. However, where preliminary and postliminary activities are job-related and necessary, they are working time. Examples include completing time sheets, picking up work assignments, and obtaining equipment for use during work.
- (ii) Waiting Time. Whether waiting time must be compensated or not depends on the particular circumstances. It depends on custom, contract, agreements, the nature of the service, and the nature of the circumstances under which the

individual was hired. Generally, an employee who waits to work while on duty must be compensated. In contrast, when an employee is completely relieved of duty for a period long enough to use the time for his or her own purposes, the time is generally not considered hours worked.

- (iii) On-Call Time. The test to determine whether on-call time is included in "hours worked" is whether the time is spent "predominantly for the employer's benefit." The more restrictive the on-call policy is on an employee's freedom, the more likely that the on-call time will be classified as compensable "hours worked." Factors considered in determining the compensability of on-call time include: terms of the employment agreement, if any; extent of physical restrictions placed on the on-call employee; response time requirements; percentage of calls expected to be returned by the on-call employee; frequency of actual calls during on-call periods; actual uses of on-call time by the on-call employee; and any disciplinary action taken by the employer against on-call employees who fail to answer calls.
- (iv) Rest Periods. Rest periods of short duration, usually up to 20 minutes, must be compensated as hours worked.
- (v) Meal Periods. Generally, meal periods may be excluded from hours worked only if the meal period is for at least 30 minutes, the employee is completely relieved of all duties, and he/she is free to leave the duty location (e.g., desk).
- (vi) Lectures, Meetings and Training Programs. Generally, voluntary attendance at lectures, meetings and training programs and similar activities do not count as time worked if all of the following four criteria are met:
 - (a) attendance is outside the employee's regular working hours;
 - (b) attendance is in fact voluntary;
 - (c) the meeting is not directly related to the employee's job; and
 - (d) the employee does not perform productive work during his or her attendance.

- (vii) Travel Time. Whether or not travel time is to be compensated depends on the kind of travel involved. For example, time spent getting to work in the morning is ordinarily not compensable. However, if the travel is to a special one-day assignment in another city at the employer's request, it is likely to be time worked and must be compensated. Travel during the workday to report to a meeting or from jobsite to jobsite is ordinarily compensable.

C. DEDUCTIONS FROM PAY AND LEAVE BANKS OF EXEMPT EMPLOYEES⁴

An exempt employee's pay may be reduced ("docked") for time away from work only in certain limited circumstances. As a general rule, exempt employees must receive their full salary for any week in which they perform any work. If an employer improperly makes deductions from an exempt employee's pay, that employee may lose his or her exempt status.

1. Deductions from Pay:

The circumstances under which deductions may be made from the **pay** of an exempt employee are⁵:

- a. Deduction **in full-day increments** for personal absence other than sickness or disability;
- b. Deduction **in full-day increments** for absence due to sickness or disability, where employee is either not eligible for, or has exhausted, a bona fide leave allowance, or is receiving payments through a bona fide sick leave or disability policy or insurance plan;
- c. Deduction **in full-day increments** as penalty, imposed in good faith, for infraction of a safety rule relating to the prevention of a serious danger to the facility or other employee;

⁴ Non-exempt employees are paid only for actual time worked, except when leave (such as vacation or sick time) is available to cover time away from work.

⁵ These deductions may not be recognized under state law in Minnesota and elsewhere. Consequently, implementing these deductions could result in a position losing its exempt status, at least during the week in which the deductions are made.

- d. Deduction **in full-week increments** for any week in which no work is performed; and
- e. Deduction **in full-day or partial-day increments** for FMLA-covered leave.

It is also important to note that an employer may **not** generally make pay deductions for exempt employees' full-day or partial-day absences caused by jury duty, service as a witness, or temporary military service. However, if jury duty (in state court), witness service, or temporary military service lasts for a full-week or more, the employer may make pay deductions in full-week increments for any week in which no work is performed.

2. Deductions from Leave Banks:

The rules for making deductions from exempt employees' *leave banks* are different from the rules pertaining to deductions from pay. The Department of Labor has ruled that where an employer has a "bona fide leave plan," which can include a formal vacation and sick leave policy, the employer may substitute or reduce the accumulated leave for an exempt employee's full-day **or** partial-day absences.

For *partial-day* absences, the key is that the leave bank deduction must **not** affect the exempt employee's **pay**. In other words, for the pay period during which the partial-day absence occurs, the exempt employee must receive his or her full salary amount. As such, if an exempt employee has insufficient accumulated leave to cover a partial-day absence, the employer is still prohibited from making a pay deduction.⁶ The employer may, however, require the employee to "borrow" from future leave accumulation. The employer may also consider the partial-day absence when evaluating the exempt employee's performance – while taking into account any related ADA and/or FMLA issues.

In contrast, (where the employer has a leave policy under which an exempt employee accumulates leave that enables the employee to be paid for time-off,) if an exempt employee has insufficient accumulated leave to cover a *full-day* absence, the Department of Labor regulations permit the employer to make a deduction from the employee's pay. It is worthwhile to note, however, that many employers do not make pay deductions in the event of full-day absences for which the exempt employee has insufficient accumulated leave. These employers act out of an abundance of caution, in an effort to have a clear practice of paying the employee's full salary without "docking."

D. LIABILITY AND PENALTIES

1. Liability for Back Wages.
2. Criminal Sanctions and Civil Penalties.

⁶ An employer is permitted to make deductions from an exempt employee's pay if the employee's partial or full-day absence is protected under the Family and Medical Leave Act (FMLA).

II. WHAT DO SUPERVISORS AND MANAGERS NEED TO KNOW ABOUT EMPLOYEE EVALUATIONS?

A. Why Should We Do Evaluations?

Performance evaluations are a critical management tool. Properly done, they can help define and measure goals for individuals and the organization, motivate and develop employees and facilitate communication. Among other things, they can be used as a tool to communicate employer expectations, to document performance against those expectations, to provide information and a basis for compensation, promotion, demotion, discipline and transfer decisions, to identify opportunities for development, to identify educational or training needs, to document performance problems and performance achievements, to document employee development over time and to obtain valuable feedback from employees about their perceptions of their performance, development and the working environment.

B. What Legal Benefits Are Associated with Conducting Performance Evaluations?

Properly done, they can reduce liability in several ways. When an employee claims that an adverse employment decision is discriminatory (e.g., based upon an illegal consideration such as race, gender, age, religion, disability) the employer will be required to produce a legitimate nondiscriminatory reason for the decision. Often, the employer will also want to show that others outside the protected class were not treated more favorably. The employer will also want to produce legitimate reasons for an adverse employment decision when an employee claims that the decision was retaliatory (e.g., designed to punish an employee for being a "whistle blower" or for exercising statutory leave or other rights) or was without cause in violation of a contract.

Documentation of performance problems in evaluations and other materials is extremely helpful in establishing that the reason for an adverse decision was performance-based and not because of protected class status or in retaliation for protected activities or in violation of a contract. In addition, the performance evaluations of others may help show that other similarly situated employees were treated similarly, regardless of status or protected activity.

In addition, the likelihood of a claim and the risk of adverse findings of liability are both reduced if employment decisions are perceived as fair. A good performance evaluation system communicates a set of clear performance expectations to an employee, provides feedback to the employee and provides an opportunity for the employee to improve performance against clear expectations. If a termination or other adverse decision is made after those steps have been taken, it is more likely to be perceived as both legal and fair.

C. What Legal Liabilities Are Associated with Conducting Performance Evaluations?

Poorly done, performance evaluations can be problematic. Employers are given substantial leeway in making candid statements about employees in performance evaluations, but false statements or statements made out of ill will or malice toward an employee can give rise to defamation claims. Evaluations must be fair, truthful, and constructive.

Performance evaluations must accurately state the facts. The source of information used in an evaluation should be reliable and credible and the facts should not be overstated or exaggerated.

Statements in evaluations which apply stereotypes can be used to support discrimination claims. Performance evaluations should focus on behavior and not generalities. Unfounded conclusions that an older person "lacks energy" or is reluctant to learn new procedures; or that a female candidate for promotion is "macho" or "needs to take a course in charm school" (*See Hopkins v. Price Waterhouse*, 490 U.S. 228 (1989)), may be used as evidence of discrimination later on.

If evaluations focus on deficiencies in the performance of protected class members but ignore the same deficiencies in a nonprotected class members, liability for discrimination may arise. Finally, if a handbook or other policy promises "annual" or other periodic evaluations or promises that evaluations will be done in a particular way, and you fail to comply, a breach of contract claim may arise.

D. How Can the Effectiveness of an Evaluation System Be Increased?

1. Maintain a system for conducting prompt, regular evaluations, but reserve the right to conduct reviews on a different schedule.
2. Let employees know what the evaluation criteria are in advance.
3. Be as objective as possible, basing appraisals on careful observations of specific events and behaviors rather than general undefined personality traits.
4. Understand what activities which are protected. For example, absenteeism which results from legitimate leaves protected by the FMLA, the ADA or other leave laws should not be negatively evaluated.
5. Provide accurate, job related feedback.
6. Provide accurate examples, especially where deficiencies are noted.
7. Evaluate for the entire period, not just the most recent few weeks.
8. Document performance problems and successes during the course of the year so that accurate information is available at the time of the review.
9. Obtain input from appropriate sources. If a supervisor is new, input from the prior supervisor for the review period may be appropriate.
10. Encourage employee input and employee response to the appraisal. Have employees sign an acknowledgment that they have reviewed the appraisal.

E. Who Has Access to Performance Evaluations?

Minnesota law allows employees to review their personnel records periodically. On termination, employees may review their personnel records once at any time within one year after separation. Performance evaluations are clearly among the documents which an employee may review. Notes that are maintained solely by a supervisor may not need to be disclosed to the employee.

Unlike some states, Minnesota does not have a statutory confidentiality requirement applicable to personnel records. However, Minnesota has adopted a common law right to privacy. While the issue has not yet been decided, it is possible that an employee could claim an invasion of privacy based upon unauthorized disclosure of performance evaluations beyond those supervisors who may have a legitimate business interest in the information.

F. What Are the Employee's Rights with Respect to an Evaluation with Which the Employee Disagrees?

Under Minnesota law, if an employee disputes specific information contained in his or her personnel records, and the employer does not agree to remove or revise the disputed information, the employee may submit a written statement specifically identifying the disputed information and explaining the employee's position. The position statement must be included with the disputed information for as long as the information is maintained in the employee's personnel record. A copy of the position statement must be provided to any person who receives a copy of the disputed information. Compliance with the statute provides a shield against defamation claims.

III. WHAT DO SUPERVISORS AND MANAGERS NEED TO KNOW ABOUT DISCIPLINE AND DISCHARGE?

A. How Can Workplace Guidelines Help Supervisors?

Employers should develop clear policies and guidelines regarding expected conduct in the workplace. If policies regarding performance and behavioral standards are established, employers should underscore the fact that a list of such expectations or standards is not an exclusive or exhaustive outline of what may give rise to discipline or termination. Such guidelines provide evidence that employees had notice of acceptable workplace standards.

It is important for supervisors to keep records of performance problems and how they were handled. These records need to be preserved. Such records provide valuable evidence that supervisors have informed employees of unacceptable performance.

Supervisors should strive for consistency in disciplinary actions. Ask what action has been taken in similar situations in the past? Are there any circumstances that would justify a departure from the past? Document the reasons for a departure from past practice.

B. How Can A Progressive Discipline System Help Supervisors?

There are many philosophical and practical reasons for using progressive discipline as a practice. However, most employers do not want to promise progressive discipline in every situation. Instead they want to retain the flexibility to determine when to use it. A progressive discipline system is not appropriate for all employee groups, nor for all types of performance problems. Employers should specifically retain the ability to respond to business problems or changing conditions.

The essence of progressive discipline is notice to an employee of performance problems and an opportunity to correct the deficiency prior to termination. A progressive discipline system establishes communication between the employer and the employee about employee expectations and behavior.

If discharge becomes necessary, the use of a progressive discipline system will create adequate documentation of the employee's performance or behavior problems and the employer's efforts to identify those problems for correction.

Progressive discipline should help eliminate pretextual discharges or discharges for the wrong reason. Progressive discipline can help create an environment of fairness, since employees will receive notice of deficiencies and the opportunity to correct them.

C. What Are The Key Steps In Investigating A Performance Problem?

1. Procedural Considerations.

- a. Make sure that you can conduct a fair investigation. There may be times where the immediate supervisor or manager is not in the best position to conduct a fair and impartial investigation. There may also be times where discharge is likely that two interviewers would be more appropriate than one.
- b. Focus on the facts rather than on the interpretation which those involved may already have placed on the facts. Remember, sometime in the future you may be asking an independent fact finder to review these facts.
- c. Maintain reasonable confidentiality. Only those who have a need to know should be informed of complaints and they, too, should be asked to maintain reasonable confidentiality.
- d. Maintain an open mind throughout the investigation.

2. Checklist for Investigations.

- a. Review and follow any internal procedures for conducting investigations. Many organizations, for example, have specific policies regarding sexual harassment investigations.

- b. Identify potential witnesses, and question them as well as the employee and any complaining party. Ask each person interviewed whether he or she is aware of any other witnesses.
- c. Identify documents and review them.
- d. Identify and preserve any physical evidence.
- e. Obtain details of the incidents.
- f. Consult with the employee's immediate supervisor and solicit his or her views on the issues involved.
- g. Review the personnel file and any other relevant documents. Pay particular attention to performance reviews, recent "merit increases," and any history of progressive discipline.

D. How Does A Supervisor Decide On A Course Of Action?

1. Consider whether there are relevant handbook, supervisory manuals, guidelines or other policies which provide guidance in this situation.
2. Consider whether the facts are sound.
 - a. Are the facts consistent?
 - b. Do the facts make sense?
 - c. Are those who report the facts credible and clear about their information?
 - d. Are the allegations consistent with the employee's past history?
 - e. Are the facts supported by any documentation?
3. Consider the nature of the offense or problem.
 - a. Is the offense or problem severe?
 - b. Does it affect the operation of the organization?
 - c. Does it affect other employees? If so, how much?

Remember, if the decision is later challenged, a key issue is likely to be whether the decision was made for legitimate business reasons, as opposed to some other illegal reason.
4. Consider whether the decision seems fair.

- a. Was the employee on notice of the problem?
- b. Has the employee had an opportunity to explain his or her version of the facts?
- c. Are there any policies or prohibitions regarding the behavior of which the employee had reasonably been informed?
- d. Had the employer represented that the behavior was acceptable or tolerated it in the past?
- e. Was the employee warned and was the employee given a chance to correct the problem?
- f. Did the employee respond to prior concerns?
- g. Is the problem a temporary issue caused by personal circumstances (e.g., divorce, death or illness) which should be considered?
- h. Is the employee a long term employee with a prior good record?

Remember, if the decision is later challenged, regardless of the legality, a jury will likely be looking at its overall "fairness."

5. Decide if the corrective action proposed matches the problem.

- a. If disciplinary action is to be taken, is it reasonably related to the problem and will it be effective? Alternatively, is the discipline action merely punitive and should it be?
- b. If termination is considered, are there appropriate alternatives to termination?
- c. Have any alternatives been tried, including clear warnings, other disciplinary actions or coaching?

6. Review whether the action being considered is consistent with actions taken in other cases. Is this action a departure from actions taken in other cases and, if so, why?

7. Ask if there are potential claims.

8. Review discharge decisions with someone else in management, preferably a personnel professional.

E. How Should A Supervisor Communicate The Course Of Action To An Employee?

1. Decide who should talk with the employee. You may want to have two employees present to confirm what happened. You may also want to avoid having a long-term friend actually administer the discipline or advise an employee of discharge.

2. When advising an employee of the reasons, stick to the facts and avoid labeling the conduct. The supervisor should give truthful reasons, but avoid debating the decision or becoming overly detailed about it. Be sure the employee understands, however, that he or she is being warned or disciplined.

3. Document any disciplinary actions and warn the employee what the next steps can be.

4. The following issues should be resolved before terminating the employee:

- a. Benefits should be identified, such as severance, COBRA benefits, continuation of other benefits and any out-placement assistance.
- b. The employer should determine what, if any, references will be given.
- c. If the employee is subject to any noncompetition agreement, it should be reviewed and any appropriate reminders given to the employee.
- d. The employer must provide final pay within 24 hours of termination for "wages and commissions" in Minnesota. Minnesota does not allow offsets in pay for disputed claims involving theft, loss of or damage to property. (Minn. Stat. § 181.13-14, 79)

F. What Issues May Arise After Discharge?

1. Unemployment Compensation.

An employee may be disqualified from receiving unemployment compensation benefits for "misconduct" but misconduct is very difficult to prove. An employer will want to consider the costs of proving misconduct and the "free discovery" which may be provided to both parties in the unemployment compensation setting.

2. Access to personnel file.

Minnesota law requires an employer to allow employees and former employees to review personnel records. (Minn. Stat. § 181.960-966)

3. Written Demand for Reason for Termination.

Minnesota law requires an employer to provide employees with a written statement of the reasons for termination if the employee requests the information in writing within 5 working days following the termination. (Minn. Stat § 181.933)

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