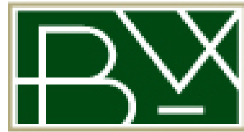

Internal Workplace Investigations of Employee Misconduct
Discipline & Termination
Iowa State Association of Counties

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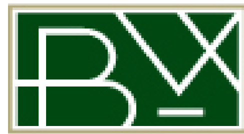
A Firm Commitment to Business™



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Why Conduct Internal Workplace Investigations?

Employers Regularly Receive Complaints of Workplace Misconduct by Employees, Including:

- Discrimination.
- Harassment (sexual and otherwise).
- Health and safety violations.
- Workplace violence or threats.
- Workplace drug and alcohol use.
- Violations of employer rules.
- Theft or fraud.
- Other criminal activity.

Workplace Investigations are an Essential Tool for Responding to Complaints

They Assist in Determining:

- Whether allegations of misconduct have merit.
- Who was involved in the misconduct.
- Disciplinary or other measures that should be taken to prevent recurrence and limit employer liability.
- Preventative steps to avoid future similar incidents.

Besides Fulfilling an ER Obligation Under the Law, the Investigation of Complaints Provides Practical Benefits.

- Affirmative defense to charge of harassment or hostile environment
- Limit Liability for discrimination or quid pro quo sexual harassment
- Safe harbor defense for improper deductions from an employee's pay
- Limit claims relating to negligent retention
- Create a less litigious workforce
- Provides a good source of information about the complaint

Additional Benefits From Conducting Investigations

- Improve employee morale.

- Increase productivity (when coupled with appropriate disciplinary action).

- Reduce turnover rates.

- End inappropriate conduct on a company-wide level.

Potential Risks

- Privacy – unlawful searches
- Defamation - avoid making defamatory statements about any participant, including the accuser and accused, during the investigation that could expose the employer to liability. Avoid conclusory and unsupportable statements.
- Retaliation – avoid retaliatory conduct toward the employee who made the accusations or an employee who participates in the investigation.
- False Imprisonment – employees should not be questioned against their will or confined to a room by their employer and prevented from leaving.
- Tort claims - poorly conducted investigations may result in other tort claims, such as intentional or negligent infliction of emotional distress and assault and battery.
- Prohibited Practice Complaints - Weingarten violations

How Do Internal Investigations Work?

- Determine Whether a Complaint Has Been Made
  - An employee makes a complaint of harassment or discrimination anytime he/she or someone on the employee's behalf makes an allegation to anyone in HR or to any manager or supervisor
  - Managers must be trained to immediately report any harassment or discrimination complaint or retaliation no matter how minor
  - Managers should not investigate on their own
  - ER should have a complaint procedure in their policies that provides a means for filing a complaint
  - ER should have a written policy that prohibits retaliation
- Receiving a Complaint
  - Instruct the complainant regarding the investigation
    - Tell complainant his/her complaint will be treated seriously and investigated
    - Tell complainant he/she will not be subject to any adverse action
    - Tell complainant to contact investigator if they feel they are being retaliated
    - Tell complainant not to discuss the matter with others
    - Tell complainant the investigator will discuss the matter with those necessary to the investigation or any action taken as a result of the investigation

How Do Internal Investigations Work (continued)

- Have the complainant write out a signed, dated complaint indicating – Who, What, Where and when, How, Witnesses

- Take detailed notes of the conversation with the complainant. Include –
  - Name of interviewer
  - Date, time , location
  - Who was present, length of interview
  - Document only facts

- Do not ask the complainant what he or she wants

- Do not make promises or offer opinions
  - Do not promise complete confidentiality
  - Do not promise the alleged wrongdoer will not know of the complaint
  - Do not promise to keep the complainant's identity a secret from the alleged wrongdoer
  - Do not tell the complainant whether you believe him or her
  - Do not promise the alleged wrongdoer will be disciplined

- Do not discipline the complainant for reporting the complaint or witnesses for participating in the investigation

Identifying the Investigator

- Should Law Enforcement Be Involved?
- Considerations:
  - Whether unlawful activity requires police involvement
  - Legal obligations to report the conduct
  - Impact of police involvement
  - Media & public opinion
  - Other

Internal or external investigator

- Determining whether to engage an internal or external investigator is important and has legal ramifications.

- Reasons for using an external investigator may include:
  - ✓ History between complainant and HR Manager
  - ✓ Complaint involves HR Manager
  - ✓ Complaint involves department head or elected official
  - ✓ Timing/Size of Investigation

Identifying an Internal Investigator

- If the decision is made to conduct the investigation internally, then the ER should determine who will conduct the investigation.
- Likely options include:
  - HR or employee relations personnel.
  - In-house counsel.
  - Other (for example, a risk management team if investigating an employee injury).

- Even if the HR department is not the investigator, HR should be involved in the planning and execution of an investigation

- HR should be involved in the assessment of the appropriate outcomes of the investigation, including determining what discipline, if any should be imposed.

- Consistent treatment of employees is key to avoiding discrimination claims. The HR department is typically the repository for information regarding how others accused of the same or similar conduct have been treated.

Investigator skills

- Investigator must be experienced, well trained, impartial, possess diplomacy, insight, compassion, perseverance
- Reason
  - Everything ER does to investigate may be admissible in a lawsuit
  - Written materials may be obtained and investigator called to testify
  - Confidentiality of information obtained through an attorney conducted investigation cannot be guaranteed.
- Wrong chosen or biased investigator may discourage candid interviews or the reporting of illegal conduct
- Ill equipped investigators may expose the ER to tort liability or prohibited practice complaint

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Planning Issues

- When Should the Investigation Commence?
- Should the Employee be Suspended or Transferred Pending Completion of the Investigation?
- Should the Complainant be Offered Paid Leave or Other Accommodation Pending Completion of the Investigation?
- Should Supervisory or Reporting Relationships be Modified Pending Completion of the Investigation?
- How Should Evidence be handled ?
- Who Should be Interviewed?
- What Should be the Sequence of the Interviews?
- Which Materials Should be Reviewed Before the Interviews Commence?

Identify Witnesses and Relevant Documents

- Interview all individuals involved with the complaint, including all witnesses identified by the complaining employee
- Consider interviewing all employees who worked closely with the accused
- Be careful interviewing non-employees – less likely to keep the matter private and may be less reliable
- Schedule meetings at a time and place they do not attract attention
- Explain the need for confidentiality to witnesses
- Ask questions to discover the who, what, where and how of the situation
- Document all interviews.
- Remember interview notes will likely be admissible in any future proceeding

Identify Witnesses and Relevant Documents (continued)

- Collect all relevant files, documents, statistics
- Review any notes, calendars, diary entries , correspondence
- Acquire personnel file of the accused, desk file maintained by the accused's supervisor
- Investigation or discipline files of others accused of similar conduct
- For discrimination claims – obtain and review files or records of employees similarly situated
- Complainant will likely have identified individuals outside the "protected classification" who he/she believes were treated better
- Files of individuals complainant has identified and files of employees the supervisor identifies as being similarly situated should be reviewed
- Files to be reviewed include: personnel; payroll; records of hiring, promotion transfer ; evaluation forms
- Employer rules, policies, procedures and instructions
- CBA

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Take Immediate, Temporary Steps to Stop any Wrongdoing

- If the investigation will take more than one day, take immediate steps to deal with the alleged wrongdoing – particularly any harassment.
- Consider:
  - Giving the complainant the option of taking paid leave from work
  - Giving the complainant the option of moving to a different work location on a temporary basis
  - Instructing the alleged wrongdoer not to talk to the complainant
  - Change the supervisory reporting structure
- Avoid the appearance that the alleged wrongdoer has already been deemed guilty of the offense
- Avoid the appearance that the complainant is being punished in any way

Initial Discussion With The Alleged Wrongdoer

- Have two people interview the alleged wrongdoer to ensure there is a witness to the discussion and statements made
- Inform the alleged wrongdoer that the ER takes the allegations seriously by investigating them consistent with its policy
- Inform the alleged wrongdoer of the allegations
- Communicate the possibility of discipline if the allegations are found to be true
- If a member of a union - remember Weingarten Rights
- Advise that he/she will be provided a full and complete opportunity to provide a meaningful response to all allegations
- Advise that the ER has not yet made any determination regarding the allegation
- Advise he/she to minimize contact with the complainant
- A strict warning not to retaliate should be given and consequences explained
- request that employees be discrete and not interfere with the investigation to protect the integrity of the investigation, protect his/her privacy and prevent rumors

Prepare the Investigation File & Log

The investigation file should be complete accurate and thorough.

It should include:

- A chronology of events
- List of people involve or contacted
- List of documents reviewed
- All communications with those involved
- Witness statements
- Documents that establish or refute the issue investigated
- Physical evidence
- Investigator’s report
- Documentation of results or remedial action taken
- Summary of the allegation and responses
- Complete record showing the employer’s prompt and appropriate action
- Do not include conclusions about credibility or the merits of the complaint
- File should only include objective, fact-finding information

Scope

Are you going down a rabbit hole?

Anticipate the Unexpected

Sabotage

- Documentation – lack of documentation, policies
- Interviews
  - employee refuses to participate
  - employee wants to tape record the interview – allowed by IAPERB
  - employee wants to bring along a friend
  - employee wants to bring along an attorney
  - witness raises new claims
  - employee threatens the investigator
  - unexpected occurs
- Confidentiality
- Delay in the investigation -
- Failure to Remain Neutral – Keep in mind all documentation may be admissible. Be wary of unsubstantiated statements or hasty opinions

Weingarten Rights

A union-represented employee who reasonably believes that an investigatory interview with his employer may lead to discipline has the rights to:

- Ask for representation by a union agent.
- Ask for representation by a fellow employee.
- Forego representation and proceed with the interview without a union representative or co-worker present.

The statutory rights of employees to get assistance from a union representative for an expected are called Weingarten rights and exercising them is considered protected concerted activity under the NLRA.

The employer does not have to offer representation unless it is requested.

NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

Weingarten Representative Conduct During the Interview

- Employers must permit the selected Weingarten representative to provide "advice and active assistance" to the employee who is being interviewed.
- An employer cannot require that the representative act merely as an observer (Washoe Med. Ctr., 348 N.L.R.B. at 361).
- If the employee or the selected representative requests, an employer must:
- Inform the representative of the subject matter of the interview if the representative requests it (Pacific Tel. & Tel. Co., 262 N.L.R.B. 1048 (1982).

- Permit the representative to:
  - have a private meeting with the employee before questioning begins (U.S. Postal Serv., 303 N.L.R.B. 463 (1991);
  - speak during the investigatory interview (Sw. Bell Tel. Co., 251 N.L.R.B. 612 (1980);
  - object to a confusing question or request that the question be clarified so that the employee understands what is being asked (Weingarten, 420 U.S. at 260);
  - suggest other employees who may have knowledge of the incident or incidents in question (Weingarten, 420 U.S. at 260);
  - advise the employee not to answer questions that are abusive, misleading, badgering or harassing (New Jersey Bell Tel. 308 N.L.R.B. 277); and
  - when the questioning ends, provide information to justify the employee's conduct (Weingarten, 420 U.S. at 257).

Weingarten Representative Conduct During the Interview (continued)

Weingarten representatives cannot:

- Turn an investigatory meeting into an adversarial proceeding. Weingarten, 420 U.S. at 263 and Yellow Freight Sys., Inc., 317 N.L.R.B. 115(1995).

- Prevent the employer from questioning the employee, even repetitiously . New Jersey Bell Tel., 308 N.L.R.B. at 279.

- Interfere with legitimate employer prerogatives, such as requesting that the employee attend an investigatory interview away from the employee's working area (Weingarten, 420 U.S. at 258 and Roadway Express, 246 N.L.R.B at 1128).

- Obstruct a legitimate investigation into employee misconduct by:
  - instructing employees not to answer the employers' questions (Manville Forest Prods. Corp., 269 N.L.R.B. 390 (1984));
  - insisting that the interview be ended (New Jersey Bell Tel., 308 N.L.R.B. at 279); or
  - repeatedly interrupting the interview, using profanity and pounding on a manager's desk (Yellow Freight Sys, 317 N.L.R.B. 115.).

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Confidentiality

In Banner Health Systems, the NLRB determined that section 7 of the NLRA prohibited employers with either unionized or nonunionized workplaces from maintaining a protocol of instructing employees to keep information from ongoing workplace investigations confidential.

The NLRB found these types of blanket rules would unlawfully discourage both unionized and nonunionized employees covered by the NLRA from discussing discipline and other terms and conditions of their employment with fellow employees or third parties, including:

- government agencies and unions

Banner Health System d/b/a Banner Estrella Medical Center, 362 NLRB No. 137 (Jun. 26, 2015).

Employers should instead request that employees be discrete and not interfere with the investigation.

Confidentiality
(continued)

The NLRB has ruled that confidential witness statements obtained by an employer in an investigation of employee misconduct are no longer exempt from production.

Instead ERs must conduct a fact specific balancing test that balances a union's need for the information against the ER's legitimate and substantial confidentiality interests (witness needs protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated or there is a danger of a cover-up).

If ER seeks to challenge a request for a witness' statement, then ER confidentiality concerns must be timely raised to the union and ER must offer an accommodation, such as nondisclosure agreement, redaction of witness names, witness summary without attribution.

American Baptist Homes of the West d/b/a Piedmont Gardens, 362 NLRB No. 139 (Jun. 26, 2015).

When Should the Investigation Commence?

- the employer should act immediately in conducting an investigation in instances of
  - threatened workplace violence
  - ongoing harm to an employee
- Federal or state law may also mandate prompt action by the employer, particularly in the areas of harassment or discrimination.
- In other circumstances, however, an immediate investigation may not be necessary. For example a theft investigation.

Before Each Interview

- Explain the process
- Identify Yourself
- Identify the Purpose of the Interview
- No promise of confidentiality
- Request that employees cooperate fully and use their best judgment and discretion when discussing the investigation with others
- Truth and candor required
- No retaliation

What Should be Asked in the Interview?

- outline the topics that will be covered
- prepare a list of the questions that will be covered
- Listen carefully & ask appropriate follow-up questions
- ask non-leading, non-judgmental and open-ended questions

  Who? What? When? Where? Why? How?

How Should The Investigation Conclude

- Organizing the Collected Information
- Make Credibility Determinations
- Make Factual Determinations
- Tell the Story
    - Be Consistent
    - Be Organized
- Determine the Response
    - allegations are corroborated.
    - allegations are disproven.
    - unable to reach a conclusion regarding whether the allegations are valid or invalid.
- Communicate the Outcome

Discipline

Performance vs. Conduct

Two Typical Scenarios:

- Performance Issues
- Misconduct Issues

Performance and Conduct

Performance: The comparison of an employee's actions against the objective or subjective standards of the employee's position

Conduct: The comparison of an employee's behavior against the employer's written or unwritten behavioral standards or work rules

Progressive/Corrective Discipline

- Employer should take action designed to correct/improve employee's performance or conduct
- Any penalty should fit the "offense"

Documenting Disciplinary Issues

Maintaining fair & accurate documentation can serve as positive evidence in a lawsuit for :

- Retaliation
- Wrongful termination
- Discrimination

(also applies to grievance arbitration)

Keys to Proving Employer's Case

- Employer Acted in Good Faith
- Employee Treated Fairly

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Documentation Best Practices

1) Show that Employer acted in good faith
2) Show that the Employee was treated fairly
3) Note the policy or rule violated
4) Note the conduct constituting the violation

Documentation Steps

- Is the performance standard or conduct standard documented? (handbook, policies, job descriptions, etc.)
- Is the Employer's Power to Measure the Employee's Performance or Conduct Documented? (handbook, policies, etc.)
- Is the Employer's Measure of the Employee's Performance or Conduct Documented? (handbook, policies, job descriptions, etc.)
- Is the Employee's input into the Employer's measure of performance or conduct documented? (handbook, policies, job descriptions, etc.)
- Is the Employee's Awareness of What Penalty Could be Imposed Documented? (handbook, policies, reviews, warnings, etc.)
- Is the Employer's Decision-making Process on the Appropriateness of the Penalty Documented? (file memos, handbooks, policies, etc.)
- Are Similar Situations Documented or Distinguished? (written discipline, file memos, etc.)

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Discipline Arbitration

In arbitrations to resolve grievances about employee discipline, arbitrators generally are asked to determine two issues:

- Whether the grievant was disciplined for just cause.
- If not, what remedies are appropriate.

Generally, the ER must show that it treated the grievant fairly. Factors include:

- The nature of the misconduct.
- Grievant's disciplinary history.
- Employees' work record or length of service.

Just Cause

Frequently CBAs include a just cause standard. In a disciplinary arbitration, arbitrators analyze whether the just cause standard has been meet on the basis of the following factors:

- Whether the employer's decision was reasonable.
- Whether the employee was provided sufficient notice of the allegation
- Whether the investigation was timely
- Was the investigation fair
- What evidence the ER relied upon
- possibility of discrimination
- Whether the nature of the misconduct was considered
- Whether the employee's past record was considered

Just Cause Factors (continued)

Arbitrators consider many additional factors, including:

The employer's:

- Whether progressive discipline was followed
- Whether the CBA was applied
- The ER’ treatment of the grievant in discipline and otherwise
- Justifications for prior grievant discipline
- Whether any probable punishment for the alleged misconduct was communicated
- ER practice of disciplining employees for the same alleged misconduct
- Whether similar situations are distinguished
- Whether there are ER rules or statutes prohibiting the grievant's conduct

Discipline Arbitration Proceedings (continued)

The grievant's:

- history of engaging in the same alleged misconduct
- training and understanding about consequences of the alleged misconduct
- discipline record for identical and other alleged misconduct
- earlier "last chance" agreements
- denial of alleged misconduct
- explanations, excuses or provocations about the alleged misconduct
- good or bad faith when engaged in the alleged misconduct
- willfulness in engaging in the alleged misconduct
- remorse or lack of remorse for alleged misconduct;
- work record including advancement, evaluations, recognition
- age
- length of service

Discipline Arbitration Factors (continued)

Nature of the misconduct:

- seriousness
- criminality
- notoriety
- harm to the employer's property or business
- harm to the employer's customers, clients, suppliers and vendors
- harm to supervisor's, or more generally, the employer's managerial authority
- harm to the employer's reputation
- harm to other employees
- harm to workplace morale.

Termination

No situation carries as much potential liability for an employer as the termination of an employee.

To reduce the risk as much as possible, employers must implement procedures that require employee terminations to be handled in a consistent and professional manner.

Employment at Will

- As a general rule, Iowa follows the employment-at-will doctrine.
- Therefore, unless there is a contract, it is employment at will
- This means the employer may discharge the employee at any time, with or without cause, for any lawful reason.
- The employee may also, in turn, quit his or her employment at any time, with or without reason or notice.

Exceptions to Employment- at-will

There are, however, some circumstances in which the employment-at-will doctrine may be limited by:

- Terminations in violation of law or public policy

    1. Federal and State and law protects certain classes of people from discrimination
    2. Most federal and state anti-discrimination and employment laws also prohibit retaliation against employees by their employers for exercising their rights to seek protection under these laws or participating in a protected activity.

- Employees working under a written employment agreement or a union contract may also be protected from discharge other than for good cause as defined by the particular agreement.

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What are the exceptions to the employment-at-will doctrine?

There are several exceptions to the employment-at-will doctrine. Various federal and state anti-discrimination statutes protect employees from being discharged on the basis of:

- race
- color
- creed
- sex
- pregnancy
- sexual orientation
- gender identity
- national origin
- religion
- age
- disability
- genetic information
- military status.

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Discrimination

Title VII of the Civil Rights Act of 1964, amended by the Civil Rights Act of 1991 (Title VII)

- Applies to both private and public employers with 15 or more employees, labor organizations, and employment agencies, but not to certain bona fide private membership clubs.

- Title VII prohibits an employer from discharging an employee on the basis of race, color, religion, national origin, or sex (including pregnancy, childbirth, or related medical conditions).

Discrimination (continued)

The Iowa Civil Rights Act (ICRA)
Iowa Code Chapter 216

- applies to employers with 4 or more employee
- protects applicants and employees from discrimination because of
  - age
  - race,
  - creed
  - color
  - sex
  - sexual orientation
  - gender identity
  - national origin
  - religion
  - disability (mental & physical)
  - retaliation

Pregnancy
(Protected Class)

The Pregnancy Discrimination Act (PDA)

- applies to both private and public employers with 15 or more employees, labor organizations, and employment agencies.
- PDA prohibits employers from discharging or otherwise discriminating against employees on the basis of pregnancy.
- PDA requires pregnant women to be treated the same as men or non-pregnant women, whose ability or inability to work is due to a non-pregnancy-related illness or disability. The PDA does not, however, require better treatment for pregnant women.

The ICRA

- protects employees from termination because of pregnancy.
- under the ICRA, leaves of absence due to the employee being disabled by pregnancy, childbirth or related medical conditions is limited to the period of time the employee is disabled or for eight weeks, whichever is less.

Age
(Protected Class)

Employer coverage under the Age Discrimination in Employment Act (ADEA) is similar to that under Title VII, except the ADEA applies only to employers with 20 or more employees.

The ADEA, as amended, prohibits an employer from discriminating against an individual with respect to discharge and other terms, conditions, and privileges of employment on the basis of the individual's age, provided that the individual is age 40 or older.

Disability
(Protected Class)

The Americans with Disabilities Act (ADA) applies to employers who have 15 or more employees.

The ADA generally prohibits discrimination and harassment in any aspect of employment, including discharge, applications, testing, hiring, assignments, evaluations, disciplinary actions, compensation, promotions, leave, and benefits.

Family And Medical Leave

The Family and Medical Leave Act (FMLA) applies to all public agencies (state and local governments) and local education agencies (schools). Public employers do not need to meet the 50 employee test.

To be eligible the employee must:

- have worked for at least 12 months (months do not need to be consecutive); and
- worked at least 1,250 hours during the 12 months that immediately precedes the start of the FMLA leave

Under the FMLA, the employee is entitled to up to 12 weeks of unpaid leave for the birth or adoption of a child, the employee's own serious health condition, or to care for a spouse, parent, or child with a serious health condition.

Family and Medical Leave (continued)

Amendments to the FMLA provide for leave for family members to provide care for a "covered service member," which includes a member of the Armed Forces, including the National Guard or Reserves:

- who is undergoing medical treatment, recuperation, or therapy; or
- who is otherwise in an outpatient status or on the temporary disability retired list for a serious injury or illness.

An employee is also allowed to take up to 12 workweeks of leave for a "qualifying exigency" arising out of that employee's spouse, son, daughter, or parent being on active duty or having been notified of an impending call or order to active duty in the Armed Forces in support of a contingency operation. Additionally, the new amendments provide for a military caregiver leave for up to 26 workweeks.

An employer may not discharge the employee for exercising his or her rights to leave under the FMLA.

Military Service
(Protected Class)

The Uniformed Services Employment and Reemployment Rights Act (USERRA) generally requires an employer of a person who enters military service to reemploy that person upon military discharge. In addition, the employer must restore the employee's rights and benefits "lost" due to military service.

Military "service" under USERRA is broadly defined to include:

- active duty
- active duty for training
- initial active duty for training
- inactive duty training
- full-time National Guard duty, and
- absence from work for an examination to determine a person's fitness for any of the listed types of duty.

Military Service (continued)

Under USERRA, the employer must give the employee a leave of absence for military service and cannot require the use of the employee's vacation or other leave. However, service members must, at their request, be permitted to use vacation that accrued prior to the beginning of their military service. In addition, employees returning from military leave are entitled to the seniority and other rights and benefits based on seniority that they would have had if they had remained continuously employed. Additionally, USERRA provides for health benefit continuation for persons who are absent from work due to military service, even when the employers are not covered by COBRA.

An employer may not refuse to hire, promote or retain an employee based (in whole or in part) on his or her membership in the uniformed services, and it may not terminate such individual or deny him or her any benefit on that basis

An employer may not terminate a reemployed employee (except for cause) within one year after the reemployment date if the military leave period was more than 180 days.

GINA
(Protected Class)

- Federal Genetic Information Nondiscrimination Act
- Title II of GINA makes it illegal to discriminate against employees or applicants because of genetic information.
- Fifteen or more employees = coverage

IOWA WAGE DISCRIMINATION IN EMPLOYMENT (Protected Class)

- Amended Iowa Civil Rights Act
- Arguably is a mirror of the Ledbetter Fair Pay Act, but actually appears to go much further
- Incorporates aspects of both the Ledbetter Fair Pay Act & the Equal Pay Act

IOWA WAGE DISCRIMINATION IN EMPLOYMENT (Protected Class)

- Covers all groups protected under the ICRA
  - In fact, it protects more classes than federal law
- Wider scope
  - Essentially "equal pay for equal work" standard (like the Equal Pay Act)
- Proof likely easier for plaintiff
  - Intent may not have to be proven; mimics EPA, which Iowa Supreme Court has said does not require proof of intent
  - Employers have burden to prove affirmative defenses for differences in pay (e.g., seniority, merit, quality/quantity of production, any other factor not protected)

IOWA WAGE DISCRIMINATION IN EMPLOYMENT (Protected Class)

- Enhanced remedies
  - 2X the wage differential – liquidated damages
  - 3X the wage differential if violation is proven to be willful – enhanced liquidated damages
  - Punitive damages not available (liquidated damages instead)

Protected Activities

Iowa Code Chapter 20 prohibits discrimination, including discriminatory discharge, based on the employee's exercise of protected, concerted activity (including, but not limited to, union activity).

Other statutorily protected activities include complaints under:

- Occupational Safety and Health Act (OSHA)
- "Whistleblower" activities – Iowa Code § 2C.11A
- wage garnishment. Iowa Code § 642.21.
- jury duty - Iowa Code § 607A.45
- workers compensation claims – Iowa Code Chapter 85
- requests for nursing mother accommodations -Section 7 of the FLSA
- wage complaints
- Exercising a right under the Iowa Smokefree Air Act - Iowa Code Chapter 142D
- And others!

Employees should not be terminated because of engaging in these protected activities.

STATE AND FEDERAL CIVIL RIGHTS COMPLAINTS
(Also Protected Activity)

- In addition to providing protected classes of people, these laws also protect people who have lodged a complaint or participated in an investigation from retaliation.

FEDERAL FLSA
(Protected Activity)

- Employees must be paid the federal minimum wage ($7.25) [Iowa Code Chapter 91D established the state minimum wage at $7.25]
- Employees must be paid time and a half for hours over 40 in a work week
- Cannot retaliate against an employee who files a complaint or participates in proceedings
- Applies to enterprises that have employees who are engaged in interstate commerce, producing goods for interstate commerce, or handling, selling or working on goods or materials that have been moved in or produced for interstate commerce. For most firms, an annual dollar volume of business test of $500,000 applies (i.e., those enterprises under this dollar amount are not covered).
- Covered regardless of volume of business: hospitals, institutions primarily engaged in the care of the sick, aged, mentally ill or disabled who reside on the premises; schools for children who are mentally or physically disabled or gifted; preschools, elementary and secondary schools and institutions of higher education; and federal, state and local government agencies.

IOWA CODE CHAPTER 91A
(Protected Activity)

Retaliation

- ER shall not discharge or in any other manner discriminate against any EE because the EE has filed a complaint, assigned a claim, brought an action or has cooperated in bringing any [wage payment] action against an ER. Iowa Code § 91A.10(5).
- If commissioner determines ER has violated this law, commissioner shall bring district court action against the ER.
- **A "complaint" under this subsection seems to infer only a complaint filed with the commissioner – this is not the case.**
  - **If an EE formally complains to the ER about a wage issue, an ER can be liable for retaliation.** See Tullis v. Merrill, 584 N.W.2d 236, 139-40 (Iowa 1998)(a complaint under section 91A.10(5) is not limited to those made to the labor commissioner, employee complaints to employers also qualify).

WORKERS COMPENSATION (Iowa)
(Protected Activity)

- The Supreme Court of Iowa has recognized that when an employee is terminated in retaliation for asserting his right to workers' compensation benefits, a public policy is violated. Springer v. Weeks & Leo Co., 429 N.W.2d 558, 559-60 (Iowa 1988).

WHAT DOES THIS MEAN?

Discipline and/or termination should not be based on protected class status or protected activity.

However, protected class status or protected activity do not insulate employees from discipline or termination – just potentially makes it more complicated…

Guidelines Employers Should Follow When Terminating Employee

Establish And Follow Work Policies

Should a termination decision be challenged, it is vital for an employer to have established written work policies or rules supporting the basis for the decision to terminate.

Rules and policies that are clearly communicated and consistently applied are very helpful in defending a wrongful termination claim.

An employer should continue to emphasize in its policies that it has the right to skip all levels of discipline and proceed to immediate discharge should the conduct at issue warrant this approach.

The employer should also reserve the right to change its rules and policies at any time and note that any published rules and policies are not all-inclusive.

Management should be thoroughly familiar with the employer's rules and policies so that managers and supervisors may fairly and accurately implement them.

Review and Investigate the Matter

Any decision that is based on incomplete or inaccurate facts will be suspect, not only by the employee, but also by a jury. As such, it is important for management and, preferably, an outside, objective party such as HR to:

- review the decision to terminate
- interview people with knowledge of the facts
- meet with the employee and hear the employee's version of events
- make a written record of the investigation.

Supervisors should contact HR or upper management whenever a problem with an employee arises.

Meetings to discuss the employee's disciplinary problems or to terminate the employee should always include at least one representative from HR or upper management to act as a witness and consultant.

The decision to terminate the employee should be evaluated and confirmed by management, as well as a HR executive.

Confirm Treatment of Similarly Situated Employees

It is vital for employers to be consistent in their treatment of employees. Management should consider the company's past practice in situations similar to the situation at hand and determine whether the employee is being treated the same as other employees in similar situations. If not, can the different treatment be adequately justified? Some factors to consider are:

- the employee's length of employment
- position held
- performance and disciplinary history
- other special circumstances that might distinguish the current situation.

Evaluate the Possibility of a Discrimination or Retaliation Claim

Before making any decision to terminate, the employer should consider the state and federal laws prohibiting discrimination and retaliation in order to evaluate whether the decision could trigger an employment discrimination or retaliation claim.

The Employer Should Take Into Account the Answers to These Questions:

- Is the employee a member of a protected class?
- What is the make-up of the remaining workforce from the standpoint of protected categories?
- Will the employee be replaced? By whom?
- What is the employee's tenure?
- Is there a written contract with the employee?
- Was the rule the employee violated a published rule? How? Where? When?
- Did the employee receive a copy of the violated work rule (for example, in a policies and procedures manual or handbook)?
- Was the rule posted elsewhere?

The Employer Should Take Into Account the Answers to These Questions (Continued)

- Has the employee been warned previously for violation of the work rule? By whom?
- Does the documentation in the personnel file support the termination?
- Has the employee recently filed a workers' compensation claim, a civil rights claim, an Equal Employment Opportunity Commission charge, or any other type of claim with a federal or state agency?
- Is the employee a whistleblower?
- Has the employee complained that he or she believes the employer has engaged in prohibited discrimination or other unlawful behavior?
- Has the employee been involved in an internal investigation during which he or she provided information about alleged discrimination, harassment, or retaliation in the work place?
- Is the justification for the termination consistent with past practice, procedure, and treatment of similarly situated employees?

Document to Support the Discharge

- Accurate documentation of employee performance issues and/or discipline leading up to an employee's discharge is essential to the defense of any discharge decision.
- Written documentation is generally perceived as being true and accurate compared to recollections of witnesses.
- As such, all significant employer actions, including performance evaluations, disciplinary warnings, probationary periods, and performance improvement plans, should be documented and retained in the employee's personnel file.
- An employer has a greater chance of prevailing when a termination decision is challenged if the documentation of the employee's performance and conduct supports the decision to terminate.
- While documentation is very important, supervisory employees should also be trained about how to document these issues appropriately.
- Unnecessary comments can be damaging and may be interpreted as including improper criterion in the termination decision.

Communicating the Decision to Terminate

- Terminating an employee is a delicate undertaking in the best circumstances. It is important that the employee understand the reasons for the discharge.
- Ideally, a representative of human resources should be present at the meeting in which the employee's manager communicates the discharge decision.
- The human resources or management representative who attends the discharge meeting should document carefully the reason provided to the employee for the discharge and any response by the employee.
- The termination meeting should be short and to the point, and the decision to terminate should be conveyed unemotionally and candidly.
- The employer should not try to soften the blow by complimenting the employee on other areas of performance, as this sends mixed messages to the employee.
- The employee should be treated with dignity and respect at all times.
- Employees who feel they were treated unfairly are more likely to file a claim for wrongful discharge, unlawful discrimination or file a grievance.

Procedural Points When Conducting a Termination Meeting

Employers should also keep in mind the following when conducting a termination meeting:

- Review the employee's employment history briefly with the employee, commenting on specific problems that have occurred and the attempts to correct these problems.
- Within the first few minutes of the interview, inform the employee that he or she is being terminated.
- Explain the decision clearly and concisely.
- Avoid counseling the employee.
- Make sure the explanation given for the termination is truthful. The reason provided to the employee for the termination is essential should a lawsuit be filed.
- In some cases, failure to state the true reason for the termination or stating reasons inconsistent with reasons later stated has been considered evidence of bad faith or discrimination.

Procedural Points When Conducting a Termination Meeting (Continued)

- It is possible to say too little or too much, so careful consideration should be given to any communication regarding the reason for the termination. **Where the termination involves a complicated matter, it may be wise to seek legal advice concerning the drafting of the separation notice.**

- Fully explain any benefits, including COBRA and unemployment compensation, that the employee may be entitled to receive. If the employee is not entitled to certain benefits, explain the reasons for this.

- Allow the employee the opportunity to respond. Pay close attention to what the employee says, **but do not argue with the employee or otherwise attempt to justify the decision.**

- The decision to terminate must be based on legitimate, nondiscriminatory, non-retaliatory business-related reasons.

Procedural Points When Conducting a Termination Meeting (Continued)

- When an employer is firing an older employee, a pregnant employee, an employee who is a member of a racial or ethnic minority, or any other employee who falls into a protected category, it is essential that the person conducting the conference not make any reference to the protected characteristic that could later be used as evidence of discrimination. **This includes any references to race, color, sex, sexual orientation, gender identity, age, religion, national origin, genetic information, or disability.**

- The manager or human resources representative conducting the interview should be organized and confident in communicating the termination decision.

- During or after the meeting the employer should document what the employee was told and how the employee responded.

- At the time of the actual discharge, at least two managerial employees or at least one manager and one human resources employee should always be present.

- Provide for the return of materials, documents, tools, information, etc. in the personal possession of the employee.

Procedural Points When Conducting a Termination Meeting (Continued)

- Establish a procedure to retrieve IDs, delete or obtain passwords, change locks, and other related security matters. Anticipate whether physical security preparations are needed.

- Remind the employee of any confidentiality requirements that may apply.

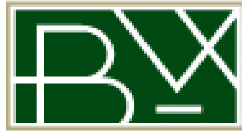
- If appropriate, consider seeking a release of liability.

- If appropriate, conduct a well-prepared exit interview and follow up on any useful suggestions made by the exiting employee.

- Ensure the employee physically leaves with as much dignity as possible. In the case of discharge, give specific thought to transportation arrangements if the employee is impaired or added security measures if the employer has reason to worry about potential workplace violence.

- Ensure that all employment-related documents are current, complete, accurate, signed, dated, and approved as appropriate.

- Make sure termination procedures and exit interviews are consistently applied to all employees.



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