

# Protecting your business

How to properly handle employee discipline or termination **Interviewed by Sue Ostrowski**

**W**hen employers don't consistently follow their guidelines when disciplining or terminating employees, they may be putting their company at risk for claims of retaliation or wrongful termination.

But by implementing policies and applying common sense and an even hand, employers can help protect themselves should a lawsuit arise, says Harold M. Schwarz, an attorney in the Litigation and Employment Group at Stark & Knoll Co., L.P.A.

"It in no way guarantees that you won't be hit with a frivolous lawsuit, but if you have sound policies and you do your absolute best to follow them, and had a legitimate reason for the discipline or termination, ultimately, you will be in a stronger position than if those things were not there," says Schwarz. "With the economy, there has been a dramatic increase in the last two to three years in the number of retaliatory discharge claims and wrongful termination claims, and employers need to take steps to protect themselves."

*Smart Business* spoke with Schwarz about how to help protect your company from claims of retaliation or wrongful discharge.

## What's the first step in protecting against claims of retaliation or wrongful discharge?

It's all about common sense and an even hand. It starts with an employer having in place appropriate policies and procedures that are set forth in an employee manual. That is always the starting point. That way, when you do have issues that may ultimately lead to discipline or termination, you have already laid out the best way to handle those scenarios. An employee manual provides something that is easily understandable that can be followed by the employer, as well as the employee.

Employers should consult with an experienced employment law attorney for guidance in creating the manual because there are nuances in the law that are important to address. Yes, you're going to be setting forth some fairly mundane, day-to-day things about your time-off policy, sick leave, etc., but at the same time, you need to address issues such as harassment in the workplace, retaliation and how an employee may properly complain about something they perceive the employer may be doing that breaks the law.

Some employers may consider downloading generic forms from the Internet, but that is a bad idea because whoever is drafting those documents may be in a state that has different employment laws.



**Harold M. Schwarz**

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## How can an employer communicate its policies to its employees?

Beyond the handbook, employers should post certain policies in common areas. Aside from the standard required workers' compensation and wage-and-hour posters, employers should also post the whistle-blower policy, anti-retaliation policy and the policy designating who employees should take a complaint to.

When a new employee comes on board, it is common practice to have someone explain the policies. But it's also a good idea, especially as a company is growing, to have annual or biannual HR training, in which the HR person goes over the policies in place and explains everything from wages and benefits to the policies covering retaliation, discrimination and whistle-blowing. After all, a policy is essentially worthless if the people who are charged with enforcing it don't know or understand it.

And when there is a change in policy, at a bare minimum, there should be an announcement to all employees, and they should receive copies of the revised manual. Transparency in your policies is critical.

## What are some common claims filed against businesses?

Claims that arise from both existing and former employees are things like discrimi-

nation, retaliation, sexual harassment and whistleblower complaints. A valid defense to each of these kinds of claims is that the employer had a nonretaliatory business reason for the termination.

## How should an employer handle disciplinary issues in a way that helps protect it in case of a lawsuit?

When disciplining an employee, don't meet with them in an open area where others can overhear the conversation. Meet with that person in private to discuss the issue, and have one or more people with you, if for no other reason than having another individual witness the meeting.

At the end of the conversation, whether it was prepared before, during or after the meeting, there should be a disciplinary form that outlines the issues that led to the meeting, what was discussed and what, if any, resolution was reached. That should be signed by the individual who meets with the employee and presented to the employee for their acceptance or rejection and signature, before being placed in their personnel file.

Keeping a written record is critical. That way, if you end up terminating an employee, you have a record of the reasons and actions that led to the termination. Then, if a lawsuit results, you have a valid reason for the termination that you can demonstrate, not just something created after a lawsuit was filed.

## What are the consequences of failing to have policies in place and consistently following them?

The consequences can be very unpleasant. Depending on the type of lawsuit, there can be back wages, as well as front pay, which includes not only what that individual may have made over the course of a career but the value of benefits they've lost. And in certain egregious instances, a case may qualify for punitive damages and attorneys' fees. These damages can literally bankrupt a company.

Some business owners may think, 'I've come this far without a policy in place, why do I need to start now?' But given the environment that we live in today, that is a dangerous way to do business. <<

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