

Coaching and Discipline in the Workplace Tool Kit



California
Employers
Association™

Contents

Performance Management – Coaching vs. Discipline.....	3
Disciplinary Action Overview	4
Protected v. Unprotected Conduct	5
At-Will Employment Relationship.....	5
Note on “Progressive Discipline” Policies	6
Exceptions to the At-Will Relationship	6
Where to Start.....	6
Employee Handbook Policies.....	6
Training Supervisors.....	7
The Importance of Documentation	7
Internal Investigations.....	8
Choosing the Appropriate Type of Discipline.....	8
Avoiding Discrimination/Favoritism Claims	8
Note on Exempt Employee Pay Deductions	8
Communicating Disciplinary Action	9
Following Up	10
Conclusion.....	10

Performance Management – Coaching vs. Discipline

If you are having a performance or conduct issue with an employee, the first step is to decide how to manage the situation. This should depend on your intention with the intervention. If your intention is to guide the employee to better performance or conduct, consider a coaching approach. If your intention is to clearly communicate that further issues will result in either discipline that is more serious and/or in termination, consider a disciplinary approach. Under either approach, you should always detail and document an employee's performance or behavior issues to create a record. Also, the approaches are not mutually exclusive – sometimes a combination of discipline and coaching may be effective.

Before you determine your approach, if you don't know the reason the employee is performing below expectations or not adhering to the company's code of conduct, have a conversation with the employee. Think of this meeting as a fact-finding mission; a discussion of your observations and an invitation for the employee to bring up any concerns or issues they may have that have led to the poor performance or inappropriate conduct.

There are a number of variables that could factor into your decision to go the coaching route and/or the disciplinary route. The table below shows factors generally associated with coaching and factors generally associated with discipline (these should be considered along with any extenuating circumstances you've discovered during your discussion with the employee):

Consider Coaching if...	Consider Discipline if...
<ul style="list-style-type: none"> This is the first time this particular issue has come up with the employee 	<ul style="list-style-type: none"> The employee has exhibited a pattern of poor performance and/or conduct that is not improving
<ul style="list-style-type: none"> The employee has been cooperative and willing to own their mistakes and strategize learning from them 	<ul style="list-style-type: none"> The employee has been generally uncooperative when other issues have been brought to their attention
<ul style="list-style-type: none"> Employee has not been provided with appropriate training, information, or resources 	<ul style="list-style-type: none"> You are certain the employee has been given all the tools and information they need to succeed; they just aren't using them
<ul style="list-style-type: none"> The employee is inexperienced with the company, the industry, or with the professional work world 	<ul style="list-style-type: none"> The employee is experienced, but refuses to adapt to new programs or processes (after appropriate training)
<ul style="list-style-type: none"> The poor performance or misconduct is not severe 	<ul style="list-style-type: none"> The poor performance is impacting the success of your company/department and/or the misconduct is severe
<ul style="list-style-type: none"> The employee generally has positive relationships with their coworkers and management 	<ul style="list-style-type: none"> Coworkers and other managers have reported issues with the employee's behavior which you've discussed with the employee

Coaching Options – there are many ways a supervisor can coach and help develop their employees who are willing and able to put in the work to improve. Your approach will depend on the employee's needs, your management style, and the employee's preferences, but here are some options:

- [Coaching discussion](#) (between the supervisor and employee)
- Employee coaching/professional development (one-on-one with a trained coach)
- Training (e.g., on tools, processes, company philosophy, or on specific topics, like conflict resolution, leadership skills)
- Performance Improvement Plan
- Shifting of job duties (if not experienced enough to perform at expected level)
- Assign a mentor or more senior employee to help get the employee where they need to be

CEA offers a wide range of training and coaching solutions to help develop your employees. Access our [Course Catalog](#) to explore training options, and visit our [Coaching](#) page to learn more about personal and executive coaching we can provide your employees.

Discipline Options/Types – if you decide to go the discipline route, here are the options/types of discipline you may want to consider:

- [Verbal Warning](#) (make sure to still document internally!)
- [Written Warning](#)
- [Final Written Warning](#)
- [Performance Improvement Plan](#) (may be applicable in both a coaching and a disciplinary context)
- Suspension
- Demotion
- Termination (refer to our [Termination Tool Kit](#) for additional steps and requirements, including final pay obligations)

Throughout the remainder of this tool kit, we will cover the compliance and employee relations aspects of employee discipline (there are a lot of things to consider).

Disciplinary Action Overview

While many supervisors and managers find disciplinary action uncomfortable, at times discipline is critical to ensure that policies are followed and the work environment is positive, respectful and professional. This tool kit assists employers in determining when disciplinary action is appropriate, choosing the type of discipline, documenting and communicating the decision, and avoiding pitfalls.

Protected v. Unprotected Conduct

At-Will Employment Relationship

In California, the default employment relationship is “at-will.” At-will employees can be disciplined (or terminated) for any *lawful* reason. Some examples of “unlawful” reasons include disciplining an employee because they filed a complaint, participated in an investigation, took a protected leave of absence, or engaged in other protected activity, such as discussing wages, hours, and working conditions with coworkers. You should never discipline an employee based on *protected conduct*.

As such, it is important to **document the reason** for discipline to demonstrate it was lawful.

Disciplinary action often relates to three general categories:

- Policy Violations & Misconduct
- Work Performance
- Absenteeism/Tardiness

While it may seem straightforward, employers should be cautious that even if they are engaging in lawful discipline, that they are not *appearing to engage in unlawful retaliation*.

Here's an example: Let's say you have an employee who has no record of disciplinary action or negative performance reviews. This employee recently filed a discrimination complaint against their supervisor. Their supervisor has now indicated that they want to discipline the employee for poor work performance over the last few months. If the supervisor proceeds with disciplinary action, they will likely appear retaliatory given the timing of the employee's complaint, and especially because there is no prior record suggesting performance concerns. In these situations, it is best to consult counsel on how to proceed. This example also illustrates why it is critical to document policy violations and performance problems as they occur (don't wait!).

Employers should also be cautious when disciplining for absenteeism/tardiness. It is important to assess whether the employee was entitled to protected leave time, which should never result in disciplinary action or count as an “occurrence” against attendance. Common examples include mandatory paid sick leave and leave under CFRA/FMLA. Even if the employee has no protected leave time available, if they were absent or tardy due to a medical issue, the employer should assess whether a reasonable accommodation is required under the FEHA/ADA, meaning no disciplinary action should result. For more on attendance-related issues and policies, refer to our [Attendance Policy Tool Kit](#).

Note on “Progressive Discipline” Policies

Some employers implement “progressive discipline” policies, which involve escalating disciplinary action in pre-defined steps (e.g., verbal warning, written warning, suspension, termination). Outside of collective bargaining/public employers, these policies are typically not recommended. The reason is that a progressive discipline policy may undo the at-will relationship and actually create a contract/agreement with the employee guaranteeing that certain steps will be followed before they are subject to termination.

If you do have such a policy, ensure it is explicit that employees are still at-will and the company reserves the right to apply whatever type of discipline it deems appropriate in the circumstances.

Exceptions to the At-Will Relationship

Some employers have employees who are not considered “at-will.” These employees may have additional rights, such as only being subject to “for cause” discipline/termination (as defined), and may be entitled to procedural rights, such as advance notice and opportunities to challenge the disciplinary action. Common exceptions to the at-will relationship include:

- Union employees covered by collective bargaining agreements (CBAs);
- Many public employees, covered by CBAs or “memorandum of understandings,” and/or statutory rights, such as the Public Safety Officers and Firefighters Procedural Bill of Rights;
- Executive-level employees who have entered into employment agreements with their employers.

When unsure about an employee’s disciplinary rights, consult legal counsel.

Where to Start

Employee Handbook Policies

In determining whether to engage in disciplinary action (or to what extent), the best place to start is often with a review of your employee handbook and policies. Your employee handbook puts employees on notice of your rules and expectations. This is why your employees should sign an acknowledgment of your handbook policies upon hire, upon any policy changes, and when they have violated those policies.

Referring to and citing your policies when engaging in disciplinary action also helps ensure that you are treating employees fairly and consistently. Common policies that are often at issue include:

- Anti-Discrimination, Harassment, and Retaliation
- Bullying/Abusive Conduct
- Code of Conduct
- Respect and Professionalism
- Safety and Health
- Attendance

- Meal/Rest Break Requirements (Non-Exempt Employees)

When dealing with performance issues, you should also refer to the employee's job description.

Training Supervisors

It is also critical to train any supervisors who are authorized to engage in disciplinary action. For example, your training should address:

- Who has final approval to make disciplinary decisions?
- What documentation and steps are required to initiate discipline at your organization?
- Who is responsible for updating the employee's personnel file with disciplinary action?
- Do you require a witness when communicating disciplinary action to the employee?
- Recognizing when disciplinary action may *appear retaliatory* and what steps are required (e.g., consult Human Resources, legal counsel, etc.).
- Do not make promises or guarantees regarding disciplinary action.
- Additional steps for terminations, including final pay requirements.

Note: To the extent you can centralize your organization's disciplinary process (i.e., all supervisors use the same forms, Human Resources provides a final level of review, etc.), this will help mitigate subjectivity, keep your process consistent, and avoid issues getting "lost in translation."

The Importance of Documentation

When you identify that an employee has violated policies, engaged in misconduct, or has performance issues, it is important to document those issues *promptly*. This will help you demonstrate that disciplinary action is for a legitimate reason. Upon learning of an incident, the documentation should include the who, what, where, when and why of the incident or issue:

- **Who** was involved in the incident, including witnesses? (Names/titles)
- **What** happened, including what policies were at issue?
- **Where** and **when** did it occur?
- Reason **why** it occurred?

The organization should additionally document:

- When/ how the supervisor or management learned about it
- Records of discussion with the employee
 - Date of discussion
 - Who was present
 - Statement of what was discussed or occurred
- Employee's response or explanation
- Employee's acknowledgment of any policy violations

Internal Investigations

At times, there may be an *allegation* that an employee violated policy or engaged in misconduct, but the employer does not have enough information to yet form a conclusion. In this case, you may need to conduct an internal investigation to determine what *more likely than not occurred*, before engaging in any disciplinary action. Under most circumstances, accused employees have a right to respond to the allegations against them.

Additionally, when the allegation involves harassment, discrimination, or retaliation, the employer is *required* to conduct an investigation in accordance with the Fair Employment and Housing Act (FEHA). If there is a finding of harassment, discrimination, or retaliation, the employer must engage in *prompt corrective action*.

For additional information on internal investigations, refer to our [Investigations in the Workplace Tool Kit](#). (Union employees may have additional rights during internal investigations.)

Choosing the Appropriate Type of Discipline

Avoiding Discrimination/Favoritism Claims

Once the employer has made a finding regarding whether the employee violated policy or has performance issues, the next step is to choose the appropriate type of discipline. It is important to apply disciplinary action consistently amongst employees to avoid claims of discrimination and favoritism.

Employers should consider the following factors:

- How severe was the violation/issue? (e.g., sexual harassment, threats, falsifying time records)
- Was this their first violation/issue?
- Has this employee had repeated violations/issues, particularly of the same nature? (Consider tenure of employee and frequency of issues throughout employment relationship.)
- How have we dealt with this type of issue in the past?
- Did the employee take ownership and accountability?
- Did the employee subject the organization to legal exposure?
- Is the employee already on a performance improvement plan and/or received a final warning?
- Did the employee recently file a complaint, participate in an investigation, request a protected leave of absence, etc.?

Note on Exempt Employee Pay Deductions

If you wish to place an exempt employee on an *unpaid* suspension as a form of disciplinary action, it must be for full workweek(s). Based on Labor Commissioner guidance, California employers are not permitted to make deductions of less than a full workweek from an exempt employee's salary for disciplinary reasons.

Be sure to check your organization's policy on how you define "workweek" (e.g., Sunday – Saturday; Tuesday – Wednesday) as this will affect how to coordinate an exempt employee's unpaid suspension. It is also critical that the exempt employee performs **absolutely no work** during the unpaid suspension, including by checking calls or emails. For this reason, it is best to remove their access to all of your work systems during the suspension.

Communicating the Disciplinary Action

Perhaps one of the most difficult aspects of disciplinary action is communicating the decision to the employee, which can be somewhat of an art form. While the supervisor should approach the discipline with dignity and respect (do not lose your temper), it is also important to be firm, direct, and clearly communicate the issue.

It is best practice to take the following steps:

- Conduct the disciplinary action in a private setting and preferably in person. If this is a final warning or termination, or if you anticipate a strong or emotional reaction from the employee, have a witness join you for the meeting. The witness should not be another one of your direct reports. They should be another management employee (i.e., another manager in your department, a manager from another department, etc.). The witness should not engage with the employee. They are just there to listen and to be able to corroborate what was discussed, if there are any discrepancies about the account of the meeting.
- Prepare and have two copies of the written document of discipline. Do not give the employee a copy of the document initially (otherwise they may be focused on reading the document instead of engaging with you).
- Present the issue completely to the employee.
 - Cover the policies or processes the employee violated (provide copies of policies or written processes), the dates and specifics of how the employee violated them (try to keep the names of non-management employees out of the written document and the discussion), how you expect the employee to perform/behave going forward, and what the consequences will be if they violate the policies or processes again.
 - If the employee begins interrupting, advise them that they will have an opportunity to comment and/or ask questions after you present the issue.
- Explain the type of disciplinary action.
- Allow the employee to comment and ask any questions. Do not engage in a debate with the employee (they may try to defend themselves, even when it has been clearly established that they violated policies or processes).
- Get the employee's signature and date on the written disciplinary document, acknowledging receipt of the disciplinary action.
 - If an employee refuses to sign, note the refusal and sign in place of the employee's signature with your name/title. (Consider obtaining a witness signature as well.)
- Advise the employee of any next steps or follow-up that will occur.

- Update the employee's personnel file. (**Note:** personnel file records, including disciplinary notices, must be retained for the duration of employment and up to four years after the cessation of employment.)

Following Up

Depending on the issue, it may be best to schedule “check ins” or follow up with the employee to determine the issue has resolved or is improving (e.g., at 30, 60, 90 days). For example, this is often appropriate when dealing with performance concerns, when the employer has been required to engage in prompt corrective action, or when the employee has been placed on a performance improvement plan or final warning status.

While performance reviews are a useful tool to document an employee's progress, experienced managers know there should be no “surprises” at a performance review. Supervisors should document and address disciplinary action and performance issues in real time. Do not wait for a performance review to address issues. For more information on the review process, refer to our [Performance Evaluation Tool Kit](#).

Conclusion

When you need to engage in disciplinary action, remember the following steps:

- Do not discipline the employee for “protected” conduct;
- Review your handbook policies to ensure fair/consistent treatment;
- Document/investigate the who, what, where, when and why;
- Determine the appropriate type(s) of discipline based on the circumstances;
- Clearly communicate the decision in a firm and direct manner; and
- Follow up with the employee, as appropriate.