

Disciplining Employees During the COVID Era: Laying the Framework for Clients

During the pandemic, consistent employee discipline is more crucial than ever before. Ultimately, noncompliance is more high stakes in a climate where everything is in flux and there is a myriad of new safety concerns. At present, the most critical policies for employers to consider are pandemic response policies, work-from-home policies, and COVID-19 vaccine policies.

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In March 2020, when the COVID-19 pandemic first became a daily presence in our lives, all employment attorneys and their clients were forced to navigate new waters. Employers, guided by their counsel, were forced to balance the need to run an efficient and productive workplace with the need to keep their employees safe. In workplaces that did not become entirely remote, employees began to express fears about coming to work. Seemingly overnight, the need to quell those fears arose as employers struggled to mitigate the spread of COVID-19 and inspire confidence in their workers.

For employment attorneys who counsel on employment law compliance, guiding clients through the confusing new landscape of COVID-related laws, Executive Orders, and Centers for Disease

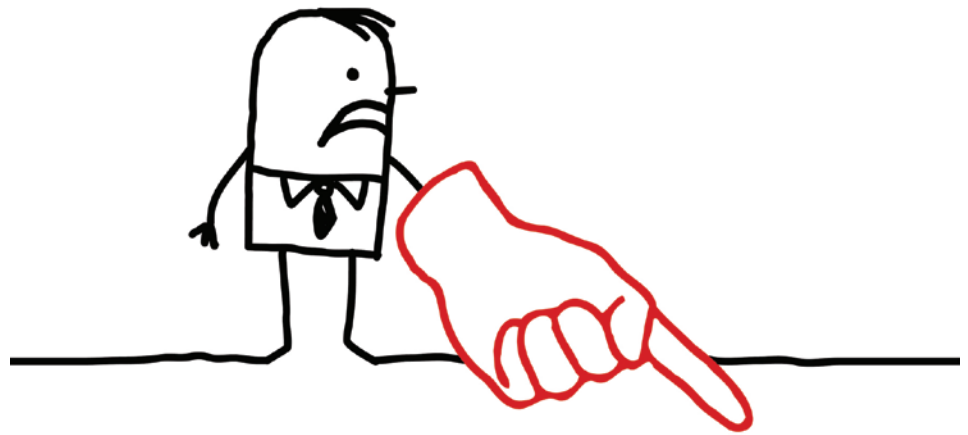


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Control guidelines became a daily challenge. In work environments where everything was changing, employers wondered how they could continue disciplining their employees and still run stable and successful companies and organizations.

During the pandemic, consistent employee discipline is more crucial than ever before. Ultimately, noncompliance—both with employer expectations and workplace policies—is more high stakes in a climate where everything is in flux and there is

a myriad of new safety concerns. In any conversation with clients about employee discipline, the need to have established policies in place and to document any employee's deviation from those policies must always be emphasized. That is especially true now.

At present, beyond the standard workplace policies, the most critical policies for employers to consider are pandemic response policies, work-from-home policies, and COVID-19 vaccine policies. All serve to provide much needed guidance to employees,

and to establish clear expectations about safety protocols and work performance in the COVID era. The defining features of these policies must be clarity and uniform application. Employment attorneys must be sure to craft policy language that leaves no ambiguity about the safety measures and precautions required of employees. Simply stated, there is no room for confusion.

Further, employees must know that the policies will be enforced uniformly as to all employees in order to take those policies seriously and feel confident about their efficacy. Consistent enforcement is essential to prevent any discrimination claims of employees. Most importantly, employees can be disciplined for failing to follow clear policies—including failure to wear masks and follow safety policies. This helps all employees feel more confident in the workplace.

Pandemic Response Policies

Employers should be counseled to have pandemic response policies that cover every necessary aspect of COVID-19 mitigation. Employees must know that they are not encouraged, but rather, required, to wear masks, to avoid congregating in common areas, to follow hygiene practices, to wipe down communal office equipment after use, to answer daily health screening questionnaires, and to take their temperatures before

entering the workplace. This way, in the event that an employee fails or refuses to do so, that employee may be disciplined for deviating from the protocols in place and putting other employees at risk of contracting COVID-19. Such policies and consistent enforcement protects employers, should employees raise COVID related safety concerns.

Work-from-Home Policies

Work-from-home policies are critical insofar as they send the message to employees that the same level of productivity and work quality is expected, regardless of where that employee is working. These policies advise employees that they will be accountable for their work performance, work quality and quantity, and output just as they were before. Doing so is critical where for some employees, working from home and lacking the structure of the typical workplace environment may lead to a more relaxed approach to working—a consequence all employers surely wish to avoid.

Work-from-home policies should state that performance reviews will be conducted as normal, in accordance with the employer's established policies regarding same, so that employees know accountability is the rule and not the exception. Further, technology and confidentiality requirements should be included

within work-from-home policies in order to safeguard the employer's confidential and proprietary information. Clear policies will aid employers in disciplining employees who are taking advantage of work-from-home arrangements and not working to their potential. Some employees struggled at first to figure out working from home, but by now all employees should be comfortable with their employer's arrangement, and if there is a failure to comply, then discipline should ensue.

COVID-19 Vaccine Policies

Finally, and not least important, are COVID-19 vaccine policies. For many employees, the vaccine is simply not yet available or accessible. Nevertheless, employment attorneys should counsel their clients to make a decision as soon as possible as to whether they wish to require their employees to get the COVID-19 vaccine, encourage their employees to get the COVID-19 vaccine, or take no stance at all.

For employers who wish to mandate the vaccine, preparing and distributing a mandatory vaccination policy is crucial so that employees have advanced notice of the requirements and can make proper preparations. Moreover, if an employee refuses to get the vaccine and cannot assert the existence of a disability or sincerely held religious belief which would entitle that employee to

be exempted from the mandate, that policy and the employee's noncompliance with the same can serve as a solid basis for discipline. Vaccination policies must be carefully crafted so that compliance is feasible, and employers must decide now whether they wish to vaccinate employees in house, or send their employees to a third-party provider, such as a pharmacy, in order to avoid obtaining the confidential medical information of their employees.

With all of the foregoing policies, it is critical to be sure that employers understand their obligations with regard to reasonable accommodations for disabilities pursuant to the Americans with Disabilities Act and the New Jersey Law Against Discrimination. Whenever an employee violates these policies, for example, by refusing to wear personal protective equipment or advising that he or she will not be vaccinated, employers must understand that they have an obligation to engage in the interactive process with that employee if the employee has asserted disability as a basis for inability to comply or if that employee has requested a reasonable accommodation for their disability. However, noncompliance is subject to discipline.

As COVID continues on, it must be a primary goal for employment attorneys to help their clients achieve this end and protect both themselves and their employees, all the while maintaining a strong framework through which employee discipline may be imposed.

Just as prior to the pandemic, employers are still permitted—and, in fact, encouraged—to discipline employees. And, just as before, documentation of employee issues is vitally important. Employees who do not work the required number of hours, who perform poorly, or who are falling short of employer expectations should be disciplined. Documentation of all issues is essential so that employers can show that discipline is due to these legitimate business reasons, and not as a result of valid COVID-related concerns expressed by employees.

Having the aforementioned policies in place, along with adhering to well-established performance standards and scheduling performance evaluations as normal, provides a strong foundation for employee discipline during the pandemic for all employees. This is true whether these employees are

working from home or in their traditional work environments. Further, strong and consistent employee discipline policies and practices make it clear that at a time when so much feels uncertain, the same work performance standards and expectations will apply.

For those good employees who always strive to do their best work, implementation of pandemic policies and a continuation of employee discipline and evaluations will serve as reassurance that their contributions are valued. At a time when business efficiency and performance is more critical than ever, motivating those employees is of the utmost importance. Ultimately, the goal for all employers is to emerge from the pandemic as strong organizations and businesses with forward momentum; to accomplish this, consistent employee discipline and oversight is key.

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