

BEST PRACTICES FOR EMPLOYER SUCCESS IN A DISCHARGE ARBITRATION

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1. Provide clear communication to the union and employees of work rules and the consequences for noncompliance. For example, rules should be posted on a bulletin board where other similar documents are posted. The rules should be addressed during meetings and training. Also a signed acknowledgment from employees when the rule is distributed helps prove notice of the rule.
2. Review the person's employment history to determine whether similar incidents have occurred in the past and evaluate the existence of any mitigating evidence. Also consider the employee's overall past record and service with the employer.
3. Review the collective bargaining agreement and/or other policies to ensure that the type of misconduct at issue is not subject to progressive discipline and is appropriate for termination. The collective bargaining agreement may specify a list of offenses for which "automatic discharge" is appropriate.
4. Review the collective bargaining agreement to determine whether the employee's prior disciplinary history can be considered. Some agreements contain provisions that essentially expunge prior disciplinary action after a certain period of time has passed. If the agreement includes this type of provision, the employer may not be able to rely on the prior disciplinary record to justify a discharge.
5. Ensure that employee requests for a *Weingarten* representative are honored. If the purpose of the meeting is to investigate the situation (rather than to issue previously decided discipline) and the employee reasonably believes the purpose of the meeting is to elicit information that could lead to discipline, he or she is entitled to union representation on request.
6. Does the evidence demonstrate that it is "more likely than not" that the employee engaged in the misconduct. In situations in which the employer discharged the employee for conduct that is criminal in nature, such as theft or violence, some, but not all arbitrators apply a "clear and convincing evidence" standard, meaning evidence is so clear, direct and weighty and convincing that an arbitrator is able to come to a clear decision, without hesitancy, of the truth of the precise facts in issue.
7. Consider whether sufficient evidence exists to prove the employee actually engaged in the misconduct. Hearsay or uncertainty lead to credibility issues.
8. Determine if the proposed discipline is consistent with penalties imposed for the same behavior in the past. Consistent enforcement is key.
9. Maintain relevant information relied upon to determine the discipline, such as complaints, investigative reports, statements, etc. so they are easily accessible when the case is scheduled for arbitration.

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