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Employee Discipline –

Best Practices for Improving Performance & Minimizing Liability

Presented by
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Today's Presenters



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Purpose of Webinar

- To equip Michigan employers with practical strategies for managing employee discipline in a way that improves workplace performance while reducing the risk of litigation.
- Michigan is an at-will employment state, meaning that either the employer or the employee may terminate the employment relationship for any reason not contrary to law.
- This at-will status does not eliminate an employer's exposure to wrongful discharge, discrimination or retaliation claims, which makes a thoughtful discipline framework essential.

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Legal Landscape for Michigan Employers

At-Will Employment and Its Limits

- What is the at-will presumption under Michigan law?
- Presumption can be overcome by proof of a contract provision for a definite term or one forbidding discharge absent just cause
- Three recognized public-policy exceptions to the at-will doctrine, are:
 - Statutory prohibitions on adverse treatment for protected activity
 - Employee refusal to violate a law
 - Employee exercise of a right conferred by a well-established legislative enactment

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Wrongful Discharge (Public Policy)

- Generally, an employee subject to an at-will employment contract may be terminated at any time and for any reason. *Suchodolski v Mich Consol Gas Co*, 412 Mich. 692, 694-695, 316 N.W.2d 710 (1982)
- “However, an exception has been recognized to that rule, based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable.” *Id.* at 695.

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Wrongful Discharge (Public Policy)

- The Michigan Supreme Court recently held that when determining “whether a public-policy claim based on alleged retaliatory action by the employer may be asserted, the threshold inquiry is whether the public-policy claim is based on a statute that has an antiretaliation provision.” *Stegall v. Res. Tech. Corp.*, 514 Mich. 327, 342, 22 N.W.3d 410, 417 (2024)
- If there is such a provision, then the court must ask “whether the remedies of the underlying statute are exclusive.” *Id.* If found to be exclusive, then the public-policy claim is preempted, while if the remedies are cumulative, the public-policy claim may proceed. *Id.* at 343
- Both OSHA and MIOSHA remedies are considered under Michigan law to be “inadequate to constitute exclusive remedies that preempt public-policy claims.” *Id.* at 352

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Michigan Supreme Court Opines

- The public policy exception to at-will employment has three grounds:
 - Explicit legislative statements prohibiting the discharge, discipline or adverse treatment of employees who act within their statutory rights or duties (such as the Whistleblowers' Protection Act, MCL 15.362)
 - The alleged reason for the employee's discharge was the failure or refusal to violate a law in the course of employment, and
 - The reason for the discharge was the employee exercising a right conferred by a well-established legislative enactment.

Suchodolski, 412 Mich. at 695–696, 316 N.W.2d 710

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Michigan Supreme Court Opines

- A plaintiff claiming retaliation for attempting to prevent or remedy a violation of law is required to meet three criteria to survive summary disposition. *Janetsky v. Cnty. of Saginaw*, No. 166477, 2025 WL 2095369, at *8 (Mich. July 25, 2025)
- The plaintiff must make a prima facie showing that: (1) there was or would have been a violation of the law, (2) that it was reasonable and in good faith to believe they were remedying or preventing a violation of law and (3) that the basis for the adverse employment action were due to the actions regarding the alleged violation. *Id.*

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Key Federal & State Anti-Discrimination Laws

- Along with other federal statutes, the following restrict the circumstances under which employers may discipline or discharge employees:
 - Title VII of the Civil Rights Act of 1964
 - ADA
 - FMLA

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Key Federal & State Anti-Discrimination Laws

- Michigan's Elliott-Larsen Civil Rights Act - prohibits discrimination based on religion, race, color, national origin, sex, age, marital status, height, and weight, and now includes expanded protections for sexual orientation and gender identity.
- Persons with Disabilities Civil Rights Act – there's now the 182-day written notice requirement for employees seeking accommodation.

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Retaliation & Whistleblower Protections

- The Michigan Whistleblowers' Protection Act prohibits employers from discharging, threatening or otherwise discriminating against an employee for reporting or being about to report a violation of law.
- The Michigan Workers Disability Compensation Act also precludes an employer from discharging or, in any manner, discriminating against an employee because the employee has filed a complaint or instituted a proceeding under the Workers Disability Compensation Act.

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Retaliation & Whistleblower Protections

- Under the Elliott-Larsen Civil Rights Act, what are the retaliation protections for employees who report or oppose discrimination?
- Note:** retaliation claims are among the most common employment claims filed and can arise even when the underlying discrimination or safety complaint is not ultimately substantiated.

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Foundations of an Effective Discipline Program

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Written Policies & Employee Handbooks

- The importance of clearly written policies that communicate workplace expectations, rules of conduct and the consequences for violations cannot be stressed enough.
- Employers, avoid creating implied contracts through handbook language. Specifically, advise against just-cause statements, mandatory language regarding discipline or discharge, “warm and fuzzy” language about continued employment, and unrealistic statements (such as guaranteeing periodic performance evaluations).
- It's recommended that employers include express at-will disclaimers and contractual disclaimers stating that the handbook does not constitute a contract.

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Key Policies

- Key policies should include:
 - Attendance and punctuality
 - Anti-harassment and anti-discrimination
 - Workplace safety
 - Performance expectations
 - Complaint reporting procedures
 - Progressive discipline procedures
 - Anti-retaliation protections



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Employee Handbooks

- Handbook should be:
 - Distributed to all employees.
 - Require signed acknowledgements.
 - Reserve discretion to skip disciplinary steps when appropriate.

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Discipline Policies That Preserve At-Will Status

- Employers should not provide a strict progressive discipline policy in the handbook, as doing so may conflict with at-will status and create questions of fact for a jury.
- Sample language that preserves employer flexibility:
 - “Violations of the rules above will result in disciplinary action as appropriate. Discipline ranges from verbal reprimand to immediate discharge, depending upon the seriousness of the violation, with consideration being given to whether it is a first violation, recurrence, type and severity of the violation, and other factors.”

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Training Supervisors & Managers

- Regular training of all managers and supervisors on the discipline process, legal compliance, communication skills and conflict resolution is needed.
- Inconsistent application of discipline by supervisors is one of the most significant sources of legal exposure, because it can give rise to claims of disparate treatment and discrimination.

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Progressive Discipline Process in Practice

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Performance Management vs. Progressive Discipline

- Many employers use different forms of progressive discipline which may include:
 - Verbal coaching
 - Written warning
 - Final warning/Performance Improvement Plan
 - Suspension
 - Termination
- Progressive discipline can demonstrate fairness, provide employees opportunities to improve and help defeat pretext arguments in litigation.



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Progressive Discipline

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Performance Management vs. Progressive Discipline

- Distinguish between day-to-day performance management (coaching, feedback and setting expectations) and formal progressive discipline, which is a series of increasingly serious corrective actions taken to address repeated or more serious problems.
- The goal of progressive discipline is to change behavior and improve performance, not to punish.



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Progressive Discipline

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Steps in the Process

- Typical steps in a progressive discipline framework:
 - Verbal counseling or warning
 - Written warning
 - Final written warning or suspension
 - Termination

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Steps in the Process

- For verbal warnings, supervisors should document the conversation, including the date, the unacceptable behavior, the expected behavior and the consequences of failing to correct the behavior.
- For written warnings, the document should clearly identify the unacceptable behavior, describe how it violated expectations, describe the impact, indicate what the employee needs to do to improve and outline future consequences.

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Performance Improvement Plans (PIPs)

- When and how do you use a Performance Improvement Plan (PIP)?
- PIPs should include specific job requirements and expectations, specific improvement needed, an action plan for improvement, a timeframe for improvement (typically 30, 60 or 90 days), and a schedule for progress review meetings.
- PIPs are not legally required in every situation but can be a valuable tool for ongoing performance issues.
- PIPs should be a collaborative process that incorporates employee input and provides the support and resources needed to meet expectations.

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When to Skip Steps: Immediate Termination

- Progressive discipline is not a rigid sequence.
- Serious misconduct — such as violence, theft, criminal activity, harassment or egregious safety violations — may warrant immediate termination without proceeding through every step.
- The employer's discipline policy should expressly reserve this right.

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Documentation: The Employer's Best Defense



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Why Documentation Matters

- Documentation creates a record of expectations, warnings and decisions, and if an employee later challenges a termination, documentation helps demonstrate that the decision was fair, consistent and based on legitimate business reasons.
- Many successful lawsuit defenses hinge on the employer's ability to produce written reviews, discussion notes and signed acknowledgments.

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What to Document

- Essential elements of a discipline record:
 - Date and time of the incident
 - Specific description of the problem (what happened, when, where, and who was involved)
 - Policy or expectation violated
 - Any prior discussions or discipline regarding similar issues
 - Expected improvement and timeline
 - Consequences if improvement does not occur
 - Signatures of both the supervisor and the employee

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Best Practices for Documentation

- Employers must act promptly when issues arise.
- Be specific and objective in describing behaviors (avoiding subjective characterizations or personality critiques).
- Maintain confidentiality.
- Store copies of all disciplinary documents in the employee's official personnel file.
 - Under Michigan's Bullard-Plawecki Employee Right to Know Act, employers with four or more employees must allow employees to inspect their personnel records.

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What's in a Document?

- Good documentation should:
 - Be factual and objective.
 - Describe conduct, dates, witnesses and policy violations.
 - Avoid emotional or speculative language.
 - Include prior coaching efforts.
 - Identify expectations going forward.

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Documentation Example

- Good: "Employee failed to submit reports by deadline on March 4 and March 11."
- Bad: "Employee is lazy and unmotivated."

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Maintaining Records

- Employers should keep:
 - Performance reviews
 - Emails
 - Written warnings
 - Investigation notes
 - Attendance records
 - Employee responses
- When possible, employers should avoid backdating and/or altering records.

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Common Pitfalls & How to Avoid Them

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Inconsistent Application of Discipline

- Inconsistent discipline is one of the most common sources of liability in discrimination claims under Title VII of the Civil Rights Act of 1964, retaliation claims, whistleblower cases and wrongful termination suits.
- Treating similar infractions differently across employees is one of the most common and damaging mistakes, because it can support claims of discrimination or disparate treatment.

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Best Practices

- Comparing treatment of similarly situated employees
- Maintaining discipline guidelines
- Requiring HR review before serious discipline and/or termination
- Documenting legitimate reasons for differences in treatment

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Handbook Language That Creates Implied Contracts

- Some courts have construed progressive discipline policies in employee handbooks as creating implied contracts, exposing employers to breach-of-contract claims if they fail to follow the policy precisely.
- Employers should use permissive language ("may" instead of "shall" or "will") and to include clear disclaimers.

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Retaliation Risks

- Discipline administered shortly after an employee engages in protected activity — such as filing a discrimination complaint, requesting FMLA leave, or reporting a safety concern — can give rise to retaliation claims.
- Employers should ensure that any disciplinary action taken in close temporal proximity to protected activity is well-documented and based on legitimate, non-retaliatory reasons.

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Failure to Consider Accommodations

- Employers, before disciplining employees for attendance or performance issues, you should consider whether the employee has a disability or other condition requiring reasonable accommodation under the ADA or Michigan's Persons with Disabilities Civil Rights Act.

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Delayed or Avoided Discipline

- Ignoring problems in the hope that they resolve themselves typically worsens the situation and can lead to decreased morale, productivity loss and increased legal exposure.
- This can lead an employer to "stacking" write-ups prior to termination.

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Practical Tips & Takeaways

- Review and update employee handbooks to ensure they contain proper at-will disclaimers, avoid mandatory discipline language and reflect current Michigan law, including the expanded protections under the Elliott-Larsen Civil Rights Act.
- Develop or refine a discipline framework that preserves flexibility while providing structure and fairness.
- Train all supervisors and managers on consistent application of discipline policies, documentation requirements and the legal boundaries of at-will employment.

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Practical Tips & Takeaways

- Document every step of the discipline process thoroughly and promptly.
- Consult employment counsel before terminating an employee, particularly in situations involving protected activity, potential accommodation issues or other elevated legal risk.
- As a best practice, employers should periodically review complaint trends, termination rationales, compliance with policies and manager inconsistencies.

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Questions?



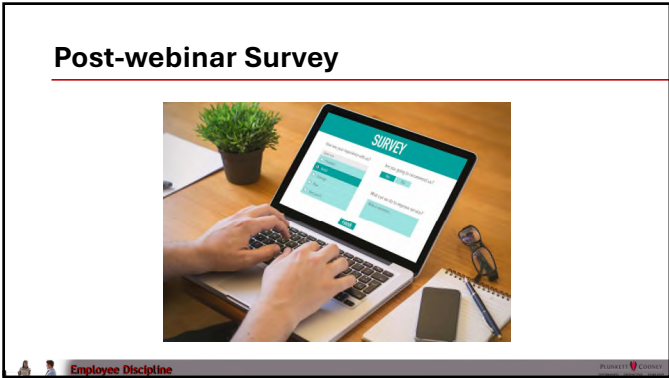
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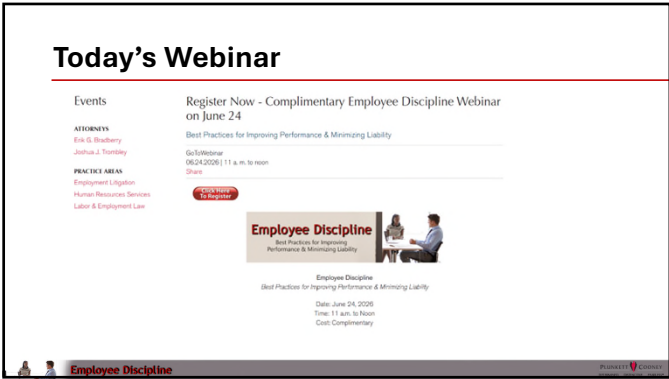
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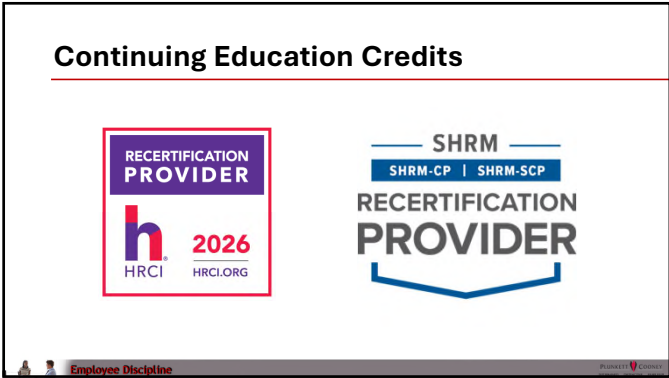
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