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60-Second Memo

December 31, 2008

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Seven Tests for Just Cause

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During my years of representing management as a labor attorney, I have found that virtually every Collective Bargaining Agreement ("CBA") contains a grievance/arbitration provision.

The typical grievance/arbitration provision will provide the Union with a detailed mechanism to challenge decisions by management. Some of the most common challenges involve the suspension or termination of an employee for disciplinary reasons.

It is also almost a universal practice for a CBA to contain restrictions on the ability of the employer to terminate the employee except for "just cause" and thus such "just cause" decisions are subject to review under the grievance/arbitration provision.

When a union and company are unable to settle a grievance dealing with discipline themselves, the matter will be referred to an outside arbitrator for a final determination as to the appropriateness of the discipline. While the CBA might attempt to

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restrict an arbitrator's authority to overturn the decisions of management, it is not uncommon for an arbitrator to find that a violation of a work rule actually occurred, but that the degree of discipline, such as discharge, did not fit the infraction committed by the employee. In short, the punishment did not fit the crime.

It is common practice for counsel advising an employer in the collective bargaining setting to structure advice with regard to discipline based upon the long standing "seven basic tests of just cause," which are almost universally applied by arbitrators to evaluate disciplinary decisions made by management.

These seven basic tests are equally applicable to employers without CBAs when evaluating the discipline that should be imposed upon one of its employees. Although a company without a CBA may not be required to arbitrate the imposition of discipline, the company might very well have to defend itself in another arena such as an administrative agency, where the discipline would be attacked as being racially motivated, based on gender, or due to other alleged improper discriminatory factors.

The seven basic tests of just cause discipline are as follows:

- 1. Did the Employee have Prior Notice of Expected Conduct?** Simply put, this is a requirement that the employee know the expectations with regard to his or her work performance. For example, if the employer is going to penalize an employee for a violation of a safety rule, it is important that the Employee Handbook clearly specify that discipline may be imposed for violation of that safety rule.

Of course, it is not necessary to detail every possible aspect of conduct in the workplace. For example, it is not necessary to notify the employee that stealing cash from a petty cash drawer may result in discipline or discharge. It is obvious to a reasonable person that theft is a terminable offense.

- 2. Was the Rule Violated Reasonably Related to the Effective Operation of the Business?** No one likes rules simply for rules' sake, and arbitrators and other decision makers are not likely to enforce discipline of rules which really do not correlate to the job requirements. For example, a rule limiting the amount of jewelry an employee may wear or prohibiting certain hair styles when there are no safety concerns (the employee does not work near machinery where injury might occur) or where the employee is not exposed to clients may be looked upon with suspicion.
- 3. Was a Complete Investigation Conducted?** It is important that the employer make sure that it does not jump to conclusions. Accordingly, it must perform a thorough investigation of the disciplined conduct by debriefing the supervisor involved, interviewing witnesses, documenting statements of those witnesses, and providing the charged

employee an opportunity to give his or her side of the story.

4. **Was the Investigation Conducted Fairly?** A standardized due process procedure should be established to provide for a reasonable investigation into all the facts.
5. **Was there Adequate Evidence that the Employee Committed the Rule Violation?** At times, employers will assign discipline to conduct which is not clearly a violation of the work rule. I recently had a situation where a supervisor believed that he observed an employee sleeping on the job and the employee was set to be terminated as a result. However, the supervisor only observed the employee from behind and it appeared to him that the employee had nodded off. When I questioned the supervisor he was not able to state conclusively that he saw the employee asleep. As a result the discipline was not imposed because there was not a clear evidentiary basis for such discipline and the employee adamantly denied being asleep.
6. **Is the Employee Being Treated Differently than Similarly Situated Employees?** Again, this is a classic rule to make sure that the employer is following past practices in imposing discipline. Disparate treatment of men and women or minority employees and nonminority employees can only lead to potential discrimination claims -- and liability -- for an employer. Accordingly, it is always a good thing to review how others have been disciplined and make sure that the discipline you are imposing in a particular case is in line with that discipline.
7. **Is the Proposed Penalty Reasonable in Light of Misconduct and the Employee's Entire Record of Service for the Employer?** Again, common sense and the use of proper discretion should be applied to the disciplinary matter. Many times, the fact that a violation occurred is not at issue, but the extent of the discipline is subject to heated dispute. Careful analysis should be made of the employee's work record, prior conduct with regard to this type of infraction, and prior warnings so that it can be shown that the employee was well aware of the penalty that would be imposed for improper conduct.

Following these basic seven tests of just cause discipline will greatly assist in maintaining a fair work environment and reduce potential arbitrations and/or discrimination complaints.

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