

# Job Performance and Employer Liability in the Senior Living Community Workplace: The 5 Steps of a Progressive Discipline Policy

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*Part 2 in the series “Employee Job Performance in the Senior Living Community Workplace Environment”*

*The coronavirus pandemic has brought new and sometimes complicated employment law issues to senior living communities. From implementing quarantine protocols to mandating vaccinations, these new issues are demanding owners and administrators to face unique challenges and to protect themselves and their entities from liability claims. We address these issues in our blog series, **Employee Job Performance in the Senior Living Community Workplace Environment**.*

Our previous article in the series, [The Employee Handbook and Performance Standards](#) covered the value of having an employee handbook to establish, in writing, a company’s expectations about a policy of conduct, performance standards, and measures of discipline in the senior living facility.

The handbook serves as notice to the employee of the steps an employer will take upon a violation of the workplace code of conduct. Known as the progressive discipline policy, these steps should be fully understood by all staff, adhered to by supervisors and administrators of the senior living facility, and consistently applied to ensure consistency and avoid potential litigation.

## How does a Progressive Discipline Policy Address Workplace Violations?

There are two primary categories of workplace violations in senior living facilities:

- Employee performance issues – including poor care of residents or facility, lack of productivity, poor recordkeeping, failing to address concerns of residents or family members, or failing to meet performance standards. However, employees rely heavily on records of other staff members so it’s important to recognize when an issue is not necessarily within the

employee's control.

- Employee behavioral issues – including misconduct and acting inconsistently with the policies and procedures of the facility, negligence, insubordination, and poor attendance. These are usually well within the control of the employee.

When a supervisor believes that an employee has violated the workplace code of conduct detailed in the employee handbook, the progressive discipline policy provides a system to follow to protect both the employer and the employee.

The progressive discipline policy not only allows time for the employee to correct the issue, but also sets forth how the employer should document the employee's level of effort to make corrections. The policy is essentially a problem-solving process, put in place to correct undesirable conduct, communicate issues directly, and establish the timing and expectations for corrections. By offering the employee steps to rehabilitate performance or behavior, the employer shows a good faith effort, but if the employee refuses the direction, there may be no alternative but termination.

As advisors to assisted living facilities facing challenging employee situations and possible disciplinary issues, we generally recommend documenting and following five steps of a progressive discipline policy, however, depending on the severity of the violation, some steps may be skipped.

## **5-Step Employee Discipline Policy for Assisted Living Facilities**

### **Step 1: Coaching Sessions and Problem Solving**

When an employer recognizes a problem, step one is to try to resolve the problem through coaching and problem solving. The supervisor should first clearly identify the performance or behaviors that are not meeting expectations and talk through potential resolutions with the employee. Addressing minor infractions early in the process can reduce more significant problems later. This conversation is informal and it is not a lecture at the employee, but rather a dialogue aimed at identifying and solving the problem before it escalates. This step is typically for minor infractions but should still be documented in the employee's file.

## Step 2: Verbal Reprimand

The verbal reprimand or verbal warning is a formal communication, and it differs from step one in that the supervisor should document the conversation in a memo, have the employee sign the memo as confirmation of the warning and place that in the employee's personnel file. The conversation and memo should include details about the specific performance or behavior violation, the time and place it occurred, as well as the effects of the incident.

In addition, the verbal reprimand should set the supervisor's expectations for improvement as well as the consequences if the behavior or performance issue does not improve. By requesting the employee to sign the memo, the employer has proof that the warning was received and that the employee's conduct was discussed and acknowledged.

## Step 3: Written Reprimand

The written reprimand is a "last chance" agreement between the employer and the employee regarding sustainable improved performance or behavior. The written reprimand, or warning, is the final step in the process before a consequence is implemented. If the behavior or performance has not improved since the verbal reprimand within the timeframe for improvement, the supervisor should prepare and give a written reprimand to the employee. Prior to this meeting, the supervisor should review the written reprimand with the leaders in HR and any other relevant departments. The meeting between the supervisor and the employee should take place immediately and in private.

The written reprimand should conform to language of the employee handbook, and should include:

- A statement of the facts similar to what was provided in the verbal reprimand, including a detailed description of the incident.
- A restatement of the policy that was violated.
- Any prior disciplinary action for the same/similar offense, but nothing more than a year old that is not for the same offense.
- The actual or potential impact of the infraction, which might range from a monetary cost to the facility, the burden or hazard inflicted on the employer or colleagues, or the overall lack of harmony and cooperation at the facility.

- The possible employment consequences, including suspension or termination, and the final opportunities the employer is providing to correct the employee's performance or behavior.
- A follow-up date to re-evaluate the employee's performance, which is typically 60-90 days depending on the type of improvement required.
- An acknowledgement of receipt of the written reprimand, with signature and date for the supervisor and the employee.

## **Step 4: Suspension (in certain circumstances)**

If the employee's behavior or performance has not improved at the culmination of the time specified in the written reprimand, additional steps are required to comply with the employee handbook and applicable state and federal employment laws.

At this point, it may be appropriate to suspend the employee pending an investigation.

It is important to note that an employer or supervisor should never terminate an employee on the spot, even for a dischargeable offense.

## **How does the Employer Notify the Employee of Suspension?**

The employee should be notified of the suspension in a written document that includes:

- A review of any past disciplinary action(s).
- A specific reason for the suspension (what happened, when it happened, who was present, etc.).
- The length of the suspension.
- The expected behavior or performance required by the end of the suspension period.
- An explicit statement that the suspension is the final warning and that future violations or the results of the pending investigation may result in termination.
- Details regarding the employee's work responsibilities during the suspension.
- Details on the employee's pay status during the suspension.

The supervisor or HR representative should be present during the notification of suspension to address any questions, but to the greatest extent possible, the notification should be put in writing.

## **How does an Investigation Begin Once the Employee is Suspended?**

The first step is to determine if the investigation itself will be conducted internally or externally. If tensions are high or neutrality is not feasible, an independent external investigation should be strongly considered.

An investigation allows time for the supervisor to deal with what is likely serious misconduct and to consult with higher levels of authority.

The supervisor should begin by collecting evidence and speaking with all involved parties, including the employee who is the subject of the investigation, as well as other employees, residents or family members. These interviews will help gather information and provide documentation when the facts and details of the incident are still fresh in the minds of the relevant parties. The supervisors should also make sure that HR is involved during this phase.

An investigation should be completed within 2-3 days of the poor conduct or receipt of complaint and should be relaxed and nonconfrontational to ensure the investigation remains dispassionate and objective.

Any investigation conducted should be analyzed and well-documented to ensure it is thorough and fair and should pinpoint the specific reason(s) for potential termination.

## **Step 5: Termination**

Once all other steps in the progressive discipline policy have been exhausted and the employee has shown no signs of rehabilitation or improvement, the final step is termination of employment.

## **How does the Employee Termination Process Begin?**

The supervisor should notify HR and prepare a letter of discharge to give to the employee, which lists the reason for discharge, a review of prior disciplinary action, and the effective date of the termination. A meeting should be scheduled to verbally notify the employee of the termination, and it is advisable to have another supervisor or HR representative present.

With regard to the discharge letter, the supervisor should work with HR to document the termination effective date, a separation agreement and release, and notification of medical coverage end date if applicable. The supervisor may need to request a forwarding address and personal email to ensure the employee receives information about COBRA medical coverage and for tax reporting purposes.

The supervisor should be prepared to facilitate the return of any keys or staff identification, as well as any property belonging to the senior living facility. Any necessary forms should be completed at this time and the employee should remove their personal items at the conclusion of the meeting and leave the premises immediately.

## **The Progressive Discipline Policy is a Measure of Protection if Legal Action is Taken**

The management of the employee discipline process is a serious responsibility. Overlooking important legal requirements can result in litigation including wrongful termination. By following a progressive disciplinary policy and enforcing the measures consistently for all staff members of a senior living facility, employers can point to a legally defensible practice if legal action is taken.

*For more information specific to the workplace environment of senior living communities, and the legal issues that arise from employment please contact the author [Timothy J. Ford, Esq.](#), who represents senior housing, long-term care and assisted living facility owners and management in all aspects of business operations and litigation.*