THE ARCHDIOCESE OF SAINT PAUL AND MINNEAPOLIS

SCHOOL LAW DAY

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JOB INSURANCE FOR ETERNITY (JIE)

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JOB INSURANCE FOR ETERNITY (JIE)

PRESENTED BY THOMAS B. WIESER

I. Introduction

Employers sometimes conclude that the Justice In Employment policies make it difficult, if not impossible, to terminate an employee for poor performance or even illegal activity at work. Employees occasionally have the attitude that the Justice In Employment policies insulate them from disciplinary action by the employer.

Justice In Employment requires that the employer show "cause" before breaking the employer-employee relationship. And except for limited circumstances, the employer is required to follow the progressive discipline steps before terminating the employee for cause.

The following materials will analyze the actions the employer can take to minimize the potential for employee claims and increase the likelihood that a decision to terminate employment will be upheld.

Failure to follow these procedures could mean that the employee has Job Insurance for Eternity (JIE).

II. Preamble to Justice In Employment

- Work is an extension of our dignity and a form of ongoing participation in God's creation.
- People have a right to decent and productive work and to fair wages.
- Workers have a responsibility to work conscientiously and justly for the compensation and benefits they receive.

III. JIE policies are based on four key principles established in teachings of the Catholic Church.

1. The Value and Dignity of the Human Person

Through work, people achieve fulfillment as human beings and become more fully human. (Statement of Pope John Paul II in *Laborem Exercens*, "On Human Work").

2. The Common Good

This allows people to fully achieve their own fulfillment. (Statement of Pope John XXIII in *Mater et Magistra*, "Mother and Teacher").

3. Justice

This occurs when workers contribute competently and conscientiously to the employer's mission and when employers establish policies to provide wages and benefits sufficient to support a family in dignity. (Statement of U.S. Catholic Bishops in "Economic Justice for All," 1986).

4. Participation

Everyone's participation in running the enterprise is encouraged to lead to greater efficiency and better service to members of an organization. (Statement of Pope Paul VI in *Gaudium et Spes*, "Joy and Hope," 1965).

These policies are considered the basic terms and conditions of employment.

By accepting a position, an employee is deemed to have accepted these policies and their application, including mandatory arbitration.

Dated March 15, 2007
Archbishop Harry J. Flynn, DD

IV. Justice In Employment (JIE)

JUSTICE IN EMPLOYMENT

EQUAL EMPLOYMENT OPPORTUNITY

Policy

It is the policy of the Archdiocese of Saint Paul and Minneapolis to provide equal employment opportunity to all qualified persons without regard to race, color, religion, creed, sex, marital status, disability, age, national origin, veteran status and status with regard to public assistance. Employment practices are intended to assure that all individuals are recruited, hired, assigned, advanced, compensated, and retained on the basis of their qualifications, and treated equally in these and all other respects without regard to race, color, religion, creed, sex, marital status, disability, age, national origin, veteran status and status with regard to public assistance. Exceptions to this nondiscrimination policy may be necessary when based upon a bona fide occupational qualification.

Note: This policy does not list sexual orientation, a protected class specifically listed in the Minnesota Human Rights Act. It also does not list genetic information.

COMMENTS:

A. Specific Anti-discrimination Laws

1. Minnesota Human Rights Act

Prohibits discrimination based on race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership in a local commission, disability, sexual orientation, or age.

2. Americans with Disabilities Act

Prohibits discrimination based on disability.

3. Age Discrimination in Employment Act

Prohibits discrimination based on age.

4. Pregnancy Discrimination Act of 1978

Prohibits discrimination based on pregnancy.

Note: Terminating a pregnant, unwed female teacher could raise a possible claim under this Act.

5. Genetic Information Nondiscrimination Act (GINA) and Minnesota counterpart, Genetic Testing in Employment

Prohibits collection of genetic information and prohibits discrimination based on genetic information. (This is not included in the JIE policy. Be aware of this protected class.)

B. JIE Selection Procedures

JUSTICE IN EMPLOYMENT

EQUAL EMPLOYMENT OPPORTUNITY

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Procedures

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SELECTION PROCESS

B) According to Clergy Bulletin Volume XVIII, Number 5, the employer must conduct a background check through the appropriate sources for all candidates for employment.

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COMMENTS:

The Fair Credit Reporting Act and Minnesota Consumer Protection Act regulate the process of obtaining background checks.

Requirements

- Applicant must be informed in writing that a report may be obtained.
- Applicant must provide written authorization for a criminal background report.

Sample Scenario

The criminal background check report provides the following information about an applicant for custodian position:

- Drunk driving arrest - November 2012
- Domestic assault conviction (misdemeanor) - August 2010
- Drug possession conviction - May 2000

EEOC Enforcement Guidance (May 2012)

There has been a significant increase in the number of Americans who have criminal records in the working age population. As of 2007, 1 in 37 adults had some form of record for jail, prison, probation, or parole.

Arrest and incarceration rates are especially high for African American and Hispanic men. They are arrested at a rate that is two to three times their proportion of the general population.

- 1 in 17 white men serve prison time.
- 1 in 6 Hispanic men serve prison time.
- 1 in 3 African American men serve prison time.

Having a criminal record is not a protected basis under anti-discrimination laws.

However, an employer can violate Title VII if the employer's reliance on the reliance on the criminal record to deny employment is determined to be based on race, color, or national origin.

An arrest record, standing alone, may not be used as a basis for refusing to hire an applicant because an arrest does not establish that criminal conduct has occurred. Many arrests do not result in criminal charges or the charges are dismissed.

A conviction will usually serve as evidence that a person engaged in particular conduct.

Information in a criminal record should consider the following three factors (Green factors):

1. The nature and gravity of the offense or conduct.
    - Misdemeanors are less serious offenses than felonies.
2. The amount of time that has passed since the offense or conduct or completion of the sentence.
    - Permanent exclusion from all employment based on any and all offenses is not consistent with business necessity.
    - The employer must consider the amount of time that has passed since the applicant's criminal conduct occurred and how that relates to the risk posed in the position in question.

3. The nature of the job held or sought. (Consider job duties, the circumstances under which the job is performed, and environment where the job is performed.)

Two-Step Process if Criminal Background Check Shows Criminal History

Step 1 (Pre-adverse action): The employer must provide written notice to the applicant that the employer is considering taking adverse action based, in whole or in part, on information contained in the criminal background report, provide the applicant with a copy of the report, provide the applicant with a summary of legal rights under the Fair Credit Reporting Act, and allow the applicant the opportunity to rebut the information in the criminal background report.

(A sample Pre-adverse action letter to applicant follows.)

SAMPLE PRE-ADVERSE ACTION LETTER

Dear Applicant:

This letter is being sent to you in compliance with the Fair Credit Reporting Act.

As part of your application for employment, you authorized us to conduct a pre-employment background investigation. This is to inform you that you may be denied a position with our organization based on the information received from:

The McDowell Agency, Inc.
1714 University Avenue West
St. Paul, MN 55104
Phone: 651-644-3880

We are forwarding a copy of the consumer report that you authorized in regard to your application for employment, together with a "Summary of Your Rights Under the Fair Credit Reporting Act." The contents of the enclosed report are currently under review in consideration of your application for employment.

If the report contains any information that is inaccurate or incomplete, you should contact our office immediately, and no later than five days, so that corrected information can be reviewed prior to an employment decision being made. Should you wish to correct any information that appears in the report, you must contact The McDowell Agency directly.

Sincerely,

("Summary of Your Rights Under the Fair Credit Reporting Act" to be enclosed with the Pre-adverse action letter follows.)

Para información en español, visite www.consumerfinance.gov/learnmore o escribe a la Consumer Financial Protection Bureau, 1700 G Street N.W., Washington, DC 20552.

A Summary of Your Rights Under the Fair Credit Reporting Act

The federal Fair Credit Reporting Act (FCRA) promotes the accuracy, fairness, and privacy of information in the files of consumer reporting agencies. There are many types of consumer reporting agencies, including credit bureaus and specialty agencies (such as agencies that sell information about check writing histories, medical records, and rental history records). Here is a summary of your major rights under the FCRA. **For more information, including information about additional rights, go to www.consumerfinance.gov/learnmore or write to: Consumer Financial Protection Bureau, 1700 G Street N.W., Washington, DC 20552.**

- **You must be told if information in your file has been used against you.** Anyone who uses a credit report or another type of consumer report to deny your application for credit, insurance, or employment – or to take another adverse action against you – must tell you, and must give you the name, address, and phone number of the agency that provided the information.

- **You have the right to know what is in your file.** You may request and obtain all the information about you in the files of a consumer reporting agency (your "file disclosure"). You will be required to provide proper identification, which may include your Social Security number. In many cases, the disclosure will be free. You are entitled to a free file disclosure if:
  - a person has taken adverse action against you because of information in your credit report;
  - you are the victim of identity theft and place a fraud alert in your file;
  - your file contains inaccurate information as a result of fraud;
  - you are on public assistance;
  - you are unemployed but expect to apply for employment within 60 days.

  In addition, all consumers are entitled to one free disclosure every 12 months upon request from each nationwide credit bureau and from nationwide specialty consumer reporting agencies. See www.consumerfinance.gov/learnmore for additional information.

- **You have the right to ask for a credit score.** Credit scores are numerical summaries of your credit-worthiness based on information from credit bureaus. You may request a credit score from consumer reporting agencies that create scores or distribute scores used in residential real property loans, but you will have to pay for it. In some mortgage transactions, you will receive credit score information for free from the mortgage lender.

- **You have the right to dispute incomplete or inaccurate information.** If you identify information in your file that is incomplete or inaccurate, and report it to the consumer reporting agency, the agency must investigate unless your dispute is frivolous. See www.consumerfinance.gov/learnmore for an explanation of dispute procedures.

- **Consumer reporting agencies must correct or delete inaccurate, incomplete, or unverifiable information.** Inaccurate, incomplete, or unverifiable information must be removed or corrected, usually within 30 days. However , a consumer reporting agency may continue to report information it has verified as accurate.

- **Consumer reporting agencies may not report outdated negative information.** In most cases, a consumer reporting agency may not report negative information that is more than seven years old, or bankruptcies that are more than 10 years old.

- **Access to your file is limited.** A consumer reporting agency may provide information about you only to people with a valid need – usually to consider an application with a creditor, insurer, employer, landlord, or other business. The FCRA specifies those with a valid need for access.

- **You must give your consent for reports to be provided to employers.** A consumer reporting agency may not give out information about you to your employer, or a potential employer, without your written consent given to the employer. Written consent generally is not required in the trucking industry. For more information, go to www.consumerfinance.gov/learnmore.

- **You many limit "prescreened" offers of credit and insurance you get based on information in your credit report.** Unsolicited "prescreened" offers for credit and insurance must include a toll-free phone number you can call if you choose to remove your name and address from the lists these offers are based on. You may opt out with the nationwide credit bureaus at 1-800-XXX-XXXX.

- **You may seek damages from violators.** If a consumer reporting agency, or, in some cases, a user of consumer reports or a furnisher of information to a consumer reporting agency violates the FCRA, you may be able to sue in state or federal court.

- **Identity theft victims and active duty military personnel have additional rights.** For more information, visit www.consumerfinance.gov/learnmore.

States may enforce the FCRA, and many states have their own consumer reporting laws. In some cases, you may have more rights under state law. For more information, contact your state or local consumer protection agency or your state Attorney General. For information about your federal rights, contact:

TYPE OF BUSINESS:	CONTACT:
1.a. Banks, savings associations, and credit unions with total assets of over $10 billion and their affiliates b. Such affiliates that are not banks, savings associations, or credit unions also should list, in addition to the CFPB:	a. Consumer Financial Protection Bureau 1700 G Street, N.W. Washington, DC 20552 b. Federal Trade Commission: Consumer Response Center – FCRA Washington, DC 20580 (877) 382-4357
2. To the extent not included in item 1 above: a. National banks, federal savings associations, and federal branches and federal agencies of foreign banks b. State member banks, branches and agencies of foreign banks (other than federal branches, federal agencies, and Insured State Branches of Foreign Banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act c. Nonmember Insured Banks, Insured State Branches of Foreign Banks, and insured state savings associations d. Federal Credit Unions	 a. Office of the Comptroller of the Currency Customer Assistance Group 1301 McKinney Street, Suite 3450 Houston, TX 77010-9050 b. Federal Reserve Consumer Help Center P.O. Box. 1200 Minneapolis, MN 55480 c. FDIC Consumer Response Center 1100 Walnut Street, Box #11 Kansas City, MO 64106 d. National Credit Union Administration Office of Consumer Protection (OCP) Division of Consumer Compliance and Outreach (DCCO) 1775 Duke Street Alexandria, VA 22314
3. Air carriers	Asst. General Counsel for Aviation Enforcement & Proceedings Aviation Consumer Protection Division Department of Transportation 1200 New Jersey Avenue, S.E. Washington, DC 20590
4. Creditors Subject to the Surface Transportation Board	Office of Proceedings, Surface Transportation Board Department of Transportation 395 E Street, S.W. Washington, DC 20423
5. Creditors Subject to the Packers and Stockyards Act, 1921	Nearest Packers and Stockyards Administration area supervisor
6. Small Business Investment Companies	Associate Deputy Administrator for Capital Access United States Small Business Administration 409 Third Street, SW, 8th Floor Washington, DC 20416
7. Brokers and Dealers	Securities and Exchange Commission 100 F Street, N.E. Washington, DC 20549
8. Federal Land Banks, Federal Land Bank Associations, Federal Intermediate Credit Banks, and Production Credit Associations	Farm Credit Administration 1501 Farm Credit Drive McLean, VA 22102-5090
9. Retailers, Finance Companies, and All Other Creditors Not Listed Above	FTC Regional Office for region in which the creditor operates or Federal Trade Commission: Consumer Response Center – FCRA Washington, DC 20580 (877) 382-4357

Step 2 (Post-adverse action): After taking the adverse action (rejecting the applicant based on information in the report), send the applicant a letter stating:

- that the adverse action was based, in whole or in part, on the criminal background report;
- the contact information for the consumer reporting agency that furnished the report (now The McDowell Agency, Inc.);
- that the consumer reporting agency did not make the adverse employment decision; and
- that the applicant can receive a free copy of the report and can dispute the information in the report.

(A sample Post-adverse action letter to applicant follows.)

SAMPLE POST-ADVERSE ACTION LETTER

Dear Applicant:

Thank you for your interest in a position with our organization. As part of the background investigation, we obtained a criminal record check. We have provided you with a copy of the report obtained from The McDowell Agency, Inc. prior to our organization making a decision regarding your application for employment.

Based on the information provided in that report, we are unable to offer you a position with our organization. Once again, the name, address, and phone number of the credit reporting agency is:

The McDowell Agency, Inc.
1714 University Avenue West
St. Paul, MN 55104
Phone: 651-644-3880

This agency did not make the determination regarding your application for employment and is unable to provide you with specific reasons why the action was taken. Please be advised that you have a right to obtain a free copy of the consumer report from The McDowell Agency, Inc. at the address listed above within 60 days and the right to dispute the accuracy or completeness of any information in the report.

Sincerely,

C. Reference Checks

Employers are reluctant to provide a reference if that reference will be anything other than an unqualified endorsement of the former employee. To avoid possible defamation claims, many employers will do nothing more than confirm the prior employee's position and dates of employment.

One possible way to address the former employer's reluctance to address the former employee's performance is to ask the applicant to release the prior employer from any claims relating to the reference. The employer should use that procedure in a non-discriminatory manner.

(A sample of such a Release to Provide Reference follows.)

RELEASE TO PROVIDE REFERENCE

I authorize [NAME OF CHURCH/SCHOOL] to release relevant information and opinion concerning my past employment to third parties, such as prospective employers, upon their request for a reference. This information and opinion may include, but is not limited to, my dates of employment, title, job classification, job-related knowledge and skills, job performance, and reasons for leaving. I understand that the information provided about me may be either negative or positive. However, I unconditionally release [NAME OF CHURCH/SCHOOL] and its agents and employees from any and all liability for damages that may result for furnishing such information and opinion and in making such statements.

Date: _____

Signature _____
Print Name _____
Address: _____
_____
_____

D. Drug and Alcohol Testing

Minnesota has one of the strictest drug and alcohol testing policies in the country. It prohibits drug and alcohol testing of applicants unless the employer has a written policy that addresses the following issues:

- which employees are subject to testing;
- the circumstances under which testing may be requested or required;
- the applicant's right to refuse testing and the consequences of refusal;
- the possible adverse action that may occur based on a positive test result;
- the right of an applicant to explain a positive test result or pay for a confirmatory retest; and
- any other appeal procedures.

An employer must post a notice that it has adopted a drug and alcohol testing policy and that a job offer is conditioned on the applicant passing the test.

E. Medical Examination and Medical Information

State and federal laws prohibit an employer from asking a job applicant medical questions or asking the applicant to take a medical examination before making a job offer.

The ADA prohibits an employer from asking whether an applicant has a disability. (This also applies to students. A school cannot ask if a prospective student has a mental or physical disability.)

Generally, an employer may not ask whether an applicant needs a reasonable accommodation to perform the job duties unless the applicant discloses that he or she has a disability.

> **CONCLUSION:** An employer's failure to follow the anti-discrimination laws or violations of other hiring procedures can make it more difficult to terminate an unqualified or underperforming employee.

V. Hiring Procedures

JUSTICE IN EMPLOYMENT

EQUAL EMPLOYMENT OPPORTUNITY

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Procedures

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PROBATION OR IN-TRAINING PERIOD

Unless otherwise specified in writing, all new employees are subject to an initial training period of *up to three (3) calendar months*. If a longer initial training period is required, it will be specified in writing. When circumstances warrant, certain *new employees may have an extended probationary period.*

The training period permits the employer to evaluate the employee's performance and provides an opportunity for the employee to assess whether the position is appropriate for his/her interests and skills. During this time, the employee is considered an at-will employee and may be terminated for any non-discriminatory reason. *The employee's immediate supervisor must conduct written evaluations at the end of the second and third month of employment and prior to a change of status to regular employment.*

The approval of the employer and his/her designate (i.e., supervisor) is required before an employee may be upgraded from an in-training employee to a regular employee status. *The upgrade must be in writing* and must state the effective date of the change from in-training status to regular employee status. The written upgrade approval also must be made a part of the employee's personnel file. Benefit eligibility will be the same for the in-training period as it is for all regular employees unless the benefit program itself (e.g. retirement program, etc.) states otherwise.

Similarly, in fulfillment of the spirit and intent of these policies, *probationary employees should*, to the extent practical, *be accorded the necessary assistance to become regular employees*. However, this does not affect their status as "at will" employees, that is, employees who may be terminated without cause at any time.

(Italics added).

COMMENTS:

1. Probationary Period

Carefully consider the appropriate length of a probationary period. If three months is inadequate, specify the length of the period of probation in writing.

If an employee has a probationary period that is longer than one year, specify when the probationary period started in each subsequent Information Letter.

> Example: "Your probationary period is three (3) years. It started on August 1, 2012."

2. Performance Evaluations

Note that this section requires three separate written evaluations by the employee's immediate supervisor before an employee can transition from probationary status to regular status. They are:

- end of second month;
- end of third month; and
- prior to change of status.

CAUTION: Do not assume that if the supervisor has failed to conduct the evaluations that transfer to regular status will not occur.

3. Good Faith Assistance

Be mindful of the employer's obligation to provide "necessary assistance" to the employee to afford the employee the opportunity to become a regular employee.

4. Be Honest: Pull the Plug When Necessary

Do not put the hiring process out of your mind after the orientation is complete.

Carefully monitor the employee's progress during the period of probation. Conduct the performance evaluations as required. Be honest in the evaluations. In the end, if the employee is not going to succeed, terminate the employee. Delay will not make that decision any easier.

CONCLUSION: Failure to follow the probation period procedures or allowing an employee who is not meeting expectations to move to regular status will complicate termination efforts.

VI. Employee Performance Evaluations

JUSTICE IN EMPLOYMENT

WORK MINISTRY/PLANNING AND REVIEW

Policy

Performance analysis and evaluation is built on a foundation of careful planning, employee involvement, use of objective job-related criteria, commitment to employee development and candid communication about performance between the employee and the supervisor.

Through observation and dialogue with the employee about expectations and job related issues, the supervisor and the employee work to establish an environment in which mutual respect may develop and work related issues may be resolved.

Employee evaluations are never fun for the employee or supervisor. However, with proper planning, it will be a productive process for the employee and organization.

An effective performance evaluation process does not consist of quickly filling out a chart at the end of the year. Instead, the evaluation process should include the following considerations:

1. Determine the overall goals and strategic objectives of the organization. Consider how the employee's skills, capabilities, and behaviors align with those goals and objectives. Where those two factors are not in alignment is where the employee's development and growth must occur.

2. Develop a culture where coaching and feedback occur regularly and continually. If a problem develops, address it immediately. Likewise, if noteworthy performance occurs, acknowledge it promptly. Finally, provide both praise and coaching as appropriate, not exclusively one or the other.

3. Information contained in the formal evaluation should not be a surprise to the employee. If the employee receives regular feedback about behavior or performance concerns, that will not happen. If you wait for the annual review to discuss the employee's challenging conduct or performance, the employee does not have the opportunity to rectify the problem.

4. The evaluation should contain information about the employee's strengths and weaknesses. If the supervisor has concerns about the employee's performance, that will not change if the employee is not aware of those concerns.

5. The assessment should include a self-evaluation component so the supervisor can see how the employee views his or her own performance and how well the employee understands the job expectations.

6. The evaluation is incomplete if it does not contain a plan of action for the employee. The evaluation should identify those areas for improvement and development and the time period for accomplishing those objectives.

CONCLUSION: Failing to document concerns about an employee's performance deficiencies and giving an employee an opportunity to correct those problems will surely undermine an employer's attempts to terminate employment based on unsatisfactory performance.

VII. Progressive Discipline

JUSTICE IN EMPLOYMENT

PROGRESSIVE DISCIPLINE

Policy

When performance deficiencies are observed, the supervisor will first offer suggestions, criticism or comments to the employee to correct those deficiencies or workplace behavior issues.

If this approach fails to resolve the problem, the supervisor will inform the employee that the supervisor is initiating progressive discipline under JIE. The following series of corrective steps may then be followed. Any step in the procedure may be bypassed if the severity of the circumstances warrant. In the process of implementing the procedures for progressive discipline, *the employer is encouraged*, but not required, *to seek the advice and counsel of a human resources professional qualified in employment related matters and knowledgeable about these policies*.

(Italics added).

Progressive discipline is a process of using increasingly severe steps or measures to correct an employee's performance problems. The underlying principle is to use the least severe sanction necessary to address the performance concerns.

The progressive discipline steps identified in JIE are:

STEP 1: Oral Warning (to be documented in writing)
STEP 2: Written Warning
STEP 3: Final Written Warning and/or suspension
STEP 4: Dismissal

Guidelines to consider when following progressive discipline include:

- Thoroughly investigate the situation by reviewing all pertinent documents, including the employee's personnel file.
- Ask for the employee's explanation or response prior to making any decision about discipline. (This is usually a two-step process.)
- Document all steps in the investigation.
- The goal of the process is to correct unacceptable behavior and improve performance. The goal is not to punish the employee.
- If it has been some time since a prior warning notice was issued, or if it appears that the employee misunderstood the prior warning, consider the benefits of repeating the prior disciplinary step.
- There is no inflexible rule that states that all steps must be followed before termination is permitted.
- Less serious steps can be skipped for more serious offenses.
- Always consider contacting a qualified attorney, per JIE, to discuss the planned strategy.
- It is acceptable to have a witness present to take notes of a meeting when progressive discipline is being discussed.

Elements of progressive discipline warning:

1. Identify the unacceptable conduct or behavior or the specific employer policy at issue. Give examples.
2. Describe the acceptable behavior or performance standard.
3. Give the employee a reasonable time to comply with the performance standard.
4. State the consequences for failing to comply with the performance requirements.
5. Have the employee acknowledge receiving the warning memo.

(A sample progressive discipline form follows.)

SAMPLE PROGRESSIVE DISCIPLINE FORM

[Oral] [Written] [Final Written] Warning

TO: [Employee Name]
FROM: [Supervisor Name]
DATE: _____, 20___
CC: [Parish Administrator]
[Pastor]

NATURE OF PRESENT CONCERN

This is to notify you that we are [initiating] [continuing] progressive discipline under Justice In Employment.

[Refer to unacceptable behavior or performance or list specific policy employee has violated.]

Background

[Provide specific examples of performance problems. If prior warnings were issued, summarize them and how they relate to the current performance issues.]

Improvement Required

[Explain acceptable behavior or type of improvement required, and give the employee a reasonable period of time to comply.]

Consequences

Any other [incident of misconduct] [violation of this policy] or any other performance deficiency will result in additional discipline, up to and including immediate termination.

By signing below, I acknowledge that I have received and reviewed this document. I understand that my refusal to acknowledge receipt of this document is grounds for disciplinary action, up to and including immediate termination.

_____ _____
[Employee Name] [Date]

CONCLUSION: Failing to document performance deficiencies in writing will likely allow an employee who is not satisfying performance requirements to remain employed.

VIII. Termination of Employment

DISCHARGE: JUST CAUSE

Policy

After an employee is upgraded from probationary or in-training status *to the status of a regular employee, the employment relationship* which exists between the employer and its employees *will be broken only "for cause,"* that is, if there are valid reasons for taking such an action.

Appropriate reasons for breaking the employment relationship include poor employee performance, improper conduct, violation of work rules and other violations of the employer/employee relationship. In the process of implementing the procedures for discharge, the employer is encouraged, but not required, to seek the advice and counsel of a human resources professional qualified in employment related matters and knowledgeable about these policies.

Prior to discharging any employee for cause, the employer or his or her designate shall seek and follow the advice of an attorney qualified in employment law and familiar with these policies, to ensure that these policies are followed. The required consultation includes review of relevant facts, circumstances, documents, records and other data relating to such employment, as they deem necessary. All such consultations shall be deemed privileged communications, and confidential, and no statements made nor documents produced in such consultations shall be subject to discovery or other disclosure and shall be inadmissible for any purpose, including impeachment, in any subsequent Arbitration under these policies.

The general insurance program requires the consultation with an attorney as described above. *Failure to do so prior to a discharge may result in denial of insurance coverage for claims of wrongful termination.* If coverage is denied, the defense of the wrongful termination and any award of damages will be the sole obligation of the employer.

Procedures

I. Discharge following progressive discipline:
Ordinarily, less serious employee performance deficiencies or workplace behavior issues will be addressed through the steps described in the Policy on Progressive Discipline. Discharge may result if progressive discipline fails to bring about desired results. In this case, the employee will be given the facts pertaining to and the reasons for discharge in writing.

II. Immediate discharge without progressive discipline:
Any of the following acts may result in immediate discharge without progressive discipline:

A) Illegal discrimination or harassment
B) Theft, misappropriation, falsification of records
C) Misconduct at the work place which endangers others
D) Insubordination or breach of professional ethics
E) Working under the influence of illegal or controlled substances
F) Consumption of alcohol (unless authorized) or drugs at work or prior to work, so as to affect the employee's performance
G) Public conduct which is inconsistent with the faith, morals, teachings and laws of the Catholic Church
H) Other gross violations of the employer/employee relationship

If the seriousness of an incident warrants removal of the employee from the premises before consultation is possible, the employee should be suspended without pay pending an investigation and prior to a final decision regarding discharge.

(Italics added).

Seven factors to determine "Just Cause" for termination:

1. Notice. Did the employee receive reasonable notice of the work rule or performance standard?

   - Is the work rule or performance standard in the employee handbook or otherwise available?
   - Is the work rule or performance standard described in prior warning notices to the employee?
   - Can the employer show that the employee was aware of the work rule or performance standard?

2. Reasonable Rule. Is the rule or order reasonably related to the orderly, efficient, and safe operation of the workplace?

3. Adequate Investigation. Did the employer conduct an investigation before making the disciplinary determination?

   - What evidence supports the claimed work rule or performance violation?
   - Are there witnesses who have been interviewed?
   - Are there records or other evidence to evaluate?
     - financial records
     - video records

4. Fair Investigation. Was the investigation fair and objective? Do not rush to judgment.

   - Who is best able to conduct a fair investigation?
   - Who should confront the employee, and when should the employee be confronted?
   - Should the employee remain at work while the investigation is underway?
   - Has the employee been given an opportunity to respond to the allegation(s) and provide an explanation?

5. Proof. What is the evidence that supports the alleged misconduct or performance deficiency? The evidence must be something more than speculation.

6. Equal Treatment. Have the rules been applied equally and without discrimination?

   - Have similarly situated employees received the same discipline?
   - What records exist to show that the work rules have been applied uniformly and consistently?

7. Appropriate Discipline. The discipline must be related to the seriousness of the employee's proven misconduct.

   - Is the discipline related to the employee's length of service and overall performance record? (Consider the performance evaluations, record of pay increases, and any certificates of merit based on performance.)

CONCLUSION: In many ways, termination for "just cause" is the centerpiece of Justice In Employment. It is also the source of the greatest frustration for employers and supervisors.

The Justice In Employment policies are based on reciprocal rights and responsibilities. The employee has a right to productive work and fair wages from the employer. The employee is obligated to contribute consistently and conscientiously to the employer's mission.

The progressive discipline process is designed to inform the employee about the employer's concerns and provide the employee with the opportunity to correct the performance problems. If successful, the employee will "become more fully human . . . through work." (*Laborem Exercens*). That is accomplished through a series of more serious disciplinary steps.

If the employee does not demonstrate the requisite level of improvement after receiving an oral warning, written warning, and final written warning, an employer is authorized to proceed to terminate the employee.

If the employer fails to follow the progressive discipline road map, termination will likely not be recommended.

IX. Reduction In Force

REDUCTION IN STAFF OR LAY OFF

Policy

A reduction in staff or lay off may occur because of a change in the organization's institutional goals or the prevailing economic condition of the employer. A termination under this section is a termination for cause. In the process of implementing the procedures for a reduction in staff or lay off, the employer is encouraged, but not required, to seek the advice and counsel of a human resources professional qualified in employment related matters and knowledgeable about these policies.

Prior to discharging any employee for cause under this section, the employer or his or her designate shall seek and follow the advice of an attorney qualified in employment law and familiar with these policies, to ensure that these policies are followed. The required consultation includes review of relevant facts, circumstances, documents, records and other data relating to such employment, as they deem necessary. All such consultations shall be deemed privileged communications, and confidential, and no statements made nor documents produced in such consultations shall be subject to discovery or other disclosure and shall be inadmissible for any purpose, including impeachment, in any subsequent Arbitration under these policies.

The archdiocesan insurance policy requires the consultation described above. Failure to do so prior to a discharge may result in denial of insurance coverage for claims of wrongful termination. If coverage is denied, the defense of the wrongful termination and any award of damages will be the sole obligation of the employer.

In the spirit of these policies, an appropriate level of severance will be provided to those affected.

Procedures

After determining the need for a reduction in staff, the employer must decide who will be affected based on valid criteria such as past performance, seniority, education, training and work skills needed by the organization. All employees affected will be advised in writing as to the criteria used and decisions made.

REDUCTION IN FORCE

Seven mistakes to avoid:

1. Failure to anticipate and plan for possible RIF. Carefully monitor budgets. In the case of schools, monitor enrollment numbers. Begin planning for a RIF early. Avoid surprises to staff.

2. Failure to be clear about short-term and long-term goals of the organization. Looking at a RIF solely as a mechanism for reducing personnel costs without considering how the loss of skilled staff will affect the core mission of the organization can harm long-term goals.

3. Failure to do deep cuts. Staff reduction is difficult and affects staff morale. Failing to make sufficient staffing reduction to prevent future rounds of reduction can be devastating.

4. Using staff reduction as a replacement for performance management.

5. Failure to communicate openly and honestly. Staffing reductions invite fear and uncertainty. Failing to provide updates about the status of the staffing changes invites rumors to circulate. Open communication can lead to increased trust.

6. Failure to properly plan for terminations. Terminating staff who have a control role in an upcoming parish or school event or activity, failing to consider the optimal day or time of day for notifying staff of the RIF selection, and failing to plan for the details of the termination meeting (who should be present, what final checks should be available, what items must employee return) can undermine confidence in the RIF process.

7. Failure to manage RIF "survivors." Planning for communications to other stakeholders, such as retained staff, parents, and parishioners, should begin at the outset of the RIF planning. While there are limits on how much information can be provided, the goal is to manage morale of the remaining staff and retain confidence of the larger constituency groups.

CONCLUSION: Staffing change is commonplace and a reality of the current economy and level of commitment by stakeholders, whether donors, parishioners, parents, volunteers, or others.

Alerting decision-makers about the possible need for a staff reduction early so that proper planning can occur is of paramount importance.

Failing to follow the Reduction In Force policy, or failing to comply with the legal requirements when implementing the staff reduction, can have devastating and costly consequences for the employer.

X. Conciliation and Arbitration

JUSTICE IN EMPLOYMENT

ARBITRATION

Policy

If a controversy between the employee and the employer concerning terms and conditions of employment, other than those relating to Workers' Compensation or Re-employment Insurance Compensation, is not resolved through the Policy on Resolution of Work Related Issues, the employee and employer agree to submit the dispute to final and binding arbitration, in accordance with the procedure explained below, which will be the exclusive remedy available to the parties, and to abide by the decision of the arbitrator. Such arbitrator may determine the extent and scope of any discovery to be permitted.

COMMENTS:

The Archdiocese Office of Conciliation states that it is available to serve "those individuals and organizations in conflict that seek reconciliation in a manner that embraces Christ's presence, the rich legacy of the Scriptures, and the principles of Catholic social teaching. Conciliation recognizes four key principles of Catholic social teaching:

1. **The value and dignity of the human person** – The most important aspect of human activity lies beyond what is produced or achieved. It is the extent to which that activity reflects and promotes human dignity. Individuals need to evaluate how well their activities serve their life and God. Organizations must evaluate their environment and expectations in light of an individual's reasonable aspirations and needs.

2. **Common Good** – Individuals and organizations focus on the larger society to promote the common good. The notion of the common good is complex and multi-faceted. It encompasses more than material well-being. The Church adds an important spiritual dimension in its contribution to the common good.

3. **Participation** – Participation brings together the interests of the individual and the common good. The individual is respected as a person. The input of many individuals helps the organization move in appropriate directions in pursuit of the common good. Participation is a tapestry of collegiality, collaboration, and consultation.

4. **Justice** – The word "justice" derives from the concept of "right relationships." Justice occurs when individuals contribute conscientiously to human and organizational relationships and when organizations establish policies and systems that elevate human dignity. Justice recognizes the existence of certain fundamental rights and freedoms which we share equally, including: (1) respect for one's person and the right to protect one's person and privacy; (2) the right to be informed of proposed actions which affect one's rights; (3) the right to be heard in defense of one's rights and to address one's accusers; and (4) the right to be judged fairly and impartially.

Historically, it has been suggested that when Justice In Employment was adopted in 1999, the employee could not be terminated except on a showing of just cause. In exchange, the employee agreed that any dispute would be resolved by conciliation or arbitration.

Conciliation:

This is a process that involves building a positive relationship between the parties who have a dispute.

The conciliator facilitates dialogue between the parties to help the parties reach a final and mutually satisfactory agreement. The conciliator helps the parties identify and articulate their own interest, needs, and wishes.

Conciliation is a "peaceful" dispute resolution process. It is a voluntary and binding process. And it allows the parties to create resolution alternatives that might not be available in a court or arbitration proceeding.

Conciliation is often successful because it allows the parties to develop a mutually satisfying outcome that uniquely meets the needs of both parties to the dispute.

Conciliation will not be successful if the parties are unwilling to recognize the validity of the arguments raised by the opposing side or if the parties hold rigid and inflexible positions.

Conciliators do not decide or judge. Instead, conciliators use communication techniques designed to help the parties reach the best outcome.

The conciliation process allows the parties to take the time necessary to identify and resolve the real issues and create a voluntary and functional outcome. The parties control the process, the issues to be discussed, and the parameters of the final agreement.

Conciliation also provides economic advantages to litigation. The conciliator usually provides his or her services free of charge. The dispute is usually resolved in a much shorter time period, thus also resulting in significant cost savings. For example, many conciliations are completed in a half-day session.

Conciliation is an informal process that allows the parties to process the dispute in a way that suits their individual needs.

The conciliation, in addition to being informal, is confidential. This allows the parties to discuss and decide the dispute without exposing the parties' dealings to public scrutiny or judgment. Specifically, statements of a party during conciliation are confidential and may not be disclosed.

One feature of the conciliation worth noting is that any party can unilaterally decide to stop the conciliation at any time that party determines that further discussions will not be productive.

If the parties reach an agreement, the terms of that agreement are put in writing and signed by the parties. It then becomes a contract and is binding on the parties. Because the parties are jointly involved in determining the outcome, there is rarely a dispute about the final decision.

Arbitration:

Arbitration is an alternative dispute process where disputing parties present their disagreement to an independent third party. The arbitrator determines the outcome of the dispute.

Advantages of arbitration over litigation in court are that the process is usually much faster and less costly than a trial.

Disadvantages include losing control over the process and the final decision because the decision-making authority is transferred to the arbitrator. Also, the ability to fashion a unique and creative remedy is lost as the arbitrator is usually limited to traditional legal remedies.

Parties to an arbitration must also recognize that an arbitration decision has the force of law but does not set a legal precedent. Further, appeal of an unfavorable arbitration decision is severely limited.

(A sample of the form to start a conciliation or arbitration proceeding follows.)

- ☐ **Petition for Conciliation**
- ☐ **Petition for Arbitration**

NAME: _____

ADDRESS: _____

PHONE/EMAIL: _____

POSITION: _____

ADVISOR/ATTORNEY: _____

PHONE/EMAIL: _____

RESPONDENT'S NAME: _____

ADDRESS: _____

PHONE/EMAIL: _____

POSITION: _____

1. Please identify the parties involved.

2. Please describe the dispute which you would like to submit for conciliation or arbitration.

3. Please describe the efforts you have made to resolve this issue prior to this time.

4. What result do you hope to achieve through the conciliation/arbitration process?

5. Why is this result important to you?

By signing this petition, I agree to take part in conciliation or arbitration in the spirit of good will and Christian values. I also agree to abide by the principles outlined in the 'Agreement to Conciliate' or 'Agreement to Arbitrate' appropriate to the process I am requesting.

DATE: _____

SIGNATURE: _____

DATE RECEIVED: _____

Complete and return to:

Jennifer Haselberger
Director, Office of Conciliation
226 Summit Avenue
Saint Paul, MN 55102