



CHAPTER 17

Employee Rights and Discipline

After you have read this chapter, you should be able to:

- Explain the difference between statutory rights and contractual rights.
- Define employment-at-will and identify three exceptions to it.
- Describe what due process is and explain some means of alternative dispute resolution.
- Identify employee rights concerns associated with access to employee records and free speech.
- Discuss issues associated with workplace monitoring, surveillance, investigations, and drug testing.
- List elements to consider when developing an employee handbook.
- Differentiate between the positive approach and progressive approach to discipline.

HR TRANSITIONS

Employment Practices Liability Insurance (EPLI)

There is a growing recognition by employers in the United States that employee rights issues are creating significant liabilities. For instance, disciplining or discharging employees may lead to lawsuits.

Another illustration of the legal exposure employers face is that the number of sexual harassment claims doubled in six years, and monetary damages in federal sexual harassment suits were over \$50 million. For sexual harassment and other employment-related claims, the average award to individuals is \$1.5 million, which ultimately is paid by employers. Just as employers have insured "risks" on their facilities and equipment, they are recognizing that they need to insure their employment-related risks.

Beginning in 1992, some insurance companies offered employers a new type of insurance coverage—employment practices liability insurance (EPLI). In seven years the number of insurance carriers offering EPLI has grown to more than 70, and additional insurance carriers are entering the market each year. Because general company insurance policies do not include employment-related areas in their coverage, EPLI provides another means to insure organizational risks.

EPLI is purchased by employers for amounts ranging from \$5,000 to hundreds of thousands of dollars, depending on the industry of the employer and the size of an employer's workforce. The EPLI policies typically cover employer costs for legal fees, settle-

ments, and judgments associated with employment-related actions. Insurance carriers provide coverage for some or all of the following employment-related actions:

- Discrimination
- Sexual harassment
- Wrongful termination
- Breach of employment contract
- Negligent evaluation
- Failure to employ or promote
- Wrongful discipline
- Deprivation of career opportunity
- Infliction of emotional distress
- Improper management of employee benefits

wanting EPLI, most insurance carriers conduct reviews of employers' HR policies and practices. Included in this review is a detailed look at an employer's HR policy manuals, employee handbooks, employment forms, and other items. Also, the employer's history of employment-related charges and complaints over the past 3–5 years is reviewed. For multisite organizations, reviews may be done in several locations outside of corporate headquarters in order to ensure that consistency of HR policies and practices exists throughout the organization.

Viewing the growth of EPLI opti-

By taking positive steps to ensure that their HR policies and practices are conducted legally and that all employees are treated appropriately, employers will be better protected in the litigious world they face.

Employers use EPLI when faced with lawsuits from current or former employees, applicants, or other parties. Coverage of costs up to \$100 million can be purchased, obviously with significantly higher premiums being charged by the insurance carriers. However, most EPLI policies exclude employment claims based on retaliatory actions by employers against employees who allege violations in legally protected areas.

To determine the level of risk and premiums to be charged to employers

mistically, it may indicate that more and more employers are recognizing that their employment-related policies and practices create liabilities. By taking positive steps to ensure that their HR policies and practices are conducted legally and that all employees are treated appropriately, employers will be better protected in the litigious world they face.¹

“The right to be left alone—the most comprehensive of rights and the most valued by civilized men.”

LOUIS BRANDEIS

This chapter considers three related and important issues in managing human resources: employee rights, HR policies and rules, and discipline. These areas may seem separate, but they definitely are not. The policies and rules that an organization enacts define employee rights at work to a certain extent, and they also constrain those rights (sometimes inappropriately or illegally). Similarly, discipline for those who fail to follow policies and rules often is seen as a fundamental right of employers. Employees who feel that employer actions have been taken inappropriately can challenge those actions—both inside and outside the organization—using the legal system. As the opening discussion of employment practices liability insurance (EPLI) indicates, the costs to employers of those challenges can be substantial.

Employees come to organizations with certain rights that have been established by the U.S. Constitution. Some of those rights include *freedom of speech*, *due process*, *unreasonable search and seizure*, and others. Although the U.S. Constitution grants these and other rights to citizens, over the years laws and court decisions have identified limits on those rights in the workplaces. For example, an employee who voices threats against other employees may face disciplinary action by the employer without the employee's freedom of speech being threatened. Indeed, the right of management to run organizations as it chooses was at one time so strong that employee rights were practically nonexistent. However, today management rights have been restrained to some degree as employee rights have been expanded.

Employee Rights and Responsibilities

Rights

That which belongs to a person by law, nature, or tradition.

Employee responsibilities

Obligations to be accountable for actions.

Generally, rights do not exist in the abstract. They exist only when someone is successful in demanding their practical applications. **Rights** belong to a person by law, nature, or tradition. Of course, there is considerable potential for disagreement as to what really is a right. Pressures placed by employers on employees with “different” lifestyles illustrate one area in which conflicts can occur. Moreover, *legal* rights may or may not correspond to certain *moral* rights, and the reverse is true as well.

Rights are offset by **employee responsibilities**, which are obligations to be accountable for actions. Employment is a reciprocal relationship (both sides have rights and obligations). For example, if an employee has the right to a safe working environment, the employer has an obligation to provide a safe workplace. Because rights and responsibilities are reciprocal, the employer also has a right to expect uninterrupted, high-quality work from the employee, meaning that the worker has the responsibility to be on the job and meet job performance standards. The reciprocal nature of rights and responsibilities suggests that each party to an employment relationship should regard the other as having equal rights and should treat the other with respect.

Statutory Rights

Statutory rights

Rights based on laws.

Employees' **statutory rights** are the result of specific laws passed by federal, state, or local governments. Federal, state, and local laws that granted employees

certain rights at work, such as equal employment opportunity, collective bargaining, and safety have changed traditional management prerogatives. These laws and their interpretations have been the subjects of a considerable number of court cases. For instance, in a 12-month period, over 23,000 employment discrimination claims were filed in federal trial courts. During the same time frame, over 78,000 employment-related discrimination complaints were filed with the federal Equal Employment Opportunity Commission (EEOC).²

Contractual Rights

An employee's **contractual rights** are based on a specific contractual agreement with an employer. For instance, a union and an employer may agree on a labor contract that specifies certain terms, conditions, and rights that employees have with the employer.

Contracts are used when a formalized relationship is needed. For instance, if someone is being hired as an independent contractor or consultant, then a contract spells out the work to be performed, expected time lines, parameters, and costs and fees to be incurred by the hiring firm. Another situation in which formal contracts are used is in a **separation agreement**. In this agreement, an employee who is being terminated agrees not to sue the employer in exchange for specified benefits, such as additional severance pay or other considerations. Contractual rights can be spelled out formally in written employment contracts or implied in employer handbooks and policies disseminated to employees.

EMPLOYMENT CONTRACTS Details of an employment agreement are often spelled out in a formal **employment contract**. These contracts are written and often very detailed. Traditionally, employment contracts have been used mostly for executives and senior managers. However, the use of employment contracts is filtering down the organization to include scarce-skilled, highly specialized professionals and technical employees. Even flexible staffing firms providing temporary help services are using contracts for employees with specialized skills. Employers who hire individuals from a staffing service after a short-term temporary assignment often are obligated to pay the staffing service a "placement fee" that can run as high as 30% of the employee's annual base salary at the new company.³

Employment contracts typically contain several provisions relating to a number of different areas. Following an identification section listing the parties to the contract, the nature of employment is specified. The employment contract may note whether the employment relationship is to be for an indeterminate time, or whether it can be renewed automatically after a specified period of time. Typically, employment contracts indicate that employment can be terminated at the will of either the employer or employee, or for just cause. Also typically identified is the general nature of the employee's job duties.⁴ The level of compensation and types of benefits often are addressed next, including any special compensation, benefits, incentives, or perquisites to be provided by the employer.

Common in employment contracts are nonpiracy and noncompete provisions. A **nonpiracy agreement** contains provisions stating that if the individual leaves the organization, existing customers and clients cannot be solicited for business for a specified period of time, usually one year. **Noncompete covenants** are even more restrictive and prohibit an individual who leaves the organization from competing with the employer in the same line of business for

Contractual rights

Rights based on a specific contractual agreement between employer and employee.

Separation agreement

Agreement in which an employee who is being terminated agrees not to sue the employer in exchange for specified benefits.

Employment contract

Agreement that formally spells out the details of employment.

Nonpiracy agreement

Provisions stating that if the individual leaves the organization, existing customers and clients cannot be solicited for business for a specified period of time.

Noncompete covenants

Agreement that prohibits an individual who leaves the organization from competing with the employer in the same line of business for a specified period of time.

FIGURE 17–1 Typical Employment Contract Provisions

LOGGING ON . . .

Employment Contracts

This site describes a firm that specializes in providing employers with employment contracts. A directory of the jobs they write contracts for can be reviewed here.

[http://www.espros.com/
contract_info.html](http://www.espros.com/contact_info.html)

a specified period of time. These agreements may be overly restrictive, so that they prohibit an individual from earning a living, and that affects how enforceable they are in state courts.⁵ In a related area, employment contracts also may place limitations on an individual to prevent that person from soliciting the firm's employees for employment with another company. As the HR Perspective indicates, employment contracts also are used to protect organizational secrets. Employment contracts also can restrict what employees may disclose to another employer.⁶

Finally, Figure 17–1 identifies typical employment provisions. Employment contracts identify the nature and conditions under which employees can be terminated from employment, or how they may resign. The contract also may spell out the severance agreement, continuation of benefits, and other factors related to employees leaving the employer.

IMPLIED CONTRACTS The idea that a contract (even an implied, unwritten one) exists between workers and their employers affects the employment relationship. Rights and responsibilities of the employee to the employer may be spelled out in a job description, in an employment contract, or in HR policies, but often are not. Employee rights and responsibilities also may exist only as unwritten employer expectations about what is acceptable behavior or performance on the part of the employee. For instance, a number of court decisions have held that if an employer

HR PERSPECTIVE

Organizational Secrets and Employment Contracts

A major reason for using employment contracts with nonexecutives is to protect confidentiality and company secrets. Several examples illustrate how the electronic age and technology have made protecting company secrets an important consideration for inclusion in employment contracts.

The best-known battle over company secrets involved General Motors (GM) and Volkswagen. When Volkswagen recruited Jose Ignacio Lopez and seven other GM employees, GM filed suit against Lopez for stealing secrets about production plans and methods. Ultimately, after a year-long court battle in both the United States and Germany, the case was settled by Volkswagen paying GM \$1.1 billion.

Even secret ideas have been the subjects of employer disputes. A telecommunications equipment firm, DSC Communications, fired an employee who refused to turn over software details to DSC. After the employee refused, DSC sued the employee because the firm had a signed employment agreement con-

taining an *intellectual-property clause*. This clause, common in the software industry, requires employees who develop new ideas, methods, or patents using company resources to give them to the employer. Now in court, the DSC case illustrates how widespread company secrets can be interpreted to be.

Another example in the software industry involved Novell, the Utah-based network software firm. After three engineers from Novell left to start a new company, Novell sued them, alleging that the engineers stole trade secrets and breached their employment contracts with Novell. Subsequently, Novell won a court order allowing police to search the men's homes and seize personal computers, disks, and other documents that would provide evidence of the secret computer codes for a new type of software that was being developed at Novell.

Concerns about theft of company secrets led to the passage of the Economic Espionage Act of 1996, which made the theft of trade

secrets a federal crime punishable by fines up to \$500,000 and prison terms up to 15 years. The law is not just used to prevent theft of trade secrets by U.S. firms, but also to prohibit foreign governments and firms from stealing U.S. technological advances. In one case, the Federal Bureau of Investigation (FBI) spent 22 months investigating the theft of information on the anti-cancer drug Taxol from Bristol-Myers Squibb by persons from a Taiwan competitor. The information the men were gathering would have allowed the Taiwan firm to make Taxol. According to the FBI, the men were to be paid \$200,000 and a percentage of the profits made by the Taiwan Company on producing and selling Taxol.

This law and these cases illustrate why it is important for employers to have employees—especially those with access to new product and technology secrets—sign employment agreements containing appropriate nonpiracy, nondisclosure, and intellectual-property provisions.⁷

hires someone for an indefinite period or promises job security, the employer has created an implied contract.⁸ Such promises establish employee expectations. When the employer fails to follow up on the implied promises, the employee has recourse in court. Numerous federal and state court decisions have held that such implied promises, especially when contained in an employee handbook, constitute a contract between an employer and its employees, even though there is no signed document.

Rights and Employee-Employer Relations

Workplace litigation has reached epidemic proportions as employees who feel that their rights have been violated sue their employers. As the opening discussion on EPLI indicates, some employers are purchasing insurance to try and

cover their risks from numerous lawsuits. Advocates for expanding employee rights warn that management policies abridging free speech, privacy, or due process will lead to further national legislation to regulate the employer-employee relationship. At the same time, HR professionals argue that they must protect management's traditional prerogatives to hire, promote, transfer, or terminate employees as they see fit, or the effectiveness of the organization may be affected.

As employees increasingly regard themselves as free agents in the workplace—and as the power of unions declines—the struggle between employee and employer “rights” is heightening. Employers frequently do not fare very well in court. Further, it is not only the employer that is liable in many cases. Individual managers and supervisors have been found liable when hiring or promotion decisions have been based on discriminatory factors, or when they have had knowledge of such conduct and have not taken steps to stop it. The changing rights associated with employee-employer relationships are an outgrowth of the changing psychological contract between employers and employees that was highlighted in Chapter 3.

Rights Affecting the Employment Relationship

It can be argued that all employee-rights issues affect the employment relationship. However, several basic issues predominate: employment-at-will, due process, and dismissal for just cause.

Employment-at-Will (EAW)

Employment-at-will (EAW)

A common-law doctrine stating that employers have the right to hire, fire, demote, or promote whomever they choose, unless there is a law or contract to the contrary.

Employment-at-will (EAW) is a common-law doctrine stating that employers have the right to hire, fire, demote, or promote whomever they choose, unless there is a law or contract to the contrary. A sample employment-at-will statement is shown in Figure 17–2. Employers often defend EAW based on one or more of the following reasons:

- The right of private ownership of a business guarantees EAW.
- EAW defends employees' right to change jobs, as well as employers' right to hire and fire.
- Interfering with EAW reduces productivity in a firm and in the economy.

In the past three decades an increasing number of state courts have questioned the *fairness* of an employer's decision to fire an employee without just cause and due process. Many suits have stressed that employees have job rights that must be balanced against EAW.



BNA

3610 Employment-at-will
In this section, see how EAW has been affected by state court rulings on each of the three EAW exceptions.

EAW AND THE COURTS Nearly all states have adopted one or more statutes that limit an employer's right to discharge employees. The national restrictions include race, age, sex, national origin, religion, and disabilities. Restrictions on other areas vary from state to state. In general, courts have recognized three different rationales for hearing EAW cases.

- *Public policy exception:* This exception to EAW holds that an employee can sue if he or she was fired for a reason that violates public policy. For example, if an employee refused to commit perjury and was fired, he could sue.

FIGURE 17-2 Employment-at-Will Statement

Employment-At-Will

On the BNA CD-ROM attached to this text, Section 3605.40.10 contains sample employment-at-will wording on an acknowledgment form that employees sign upon receiving an employee handbook or policy manual. It is reproduced here so that typical at-will language can be reviewed by readers.

At-Will Acknowledgment Form

I, _____, acknowledge that my employment with EMPLOYER is an at-will relationship that has no specific duration. This means that I can resign my employment at any time, with or without reason or advance notice, and that EMPLOYER has the right to terminate my employment at any time, with or without reason or advance notice.

I also acknowledge that no officer, supervisor, or employee of EMPLOYER, other than the chief executive officer and the vice president of HR, has the authority to promise or agree to any substantive terms of or conditions of employment different from those slated in the written guidelines and policies contained in the employee handbook I received from EMPLOYER. I also understand that any different employment agreement or arrangement entered into by the chief executive officer or vice president of HR must be clearly stated in writing and signed by both of those individuals.

Furthermore, I acknowledge that the employee handbook I received from EMPLOYER is neither a contract of employment nor a legal document, and nothing in the handbook creates an expressed or implied contract of employment. I understand that I should consult my supervisor or a representative of the HR department if I have any questions that are not answered in this handbook.

Signed: _____ Date: _____

- *Implied employment contract:* This approach holds that the employee will not be fired as long as he or she does the job. Long service, promises of continued employment, and lack of criticism of job performance imply continuing employment.
- *Good faith and fair dealing:* This approach suggests that a covenant of good faith and fair dealing exists between the employer and at-will employees. If the employer has broken this covenant by unreasonable behavior, the employee has legal recourse.

Wrongful discharge

Occurs when an employer terminates an individual's employment for reasons that are illegal or improper.

WRONGFUL DISCHARGE Employers who violate EAW restrictive statutes may be found guilty of **wrongful discharge**, which occurs when an employer terminates an individual's employment for reasons that are illegal or improper. Some state courts have recognized certain nonstatutory grounds for wrongful-discharge suits. Additionally, courts generally have held that unionized workers cannot pursue EAW actions as at-will employees because they are covered by the grievance-arbitration process.

A landmark court case in wrongful discharge is *Fortune v. National Cash Register Company*. The case involved the firing of a salesman (Fortune) who had been with National Cash Register (NCR) for 25 years.⁹ Fortune was fired shortly after winning a large order that would have earned him a big commission. From the evidence, the court concluded that he was wrongfully discharged because NCR wanted to avoid paying him the commission, which violated the covenant of good faith and fair dealings.

Wrongful-discharge lawsuits have become a major concern for many firms. According to one study, the median compensatory award for wrongful-termination cases lost by employers was \$204,310. The same study found that wrongfully discharged executives won their cases 58% of the time, but general laborers won only 42% of their cases.¹⁰

The lesson of wrongful-discharge suits is that employers should take care to see that dismissals are handled properly, that all HR management systems are in order, and that due process and fair play are observed. Suggestions for preparing for the defense of any such lawsuits are shown in Figure 17–3.

One often-cited case involving "just cause" examined the right of an employer to terminate an employee following investigation of allegations that a company vice president had sexually harassed two employees. The employee filed suit that he had been terminated without good cause, because the allegations had not been proven. Despite a lower court ruling for the employee, the California Supreme Court ruled that the company had conducted a proper investigation, had not reached its decision arbitrarily, and had a reasonable belief that the employee had engaged in the impermissible conduct.¹¹ Therefore, this case emphasizes the importance of employers using due process and conducting appropriate investigations when handling employee disciplinary situations.

Just cause

Sufficient justification for taking employment-related actions.

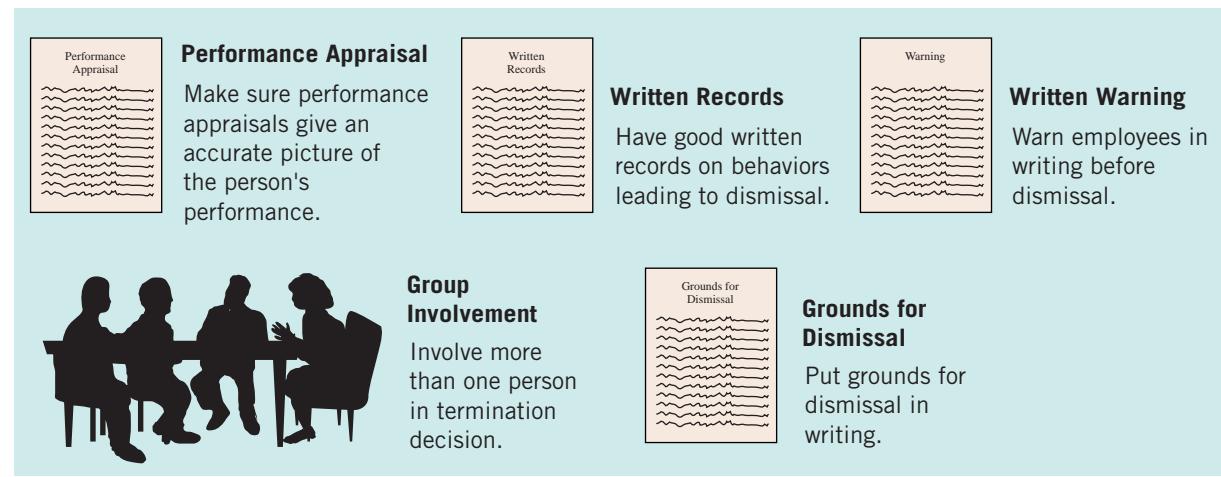
Constructive discharge

Occurs when an employer deliberately makes conditions intolerable in an attempt to get an employee to quit.

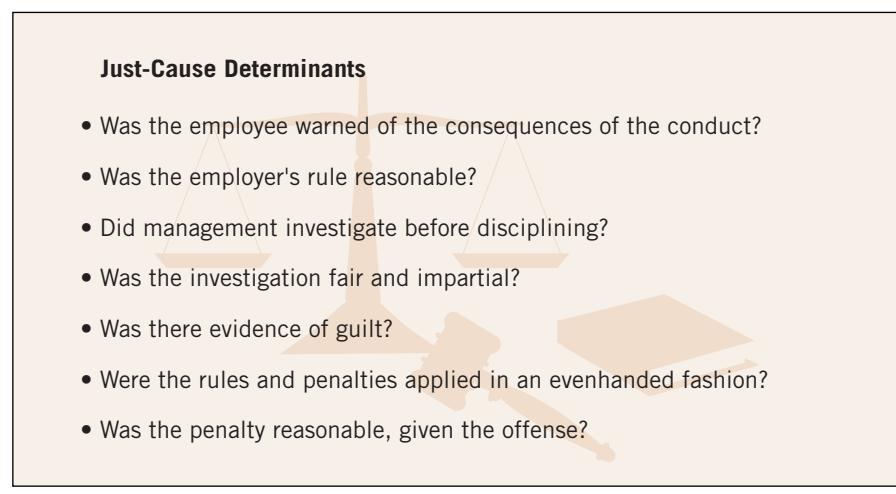
Just Cause

What constitutes **just cause** as sufficient justification for employment-related actions such as dismissal usually is spelled out in union contracts, but often is not as clear in at-will situations. While the definition of *just cause* varies, the criteria used by courts have become well-defined. They appear in Figure 17–4.

Related to just cause is the concept of **constructive discharge**, which occurs when an employer deliberately makes conditions intolerable in an attempt

FIGURE 17–3 Keys for Defense in Wrongful Discharge: The “Paper Trail”

to get an employee to quit. Under normal circumstances, an employee who resigns rather than being dismissed cannot later collect damages for violation of legal rights. An exception to this rule occurs when the courts find that the working conditions are so intolerable as to *force* a reasonable employee to resign. Then, the resignation is considered a discharge. For example, an employee had been told he should resign but refused. He was then given lesser assignments, publicly ridiculed by his supervisor, and threatened each day with dismissal. He finally resigned and sued his employer, and the judge held that he had been “constructively discharged.” His employer had to pay damages because it had forced him to resign.

FIGURE 17–4 Just-Cause Determinants

Due Process

Due process

In employment settings, the opportunity for individuals to explain and defend their actions against charges of misconduct or other reasons.

Distributive justice

Perceived fairness in the distribution of outcomes.

Procedural justice

Perceived fairness of the process used to make decisions about employees.

In employment settings, **due process** is the opportunity for individuals to explain and defend their actions against charges of misconduct or other reasons. Figure 17–5 shows some factors that are considered when evaluating whether due process was provided to an individual. These factors usually must be addressed by HR managers and their employers if due process procedures are to be perceived as fair by the courts.

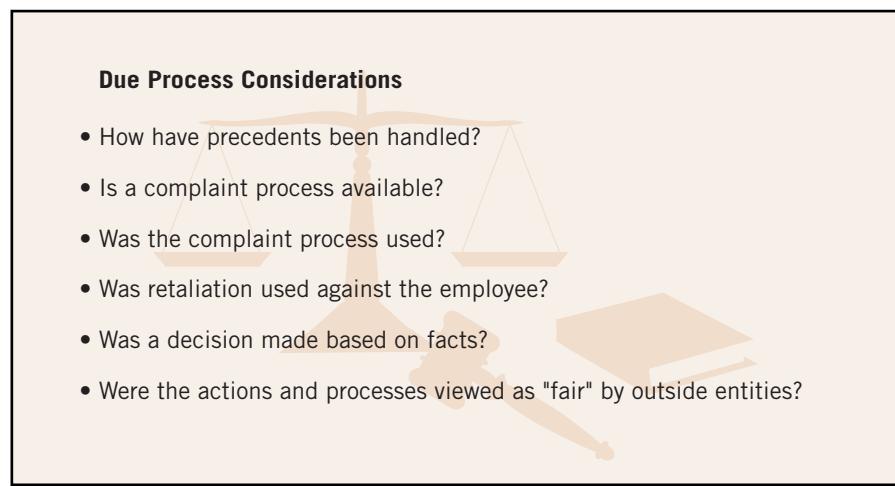
DISTRIBUTIVE JUSTICE AND PROCEDURAL JUSTICE Employees' perceptions of fairness or justice in their treatment reflect at least two factors. First, people prefer favorable *outcomes* for themselves. They decide how favorable their outcomes are by comparing them with those of others, given their relative situations. This decision involves the concept of **distributive justice**, which deals with the question: Is the way the outcomes were distributed fair?

Procedural justice also is involved in whether an action generally will be viewed as fair by an employee. It focuses on whether the *procedures* that led to an action were appropriate, were clear, and gave appropriate opportunity for input. Procedural justice deals with the question: Was the process used to make the decision fair? Some research has found that if organizations provide procedural justice, employees are more likely to respond to positive behaviors that benefit organizations in return.¹²

DUE PROCESS AND UNIONIZED EMPLOYEES For unionized employees, due process usually refers to the right to use the grievance procedure specified in the union contract. Due process may mean including specific steps in the grievance process, imposing time limits, following arbitration procedures, and providing knowledge of disciplinary penalties. More discussion of the grievance process and procedures in unions is contained in Chapter 18.

NONUNION COMPLAINT PROCESSES Compared with due process procedures specified in union contracts, procedures for at-will employees are more varied and

FIGURE 17–5 Due Process Considerations



may address a broader range of issues. Nonunion organizations should have formal complaint procedures providing due process for their employees. Just the presence of such a formal complaint mechanism is one indicator that an employee has been given due process. Further, if the due process procedure is seen as fair and available for use, employees with complaints are less likely to sue their employers.

Due Process and Alternative Dispute Resolutions (ADR)

Alternative means of ensuring that due process occurs in cases involving employee rights are being used with increasing frequency. A major reason for their growth is dissatisfaction with the expense and delays common in the court system when lawsuits are filed.¹³ The most common of the alternative dispute resolution (ADR) methods are arbitration, peer review panels, and ombudsmen.

ARBITRATION Because employers and employees do not always agree, disagreements often mean lawsuits and big legal bills to determine settlement. One alternative is **arbitration**, which uses a neutral third party to make a decision, thereby making use of the court system unnecessary. While arbitration has been a common feature of union contracts, a growing number of employers are requiring that arbitration be used to settle nonunion employment-related disputes.

Many firms have required *compulsory arbitration*. This approach requires employees to sign a preemployment agreement stating that all disputes will be submitted to arbitration, and that employees waive their rights to pursue legal action until arbitration has been completed. However, because the arbitrators often are selected by the employers, and because arbitrators may not be required to issue written decisions and opinions, many critics see the use of arbitration in employment-related situations as unfair.¹⁴ For instance, a female stockbroker was fired and was unable to pursue her sex discrimination claim because she had signed a mandatory arbitration clause when joining the brokerage firm 13 years earlier.¹⁵

Continuing pressure from state courts, federal employment regulatory commissions, and additional cases have challenged compulsory arbitration as being unfair in some situations. In 1998, the U.S. Supreme Court declined to review a lower-court ruling favorable to employees. As a result, employers cannot force workers to use compulsory arbitration in job-related discrimination cases. Also, it was noted that voluntary arbitration can be agreed to by employees, but blanket mandatory arbitration agreements requiring all employees to waive their rights to pursue legal action were too broad.¹⁶ Consequently, it is recommended that employers eliminate the mandatory arbitration agreements and consider using either individually signed voluntary agreements or other ADR means.¹⁷

PEER REVIEW PANELS Some employers allow employees to appeal disciplinary actions to an internal committee of employees. A **peer review panel** is composed of employees who hear appeals from disciplined employees and make recommendations or decisions. In general, these panels reverse management decisions much less often than might be expected. Such bodies really serve as the last stage of a formal complaint process for nonunion employees. Their use reduces the likelihood of unhappy employees filing lawsuits. Also, if lawsuits are filed, the employer's case is strengthened when a peer group of employees has reviewed the employer's decision and found it to be appropriate.

Arbitration

Process that uses a neutral third party to make a decision.

Peer review panel

Alternative dispute resolution method in which a panel of employees hear appeals from disciplined employees and make recommendations or decisions.

Ombudsman

Person outside the normal chain of command who acts as a problem solver for management and employees.

ORGANIZATIONAL OMBUDSMAN Another means that some organizations use to ensure process fairness is through an **ombudsman**, who is a person outside the normal chain of command who acts as a problem solver for management and employees. Some firms using ombudsmen are Rockwell, Volvo, and Johnson & Johnson, as well as others that are less well known.¹⁸

Balancing Employer Security Concerns and Employee Rights

Right to privacy

Defined in legal terms for individuals as the freedom from unauthorized and unreasonable intrusion into their personal affairs.

The **right to privacy** that individuals have is defined in legal terms as the freedom from unauthorized and unreasonable intrusion into their personal affairs. Although the right to privacy is not specifically identified in the U.S. Constitution, a number of past Supreme Court cases have established that such a right must be considered. Also, several states have right-to-privacy statutes. Additionally, federal acts related to privacy have been passed, some of which affect HR policies and priorities in organizations.

The growing use of technology in organizations is making it more difficult to balance employer security rights with employee privacy concerns. Although computers, cameras, and telecommunications systems are transforming many workplaces, the usage of these items by employers to monitor employee actions is raising concerns that the privacy rights of employees are being threatened.

On one side, employers have a legitimate need to ensure that employees are performing their jobs properly in a secure environment. On the other side, employees have expectations that the rights to privacy that they have outside of work also exist at work. Although these two views may seem clear, balancing them becomes more difficult when addressing such issues as access to employee records, employees' freedom of speech, workplace performance monitoring and surveillance, employer investigations, and substance abuse and drug testing.

Rights Issues and Employee Records

As a result of concerns about protecting individual privacy rights, the Privacy Act of 1974 was passed. It includes provisions affecting HR record-keeping systems. This law applies *only* to federal agencies and organizations supplying services to the federal government; but similar state laws, somewhat broader in scope, also have been passed. Regulation of private employers on this issue for the most part is a matter of state rather than federal law. Public-sector employees have greater access to their files in most states than do private-sector employees.

The following legal issues are involved in employee rights to privacy and HR records. These issues include rights to:

- Access personal information
- Respond to unfavorable information
- Correct erroneous information
- Know when information is given to a third party

AMERICANS WITH DISABILITIES ACT (ADA) AND EMPLOYEE MEDICAL RECORDS

Record-keeping and retention practices have been affected by the following provision in the Americans with Disabilities Act (ADA):

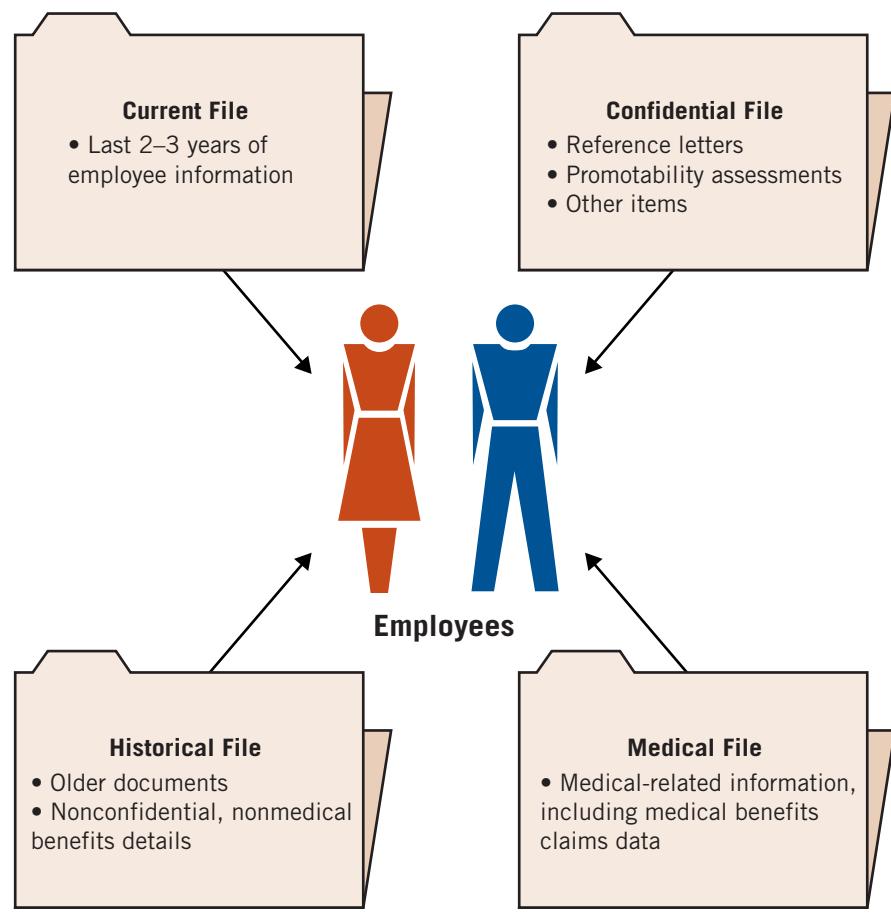
Information from all medical examinations and inquiries must be kept apart from general personnel files as a separate confidential medical record available only under limited conditions specified in the ADA.¹⁹

As interpreted by attorneys and HR practitioners, this provision requires that all medical-related information be maintained separately from all other confidential files. As Figure 17–6 shows, the result of all the legal restrictions is that many employers are establishing several separate files on each employee.

SECURITY OF EMPLOYEE RECORDS It is important that specific access restrictions and security procedures for employee records be established. These restrictions and procedures are designed to protect both the privacy of employees and employers from potential liability for improper disclosure of personal information. The following guidelines have been offered regarding employer access and storage of employee records:²⁰

- Restrict access to records to a limited number of individuals.
- Utilize confidential passwords for accessing employee records in an HRIS database.

FIGURE 17–6 Employee Record Files



- Set up separate files and restricted databases for especially sensitive employee information.
- Inform employees of types of data retained.
- Purge employee records of outdated data.
- Release employee information only with employee's consent.

Regarding the last point, employers have run afoul of laws on employee records when other employers have asked for information about former employees. Many lawyers recommend the release of only the most basic employment history, such as job title, dates of employment, and ending salary.

EMPLOYEE ACCESS TO HR RECORDS One concern that has been addressed in various court decisions and laws is the right of employees to have access to their own files. Related concerns are the types of information kept in those files and the methods used to acquire that information. In other business-related areas, federal laws have been passed that allow individuals access to their own files, such as credit records and medical records. But only in some states have laws been passed to require employers to give employees access to their HR records, or parts of them. Many of these state laws allow employers to exclude certain types of information from inspection, such as reference letters written by former employers. Some employers in states without access laws nevertheless allow employees access to certain records.

Employer Restrictions on Employees' Free Speech Rights



LOGGING ON . . .

Privacy and Employment

This website is by a non-profit organization. It is a leading resource for information on new and existing business privacy issues.

<http://www.pandab.org/>

EMPLOYEE ADVOCACY OF CONTROVERSIAL VIEWS One area of free speech involves the right of employees to advocate controversial viewpoints at work. One example of an employer restricting free speech involved a woman working at a large telecommunications firm. The woman, an ardent opponent of abortion, wore buttons to work that had pictures of fetuses on them. When other employees complained, the employer ordered the employee to remove the buttons. When she refused, she was disciplined and ultimately terminated. The woman filed suit against the employer for violating her freedom of speech and wrongfully discharging her. The Court decision in this case ruled that the employer had the right to restrict the woman's freedom of expression because of its effect on other employees, and that the employer could have workplace limitations for offensive items.²¹

Numerous other examples can be cited as well. For instance, can an employee of a tobacco company join in antismoking demonstrations outside of work, or can a disgruntled employee at a nonunion employer wear a union badge on his cap at work? In situations such as these, it is important for employers to demonstrate that disciplinary actions taken against employees can be justified for job-related reasons, and that due process procedures are followed. This is especially important when dealing with whistle-blowing situations.

Whistle-blowers

Individuals who report real or perceived wrongs committed by their employers.

WHISTLE-BLOWING Individuals who report real or perceived wrongs committed by their employers are called **whistle-blowers**. The HR Perspective describes a research study on whistle-blowing.

HR PERSPECTIVE

Research on Whistle-blowing

As whistle-blowing by employees has become more prevalent, media coverage of the employees doing the whistle-blowing and the employer's actions have become widespread. But for HR professionals and others, it may be important to be familiar with the characteristics of those who report illegal or inappropriate actions.

Sims and Keenan conducted a study on organizational and intrapersonal factors present when external whistle-blowing has occurred. Their study, published in the *Journal of Business Ethics*, focused on external whistle-blowing, which occurs when present or former employees report wrongful actions to individuals or entities outside the organization.

Using both graduate and undergraduate students, the researchers presented three ethical business situations to the research subjects. Three factors were used to analyze the research subjects' responses to the situations: (1) ideal values, which was how the situations should be addressed, including external whistle-blowing; (2) supervisor expectations, which asked subjects to identify how they believed a supervisor would expect them to respond; and (3) organizational commitment, which focused on measuring organizational loyalty.

The study found that external whistle-blowing was more likely to occur when supervisory support and informal policies of external whistle-

blowing existed. Interestingly, formal whistle-blowing policies were found to predict the whistle-blowing decision; but evidently, having these policies made external whistle-blowing less likely. The researchers also found that women were less likely to choose external whistle-blowing methods than men were. Even though this research study was conducted using students and hypothetical situations, the researchers suggest that their findings could be used by managers in actual organizations. They believe that organizations would benefit from providing both formal whistle-blowing policies and training of supervisors on handling whistle-blowing situations.²²

Two key questions in regard to whistle-blowing are (1) When do employees have the right to speak out with protection from retribution? (2) When do employees violate the confidentiality of their jobs by speaking out? Often, the answers are difficult to determine. What is clear is that retaliation against whistle-blowers is not allowed, based on a number of court decisions.²³

Whistle-blowers are less likely to lose their jobs in public employment than in private employment, because most civil service systems have rules protecting whistle-blowers. However, there is no comprehensive whistle-blowing law that protects the right to free speech of both public and private employees.

Two cases illustrate the consequences of whistle-blowing in the private sector. In one case a scientist, who was the director of toxicology for a major oil company, was awarded almost \$7 million. The scientist discovered that a Japanese subsidiary of the oil company was using gasoline containing a high level of benzene, which is carcinogenic. Even though Japanese industry guidelines called for lower levels, no Japanese law was broken. The director complained inside the firm, but was fired. He then filed suit under a New Jersey law protecting whistle-blowers, winning his case and the large monetary settlement.²⁴

The other case involved Archer-Daniels Midland (ADM), a large agribusiness firm. A former executive of ADM, Mark Whitacre, blew the whistle on ADM's participation in a price-fixing scheme with other industry competitors throughout the world. ADM ended up pleading guilty and had to pay a \$100 million fine. Whitacre, who exposed the scheme, also went to jail when further investigation revealed that he had stolen \$9 million through the use of false invoices and foreign bank accounts, and then lied about his involvement.²⁵

MONITORING OF E-MAIL AND VOICE MAIL Both e-mail and voice-mail systems increasingly are seen by employers as areas where employers have a right to monitor what is said and transmitted. Information and telecommunications technological advances have become a major issue for employers regarding employee privacy. The use of e-mail and voice mail increases every day, also raising each employer's risks of being liable if they monitor or inspect employee electronic communications.²⁶

The Electronic Communications Privacy Act (ECPA) has been applied to employer monitoring of e-mail and voice mail. Originally intended for applications by law enforcement officials, the provisions of the ECPA have been extended by court decisions to cover employer "eavesdropping" on e-mail or voice mail. The act requires that at least one party to the electronic communication has provided consent, but that employers can use electronic monitoring as part of the ordinary course of business.

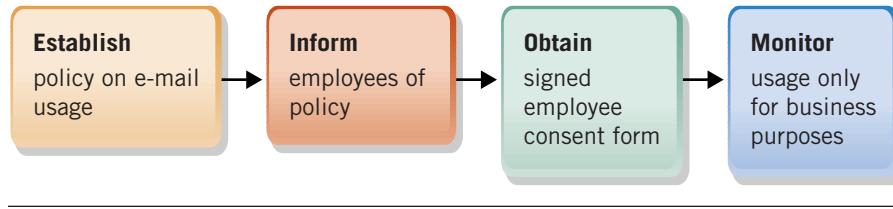
Additionally, the ECPA allows entities that provide electronic communications services to have access to stored electronic communications. This provision has been applied very broadly to employers, because they provide the electronic communications services to employees.

To address the various concerns regarding monitoring of e-mail and voice mail, many employers have established the following policies:

- Voice mail, e-mail, and computer files are provided by the employer and are for business use only.
- Use of these media for personal reasons is restricted and subject to employer review.
- All computer passwords and codes must be available to the employer.
- The employer reserves the right to monitor or search any of the media, without notice, for business purposes.

The most important actions that every employer can take to decrease potential exposure to lawsuits are to: (1) create an *electronic communications policy*; (2) inform employees and have them *sign an acknowledgment*; and (3) *strictly enforce* every portion of the policy and monitor usage for business purposes only. As Figure 17-7 indicates, it is especially important to inform employees that their electric communications may be monitored, and have them acknowledge the policy and sign a consent form. Thus employers can reduce their employees' expectations of privacy, as well as their own potential liabilities. Experts note that due to ECPA considerations, employers should concentrate their monitoring of e-mail and voice mail on stored messages, rather than messages in transit.²⁷

TRACKING EMPLOYEE INTERNET USAGE Another concern in which employer-employee rights must be balanced is employee usage of employer-provided access to the Internet. As more and more employees access the Internet for business purposes, a major concern is employees' use of the Internet for personal purposes that may be inappropriate. For example, some employees in different organizations have accessed pornographic or other websites which could create problems for employers. If law enforcement investigations were conducted, the employer could be accused of aiding and abetting illegal behavior. Therefore, many employers have purchased software that tracks the websites accessed by employees. Also, some employers use software programs for blocking certain categories and websites that would not be appropriate for business use.

FIGURE 17–7 Guidelines for Employer E-mail Monitoring

Another concern about Internet usage is composing and/or forwarding personal messages to and from others outside the company. For instance, individuals may receive jokes or other items that clearly are not business related, and then may forward them to coworkers and friends both inside and outside the organization. If the content of the jokes or messages is sexual or otherwise inappropriate, a possibility of sexual harassment may exist. At one financial services firm, some African American employees filed race discrimination charges against their employer because of racist jokes that were forwarded to them and others in the firm. Ultimately the firm resolved the complaint by firing the two executives transmitting the jokes.²⁸

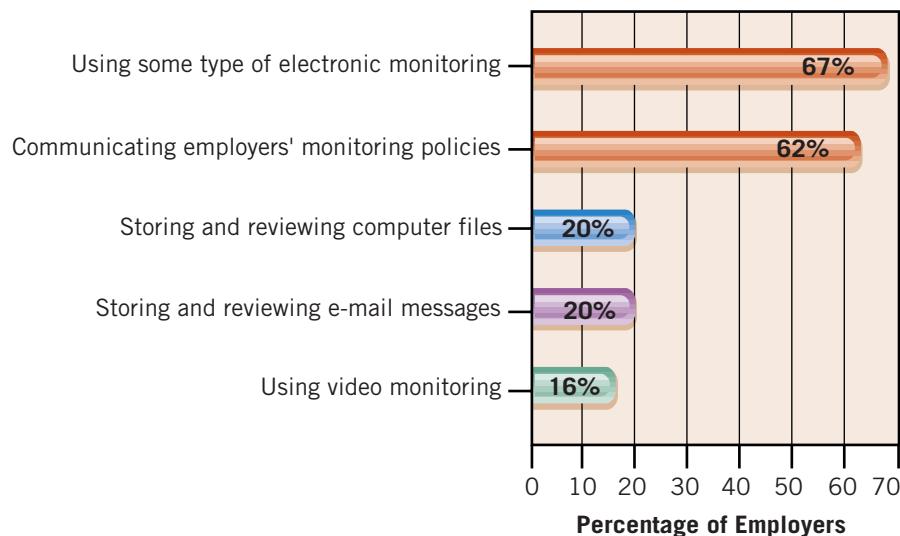
A growing number of employers have developed and disseminated Internet usage policies. Communicating these policies to employees, enforcing them by monitoring employee Internet usage, and disciplining offenders are the ways employers ensure that appropriate usage of the Internet access occurs.

Workplace Performance Monitoring and Surveillance

Federal constitutional rights, such as the right to protection from unreasonable search and seizure, protect an individual only against the activities of the government. Thus, employees of both private-sector and governmental employers can be monitored, observed, and searched at work by representatives of the employer. This principle has been reaffirmed by several court decisions, which have held that both private-sector and government employers may search desks and files without search warrants if they believe that work rules have been violated. Often, workplace searches and surveillance are used as part of employee performance monitoring. Employers also conduct workplace investigations for theft and other illegal behavior. As Figure 17–8 on the next page indicates, various types of monitoring and surveillance means are relatively widespread.

EMPLOYEE PERFORMANCE MONITORING Employee performance may be monitored to measure performance, ensure performance quality and customer service, check for theft, or enforce company rules or laws. Performance monitoring occurs with truck drivers, nurses, teleservice customer service representatives, and many other jobs. The common concern in a monitored workplace is usually not whether monitoring should be used, but how it should be conducted, how the information should be used, and how feedback should be communicated to employees.

As a minimum, employers should obtain a signed employee consent form indicating that performance monitoring and taping of phone calls will occur. Also, employers should communicate that monitoring is done and will be done

FIGURE 17–8 Employer Monitoring Practices

SOURCE: Based on data in American Management Association survey of 1,085 HR managers, reported in "E-mail, Computer Monitoring Is Rising," *Bulletin to Management*, November 26, 1998, 369.

regularly. However, simply stating that employee conversations may be monitored does not eliminate all liability. In one case the employer recorded 22 hours of an employee's personal calls, in order to catch the employee admitting to theft of company property. The court refused to find consent where the employer had indicated that it "might" use monitoring to reduce employee personal phone calls.²⁹

Finally, it is recommended that employers publish feedback on monitoring results, to help employees improve their performance or to commend them for good performance. For example, one major catalog retailer allows employees to listen to their customer service calls and rate their own performance. Then the employees meet with their supervisors to discuss both positive and negative performance issues.

VIDEO SURVEILLANCE AT WORK Numerous employers have installed video surveillance systems in workplaces. Sometimes these video systems are used to ensure employee security, such as in parking lots, garages, and dimly lighted exterior areas. Other employers have installed them in retail sales floors, production areas, parts and inventory rooms, and lobbies.

But it is when video surveillance is extended into employee restrooms, changing rooms, and other more private areas that employer rights and employee privacy collide. For instance, a small Midwestern firm videotaped women changing in and out of their uniforms. Male managers in the firm later viewed the tapes for entertainment. In this case a court found that the employer had invaded employees' privacy, and that there appeared to be no appropriate business purposes for the taping. In another case involving an electric utility, the use of hidden cameras, even as part of a criminal investigation for drug dealing in a men's locker room, was ruled to be questionable.³⁰

As with other forms of surveillance, it is important that employers develop a video surveillance policy, inform employees about it, do it only for legitimate

business purposes, and strictly limit those who view the video surveillance results. Also, except in unusual circumstances, employers should not have video surveillance in rest rooms, changing rooms, and other more private areas.

Employer Investigations

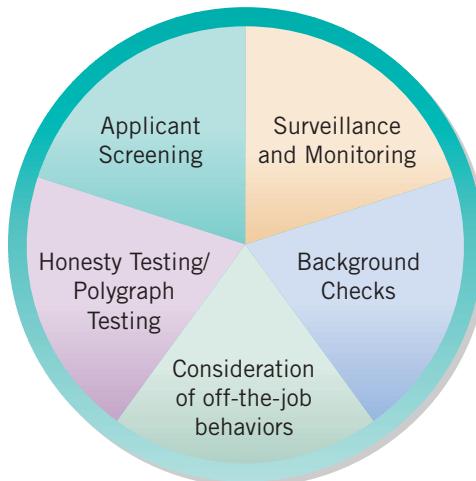
Another area of concern regarding employee rights involves workplace investigations. Public-sector employees are protected by the Constitution in the areas of due process, search and seizure, and privacy. But employees in the private sector are not protected. Whether at work or off the job, unethical employee behavior is becoming an increasingly serious problem for organizations. On the job, unethical behavior includes theft, illegal drug use, falsification of documents, misuse of company funds, and disclosure of organizational secrets. Workplace investigations are used as well by retailers and other employers, as Figure 17–9 indicates.

Employee Theft

An increasing problem faced by employers is theft of employer property and vital company secrets. According to one study, workplace theft and fraud have resulted in a 6% increase in the prices charged by employers to consumers.³¹ For instance, employee theft is estimated to cost retailers over \$10 billion per year. Some major retailers have even joined forces to create a Theftnet database of workers who have confessed to theft, and all job applicants are checked to see if they appear in Theftnet. Any person appearing in Theftnet is not hired.³²

POLYGRAPH AND HONESTY TESTING The theory behind a polygraph is that the act of lying produces stress, which in turn causes observable physical changes. An examiner can thus interpret the physical responses to specific questions and make a judgment as to whether the person being tested is practicing deception. However, the Polygraph Protection Act prohibits the use of

FIGURE 17–9 Methods of Workplace Investigations



polygraphs for most preemployment screening and for judging a person's honesty while employed.

"Pencil-and-paper" honesty tests have gained popularity recently. They are not restricted by the Polygraph Protection Act nor by the laws of most states. Many organizations are using this alternative to polygraph testing, and over two dozen variations of such tests are being sold.

Honesty tests are developed from test items that differentiate between people known to be honest and those known to be dishonest. (This is similar to the way personality tests are developed.) It is not always easy to determine who is honest for the purpose of validating the tests. In the private sector, honesty tests do not violate any legal rights of employees if employers adhere to state laws. The Fifth Amendment (which protects persons from compulsory self-incrimination) may be a basis for prohibiting such tests in public-sector employment.

BEHAVIOR OFF THE JOB It is especially difficult for an employer to establish that there is a "just cause" for disciplining employees for their off-the-job behavior. The premise is that an employer should not control the lives of its employees off the job except when there are clear job-related consequences. However, in general, disciplinary action for off-the-job behavior of employees is unsettling to both employers and employees. Further, the general public is leery of employers' investigating the off-the-job behavior of their workers. Many workers believe that their employers have no right to monitor or question employees' private lives, lifestyles, and off-work activities.

Employee Substance Abuse and Employer Drug Testing

The issue of substance abuse and drug testing at work has received a great deal of attention. The importance of the problem to HR management is clear. Concern about substance abuse at work also is appropriate, given that accident rates, absenteeism, and worker compensation costs are higher for workers using illegal substances. The extent of substance abuse problems is seen in U.S. Department of Labor estimates that 70% of all users of illegal drugs are employed, totaling over 10 million people.³³ However, among workers, the rate of drug usage has declined from 18% a decade ago to about 5.5% currently, according to data from a major pharmaceutical firm.³⁴ Many experts believe that the decline is due to increased usage of workplace drug testing, including testing by employers covered by the federal act discussed next.

DRUG-FREE WORKPLACE ACT OF 1988 The U.S. Supreme Court has ruled that certain drug-testing plans do not violate the Constitution. But private employer programs are governed mainly by state laws, which currently are a confusing hodgepodge. Passage of the Drug-Free Workplace Act in 1988 has required government contractors to take steps to eliminate employee drug usage. Failure to do so can lead to contract termination. Tobacco and alcohol are not considered controlled substances under the act, and off-the-job drug use is not included. Additionally, the U.S. Transportation Department requires testing of truck and bus drivers, train crews, mass-transit employees, airline pilots and mechanics, pipeline workers, and licensed sailors.

DRUG TESTING AND EMPLOYEE RIGHTS Disciplinary action of an employee because of substance-abuse problems must be done only in keeping with the due

process described in an employer's policy. Unless state or local law prohibits testing, employers have a right to require applicants or employees to submit to a drug test. Random drug testing of current employees may be more controversial, and public agencies must have "probable cause" to conduct drug tests.

However, there are several arguments against drug testing: (1) It violates employees' rights. (2) Drugs may not affect job performance in every case. (3) Employers may abuse the results of tests. (4) Drug tests may be inaccurate, or the results can be misinterpreted.

It is interesting to note that employee attitudes toward drug testing appear to have changed. Apparently, experience with workplace drug problems has made managers and employees less tolerant of drug users. Drug testing appears to be most acceptable to employees when they see the procedures being used as fair, and when characteristics of the job (such as danger to other people) require that the employee be alert and fully functioning. *Procedural justice* appears to be an important issue in perceptions of fairness of drug testing, but drug testing raises less concern about employee rights than it once did.

TYPES OF TESTS FOR DRUGS The most common tests for drug use are urinalysis, radioimmunoassay of hair, and fitness-for-duty testing. Urinalysis is the test most frequently used. It requires a urine sample that must be tested at a lab. There is concern about sample switching, and the test detects drug use only over the past few days. But urinalysis is generally accurate and well accepted.

Hair radioimmunoassay requires a strand of an employee's hair, which is analyzed for traces of illegal substances. These tests are based on scientific studies indicating that a relationship exists between drug dosage and the concentration of drugs detected in the hair. A 1.6-inch hair sample provides a 90-day profile. Sample swapping is more difficult than in urinalysis, and the longer time period covered is advantageous. However, the testing is somewhat controversial, and testing is not recommended following accidents because it does not detect how recent the drug usage has been.³⁵

The fitness-for-duty tests discussed in Chapter 16 can be used alone or in conjunction with drug testing. These tests can also distinguish individuals who may have used alcohol or prescription drugs that might impair their abilities to perform their jobs.

CONDUCTING DRUG TESTS Employers who conduct drug tests can do so for both applicants and employees. As mentioned in Chapter 9, preemployment drug testing has become widely used. Its use by more employers is thought to contribute to the decline in employee drug use. It has been reported to employers in some areas that word spreads among applicants about which employers test and which do not test. Therefore, substance abusers do not even apply to employers who conduct preemployment drug tests. The rights of those testing positive who are not yet employed have been ruled to be different from the rights of those who are employees.

If drug testing is done, three different policies are used by employers: (1) random testing of everyone at periodic intervals; (2) testing only when there is probable cause; or (3) testing after accidents. Each method raises its own set of problems.

If testing is done for probable-cause reasons, it is important that managers be trained on how to handle those situations. It is important that managerial action be based on performance-related consequences, not just the substance usage

itself. From a policy standpoint, it is most appropriate to test for drugs when the following conditions exist:

- Job consequences of abuse are so severe that they outweigh privacy concerns.
- Accurate test procedures are available.
- Written consent of the employee is obtained.
- Results are treated confidentially, as with any medical record.
- Employers have a complete drug program, including employee assistance for substance users.

HR Policies, Procedures, and Rules

It is useful at this point to consider some guidelines for HR policies, procedures, and rules. They greatly affect employee rights (just discussed) and discipline (discussed next). Where there is a choice among actions, **policies** act as general guidelines that focus organizational actions. Policies are general in nature, while procedures and rules are specific to the situation. The important role of policies in guiding organizational decision making requires that they be reviewed regularly, because obsolete policies can result in poor decisions and poor coordination. Policy proliferation also must be carefully monitored. Failure to review, add to, or delete policies as situations change may lead to problems.

Procedures are customary methods of handling activities and are more specific than policies. For example, a policy may state that employees will be given vacations. Procedures will establish a specific method for authorizing vacation time without disrupting work.

Rules are specific guidelines that regulate and restrict the behavior of individuals. They are similar to procedures in that they guide action and typically allow no discretion in their application. Rules reflect a management decision that action be taken—or not taken—in a given situation, and they provide more specific behavioral guidelines than policies. For example, one computer-repair company has a policy stating that management intends to provide the highest-quality repair service in the area. The rule that repair technicians must have several technical product certifications or they will not be hired promotes this policy, and this constrains HR selection decisions.

Responsibilities for HR Policy Coordination

For policies, procedures, and rules to be effective, coordination between the HR unit and other managers is vital. As Figure 17–10 shows, managers are the main users and enforcers of rules, procedures, and policies; and they should receive some training and explanation in how to carry them out. The HR unit supports managers, reviews disciplinary rules, and trains managers to use them. It is critical that any conflict between the two entities be resolved so that employees receive appropriate treatment.

Guidelines for HR Policies and Rules

Well-designed HR policies and rules should be consistent, necessary, applicable, understandable, reasonable, and distributed and communicated. A discussion of each characteristic follows.

FIGURE 17–10 Typical Responsibilities for HR Policies and Rules

HR Unit	Managers
<ul style="list-style-type: none"> ● Designs formal mechanisms for coordinating HR policies ● Provides advice in development of organizationwide HR policies, procedures, and rules ● Provides information on application of HR policies, procedures, and rules ● Explains HR rules to managers ● Trains managers to administer policies, procedures, and rules 	<ul style="list-style-type: none"> ● Help in developing HR policies and rules ● Review policies and rules with all employees ● Apply HR policies, procedures, and rules ● Explain rules and policies to all employees

CONSISTENT Rules should be consistent with organizational policies, and policies should be consistent with organizational goals. The principal intent of policies is to provide written guidelines and to specify actions. If some policies and rules are enforced and others are not, then all tend to lose their effectiveness.

NECESSARY HR policies and rules should reflect current organizational philosophy and directions. To this end, managers should confirm the intent and necessity of proposed rules and eliminate obsolete ones. Policies and rules should be reviewed whenever there is a major organizational change. Unfortunately, this review is not always done, and outdated rules are still on the books in many organizations.

APPLICABLE Because HR policies are general guidelines for action, they should be applicable to a large group of employees. For policies that are not general, the appropriate areas or people must be identified. For instance, if a sick-leave policy is applicable only to nonexempt employees, that should be specified in the company handbook. Policies and rules that apply only to one unit or type of job should be developed as part of specific guidelines for that unit or job.

UNDERSTANDABLE HR policies and rules should be written so employees can clearly understand them. One way to determine if policies and rules are understandable is to ask a cross-section of employees with various positions, education levels, and job responsibilities to explain the intent and meaning of a rule. If the answers are extremely varied, the rule should be rewritten.

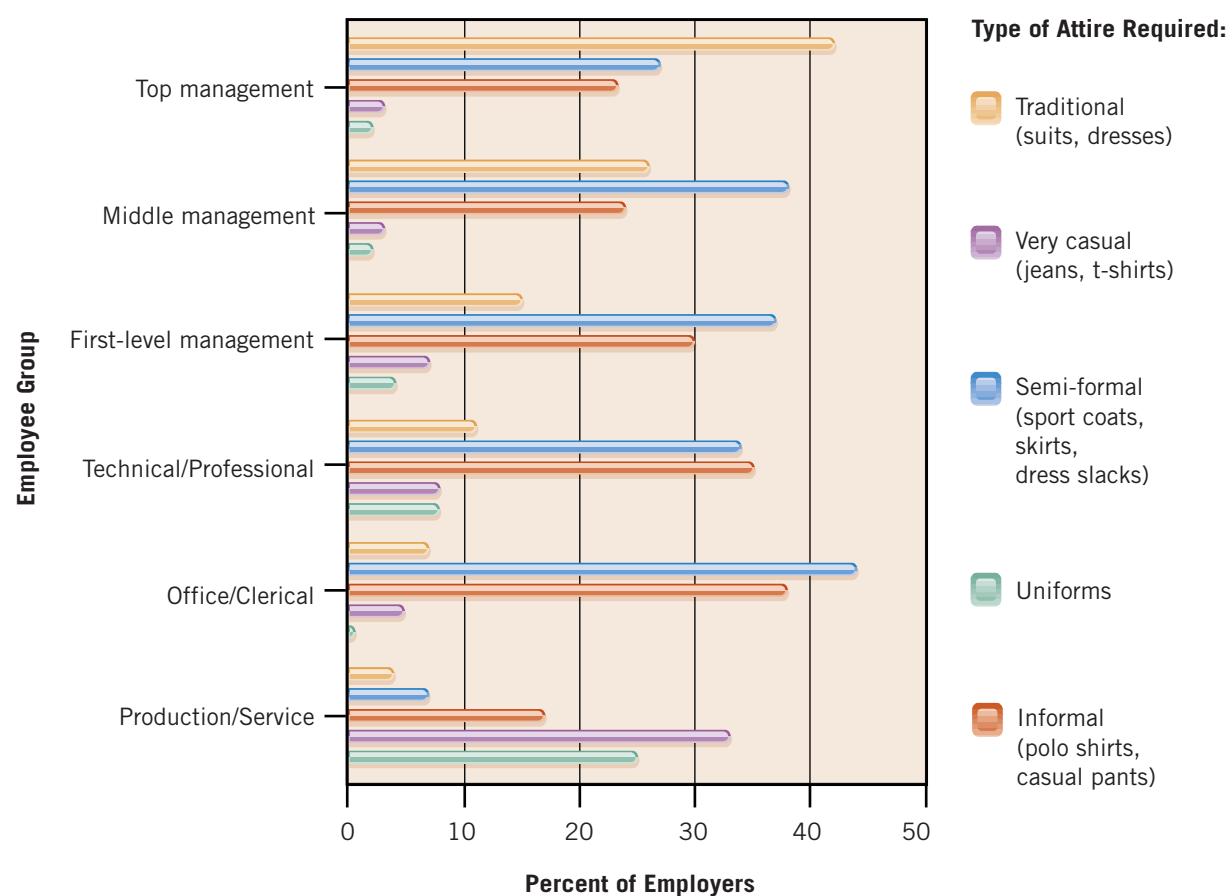
REASONABLE Ideally, employees should see policies as fair and reasonable. Policies and rules that are perceived as being inflexible or as penalizing individuals unfairly should be reevaluated. For example, a rule forbidding workers to use the company telephone for personal calls may be unreasonable if emergency phone calls are occasionally necessary. Limiting the amount of time the telephone can be used for personal business and the number of calls might be more reasonable.

Some of the most ticklish policies and rules involve employee behavior. Dress codes are frequently controversial, and organizations that have them should be

able to justify them to the satisfaction of both employees and outside sources who might question them. Information on policies regarding dress at work in organizations is shown in Figure 17–11.

DISTRIBUTED AND COMMUNICATED To be effective, HR policies must be distributed and communicated to employees. It is especially important that any changes in HR policies and rules be communicated to all employees. Employee handbooks can be designed creatively to explain policies and rules, so that employees can refer to them at times when no one is available to answer a question. Supervisors and managers can maintain discipline by reminding their employees about policies and rules. Because employee handbooks are widely used to do so, guidelines for their preparation and use are discussed next.

FIGURE 17–11 Dress Policies for Regular Work Days



Note: Percentages are based on all 422 responding employers. Percentages in each column may not add to 100 due to rounding or having no response.

SOURCE: *Dress Policies and Casual Dress Days*, Personnel Policies Forum Survey No. 155, (January 1998). Copyright 1998 by The Bureau of National Affairs, Inc. (800-372-1033) <<http://www.bna.com>>

Guidelines for an Employee Handbook

An employee handbook gives employees a reference source for company policies and rules and can be a positive tool for effective management of human resources. Even smaller organizations can prepare handbooks relatively easily using computer software. However, management should consider several factors when preparing handbooks.

LEGAL REVIEW OF LANGUAGE As mentioned earlier, there is a current legal trend to use employee handbooks against employers in lawsuits charging a broken "implied" contract. But that is no reason to abandon employee handbooks as a way to communicate policies to employees. *Not* having an employee handbook with HR policies spelled out can also leave an organization open to costly litigation and out-of-court settlements.

A more sensible approach is first to develop sound HR policies and employee handbooks to communicate them and then have legal counsel review the language contained in them. Recommendations include the following:

- *Eliminate controversial phrases:* For example, "permanent employee" as a phrase often is used to describe those people who have passed a probationary period. This wording can lead to disagreement over what the parties meant by *permanent*. A more appropriate phrase is "regular employee."
- *Use disclaimers:* Contract disclaimers have been upheld in court, but only if they are prominently shown in the handbook.³⁶ However, there is a trade-off between disclaimers and the image presented by the handbook, so disclaimers should not be overused. A disclaimer also should appear on application forms. A disclaimer in the handbook can read as follows:

This employee handbook is not intended to be a contract or any part of a contractual agreement between the employer and the employee. The employer reserves the right to modify, delete, or add to any policies set forth herein without notice and reserves the right to terminate an employee at any time with or without cause.

- *Keep the handbook current:* Many employers simply add new material to handbooks rather than deleting old, inapplicable rules. Those old rules can become the bases for new lawsuits. Consequently, handbooks and HR policies should be reviewed periodically and revised every few years.

READABILITY The specialists who prepare employee handbooks may not write at the appropriate level. One review of the reading level of some company handbooks revealed that on average they were written at the third-year college level, which is much higher than the typical reading level of employees in most organizations. One solution is to test the readability of the handbook on a sample of employees before it is published.

USE Another important factor to be considered in preparing an employee handbook is its method of use. Simply giving an employee a handbook and saying, "Here's all the information you need to know," is not sufficient.

It is important that the HR information be communicated and discussed. A growing number of firms are distributing employee handbooks electronically using an intranet, which enables employees to access policies in employee handbooks at any time.³⁷ Also, changes in policies in the handbook can be made



LOGGING ON . . .

Policy Handbooks on the Web

This website contains a collection of sample policies, procedures, and handbooks. The samples were collected by the Society for Human Resource Management to be used as a guide for employers.

<http://www.shrm.org/hrlinks/policy.html>

electronically, rather than having to distribute correction pages and memos that must be filed with every handbook. In addition to distributing policies and rules in an employee handbook, it is important that communication about HR issues, policies, rules, and organizational information be disseminated widely.

Communicating HR Information

HR communication focuses on the receipt and dissemination of HR data and information throughout the organization. *Downward communication* flows from top management to the rest of the organization and is essential to informing employees about what is and will be happening in the organization, and what top management expectations and goals are. *Upward communication* also is important, so that managers know about the ideas, concerns, and information needs of employees.

HR PUBLICATIONS AND MEDIA Organizations communicate with employees through internal publications and media, including newspapers, company magazines, organizational newsletters, videotapes, Internet postings, and computer technology. Whatever the formal means used, managers should make an honest attempt to communicate information employees need to know. Communication should not be solely a public relations tool to build the image of the organization. Bad news, as well as good news, should be reported objectively in readable style. For example, an airline publication distributed to employees has a question-and-answer section in which employees anonymously can submit tough questions to management. Management's answers are printed with the questions in every issue. Because every effort is made to give completely honest answers, this section has been very useful. The same idea fizzled in another large company because the questions were answered with "the company line," and employees soon lost interest in the less-than-candid replies.

Some employers produce *audiotapes* or *videotapes*—explaining benefit programs, corporate reorganizations, and revised HR policies and programs—that are shipped to each organizational branch. At those locations, the tapes are presented to employees in groups and then questions are addressed by a manager or someone from headquarters. The spread of electronic communications has made disseminating HR information more timely and widespread.

ELECTRONIC COMMUNICATION: E-MAIL AND TELECONFERENCING As electronic and telecommunications technologies have developed, many employers are adding more technologically based methods of communicating with employees. The growth of information systems in organizations has led to the widespread use of electronic mail. With the advent of e-mail systems, communication through organizations can be almost immediate. E-mail systems can operate worldwide through networks. Replies can be returned at once rather than in a week or more. One feature of e-mail systems is that they often result in the bypassing of formal organizational structure and channels.

Some organizations also communicate through *teleconferencing*, in which satellite technology links facilities and groups in various locations. In this way, the same message can be delivered simultaneously to various audiences.

Suggestion system
A formal method of obtaining employee input and upward communication.

SUGGESTION SYSTEMS A **suggestion system** is a formal method of obtaining employee input and upward communication. Such programs are becoming even

more important as they are integrated with gainsharing or total quality management (TQM) efforts. Giving employees the opportunity to suggest changes or ways in which operations could be improved can encourage loyalty and commitment to the organization. Often, an employee in the work unit knows more about how waste can be eliminated, how hazards can be controlled, or how improvements can be made than do managers, who are not as close to the actual tasks performed. Many suggestion systems give financial rewards to employees for cost-saving suggestions, and often payments to employees are tied to a percentage of savings, up to some maximum level. Often committees of employees and managers are used to review and evaluate suggestions.

Employee Discipline

Employee rights have been an appropriate introduction to employee discipline, because employee rights are often an issue in disciplinary cases. **Discipline** is a form of training that enforces organizational rules. Those most often affected by the discipline systems in an organization are problem employees. Fortunately, problem employees comprise a small number of employees, but they often are the ones who cause the most disciplinary situations. If employers fail to deal with problem employees, negative effects on other employees and work groups often result. Common disciplinary issues caused by problem employees include absenteeism, tardiness, productivity deficiencies, alcoholism, and insubordination.

Figure 17–12 shows a possible division of responsibilities for discipline between the HR unit and managers. Notice that managers and supervisors are the ones to make disciplinary decisions and administer the discipline. HR specialists often are consulted prior to disciplinary action being instituted, and they may assist managers in administering the disciplinary action.

Discipline

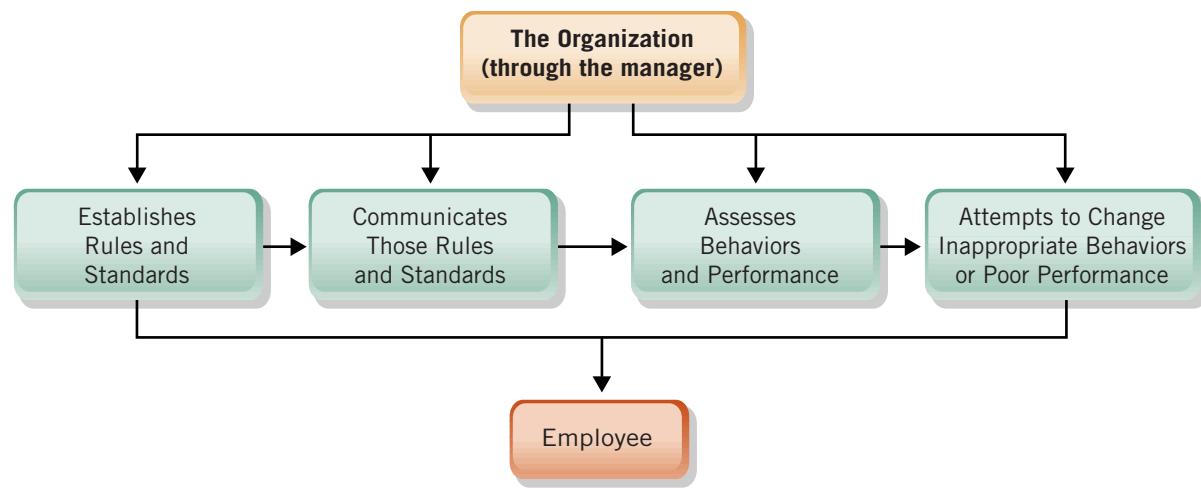
A form of training that enforces organizational rules.

Approaches to Discipline

The disciplinary system (see Figure 17–13) can be viewed as an application of behavior modification for problem or unproductive employees. The best discipline is clearly self-discipline; when most people understand what is required at work, they can usually be counted on to do their jobs effectively. Yet some find that the

FIGURE 17–12 Typical Division of Responsibilities for Employee Rights and Discipline

HR Unit	Managers
<ul style="list-style-type: none">● Designs HR procedures that consider employees' rights● Designs progressive discipline process if nonunion● Trains managers on the use of discipline process● Assists managers with administration of discipline	<ul style="list-style-type: none">● Are knowledgeable about organizational HR policies and rules● Make disciplinary decisions● Notify employees who violate policies and rules● Discuss discipline follow-up with employees

FIGURE 17–13 The Disciplinary System

prospect of external discipline helps their self-discipline. This philosophy has led to the development of the positive discipline approach.

POSITIVE DISCIPLINE APPROACH The positive discipline approach builds on the philosophy that violations are actions that usually can be constructively corrected without penalty. In this approach, the focus is on fact-finding and guidance to encourage desirable behaviors, instead of on using penalties to discourage undesirable behaviors. There are four steps to positive discipline.

1. *Counseling:* Counseling can be an important part of the discipline process, because it gives a manager or supervisor the opportunity to identify employee work behavior problems and discuss solutions. The goal of this phase is to heighten employee awareness of organizational policies and rules. Knowledge of disciplinary actions may prevent violations. The emphasis is similar to that on preventing accidents. Counseling by a supervisor in the work unit can have positive effects. Often, people simply need to be made aware of rules.
2. *Written documentation:* If employee behavior has not been corrected, then a second conference is held between the supervisor and the employee. Whereas the first stage was done orally, this stage is documented in written form. As part of this phase, the employee and the supervisor develop written solutions to prevent further problems from occurring.
3. *Final warning:* When the employee does not follow the written solutions noted in the second step, a final warning conference is held. In that conference the supervisor emphasizes to the employee the importance of correcting the inappropriate actions. Some firms incorporate a *decision-day off*, in which the employee is given a day off with pay to develop a firm, written action plan to remedy the problem behaviors. The idea is to impress on the offender the seriousness of the problem and the manager's determination to see that the behavior is changed.
4. *Discharge:* If the employee fails to follow the action plan that was developed and further problem behaviors exist, then the supervisor will discharge the employee.

The advantage of this positive approach to discipline is that it focuses on problem solving. Also, because the employee is an active participant throughout the process, employers using this approach are more likely to win wrongful-discharge lawsuits if they are filed. The greatest difficulty with the positive approach to discipline is the extensive amount of training required for supervisors and managers to become effective counselors. Also, the process often takes more supervisory time than the progressive discipline approach discussed next.

PROGRESSIVE DISCIPLINE APPROACH Progressive discipline incorporates a sequence of steps into the shaping of employee behaviors. Figure 17–14 shows a typical progressive discipline system. Like the procedures in the figure, most progressive discipline procedures use verbal and written reprimands and suspension before resorting to dismissal. Thus, progressive discipline suggests that actions to modify behavior become progressively more severe as the employee continues to show improper behavior. For example, at one manufacturing firm, failure to call in when an employee is to be absent from work may lead to a suspension after the third offense in a year. Suspension sends a very strong message to an employee that undesirable job behavior must change or termination is likely to follow.³⁸

An employee is given opportunities to correct deficiencies before being dismissed. Following the progressive sequence ensures that both the nature and seriousness of the problem have been clearly communicated to the employee.

Not all steps in the progressive discipline procedure are followed in every case. Certain serious offenses are exempted from the progressive procedure and may result in immediate termination. Typical offenses leading to immediate termination are as follows:

- Intoxication at work
- Possession of weapons
- Alcohol or drug use at work
- Fighting
- Theft
- Falsifying employment application

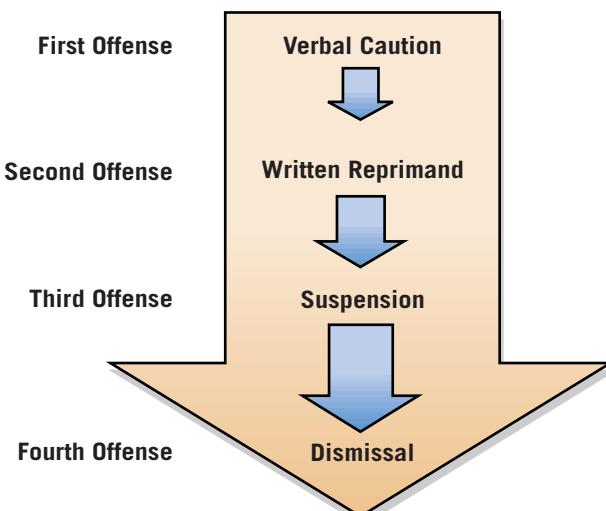


BNA:

1405.10–1405.50 Progressive Discipline

A discussion of progressive discipline, the steps in it, and a model policy and form can be found here.

FIGURE 17–14 Progressive Discipline Procedure



Reasons Why Discipline Might Not Be Used

Sometimes managers are reluctant to use discipline. There are a number of reasons why discipline may not be used:

- *Organizational culture regarding discipline:* One factor affecting the use of discipline is the culture of the organization and managerial willingness to use discipline. If the organizational “norm” is to avoid penalizing problem employees, then managers are more likely not to use discipline. This reluctance to discipline extends even to dismissal of problem employees.³⁹
- *Lack of support:* Many managers do not want to use discipline, because they fear that their decisions will not be supported by higher management. The degree of support also is a function of the organizational culture.
- *Guilt:* Some managers feel that before they become managers, they committed the same violations as their employees, and they cannot discipline others for doing something they used to do.
- *Loss of friendship:* Managers who allow themselves to become too friendly with employees may fear losing those friendships if discipline is used.
- *Time loss:* Discipline, when applied properly, requires considerable time and effort. Sometimes it is easier for managers to avoid taking the time required for disciplining, especially if their actions may be overturned on review by higher management.
- *Fear of lawsuits:* Managers are increasingly concerned about being sued for disciplining someone, particularly for taking the ultimate disciplinary step of dismissal.



LOGGING ON . . .

Effective Discipline

This site describes assistance with effective disciplinary measures for employers. “Discipline without punishment” is described.

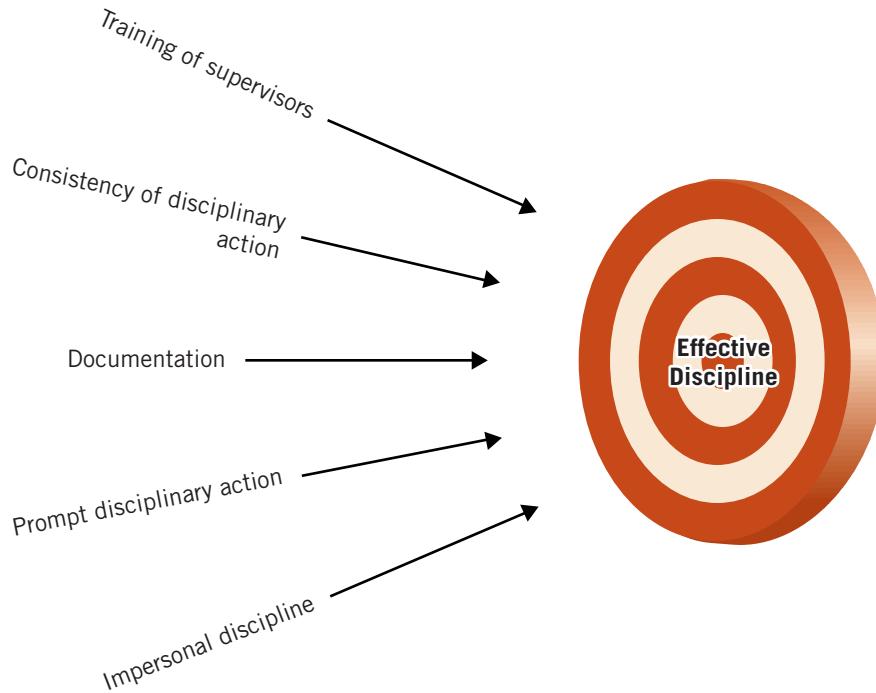
<http://www.grotecon.com/index.html>

Effective Discipline

Because of legal concerns, managers must understand discipline and know how to administer it properly. Effective discipline should be aimed at the behavior, not at the employee personally, because the reason for discipline is to improve performance.

Discipline can be positively related to performance, which surprises those who feel that discipline can only harm behavior. Employees may resist unjustified discipline from a manager, but actions taken to maintain legitimate standards actually may reinforce productive group norms and result in increased performance and feelings of fairness. A work group may perceive that an inequity has taken place when one individual violates standards. An individual who violates standards may also be violating group norms, so lack of discipline can cause problems for the group as well as for the manager. Distributive and procedural justice suggest that if a manager tolerates this unacceptable behavior, the group may feel it is not fair. Some of the factors leading to effective disciplinary practices in an organization are shown in Figure 17–15 and are discussed next.

TRAINING OF SUPERVISORS Training supervisors and managers on when and how discipline should be used is crucial. Research has found that training supervisors in procedural justice as a basis for discipline results in both their employees and others seeing disciplinary action as more fair than discipline done by untrained supervisors.⁴⁰ Regardless of the disciplinary approach used, it is important to provide training on counseling and communicating skills, because supervisors and managers will be using them as they deal with employee performance problems.

FIGURE 17–15 Effective Discipline

CONSISTENCY OF DISCIPLINARY ACTIONS The manager administering discipline must consider the effect of actions taken by other managers and of other actions taken in the past. Consistent discipline helps to set limits and informs people about what they can and cannot do. Inconsistent discipline leads to confusion and uncertainty.

DOCUMENTATION Effective discipline requires accurate, written record keeping and written notification to the employee. In a number of cases, the lack of written notification has been used to support an employee's argument that he or she "did not know."

PROMPT DISCIPLINARY ACTION Additionally, effective discipline is immediate. The longer the time that transpires between the offense and the disciplinary action, the less effective the discipline will be.

IMPERSONAL DISCIPLINE Finally, effective discipline is handled impersonally. Managers cannot make discipline an enjoyable experience, but they can minimize the unpleasant effects somewhat by presenting it impersonally and by focusing on behaviors, not on the person. Also, managers should limit how emotional they become in disciplinary sessions. Obviously, employees are likely to become angry, upset, or otherwise emotional. But it is important that the supervisor conducting the discipline avoid rising to the same emotional intensity as the employee does.

Discharge: The Final Disciplinary Step

The final stage in the disciplinary process is termination. A manager may feel guilty when dismissing an employee, and sometimes guilt is justified. If an employee fails, it may be because the manager was not able to create an appropriate work environment. Perhaps the employee was not adequately trained, or perhaps management failed to establish effective policies. Managers are responsible for their employees, and to an extent, they share the blame for failures.

Both the positive and progressive approaches to discipline provide that when dismissal is used, it is clear that employees have been warned about the seriousness of their performance problems. Terminating workers because they do not keep their own promises is more likely to appear equitable and defensible to a jury. Also, such a system seems to reduce the emotional reactions that lead fired workers to sue in the first place.

When dismissal occurs, the reasons for the termination should be clearly stated. Any effort to "sugar-coat" the reason ultimately confuses the employee, and it could undermine the employer's legal case should the termination decision be challenged. Many employers provide a specific letter or memo, which can provide evidence that the employee was notified of the termination decision.

Often, it is valuable to have both an HR representative and the employee's supervisor or manager attend the termination meeting, so that an additional witness exists to what occurred. Also, any severance benefits or other HR-related issues can be described. Some items that are HR related include COBRA notification rights, any continuance of other employee benefits, and payments for unused vacation or sick leave. Finally, throughout the termination discussion it is crucial that the supervisor and others remain professional and calm, rather than becoming emotional or making sarcastic or demeaning remarks.⁴¹

Summary

- The employment relationship is a reciprocal one in which both the employers and employees have rights.
- The two primary types of rights are statutory rights and contractual rights.
- Contractual rights can be spelled out in an employment contract or be implied as a result of employer promises.
- Rights affecting the employment relationship include employment-at-will, due process, and dismissal for just cause.
- Employment-at-will allows employers the right to hire or terminate employees with or without notice or cause.
- Employment-at-will relationships are changing in the courts, which have found exceptions for public policy, implied contract, and good-faith/fair-dealing reasons.
- Although due process is not guaranteed for at-will employees, the courts expect to see evidence of due process in employment-related cases.
- Wrongful discharge occurs when an employer terminates an individual's employment for improper or illegal reasons.
- Just cause for employment-related actions should exist. When just cause is absent, constructive discharge may occur, in which the employee is forced to "voluntarily" quit the job.
- Due process is important for both unionized and nonunion employees. In nonunion situations, alternative dispute resolution (ADR) means are growing in use.

- Balancing employer security concerns and employee rights is most often seen when dealing with access to employee records, free speech, workplace monitoring, employer investigations, and employee substance abuse.
- Employers increasingly are facing free speech issues at work, in areas such as whistle-blowing, monitoring of e-mail and voice mail, and Internet usage.
- Drug testing generally is legal and is widely used as employers try to deal with increasing drug problems at work.
- To be effective, HR policies and rules should be consistent, necessary, applicable, understandable, reasonable, and communicated.
- Employee handbooks have been viewed as implied contracts by the courts, which presents few problems as long as the handbook conforms to appropriate standards. Issues to be considered in preparing an employee handbook include reliability, use, and legal review of language.
- Discipline is best thought of as a form of training. Although self-discipline is the goal, sometimes positive or progressive discipline is necessary to encourage self-discipline.
- Managers may fail to discipline when they should, for a variety of reasons. However, effective discipline can have positive effects on the productivity of employees.

Review and Discussion Questions

1. Assume you had to develop an employment contract for a key research manager. What provisions should be included?
2. Give some examples to illustrate the public policy exception to employment-at-will.
3. Discuss the differences and similarities between the issues of due process and just cause.
4. Discuss the following statement: "Even though employers' efforts to restrict employees' free speech at work may be permissible, such efforts raise troubling questions affecting individual rights."
5. Identify some advantages and disadvantages associated with employers monitoring employee e-mail and work performance using technological and electronic means.
6. Examine an employee handbook from a local employer and identify problems and issues with its content.
7. Why has the positive approach to discipline been useful in reducing employee lawsuits?

Terms to Know

- | | | |
|-------------------------------|--------------------------|--------------------------|
| arbitration 575 | just cause 572 | right to privacy 576 |
| constructive discharge 572 | noncompete covenants 567 | rules 586 |
| contractual rights 567 | nonpiracy agreement 567 | separation agreement 567 |
| discipline 591 | ombudsman 576 | statutory rights 566 |
| distributive justice 574 | peer review panel 575 | suggestion system 590 |
| due process 574 | policies 586 | whistle-blowers 578 |
| employee responsibilities 566 | procedural justice 574 | wrongful discharge 572 |
| employment-at-will (EAW) 570 | procedures 586 | |
| employment contract 567 | rights 566 | |

Using the Internet



Employment Contracts

The president has contacted you, the HR manager, about employment contracts. He would like you to prepare a report identifying the reasons it would be in the best interest of the company to begin using employment contracts for key managers and executives.

He also asked you to identify and discuss what most organizations include in their employment contracts. Use the following website to assist you.

<http://www.careerlinc.com/econtract.htm>

CASE

Disciplinary Process at Red Lobster

At the Red Lobster restaurant in Pleasant Hills, Pennsylvania, a waitress was fired for stealing a guest comment card that was critical of her. Having worked for Red Lobster for almost 20 years, the employee naturally was very upset about being terminated for such an infraction.

While situations such as these happen in many organizations, it is the disciplinary due process at Red Lobster that is not common. In disciplinary situations such as these, employees at Red Lobster can request that their situation be reviewed by a panel of other Red Lobster employees. Instead of filing a lawsuit against Red Lobster, which likely would have happened, the discharged employee had her case heard by a peer review panel composed of five employees in the Red Lobster chain, not necessarily from her specific location. The panel was composed of a bartender, food server, hostess, assistant manager, and a general manager. Here are the facts they heard.

According to the manager of the Pleasant Hills restaurant, the waitress was fired because she took a customer comment card from the comment card box. On the customer's card, the customer had called the waitress "uncooperative" and said that the prime rib served had been too rare. The irate customer complained to both the shift supervisor and the restaurant manager about the food and the waitress's service. Through facts not clearly identified, the customer learned that the waitress had retrieved the crit-

ical comment card, which angered the customer more. Based on these facts, and on a policy in the Red Lobster handbook about unauthorized removal of company property, the Pleasant Hill manager terminated the waitress.

The waitress stated her case by noting that the customer had asked for a well-done prime rib. When she received it, the customer explained that it was too rare and that it had too much fat on it. Although the waitress explained that prime rib always has fat on it, the customer was not mollified; so the waitress had the prime rib cooked more. Still unhappy, the customer dumped steak sauce on it and pushed her dinner away. Despite being offered a free dessert by the waitress, the customer demanded the bill, completed a comment card, and dropped it in the locked customer comment box. She then left the restaurant.

Wanting to know what was said, the waitress asked the hostess for the key, unlocked the box, and pocketed the card. Support for the waitress came from the hostess, who stated that other people had requested and received the key to the comment box lock in the past.

After deliberating in the case, the peer review panel ruled that the waitress had not intentionally stolen company property. Further, the panel found that the manager had overreacted with an otherwise satisfactory employee, and a written disciplinary notice would have been more appropriate. In its final

decision, the panel decided that the waitress would receive reinstatement to her job; but that she would not receive the three weeks' back wages she had requested. Interviewed several months later, the waitress indicated that the manager treated her professionally and had given her some accommodations when the waitress hurt her back.⁴²

Notes

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