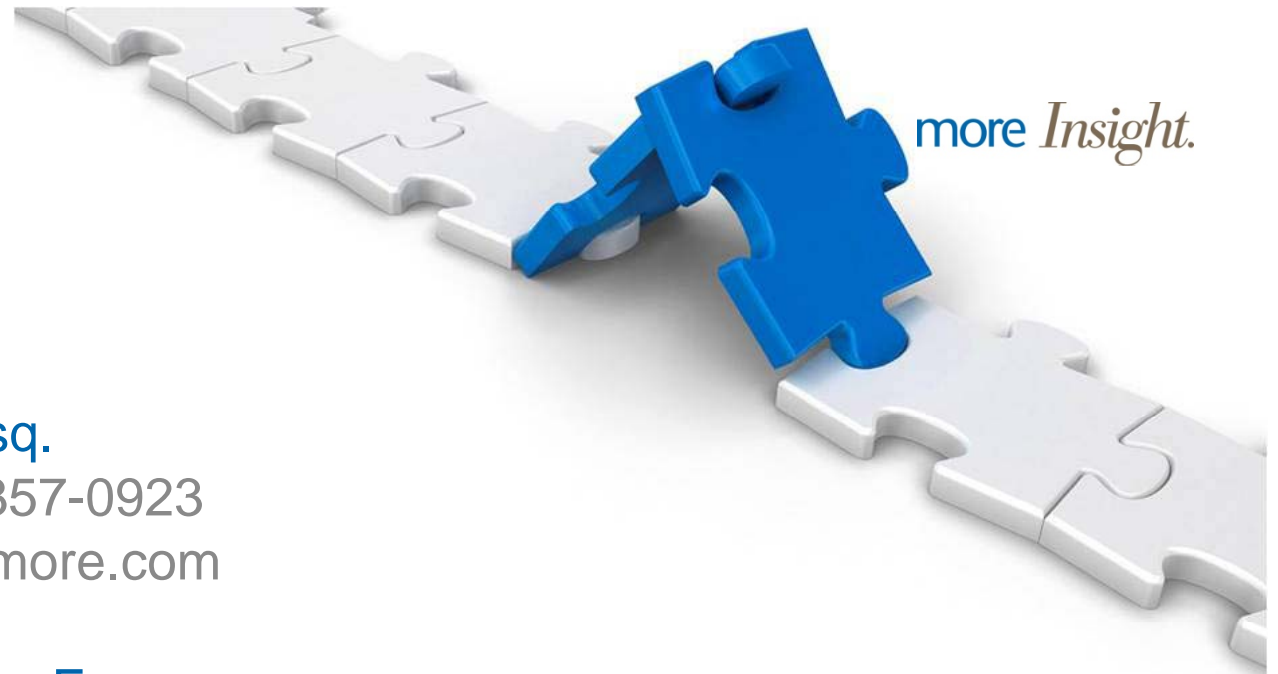




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8 Things to Ask Before Taking an Adverse Employment Action



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Remember:

The fair employer usually wins the lawsuit; the unfair one has stacked the deck against itself... Even when the law may be on their side; the employer gave the aces & face cards away.

We're The Same Except When We Are Different

In some states, juries think:

- ▶ Unfair employers = mean employers
- ▶ Mean employers = acting with malice
- ▶ Malice = Punitive Damage\$\$\$
- ▶ KNOW the predilections of jurors in the state or city where the employment action is taking place
- ▶ *Are they mostly union? Is there something unique about state statutes or case law? What kind of verdicts are there in employment cases?*

HERE ARE THE 8 QUESTIONS
WORTH ASKING
BEFORE TAKING ADVERSE
EMPLOYMENT ACTION

Question No. 1 *How long has the employee been working here and is this their first disciplinary issue?*

- ▶ The longer someone has been with an employer, the more likely a jury will believe the employee is entitled to “progressive discipline”
- ▶ An employee of 20 years is viewed differently by juries than one working 20 months or 20 days

Question No. 2 *Have there been any past warnings?*

- ▶ In some states, jurors think progressive discipline is a legal right (*or should be*)
- ▶ Unless the misconduct is egregious (*insubordination, serious violations of company policy or potentially criminal conduct*) it is useful to consider whether initiating progressive discipline is more appropriate than discharge, especially for a minor infraction (or long term employees)
- ▶ Put all warnings in writing so they are documented; warnings should also say what happens next, including potential discharge
- ▶ If there **are** past warnings, this might be the time for discharge

Question No. 3 *Have you reviewed all the documentation regarding the incident?*

- ▶ When a supervisor or manager is ready to discharge – emotions are usually running high
- ▶ Examine documents to ensure no improper motives
- ▶ Is the discipline appropriate to the misconduct?
- ▶ Does the documentation support the decision
- ▶ Most importantly....
 - ▶ Look at the documentation to see if an objective person (jurors) would find that there was an infraction or misconduct and/or the employer is being **FAIR**

Question No. 4 *Has anyone else done this & been treated differently?*

- ▶ The law calls them Comparators
- ▶ Juries listen to this evidence of how others were treated for the same infractions to see if the employer is being FAIR
- ▶ Judges usually decide in advance of trial if the situations are evidence of comparators

Is Someone A Comparator? Depends On Whether The Employees Are *Similarly Situated*

- ▶ The Factors reviewed
- ▶ Recency vs. remote in time
- ▶ Different management team
- ▶ Different education, experience, position in the company, aptitude

Question No. 5 *Were there any witnesses?*

- ▶ If there were witnesses, it pays to know:
 - ▶ Who they are
 - ▶ What they will say
- ▶ If an employer conducts a truncated investigation without interviewing actual witnesses, a jury will second guess the Employer's motivation & any rush to discharge

Question No. 6 *Is the employee a member of a protected class?*

- ▶ To make a prima facie claim of unlawful discrimination, the discharged employee need only be able to prove they are a member of a protected class:
- ▶ Know if the employee is protected by various federal, state and local civil rights laws:
 - ▶ Age, Gender, Race, National Origin, Religion, Disability, Sexual Preference
- ▶ Know if there are facts leading to various whistle-blower or retaliatory discharge claims:
 - ▶ Reported violations of law, suffered Worker Comp injury, used FMLA time, etc.

Question No. 7 *Will co-workers believe the company was fair?*

- ▶ Think of your employees as your first jury. This does NOT mean you discuss the facts with employees, BUT if they knew or know the facts, what would the majority think is fair
- ▶ *Why does this matter?*
- ▶ They may be your best witnesses in a trial
- ▶ It matters when the majority will be telling the discharged employee to go to a lawyer OR the majority are telling the discharged employee to get over it, the employee was in the wrong
- ▶ Too much perception of unfairness often leads to union organizing: employees come to believe they need a union to protect them from their unfair employer

Question No. 8 *What do you plan to tell the employee who will be discharged?*

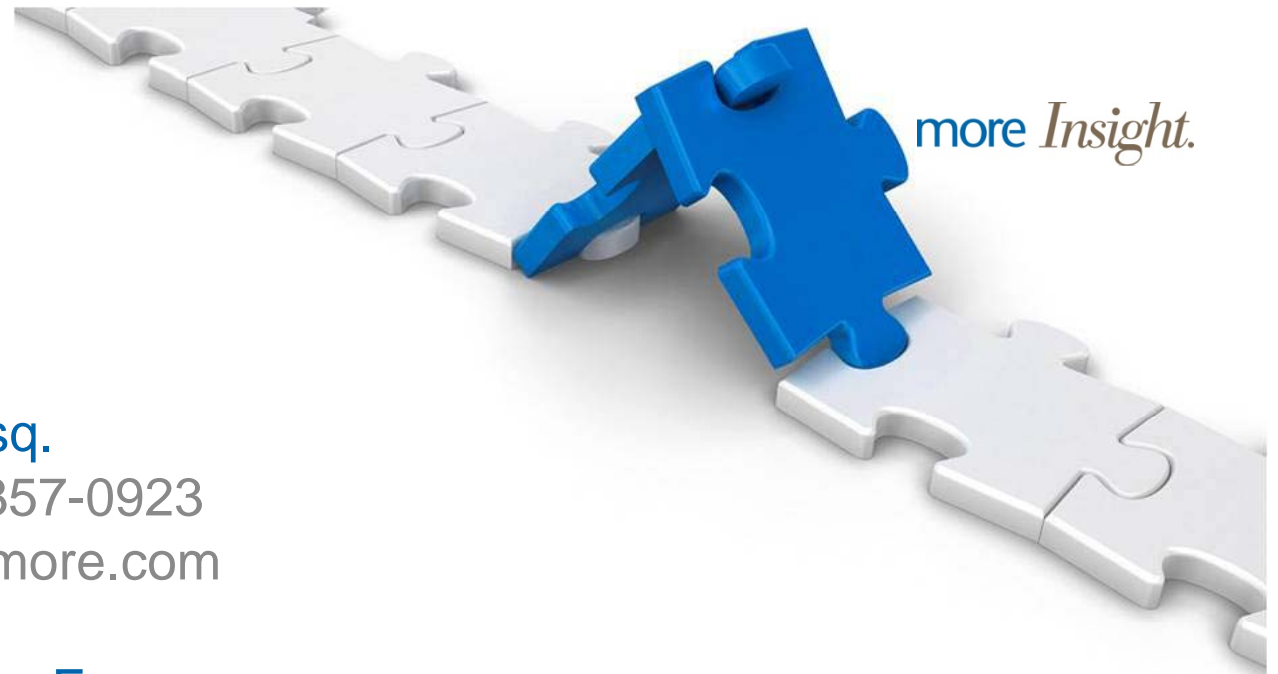
- ▶ Planning the discharge meeting is crucial to preventing future liability
- ▶ *Best done in person with lawful & actual (generalized) reasons given*
- ▶ Follow any written company policies or procedures
- ▶ Bring your own witness to the discharge meeting (another supervisor or manager should be present)
- ▶ Consider an opportunity to *hear their side of the story* in case you missed something that would change your mind if true
- ▶ Avoid making careless, discriminatory, or emotionally-charged statements

Other Best Practices

- ▶ Use a brief bullet point script for the meeting which script is followed
- ▶ Consult an objective, impartial experienced person (within your organization) for advice (*not privileged communication*)
- ▶ Consult an outside HR expert (*this is not privileged communication either*)
- ▶ Consult a lawyer; better yet, consult an expert in Labor & Employment law. If it is a unique situation, you may need to consult an L&E lawyer with expertise in the area of law involved
- ▶ Never underestimate the power of consulting others before taking final action

Conclusion

- ▶ Asking these questions & using the information you receive to make more informed & FAIR decisions results in:
 - ▶ Fewer meritorious cases filed against the employer
 - ▶ Increase the likelihood of employee witnesses willing to testify on behalf of the employer
 - ▶ Increase employee morale because the majority of employees believe their employer is FAIR
 - ▶ Lower exposures on damages when suits by discharged employees are filed
 - ▶ Lower jury verdicts for discharged employees
 - ▶ Reduces the likelihood of punitive damages



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Questions?

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