

15

Employee Rights and Responsibilities

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

- Define employment-at-will and discuss how wrongful discharge, just cause, and due process are interrelated.
- Identify employee rights associated with free speech and access to employee records.
- Discuss issues associated with workplace monitoring, employer investigations, and drug testing.
- List elements to consider when developing an employee handbook.
- Describe different kinds of absenteeism and how to measure it.
- Differentiate between the positive approach and the progressive approach to discipline.

Technology Usage and HR Policy Issues



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Employees use technology for both job-related and personal reasons, on and off the job. For instance, a Florida lumber company lost a \$21 million lawsuit caused by an employee having an accident while making cell phone sales calls while driving. To address the various concerns, many employers have established policies regarding technology usage. Such policies generally have the following four elements:

- Voice mail, e-mail, and other electronic files provided by the employer are for business use only.
- Use of these means for personal reasons is restricted and subject to employer review and possible disciplinary action.
- Computer passwords and codes must be available to the employer.
- The employer reserves the right to monitor or search any of the messages and media used for business purposes without notice.

However, court decisions have indicated that reading employee e-mails may violate some privacy rights unless specific security and privacy components are stated properly. As a result, HR professionals and legal advisors have developed employer policies to be identified and distributed online as well as in policy documents. As example, many universities, such as the University of Maryland–Baltimore, use online means to conduct employee and student training on policies involving topics such as sexual harassment, safety, health, and many others. Doing so reflects how the current state of technology is affecting employee/employer rights and responsibilities.¹

Four interrelated HR issues are considered in this chapter: *employee rights*, *HR policies*, *absenteeism*, and *discipline*. How are they related? Employees come to work with some rights, but many more are granted or constrained by the HR policies and rules an employer sets. For example, such rules include policies on absenteeism. Further, discipline used against those who fail to follow policies and rules has both employee and employer rights dimensions. The concepts of rights, policies, and discipline change and evolve as laws and societal values change. Indeed, at one time the right of an employer to operate an organization as it might see fit was very strong. However, today that right is offset to varying extents by the increase in employee rights.

EMPLOYER AND EMPLOYEE RIGHTS AND RESPONSIBILITIES

Rights generally do not exist in the abstract. Instead, **rights** are powers, privileges, or interests derived from law, nature, or tradition. Of course, defining a right presents considerable potential for disagreement. For example, does an employee have a right to privacy of communication in personal matters when using the employer's computer on company time? Moreover, *legal rights* may or may not correspond to certain *moral rights*, and the reverse is true as well—a situation that opens “rights” up to controversy and lawsuits.

Statutory rights are the result of specific laws or statutes passed by federal, state, or local governments. Various federal, state, and local laws have granted employees certain rights at work, such as equal employment opportunity, collective bargaining, and workplace safety. These laws and their interpretations also have been the subjects of a considerable number of court cases because employers also have rights.

Rights are offset by **responsibilities**, which are obligations to perform certain tasks and duties. Employment is a reciprocal relationship in that both the employer and the employee have rights and obligations. For example, if an employee has the right to a safe working environment, then the employer must have an obligation to provide a safe workplace. If the employer has a right to expect uninterrupted, high-quality work from the employee, then the worker has the responsibility to be on the job and to meet job performance standards. The reciprocal nature of rights and responsibilities suggests that both parties to an employment relationship should regard the other as having rights and should treat the other with respect.

Rights Powers, privileges, or interests that belong by law, nature, or tradition.

Statutory rights Rights based on laws or statutes passed by federal, state, or local governments.

Responsibilities Obligations to perform certain tasks and duties.

Contractual rights Rights based on a specific contract between an employer and an employee.


Contractual Rights

When individuals become employees, they are likely to encounter both employment rights and responsibilities. Those items can be spelled out formally in written employment contracts or in employer handbooks and policies disseminated to employees. Contracts formalize the employment relationship. For instance, when hiring an independent contractor or a consultant, an employer should use a contract to spell out the work to be performed, expected timelines, parameters, and costs and fees to be incurred.

An employee's **contractual rights** are based on a specific contract 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 who are

FIGURE 15-1

Provisions in Employment Contracts

EMPLOYMENT CONTRACT
◆ Parties to the contract
◆ General job duties and expectations
◆ Compensation and benefits
◆ Terms and conditions of employment
◆ Termination/resignation factors
◆ Noncompete and nonpiracy agreements
◆ Nonsolicitation of current employees
◆ Intellectual property and trade secrets
Date:
_____ Employee's signature:
_____ Company representative's signature:


represented by the union have with the employer. The contract also identifies employers' actions and restrictions.

Employment Contracts Traditionally, employment contracts have been used mostly for executives and senior managers, but the use of employment contracts is filtering down in the organization to include highly specialized professional and technical employees who have scarce skills. An **employment contract** is a formal agreement that outlines the details of employment. Depending on the organization and individuals involved, employment agreements may contain a number of provisions. Figure 15-1 shows common provisions.

Typically, an *identification section* lists the parties to the contract and the general nature of the employee's job duties. The level of compensation and types of benefits are often addressed, including any special compensation, benefits, incentives, or perquisites to be provided by the employer. The employment contract also 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. Finally, the contract may spell out a severance agreement, continuation of benefits, and other factors related to the employee's leaving the employer.

Employment contract

Formal agreement that outlines the details of employment.

Noncompete Agreements Employment contracts may include **noncompete agreements**, which prohibit individuals who leave an organization from working with an employer in the same line of business for a specified period of time. A noncompete agreement may be presented as a separate contract or as a clause in an employment contract. Though primarily used with newly hired employees, some firms have required existing employees to sign noncompete agreements.

Different court decisions have ruled for or against employers that have fired employees who either have refused to sign noncompete agreements or have violated them. For example, an executive at Starbucks accepted a job at Dunkin Donuts. The impact of the case was reviewed and led to legal actions by Starbucks. While this example is still not resolved, it illustrates how noncompete agreement cases can occur. These agreements can be enforced less often in states such as California than in others.²

To create an employment contract with a noncompete agreement that is likely to be enforced in most states, it is recommended that the contract have geographical and time limitations (such as 1–2 years). Also, it is recommended that the noncompete agreement be limited to similar jobs and require customer confidentiality.³ Such contracts may contain *nonpiracy agreements*, which bar former employees from soliciting business from former customers and clients for a specified period of time. Other clauses requiring *nonsolicitation of current employees* can be incorporated into the employment agreement. These clauses are written to prevent a former employee from contacting or encouraging coworkers at the former firm to join a different company, often a competitor.⁴

Intellectual Property An additional area covered in employment contracts is protection of *intellectual property* and *trade secrets*. A 1996 federal law made the theft of trade secrets a federal crime punishable by fines up to \$5 million and 15 years in jail. Employer rights in this area include the following:

- The right to keep trade secrets confidential
- The right to have employees bring business opportunities to the employer first before pursuing them elsewhere
- A common-law copyright for works and other documents prepared by employees for their employers

Implied Contracts

The idea that a contract (even an implied or unwritten one) exists between individuals and their employers affects the employment relationship. The rights and responsibilities of the employee may be spelled out in a job description, in an employment contract, in HR policies, or in a handbook, but often they are not. The rights and responsibilities of the employee may exist *only* as unwritten employer expectations about what is acceptable behavior or performance on the part of the employee. Some court decisions have held that if an employer hires someone for an indefinite period or promises job security, the employer has created an implied contract. Such promises establish employee expectations, especially if there has been a long-term business relationship.

Noncompete agreements

Agreements that prohibit individuals who leave an organization from working with an employer in the same line of business for a specified period of time.

Employment Practices Liability Insurance



Workplace litigation has reached epidemic proportions as employees have sued their employers because they believed that their rights were violated. Class-action lawsuits by groups of workers also have expanded, which can be very expensive for employers. For example, some cases have led to claims ranging from less than \$1 million to as high as more than \$100 million. Although the actual resolution of a case may cost less than the amount of a claim, a case still can be very expensive if the employer is found guilty.

As a result, a significant number of employers have purchased employment practices liability insurance (EPLI) to cover their risks from lawsuits. This insurance covers employer costs for legal fees, settlements, and judgments associated with employment actions when individuals file suits alleging wrongful discharge or discrimination, and for other reasons.⁵

These insurance policies vary depending upon the nature of coverage and the provider. Some exclude payment for certain types of claims by employees and agencies regarding punitive damages caused by employer policies that violate various laws, such as the Fair Labor Standards Act, the Occupational Health and Safety Act, and others.

To determine the level of risk and premiums to be charged to employers wanting EPLI, most insurance carriers review the employers' HR policies and practices. The review may include a detailed look at an employer's HR policy manuals, employee handbooks, employment forms, and other items. It also may involve an examination of the employer's history of employment-related charges and complaints during the past three to five years. In a sense, such a review can be viewed as an audit of the organizational policies and practices regarding employee rights.⁶



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Human Resources Law Cases®

This website provides information on workplace issues such as employment contracts and other issues. Visit the site at www.hrlawindex.com.

When the employer fails to follow up on the implied promises, the employee may pursue remedies 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 without a signed contract document. Many employers acquire special insurance to cover the costs of responding to legal actions on various contracts and employer actions, as the HR Perspective discusses.

RIGHTS AFFECTING THE EMPLOYMENT RELATIONSHIP

As employees have increasingly regarded themselves as free agents in the workplace and as the power of unions has changed in the United States, the struggle between individual employee and employer "rights" has become heightened. Employers frequently do not fare well in court in employee "rights" cases. Not only is the employer liable in many cases, but also 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. Several concepts from law

and psychology influence the employment relationship: employment-at-will, wrongful or constructive discharge, just cause, due process, and distributive and procedural justice.

Employment-at-Will (EAW)

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 a contract to the contrary. Conversely, employees can quit whenever they want and go to another job under the same terms. An employment-at-will statement in an employee handbook usually contains wording such as the following:

This handbook is not a contract, express or implied, guaranteeing employment for any specific duration. Although we hope that your employment relationship with us will be long term, either you or the Employer may terminate this relationship at any time, for any reason, with or without cause or notice.

National restrictions on EAW include prohibitions against the use of race, age, sex, national origin, religion, and disabilities as bases for termination. Restrictions on other areas vary from state to state. Nearly all states have enacted one or more statutes to limit an employer's right to discharge employees. Also, numerous states allow employees to file breach-of-contract lawsuits because of some provisions in employee handbooks.⁷

EAW and the Courts In general, the courts have recognized three rationales for hearing EAW cases. The key ones are as follows:

- **Public policy exception:** This exception to EAW holds that employees can sue if fired for a reason that violates public policy. For example, if an employee refused to commit perjury and was fired, the employee can sue the employer.
- **Implied contract exception:** This exception to EAW holds that employees should not be fired as long as they perform their jobs. Long service, promises of continued employment, and lack of criticism of job performance imply continuing employment.
- **Good-faith and fair-dealing exception:** This exception to EAW suggests that a covenant of good faith and fair dealing exists between employers and at-will employees. If an employer breaks this covenant by unreasonable behavior, the employee may seek legal recourse.

Over the past several decades many state courts have redefined the employment-at-will and contractual components. Some courts have placed limits on those areas, including when employers exhibit extremely abusive actions. Also, as the nature of workers in their jobs has changed, varying employment contract interpretations have been adapted.⁸

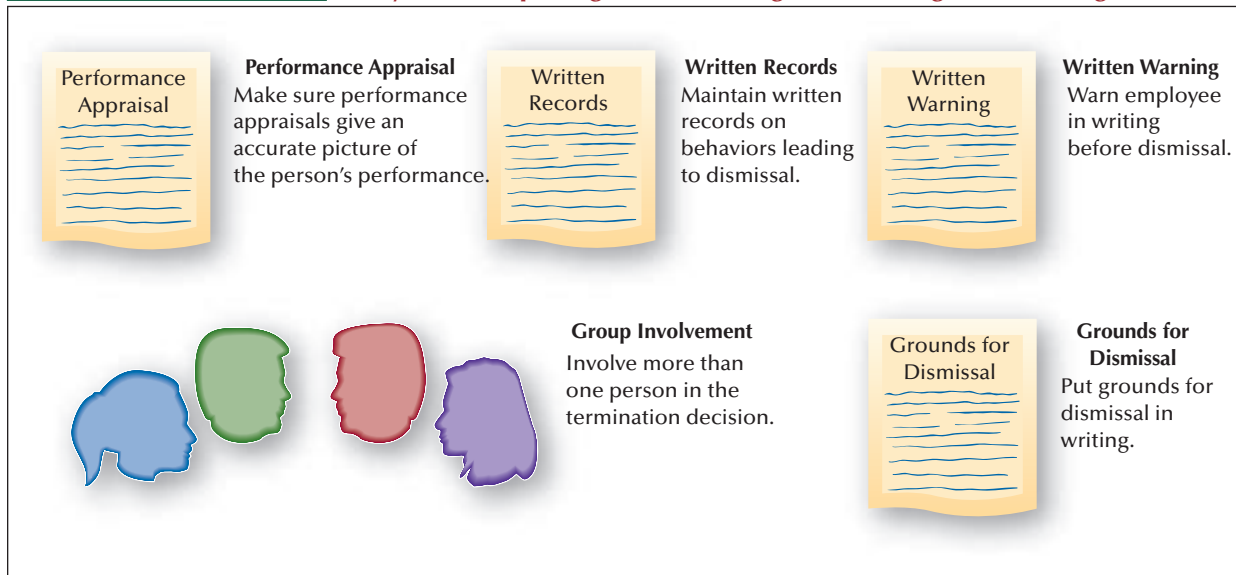
Wrongful Discharge Employers who run afoul of EAW restrictions may be guilty of **wrongful discharge**, which is the termination of an individual's employment for reasons that are illegal or improper. Employers should take several precautions to reduce wrongful-discharge liabilities. Having a well-written employee handbook, training managers, and maintaining adequate documentation are key. Figure 15-2 offers suggestions for preparing a defense against wrongful-discharge lawsuits.

Employment-at-will (EAW) 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.

Wrongful discharge Termination of an individual's employment for reasons that are illegal or improper.

FIGURE 15-2

Keys for Preparing a Defense against Wrongful Discharge



A landmark court case in wrongful discharge was *Fortune v. National Cash Register Company*. The case involved the firing of a salesperson (Mr. Fortune) who had been with National Cash Register (NCR) for 25 years.⁹ The employee's termination came shortly after he got a large customer order that would have earned him a big commission. Based on the evidence, the court concluded that he was wrongfully discharged because NCR dismissed him to avoid paying the commission, thus violating the covenant of good faith and fair dealing.

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. As EAW has changed in interpretations and more wrongful-discharge lawsuits have been brought, employers have become more concerned about legal liability issues.¹⁰

Constructive Discharge Closely related to wrongful discharge is **constructive discharge**, which is deliberately making conditions intolerable 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 were made so intolerable as to *force* a reasonable employee to resign. Then, the resignation is considered a discharge.

Dangerous duties, insulting comments, and not providing reasonable work are examples of actions that can lead to a claim of constructive discharge. For example, two church employees claimed constructive discharge when their benefits and work conditions changed because the church had hired a private detective to investigate the senior pastor. As it turned out, the pastor had been embezzling. Consequently, a settlement was reached with the two employees to eliminate their constructive discharge claim.¹¹

Constructive discharge

Process of deliberately making conditions intolerable to get an employee to quit.

Just Cause

Just cause is reasonable justification for taking employment-related action. The need for a “good reason” for disciplinary actions such as dismissal usually can be found in union contracts, but not in at-will situations. The United States has different just-cause rules than do some other countries. Even though definitions of *just cause* vary, the overall concern is fairness. To be viewed by others as *just*, any disciplinary action must be based on facts in the individual case.

One case involving a female employee with three years’ experience illustrates how just cause can be interpreted. After taking most of her maternity leave, she was told two weeks before her return that she was being terminated due to a business slowdown. The company said she was among 23 employees fired because of poor performance. Yet the employee had received pay increases and a promotion, had never had any documented performance problems, and then was replaced by a full-time employee. Pointing to these facts, the court ruled that the employee could sue the company.¹²

Due Process

Due process, like just cause, is about fairness. Due process is the requirement that the employer use a fair process to determine if there has been employee wrongdoing and that the employee have an opportunity to explain and defend his or her actions. Organizational justice is a key part of due process.

Organizational Justice Most people have a need to feel the organization is treating employees justly. A wide range of HR activities can affect that perception of justice, including selection processes, job performance activities and evaluations, and disciplinary actions.

Whether employees perceive fairness or justice in their treatment depends on at least three factors that are more psychological than legal in nature.¹³ First, people obviously prefer favorable outcomes for themselves. They decide the favorability of their outcomes by comparing them with the outcomes of others, given their relative situations. This decision involves the concept of **distributive justice**, which deals with the question “Were outcomes distributed fairly?” Fairness would not include disciplinary action based on favoritism when some are punished and others are not. Fairness is often dependent on employee perceptions, and is ultimately a subjective determination.

The second factor, procedural justice, focuses on whether the procedures that led to an action were appropriate, clearly understood, and provided an opportunity for employee input. **Procedural justice** deals with the question “Was the decision-making *process* fair?” Due process is a key part of procedural justice when making promotion, pay, discipline, and other HR decisions. If organizations provide procedural justice, employees tend to respond with positive behaviors that benefit the organization in return.

Interactional justice is based on perceived fairness about how a person interacts with others. For example, if a manager is perceived as rude and insults another manager, their relationship may be affected negatively. But if a manager treats the other person with respect and shares information truthfully, then the individuals are more likely to work well together.

Figure 15-3 shows some factors to be considered when combining an evaluation of just cause and due process. How HR managers address these factors determines whether the courts perceive employers’ actions as fair.

Just cause Reasonable justification for taking employment-related action.

Due process Requirement that the employer use a fair process to determine employee wrongdoing and that the employee have an opportunity to explain and defend his or her actions.

Distributive justice Perceived fairness in the distribution of outcomes.

Procedural justice Perceived fairness of the processes used to make decisions about employees.

Interactional justice Perceived fairness about how a person interacts with others.

FIGURE 15-3

Criteria for Evaluating Just Cause and Due Process



Complaint Procedures and Due Process Complaint procedures are provided by employers to resolve employee complaints or grievances. In most cases, the complaint procedures used to provide due process for unionized employees differ from those for nonunion employees. For unionized employees, due process usually refers to the right to use the formal grievance procedure specified in the union contract. Due process may involve 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 can be found in Chapter 16.

Due process procedures for at-will employees are more varied than for union workers and may address a broader range of issues. Many organizations have a variety of means for addressing workplace disputes.¹⁴ Numerous employers, especially smaller ones, use an **“open-door” policy**, which means that anyone with a complaint can talk with a manager, an HR representative, or an executive. However, often the door is not really open, especially if criticisms or conflicts are part of the complaint. For example, despite such a policy, an employee won a judgment against Wal-Mart because of threats from a coworker that were not responded to sufficiently by management.¹⁵ Therefore, nonunion organizations generally benefit from having formal complaint procedures that are used effectively, since they provide due process for employees.

Work-Related Alternative Dispute Resolution (ADR)

Disputes between management and employees over different work issues are normal and inevitable, but how the parties resolve their disputes can become important. Formal grievance procedures and lawsuits provide two resolution methods. However, more and more companies are looking to alternative means of ensuring that due process occurs in cases involving employee rights. Dissatisfaction with the expenses and delays that are common in the court

“Open-door” policy

A policy in which anyone with a complaint can talk with a manager, an HR representative, or an executive.

system when lawsuits are filed explains the growth in alternative dispute resolution (ADR) methods such as arbitration, peer review panels, and ombuds.

Arbitration Disagreements between employers and employees often can result in lawsuits and large legal bills for settlement. Most employees who believe they have experienced unfair discrimination do not get legal counsel, but their discontent and complaints are likely to continue. Consequently, to settle disputes, a number of employers are using arbitration in nonunion situations.

Arbitration is a process that uses a neutral third party to make a decision, thereby eliminating the necessity of using the court system. Arbitration has been a common feature in union contracts. However, it must be set up carefully if employers want to use it in nonunion situations. Because employers often select the arbitrators, and because arbitrators may not be required to issue written decisions and opinions, many see the use of arbitration in employment-related situations as unfair.

Some firms use *compulsory arbitration*, which 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 the completion of the arbitration process. Requiring arbitration as a condition of employment is legal, but employers must follow it rather than try to waive its use. Such a problem occurred with Dillard's, in a case where the firm did not participate in its own arbitration agreement.¹⁶ However, in other situations, exceptions have been noted, so a legal check of compulsory arbitration as part of ADR should be done before adopting the practice.



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American Arbitration Association
Information and resources for arbitration can be found at this association website. Visit the site at www.adr.org.

Peer Review Panels Some employers allow their employees to appeal disciplinary actions to an internal committee of employees. This panel reviews the actions and makes recommendations or decisions. Peer review panels use fellow employees and a few managers to resolve employment disputes. Panel members are specially trained volunteers who sign confidentiality agreements, after which the company empowers them to hear appeals.

These panels have several advantages including fewer lawsuits, provision of due process, lower costs, and management and employee development. Also, peer review panels can serve as the last stage of a formal complaint process for nonunion employees, and their use may identify means that resolve the disputes without court action. Peer review decisions can be made binding to avoid court lawsuits as well.¹⁷ But if an employee does file a lawsuit, the employer presents a stronger case if a group of the employee's peers previously reviewed the employer's decision and found it to be appropriate.

Ombuds Some organizations ensure process fairness through **ombuds**—individuals outside the normal chain of command who act as independent problem solvers for both management and employees. At a number of large and medium-sized firms, ombuds have effectively addressed complaints about unfair treatment, employee/supervisor conflicts, and other workplace behavior issues. Ombuds address employees' complaints and operate with a high degree of confidentiality. Any follow-up to resolve problems is often handled informally, except when situations include unusual or significant illegal actions.

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

Ombuds Individuals outside the normal chain of command who act as problem solvers for both management and employees.

MANAGING INDIVIDUAL EMPLOYEE AND EMPLOYER RIGHTS ISSUES

Employees who join organizations in the United States bring with them certain rights, including *freedom of speech*, *due process*, and *protection against unreasonable search and seizure*. Although the U.S. Constitution grants these and other rights to citizens, over the years, laws and court decisions have identified limits on them in the workplace. Globally, laws and policies vary, which means more issues for employers with expatriates and local workers in different countries. 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 violated.

Balancing both employers' and employees' rights is a growing HR concern due to more legal and court cases and expanding global workforces. Employers have legitimate rights and needs to ensure that employees are doing their jobs and working in a secure environment, while employees expect their rights, both at work and away from work, to be protected.

The **right to privacy** is defined in legal terms as an individual's freedom from unauthorized and unreasonable intrusion into personal affairs. Although the right to privacy is not specifically identified in the U.S. Constitution, a number of past U.S. Supreme Court cases have established that such a right must be considered. Also, several states have enacted right-to-privacy statutes. A scope of privacy concerns exists in other countries as well.

The dramatic increase in Internet communications, twitters, specialized computers, and telecommunications systems is transforming many workplaces. That is why having an HR culture that incorporates privacy as a key component is important.¹⁸ The use of technology items by employers to monitor employee actions is amplifying concerns that the privacy rights of employees are being threatened.

Privacy Rights and Employee Records

As a result of concerns about protecting individual privacy rights in the United States, the Privacy Act of 1974 was passed. It includes provisions affecting HR recordkeeping systems. This law applies *only* to federal agencies and to organizations supplying services to the federal government. However, similar state laws, somewhat broader in scope, also have been passed. For the most part, state rather than federal law regulates private employers on this issue. In most states, public-sector employees are permitted greater access to their files than are private-sector employees.



LOGGING ON

Privacy, Business and Law

This nonprofit organization is a leading resource for information on new and existing business privacy issues. Visit the website at www.pandab.org.

Right to privacy An individual's freedom from unauthorized and unreasonable intrusion into personal affairs.

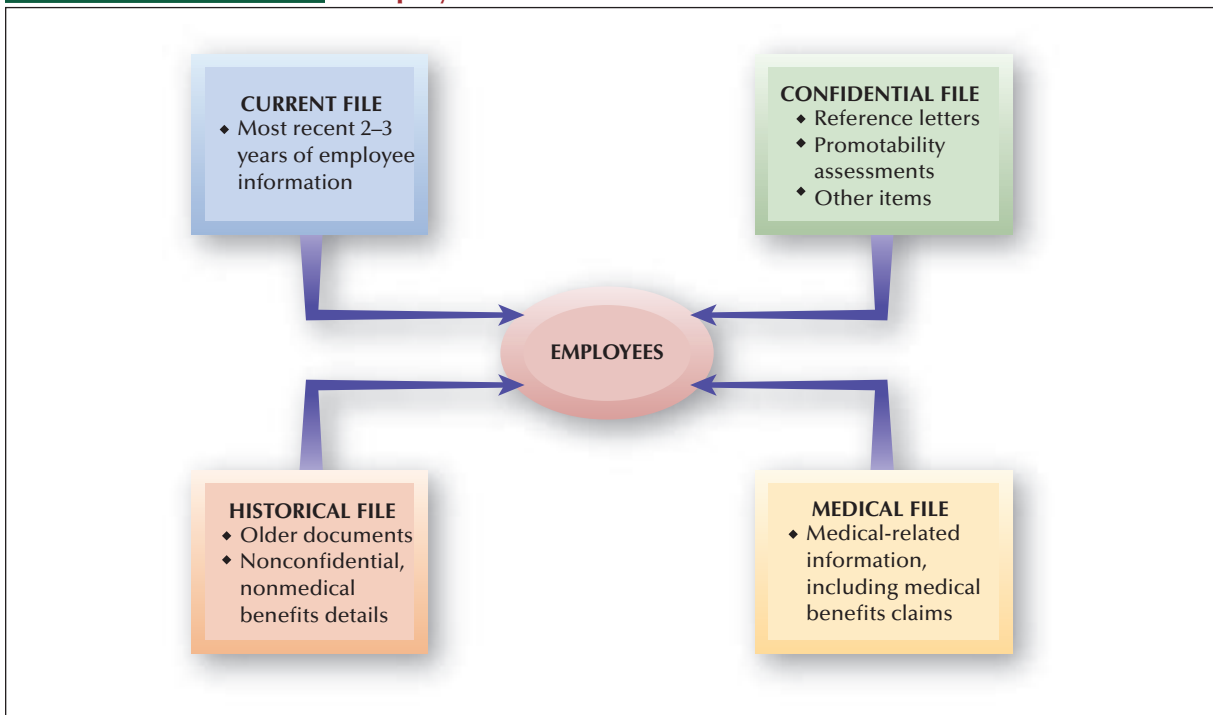
Employee Medical Records Recordkeeping and retention practices have been affected by the following provision in the Americans with Disabilities Act (ADA):

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.

As interpreted by attorneys and HR practitioners, this provision requires that all medical-related information be maintained separately from all other

FIGURE 15-4

Employee Record Files



confidential files. The Health Insurance Portability and Accountability Act also contains regulations designed to protect the privacy of employee medical records. Both regular and confidential electronic files must be considered. As a result of all the legal restrictions, many employers have established several separate files on each employee, as illustrated in Figure 15-4.

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 the privacy of employees and to protect employers from potential liability for improper disclosure of personal information. For instance, security breaches can occur through employer records regarding an employee's Social Security data, home address, and family details, especially by electronic means.¹⁹

A legal regulation called the Data Protection Act requires employers to keep personnel records up-to-date and to keep only the details that are needed.²⁰ The following guidelines are offered regarding employer access and storage of employee records:

- Restrict access to records to a limited number of individuals.
- Use confidential passwords for accessing employee records in various HR databases.
- Set up separate files and restricted databases for especially sensitive employee information.
- Inform employees about which types of data are retained.
- Purge employee records of outdated data.
- Release employee information only with employee consent.

Personnel files and records usually should be maintained for three years. However, different types of records should be maintained for shorter or longer periods of time based on various legal and regulatory standards.

Electronic Records An increasing concern is how electronic records are maintained and secured, given the changes in software, e-mail, and other technology means. Estimates are that more than 200 billion company e-mails are sent daily. Many of these emails may relate to some aspect of electronic records and worker actions. Therefore, employers should establish electronic records policies to ensure legal compliance and to avoid violating individuals' personal rights.²¹ Electronic records policies are discussed in more detail later in the chapter.



LOGGING ON

Privacy Rights Clearinghouse

For fact sheets and information on workplace monitoring rights, visit this website at www.privacyrights.org.

Employees' Free Speech Rights

The right of individuals to freedom of speech is protected by the U.S. Constitution. However, that freedom is *not* an unrestricted one in the workplace. Three areas in which employees' freedom of speech has collided with employers' restrictions are controversial views, whistle blowing, and use of the Internet and other technology.

Employee Advocacy of Controversial Views Questions of free speech arise over the right of employees to advocate controversial viewpoints at work. Numerous examples can be cited. For instance, can an employee of a tobacco company join in antismoking demonstrations outside of work? Can a disgruntled employee at a nonunion employer wear a union badge on a cap at work? In one U.S. case, a court decision ruled against a white worker who displayed Confederate flags on his toolbox, which offended some African American employees. The court said that the worker's free speech right was not violated when the employer fired him for refusing to remove the flags.²² In situations such as these, employers must follow due process procedures and demonstrate that disciplinary actions taken against employees can be justified by job-related reasons.

However, simply because an employer *might be able* to punish public embarrassments, should it do so? Perhaps not—this is the sort of management activity that might be viewed by employees as overreacting by the employer. It may cause other employees to leave, or at least to not respect the employer. The best way to handle these concerns is to make clear the boundaries and expectations through a policy that spells them out and to have a signed non-disclosure privacy agreement.

Whistle Blowing and Sarbanes–Oxley Individuals who report real or perceived wrongs committed by their employers are called **whistle blowers**. The reasons why people report actions that they question vary and often are individual in nature.²³ Many well-known whistle-blowing incidents have occurred in past years at companies such as Enron, Adelphia Communications, and WorldCom. Also, a number of government workers have filed complaints because of actions by their bosses, which then have led to retaliations. An FBI agent filed a whistle-blowing suit after his complaints about wiretapping rules being violated led to his resignation.²⁴

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

However, whistle blowers are less likely to lose their jobs in public employment than in private employment because most civil service systems follow rules protecting whistle blowers. A 2009 U.S. federal amendment said that for private employers to receive federal stimulus funding, they must have the same whistle-blowing regulations as the federal government.²⁵ However, no comprehensive whistle-blowing law fully protects the right to free speech of both public and private employees.

The culture of the organization often affects the degree to which employees report inappropriate or illegal actions internally or resort to using outside contacts. Employers need to address two key questions in regard to whistle blowing: (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? Even though the answers may be difficult to determine, retaliation against whistle blowers is clearly not allowed. Also, whistle blowing can appear to show a lack of loyalty on the part of an employee, although that may not be a correct interpretation.²⁶

The Sarbanes–Oxley Act is intended to remedy company ethical breaches. It adds protection for whistle blowers. But an antiretaliation provision covers *only* complaints made to certain entities, such as a manager/executive and federal regulatory or law enforcement agencies.

Ethical HR Issues on Blogs



“Blogs,” or Web logs, provide an easy way for people to post opinions or views on any subject—including work, the boss, the company, company products, and people at work. Blogs also may be created by outsiders, and both positive and negative publicity can be the result. Wal-Mart, McDonalds, and many other firms have experienced this situation.

A major use of blogs for employers is providing information to employees about activities, policies, and practices within the organization. Thus, communication from HR and other departments, as well as from individual employees, can be delivered efficiently and effectively. However, misuse by employees may lead to disciplinary action and even termination.

Because HR policies on blogs may not be established or current, ethical problems can occur in blogs that are personal and not job related, as well as in work-related blogs. For example, an employee may communicate harmless information on friends and family members, as well as on other employees.

Work-related blogs can be either useful or insult managers and coworkers. However, both types can be identified as violating employer policies and lead to firing of employees.

A research study on terminations for either type of blog comments examined how college students and job workers viewed such terminations. The results of the study identified that those surveyed saw firing people for innocuous, harmless blog actions as being inappropriate and creating organizational ethical concerns. However, they viewed terminating persons for work-related negative blog comments as being more appropriate.

Consequently, HR executives and professionals are advised to establish and communicate ethical requirements on blogging. Training of all managers and employees on those HR requirements must be continuous, not just a one-time occurrence. If HR efforts on blogs are done well, employee morale and behaviors can be enhanced.²⁷

Technology and Employer/Employee Issues

The extensive growth of technology use by employers and employees is constantly creating new issues to be addressed. Such technology usages as twitters, wikis, social networking, and blogs require attention by employers. For instance, ethical issues surrounding blogs and how they can lead to termination are highlighted in the HR Online.

Monitoring Electronic Communications Employers have a right to monitor what is said and transmitted through their Internet and voicemail systems, despite employees' concerns about free speech. Advances in information and telecommunications technology have become a major employer issue regarding employee and workplace privacy. For example, the use of e-mail increases every day, along with employers' liabilities if they improperly monitor or inspect employees' electronic communications.²⁸ Many employers have specialized software that can retrieve deleted electronic communications e-mail, and some even record each keystroke made on their computers.

There are recommended actions for employers to take when monitoring technology. Employers should monitor only for business purposes and strictly enforce the policy. For instance, one problem is that most people express themselves more casually in e-mail than they would in formal memos. This tendency can lead to sloppy, racist, sexist, or otherwise defamatory messages. Court cases have been brought over jokes forwarded through e-mails that contained profanity or racist undertones. Another problem is that electronic messages can be sent rapidly to multiple (and sometimes unintended) recipients. Also, the messages can be stored, and often legal cases hinge on retrieval of the messages.²⁹

HR Policies on Electronic Communications Given all the time and effort employees spend on technology through both work and personal actions, it is important for HR professionals to provide guidance to executives, managers, and employees. Some areas in which HR policies need to be made can include the following:

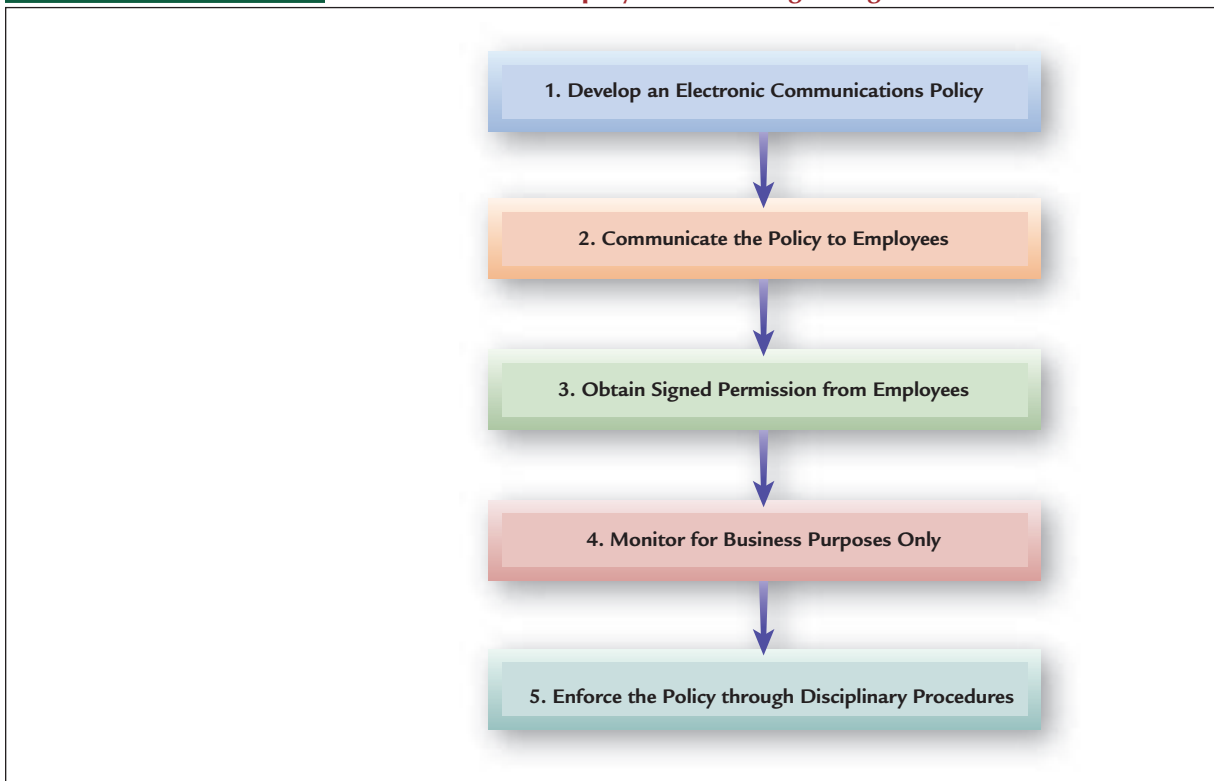
- Establishing security and voicemail system
- Communicating that the employer will attempt to monitor security, but it may not be totally guaranteed
- Restricting the use of employee records to a few individuals

As the HR Headline indicates, many employers have developed and disseminated electronic communications policies. Figure 15-5 depicts recommended employer actions, beginning with the development of these policies.

Communicating policies on electronic communications to employees, enforcing them by monitoring employee Internet use, and disciplining offenders are means used by employers to ensure that the Internet is used appropriately. These efforts are necessary because both supervisors and employees can engage in violating electronic monitoring policies and practices.³⁰

Employers' efforts also can attempt to guard against some employees' accessing pornographic or other websites that could create problems for the employer. If law enforcement investigations find evidence of such access, the employer could be accused of aiding and abetting illegal behavior. Many employers have purchased software that tracks the websites accessed by employees, and some employers use software programs to block certain websites that are inappropriate for business use.

FIGURE 15-5

Recommended Employer Actions Regarding Electronic Communications

Employee Rights and Personal Behavior Issues

Another area to which employers must give attention is employee personal behavior. Personal behavior on or off the job could be at issue. For example, if an employer investigates off-the-job charges of illegal behavior, an invasion-of-privacy claim might result. On the other hand, failure to do due diligence could jeopardize disciplinary actions that should be taken by employers. Some of the more prevalent concerns in this area are discussed next.

Reviewing Unusual Behavior Employers may decide to review unusual behavior by employees both on and off the job. For instance, if an employee is suddenly wearing many new clothes and spending lavishly, inquiries as to the reasons why and the resources used might be warranted. Another issue is “workforce bullying,” which is discussed in the ending case of this chapter.

Organizations and HR also must deal with actions such as employees or managers being inappropriately angry, insulting, or extremely rude to customers, suppliers, or employees at different levels. Even jokes or comments that are inconsiderate can create problems. To respond to such actions, managers and HR professionals should identify what are acceptable and unacceptable behaviors and activities. Meeting privately with persons to discuss concerns and getting feedback is also useful. Documenting such actions in supervisory HR records is recommended.³¹

Dressing and Body Appearance Limitations Employers have put limits on employees’ dress and appearance in some situations, including items such as visible tattoos, certain clothing and accessories, and body piercings. Many

managers have unwritten dress policies, but legally it is recommended that firms have written dress and appearance policies and codes.³² The key is to give adequate notice to employees and managers, and to answer their concerns before a dress and appearance code is implemented.

One industry in which dress and appearance codes and policies are important is the retail industry. For instance, a pizza firm in New Mexico prohibits visible tattoos and many kinds of body piercing. However, employers must be careful that the codes do not discriminate against women, racial and ethnic minorities, those with disabilities, or religious individuals. Appearance issues can be the subject of policies that affect employee rights if they are job related.³³

Off-Duty Behavior An additional employee rights issue concerns personal behavior off the job. Employers encounter special difficulty in establishing “just cause” for disciplining employees for their off-the-job behavior. Most people believe an employer should not control the lives of its employees off the job except in the case of clear job-related consequences. For example, can employees be disciplined for drinking or using tobacco or drugs on their own time away from work? Or, what should an employer do if an employee is an acknowledged transvestite, a member of an activist environmental group, a leader in a racist group, or an exotic dancer on weekends? In some cases, the answer should be “nothing”; in others, action must be taken.

These are just a few examples in which employee rights and personal behaviors can conflict with employer expectations. There really is no law that says an employer cannot discriminate against off-the-job behavior, but society has reservations about employers intruding into personal lives. The litmus test is whether the employee’s off-the-job behavior puts the company in legal or financial jeopardy.³⁴

BALANCING EMPLOYER SECURITY AND EMPLOYEE RIGHTS

Balancing employer and employee rights is becoming more difficult. 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 expect the rights that they have both at work and away from work to be protected. The commonplace monitoring of e-mail and voicemail is only one way employers watch the workplace. Technology gives employees who leave an employer the opportunity to take a great deal of valuable company secrets or data with them. For this reason (and others as well), workplace monitoring has increased.

Workplace Monitoring

In the United States, the right of protection from unreasonable search and seizure protects an individual against activities of the government only. Thus, employees of private-sector employers can be monitored, observed, and searched at work by representatives of the employer. Several court decisions have reaffirmed the principle that both private-sector and government employers may search desks, files, lockers, and computer files without search warrants if they believe that work rules have been violated. Also, the terrorist

attacks of September 11, 2001, led to passage of the USA Patriot Act, which expanded legislation to allow government investigators to engage in broader monitoring of individuals, including in workplaces, in order to protect national security.

Conducting Video Surveillance at Work Numerous employers have installed video surveillance systems in workplaces. Some employers use these systems to ensure employee security, such as in parking lots, garages, and dimly lit exterior areas. Other employers have installed them on retail sales floors and in production areas, parts and inventory rooms, and lobbies. When video surveillance is extended into employee restrooms, changing rooms, and other more private areas, employer rights and employee privacy collide. It is important that employers develop a video surveillance policy, inform employees about the policy, perform the surveillance only for legitimate business purposes, and strictly limit those who view the surveillance results.

Monitoring Employee Performance Employee activity may be monitored to measure performance, ensure performance quality and customer service, check for theft, or enforce company rules or laws. The common concerns in a monitored workplace usually center not on whether monitoring should be used, but on how it should be conducted, how the information should be used, and how feedback should be communicated to employees.

At a minimum, employers should obtain a signed employee consent form that indicates that performance will be monitored regularly and phone calls will be taped regularly. Also, it is recommended that employers provide employees with feedback on monitoring results to help employees improve their performance and to commend them for good performance. For example, one major hotel reservation center 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.

Employer Investigations

Another area of concern regarding employee rights involves workplace investigations. The U.S. Constitution protects public-sector employees in the areas of due process, search and seizure, and privacy at work, but private-sector employees are not protected. Whether on or off the job, unethical or illegal employee behavior can be a serious problem for organizations. Employee misconduct may include illegal drug use, falsification of documents, misuse of company funds, disclosure of organizational secrets, workplace violence, employee harassment, and theft.

Conducting Work-Related Investigations Workplace investigations can be conducted by internal or external personnel. Often, HR staff and company security personnel lead internal investigations. Until recently, the use of outside investigators—the police, private investigators, attorneys, or others—was restricted by the Fair Credit Reporting Act. However, passage of the Fair and Accurate Credit Transactions (FACT) Act changed the situation. Under FACT, employers can hire outside investigators without first notifying the individuals under investigation or getting their permission.

Workplace investigations are frequently conducted using technology. Such means allow employers to review e-mails, access computer logs, conduct video

surveillance, and use other investigative tactics. When using audiotaping, wire-tapping, and other electronic methods, care should be taken to avoid violating privacy and legal regulations.

Employee Theft A problem faced by employers is employee theft of property and vital company secrets. White-collar theft through embezzlement, accepting bribes, and stealing company property also is a concern. If the organizational culture encourages or allows questionable behavior, then employees are more likely to see theft as acceptable.

Employee theft and other workplace misconduct can be addressed using a number of methods.³⁵ Typical methods may include doing an investigation before hiring, using applicant screening, and conducting background investigations. After hire, workplace monitoring can review unusual behaviors, such as those mentioned earlier. Honesty and polygraph tests may be used both before and after a person is hired.

Honesty and Polygraph Tests Pencil-and-paper honesty tests are alternatives to polygraph testing, as mentioned in Chapter 7. These tests are widely used, particularly in the retail industry and others. More than two dozen variations are available. However, their use has been challenged successfully in some court decisions.

For current employees, polygraph testing (performed with lie detectors) is used by some organizations. The Employee Polygraph Protection Act prohibits the use of polygraphs for most preemployment screening and also requires that employees must:

- Be advised of their rights to refuse to take a polygraph exam.
- Be allowed to stop the exam at any time.
- Not be terminated because they refuse to take a polygraph test or solely because of the exam results.

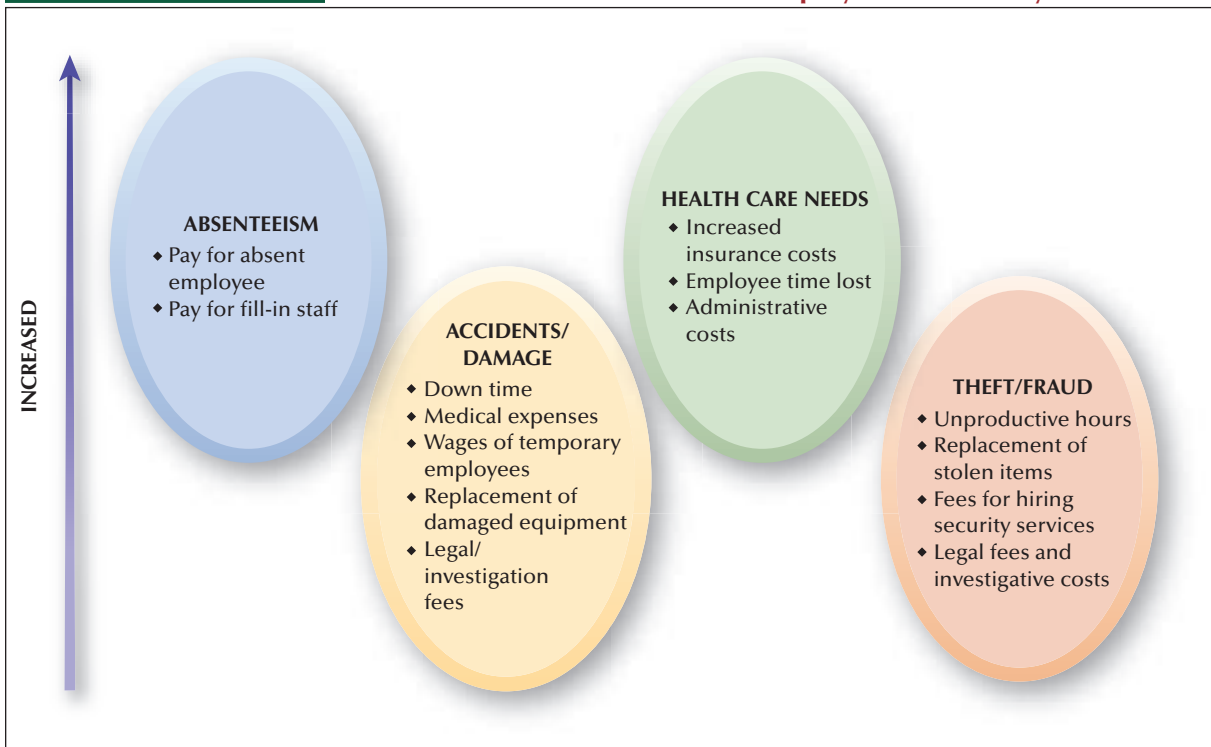
Substance Abuse and Drug Testing

Employee substance abuse and drug testing have received a great deal of attention. Concern about substance abuse at work is appropriate, given that absenteeism, accident/damage rates, and theft/fraud are higher for workers using illegal substances or misusing legal substances such as drugs and alcohol. Estimates by the U.S. Office of National Drug Control Policy are that about 8% of employees are drug abusers, and those persons create significantly more employer medical and workers' compensation claims.³⁶ Figure 15-6 identifies some of the financial effects of substance abuse. Ways to address substance abuse problems were discussed in Chapter 14. Employee rights concerned with those means are discussed in the following sections.

Drug-Free Workplace Act of 1988 The U.S. Supreme Court has ruled that certain drug-testing plans do not violate the Constitution. Private-employer programs are governed mainly by state laws, which can be a confusing hodgepodge. The Drug-Free Workplace Act of 1988 requires government contractors to take steps to eliminate employee drug use. Failure to do so can lead to contract termination. Tobacco and alcohol do not qualify as controlled substances under the act, and off-the-job drug use is not included. Additionally, the U.S. Department of Transportation requires regular testing

FIGURE 15-6

How Substance Abuse Affects Employers Financially



of truck and bus drivers, train crews, mass-transit employees, airline pilots and mechanics, pipeline workers, and licensed sailors.

Drug Testing and Employee Rights Unless federal, state, or local law prohibits testing, employers have a right to require applicants or employees to submit to a drug test. Laws on drug testing vary globally, due to different regulations in different countries.³⁷ Preemployment drug testing is widely used. When employers conduct drug testing of current employees, they generally use one of three policies: (1) random testing of everyone at periodic intervals, (2) testing only in cases of probable cause, or (3) testing after accidents. Means of testing include urinalysis and hair testing, among others.

If testing is done for probable cause, it needs to be based on performance-related behaviors, such as excessive absenteeism or reduced productivity, and not just the substance usage itself. From a policy standpoint, it is most appropriate to test for drugs when the following conditions exist:

- Job-related consequences of the abuse are severe enough that they outweigh privacy concerns.
- Accurate test procedures are available.
- Written consent of the employee is obtained.
- Results are treated confidentially, as are any medical records.
- Employer offers a complete drug program, including an employee assistance program.

Employers win many drug-testing cases in courts, including cases in which a person has been terminated for violating drug policy provisions. For example, a train conductor taking prescription drugs was terminated

because he did not give accurate details in a medical screening as part of the employer's drug policy.³⁸ However, not all employers are enamored with drug testing, and some claim the rate of testing is dropping because it shows no demonstrable return on investment. Also, drug testing for certain employers may restrict the hiring of sufficient numbers of new employees, so employers may reexamine their drug policies.

HR POLICIES, PROCEDURES, AND RULES

HR policies, procedures, and rules greatly affect employee rights (just discussed) and discipline (discussed next). Where there is a choice among actions, **policies** act as general guidelines that help focus those organizational actions. **Policies** are general in nature, whereas procedures and rules are specific to the situation. The important role of all three requires that they be reviewed regularly.

Procedures provide customary methods of handling activities and are more specific than policies. For example, a policy may state that employees will be given vacations according to years of service, and a procedure establishes 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 do policies. Certain rules may be violated more than others, and violations may occur more frequently if individual and organizational performance is not what is expected.³⁹ An example of a rule might be that a vacation day may not be scheduled the day before or after a holiday.

Perhaps more than any other part of the organization, the HR function needs policies, procedures, and rules. People react strongly to differential treatment regarding time off, pay, vacation time, discipline, and other factors. New and smaller employers often start without many of these HR issues well defined. But as they grow, issues become more complex, with policy decisions being made as necessary. Before long the inconsistency and resulting employee complaints bring on the need for clear policies, procedures, and rules that apply to everyone. Therefore, it is important that HR policies be consistent, but also allow some flexibility within the overall policy requirements.⁴⁰

Coordination is necessary between the HR unit and operating managers for HR policies, procedures, and rules to be effective. As Figure 15-7 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 policies and disciplinary rules, and trains managers to use them. Often policies, procedures, and rules are provided in employee handbooks.

Policies General guideline that focus organizational actions.

Procedures Customary methods of handling activities.

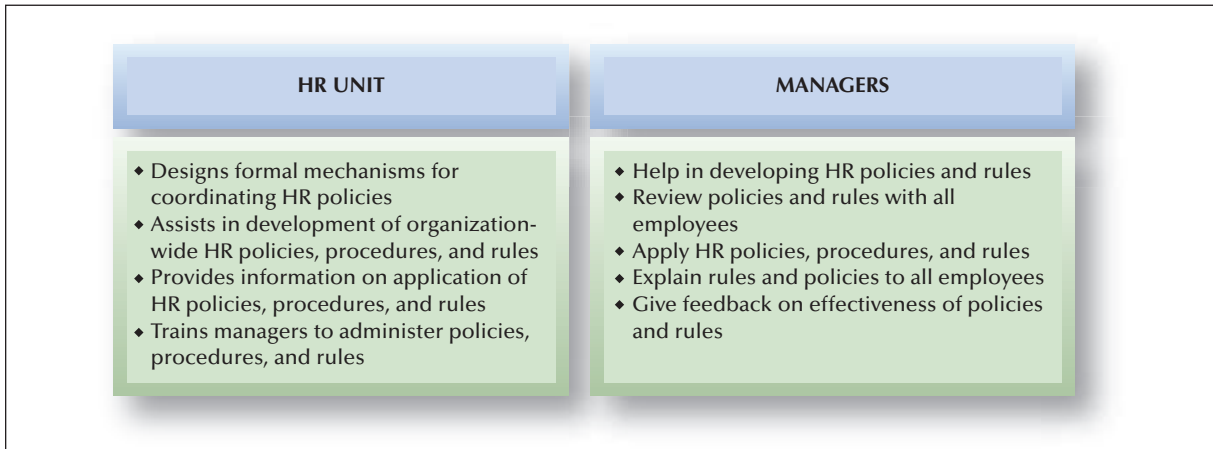
Rules Specific guidelines that regulate and restrict the behavior of individuals.

Employee Handbooks

An employee handbook can be an essential tool for communicating information about workplace culture, benefits, attendance, pay practices, safety issues, and discipline. The handbooks are sometimes written in a formal legalistic fashion, but

FIGURE 15-7

Typical Division of HR Responsibilities: Policies, Procedures, and Rules



need not be. More common language can make the handbook a positive element. Even small organizations can prepare handbooks relatively easily using available computer software with sample policies. When preparing handbooks, management should consider legal issues, readability, and use. Handbooks may contain many different areas, but some policies commonly covered in them include:

- At-will prerogatives
- Harassment
- Electronic communication
- Pay and benefits
- Discipline
- Hours worked

Legal Review of Language As mentioned earlier, one current trend in the courts is to use employee handbooks against employers in lawsuits by charging a broken “implied” contract. This tendency should not eliminate the use of employee handbooks as a way of communicating policies to employees. In fact, not having an employee handbook with HR policies spelled out understandably can leave an organization open to costly litigation and out-of-court settlements. A sensible approach is to first develop sound HR policies and employee handbooks to communicate them, and then have legal counsel review the language contained in the handbooks. Some legal experts recommend that overuse of legal wording can make handbooks less useful for employees.⁴¹ Several recommendations include the following:

- *Eliminate controversial phrases.* For example, the phrase “permanent employee” may be used to describe a person who has 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.* Courts generally uphold disclaimers, but only if they are prominently shown in the handbook.⁴² To ensure that disclaimers are appropriate and create a positive image in the handbook, they should be done carefully. For instance, 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 a specific cause.



LOGGING ON

SHRM Policy Handbooks

This website contains sample policies, procedures, and handbooks collected by the Society for Human Resource Management. Visit the website at www.shrm.org, and click on Templates and Tools.

- *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 regularly.⁴³

To communicate and discuss HR information, 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. It also allows changes in policies to be made electronically rather than distributed as paper copies.

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, informing employees about what is and will be happening in the organization, and what the expectations and goals of top management are. *Upward communication* enables managers to learn about the ideas, concerns, and information needs of employees.

Organizations communicate with employees through internal publications and media, including newspapers, company magazines, organizational newsletters, videotapes, Internet postings, and e-mail announcements. Whatever the formal means used, managers should make an honest attempt to communicate information employees need to know. Electronic communications allows for more timely and widespread dissemination of HR policy information.⁴⁴ But online usage can present problems because policies may not be viewed appropriately by managers and employees.

EMPLOYEE ABSENTEEISM

One major application of HR policies and practices by employers relates to employees who are absent from their work and job responsibilities. **Absenteeism** is any failure by an employee to report for work as scheduled or to stay at work when scheduled. Being absent from work may seem like a normal matter to an employee. But if a manager needs 12 people in a unit to get the work done, and 4 of the 12 are absent much of the time, the work of the unit will decrease or additional workers will have to be hired to provide results. Estimates are that productivity losses due to absenteeism cost more than \$70 billion per year for U.S. employers in total, and one study indicated that employee absenteeism averages about 36% of a company's payroll.⁴⁵ Some people have limited concerns about arriving at work late, and tardiness can be closely related to absenteeism, as the HR Perspective describes.

Types of Absenteeism

Absenteeism Any failure by an employee to report for work as scheduled or to stay at work when scheduled.

Employees can be absent from work or tardy for several reasons. Clearly, some absenteeism is inevitable because of illness, death in the family, and other personal reasons. Though absences such as those that are health related are unavoidable and understandable, they can be very costly.⁴⁶ Many employers

Effects of Tardiness on Work and Absenteeism



Tardiness, in which persons report late to work, is part of the issue of absenteeism addressed by HR. Whether an employee is a few minutes or a few hours late, tardiness means time away from work, and therefore controlling tardiness is part of controlling absenteeism.⁴⁷

Some tardiness may be less controllable by employees, such as that caused by traffic problems like public transportation delays, road construction, and traffic accidents. However, many employees are late to work for personal, family, or other reasons. For instance, one survey found that about one-fourth of employees were tardy because of lack of sleep the night before. Tardiness also might be related to family issues, such as getting children to school or aiding an elderly or sick relative. Other people may not want to be at an early work meeting.

Regardless of the reasons for it, tardiness amounts to absenteeism and must be addressed by HR. Some ways of addressing it can include the following:

- Establish and consistently communicate policies on lateness as part of absenteeism.
- Remind employees of the consequences of tardiness, especially if it is frequent.
- Have specific discussions with tardy persons on the reasons for their lateness, and then document those reasons as part of HR records.
- If appropriate, consider individual flexible work scheduling, focusing on number of hours worked without having a specific set work time.
- Implement disciplinary actions for persons who are repeatedly or frequently tardy, especially for those who are tardy for reasons that are personal and controllable.

have sick leave policies that allow employees a certain number of paid days each year for those types of *involuntary* absences. However, much absenteeism is avoidable, or *voluntary*. According to a study, about two-thirds of employee absenteeism is due to personal or family reasons.⁴⁸

One problem is that a number of employees see no real concern about being absent or late to work because they feel that they are “entitled” to some absenteeism. In many firms, a relatively small number of individuals are responsible for a large share of the total absenteeism in the organization. Also, individuals’ work-related stress and strain can lead to absenteeism.⁴⁹

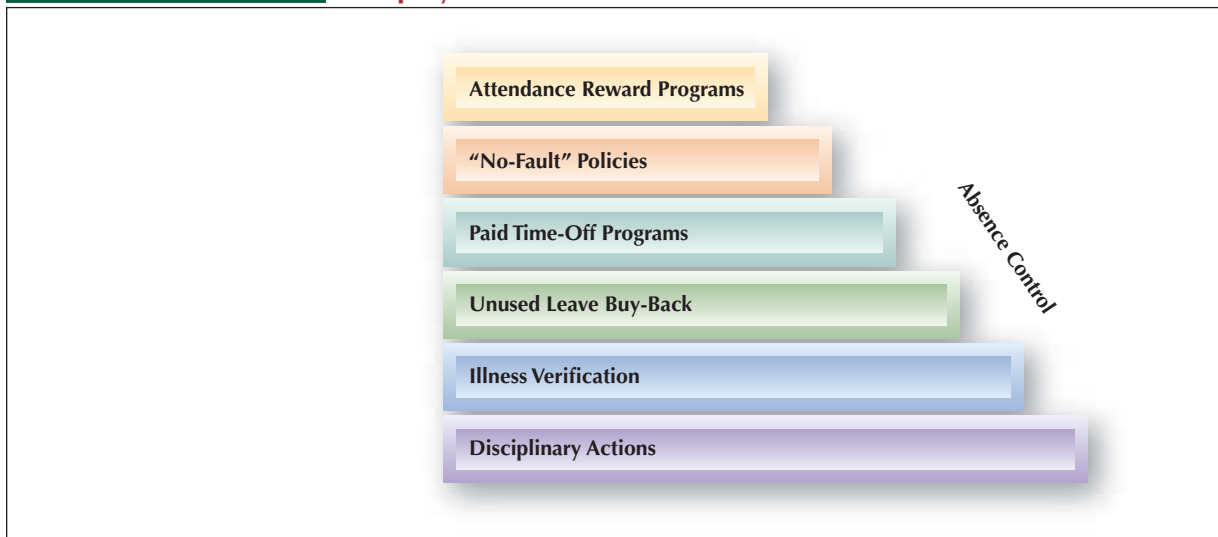
Regardless of the reason, employers need to know if someone is going to be absent. Various organizations have developed different means for employees to report their absences. Wal-Mart and others have established an automated system in which their employees who will be absent call a special phone number. Others have special electronic notification e-mail accounts.⁵⁰ Regardless of the method used, employers need to have a clear policy on how the employee should notify the employer when an absence occurs.

Controlling Absenteeism

Voluntary absenteeism is better controlled if managers understand its causes clearly. Once they do, they can use a variety of approaches to reduce it. Organizational policies on absenteeism should be stated clearly in an employee handbook and emphasized by supervisors and managers. Figure 15-8 shows some common actions that employers use to control absenteeism.

FIGURE 15-8

Employee Absenteeism Control Actions



The methods employers use to address absenteeism can be placed into categories. Five of the more prominent ones are as follows:

- *Disciplinary approach*: Many employers use this approach. People who are absent the first time receive an oral warning, and subsequent absences bring written warnings, suspension, and finally dismissal.
- *Positive reinforcement*: Positive reinforcement includes such actions as giving employees cash, recognition, time off, and other rewards for meeting attendance standards. Offering rewards for consistent attendance, giving bonuses for missing fewer than a certain number of days, and “buying back” unused sick leave are all positive methods of reducing absenteeism.
- *Combination approach*: A combination approach ideally rewards desired behaviors and punishes undesired behaviors. This “carrot and stick” approach uses policies and discipline to punish offenders and various programs and rewards to recognize employees with outstanding attendance. For instance, employees with perfect attendance may receive incentives of travel and other rewards.
- *“No-fault” policy*: With a “no-fault” policy, the reasons for absences do not matter, and the employees must manage their own attendance unless they abuse that freedom. Once absenteeism exceeds normal limits, then disciplinary action up to and including termination of employment can occur. The advantages of the no-fault approach are that all employees can be covered by it, and supervisors and HR staff do not have to judge whether absences count as excused or unexcused.
- *Paid-time-off (PTO) programs*: Some employers have paid-time-off programs, in which vacation time, holidays, and sick leave for each employee are combined into a PTO account. Employees use days from their accounts at their discretion for illness, personal time, or vacation. If employees run out of days in their accounts, they are not paid for any additional days missed. PTO programs generally reduce absenteeism, particularly one-day absences, but they often increase overall time away from work because employees use all of “their” time off by taking unused days as vacation days.



HR Metrics: Measuring Absenteeism

A major step in reducing the expense of absenteeism is to decide how the organization is going to record absences and what calculations are necessary to maintain and benchmark their rates. Controlling or reducing absenteeism must begin with continuous monitoring of the absenteeism statistics in work units. Such monitoring helps managers pinpoint employees who are frequently absent and departments that have excessive absenteeism. Various methods of measuring or computing absenteeism exist. One formula suggested by the U.S. Department of Labor is as follows:

$$\frac{\text{Number of person-days lost through job absence during period}}{(\text{Average number of employees}) \times (\text{Number of workdays})} \times 100$$

The absenteeism rate also can be based on number of hours instead of number of days.

One set of metrics that can be calculated is the rate of absenteeism, which can be based on annual, monthly, quarterly, or other periods of time.⁵¹ Other useful measures of absenteeism might include:

- *Incidence rate:* The number of absences per 100 employees each day
- *Inactivity rate:* The percentage of time lost to absenteeism
- *Severity rate:* The average time lost per absent employee during a specified period of time (a month or a year)

Additional information can be gained by separating absenteeism data into long- and short-term categories. Different problems are caused by employees who are absent for one day 10 times during a year, and employees who are absent one time for 10 days. When absenteeism costs are specifically identified, they may include these variables:

- Lost wages and benefits
- Overtime for replacements
- Fees for temporary employees, if incurred
- Supervisor's and manager's times
- Substandard production and performance
- Overstaffing necessary to cover anticipated absences

EMPLOYEE DISCIPLINE

The earlier discussion about employee rights provides an appropriate introduction to the topic of employee discipline, because employee rights often are a key issue in disciplinary cases. **Discipline** is a form of training that enforces organizational rules. Those most often affected by the discipline systems are problem employees. Fortunately, problem employees comprise a small number of employees. If employers fail to deal with problem employees, negative effects for other employees and groups often result.

Common disciplinary issues caused by problem employees include absenteeism, tardiness, productivity deficiencies, alcoholism, and insubordination. Often, discipline occurrences are seen differently by managers and employees. Whereas managers may see discipline as part of changing workers' behaviors, employees often see discipline as unfair because it can affect their jobs and careers.⁵²

Discipline Form of training that enforces organizational rules.

Reasons Why Discipline Might Not Be Used

Managers may be reluctant to use discipline for a number of reasons. Some of the main ones include the following:

- *Organizational culture of avoiding discipline:* If the organizational “norm” is to avoid penalizing problem employees, then managers are less likely to use discipline or to dismiss problem employees.
- *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 is also a function of the organizational culture.
- *Guilt:* Some managers realize that before they became managers, they committed the same violations as their employees, and therefore they do not discipline others for actions they formerly did.
- *Fear of loss of friendship:* Managers may fear losing friendships or damaging personal relationships if they discipline employees.
- *Avoidance of time loss:* Discipline often 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 an employee, particularly in regard to the ultimate disciplinary step of termination.

Effective Discipline

Because of legal concerns, managers must understand discipline and know how to administer it properly. Effective discipline should be aimed at the problem behaviors, not at the employees personally, because the reason for discipline is to improve performance. Distributive and procedural justice suggest that if a manager tolerates unacceptable behavior, other employees may resent the unfairness of that tolerance.

Training of Supervisors Training supervisors and managers on when and how discipline should be used is crucial. Employees see disciplinary action as more fair when given by trained supervisors who base their responses on procedural justice than when discipline is done by untrained supervisors. Training in counseling and communications skills provides supervisors and managers with the tools necessary to deal with employee performance problems, regardless of the disciplinary approaches used.

Approaches to Discipline

The disciplinary system can be viewed as an application of behavior modification to a problem or unproductive employee. The best discipline is clearly self-discipline. Most people can be counted on to do their jobs effectively when they understand what is required at work. But for some people, the prospect of external discipline helps their self-discipline. One approach is positive discipline.

Positive Discipline Approach The positive discipline approach builds on the philosophy that violations are actions that usually can be corrected

constructively without penalty. In this approach, managers focus on using fact finding and guidance to encourage desirable behaviors, rather than using penalties to discourage undesirable behaviors. The hope is that employee performance will improve and future disciplinary actions will not be needed.⁵³ The four steps to positive discipline are as follows:

1. *Counseling*: The goal of this phase is to heighten employee awareness of organizational policies and rules. Often, people simply need to be made aware of rules, and knowledge of possible disciplinary actions may prevent violations.
2. *Written documentation*: If an employee fails to correct behavior, then a second conference becomes necessary. Whereas the first stage took place as a conversation between supervisor and the employee, this stage is documented in written form, and written solutions are identified to prevent further problems from occurring.
3. *Final warning*: If 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 require the employee to take a day off with pay to develop a specific written action plan to remedy the problem behaviors. The decision day off emphasizes 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 problems exist, then the supervisor can discharge the employee.

The advantage of this positive approach to discipline is that it focuses on problem solving. The greatest difficulty with the positive approach to discipline is the extensive amount of training required for supervisors and managers to become effective counselors, and the need for more supervisory time with this approach than with the progressive discipline approach, which is discussed next.

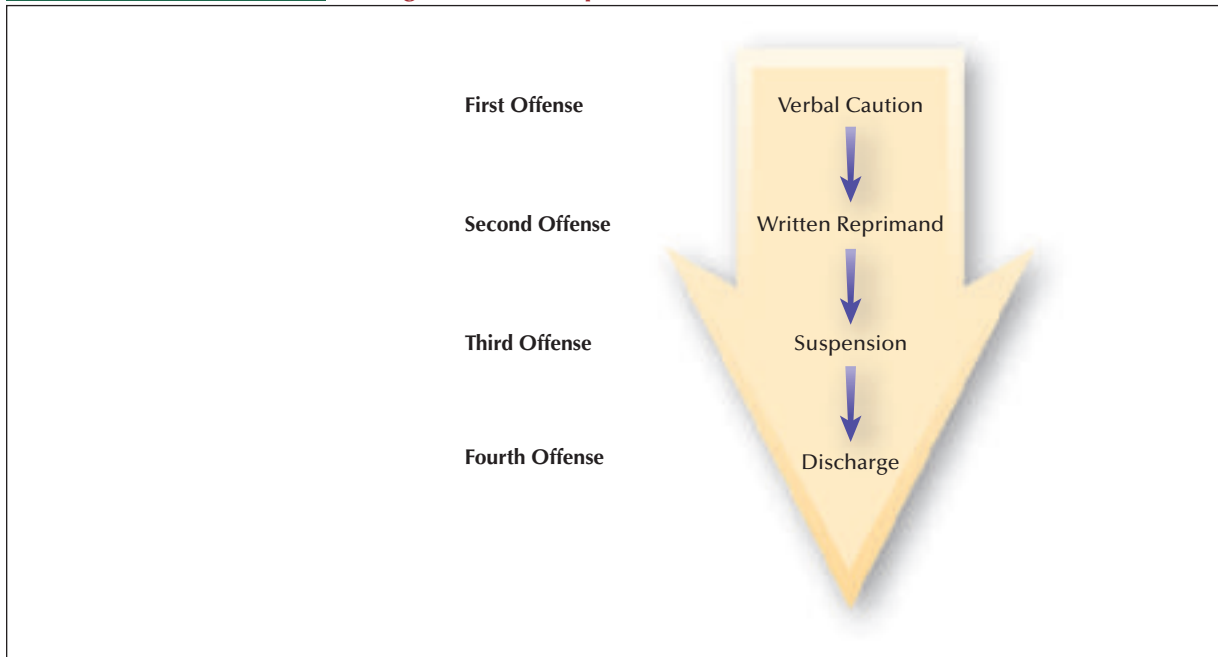
Progressive Discipline Approach Progressive discipline incorporates steps that become progressively more stringent and are designed to change the employee's inappropriate behavior. Figure 15-9 shows a typical progressive discipline process; most progressive discipline procedures use verbal and written reprimands and suspension before resorting to dismissal. For example, at a manufacturing firm, an employee's failure to call in when being absent from work might lead to a suspension after the third offense in a year. Suspension sends employees a strong message that undesirable job behaviors must change or termination is likely to follow.

Although it appears to be similar to positive discipline, progressive discipline is more administrative and process oriented. Following the progressive sequence ensures that both the nature and the seriousness of the problem are clearly communicated to the employee. Not all steps in progressive discipline 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 include intoxication at work, alcohol or drug use at work, fighting, and theft.

However, if a firm has a progressive discipline policy, it should be followed in every case in which immediate termination is not appropriate. Several court

FIGURE 15-9

Progressive Discipline Process



decisions have ruled that failure to follow written policies for progressive discipline can invalidate an employee's dismissal as unlawful retaliation. This type of equal employment claim increased by 18% in one report year.⁵⁴

Discharge: The Final Disciplinary Step

The final stage in the disciplinary process may be called *discharge*, *firing*, *dismissal*, or *termination*, among other terms. Regardless of the word used, **discharge** is when an employee is removed from a job at an employer. Both the positive and the progressive approaches to discipline clearly provide employees with warnings about the seriousness of their performance problems before dismissal occurs.

One difficult phase of employee termination is the removal of terminated employees and their personal possessions from company facilities. The standard advice from legal experts is to physically remove the employee as quickly as possible. Often ex-employees are escorted out of the building by security guards. Some firms allow terminated employees to return to their desks, offices, or lockers to retrieve personal items under the observation of security personnel and the department supervisor/manager, but this means the ex-employee may be seen by and may talk with coworkers while still upset or angry. The HR On-the-Job discusses some practices that can make employee termination less difficult.

Termination Considerations Termination happens for a wide range of reasons. One study identified that more than 50% of all employers had terminated employees for inappropriate use and abuse of e-mails. Other causes can be violation of company policies, sexual harassment, off-work criminal behavior, poor performance, and numerous other occurrences.⁵⁵

Discharge When an employee is removed from a job at an employer.

Termination Procedure

Dismissal of an employee can be problematic. The following practices can make it less difficult:

1. *Review evidence.* The disciplining manager, that manager's superior, and an HR representative should review the documentation and make the final determination.
2. *Select a neutral location.* Termination should occur in a neutral location, not in the supervisor/manager's office.
3. *Conduct the termination meeting.* The HR representative and/or the manager informs the employee of the reason for the termination. The manager and the HR representative should remain professional and calm, not be apologetic or demeaning.
4. *Have HR discuss termination benefits.* The HR representative explains the employee's final payroll and benefits. A specific letter can serve as evidence that the employee was notified of the termination decision and details of those rights.
5. *Escort the employee from the building.* This phase is controversial. The goal is to ensure that the employee, who is likely to be upset, is removed from the premises quickly without obvious conflicts or concerns about security.
6. *Notify the department staff.* The manager notifies the department staff that the individual is no longer employed. No details or explanations should be provided.⁵⁶

However, following terminations, HR professionals and managers may be faced with *wrongful termination* claims and lawsuits. These legal challenges can be based on federal, state, and local laws. From a legal standpoint, terminating workers because they do not keep their own promises is likely to appear equitable and defensible in many courts, but nevertheless, it is important for the employer to consistently document reasons for termination and to follow appropriate HR processes discussed earlier. Doing so can increase the possibility that the employer will win termination lawsuits.⁵⁷

Separation Agreements In some termination situations, formal contracts may be used. One type is a **separation agreement**, in which 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.”

For such agreements to be legally enforceable, the considerations usually should be additional items that are not part of normal termination benefits. For international employees, different legal requirements may exist in various countries, including certain requirements for severance pay and benefits. When using separation agreements, care must be taken to avoid the appearance of constructive discharge of employees. Use of such agreements should be reviewed by legal counsel.

Separation agreement

Agreement in which a terminated employee agrees not to sue the employer in exchange for specified benefits.

S U M M A R Y

- The employment relationship is a reciprocal one in which both employers and employees have statutory and contractual rights, as well as responsibilities.
- Contractual rights can be spelled out in an employment contract or be implied as a result of employer promises.
- Employment-at-will gives employers the right to hire and terminate employees with or without notice or cause.
- Courts are changing aspects of employment-at-will relationships through exceptions for violations of public policy, an implied contract, and good faith and fair dealing.
- Wrongful discharge occurs when an employer improperly or illegally terminates an individual's employment.
- Constructive discharge is the process of making conditions intolerable to get an employee to "voluntarily" quit a job.
- Just cause for employment-related activities should exist for taking appropriate employment-related actions.
- Although both due process and organizational justice are not guaranteed for the at-will employees, the courts expect to see evidence of due process in employment-related cases.
- Complaint procedures and due process is important for both unionized and nonunion employees. In nonunion situations, alternative dispute resolution (ADR) means may be used.
- Arbitrations, peer review panels, and ombuds also can be used to address disciplinary actions.
- Balancing employer and employee rights becomes an issue when dealing with privacy rights, access to employee records, free speech, and whistle-blowing situations.
- Employers increasingly are facing privacy, free speech, and other issues in electronic communications, including e-mails, twitters, blogs, wikis, voicemail, and other technology means.
- The rights of employees for personal behavior must be balanced by employers' rights, particularly in regard to individuals' display of behaviors, unique dress or appearance, and questionable off-duty actions.
- Employer investigations protect both employer and employee rights.
- Drug testing provides a useful and legal method for employers to deal with increasing drug problems at work.
- HR policies, procedures, and rules should be in employee handbooks and other communications means. Courts sometimes view employee handbooks as implied contracts.
- Absenteeism is expensive. It can be controlled by discipline, positive reinforcement, use of a no-fault policy, and paid-time-off programs.
- Although employee self-discipline is the goal, positive or progressive discipline is sometimes necessary to encourage self-discipline.
- The final disciplinary phase is discharge of an employee through termination, which might include a separation agreement.

C R I T I C A L T H I N K I N G A C T I V I T I E S

1. Identify how the issues of due process and just cause are linked to employer disciplinary actions.
2. Discuss the following statement: "Even though efforts to restrict employees' free speech at work may be permissible, such efforts raise troubling questions affecting individual rights."
3. Give some examples of how technology is creating employer/employee rights and policy issues. Then suggest some possible actions that may be needed.
4. Assume that as the HR manager, you have decided to prepare some guidelines for supervisors to use when they have to discipline employees. Gather the information needed, using Internet resources such as www.blr.com and www.workforce.com for sample policies and other details. Then prepare a guide for supervisors on implementing both positive and progressive discipline.

HR EXPERIENTIAL PROBLEM SOLVING

In developing a company workplace violence prevention program, management has become aware of concerns regarding a drug-free workplace. Several employees have recently come to HR requesting a leave of absence to enter a drug rehabilitation program. The managers were not aware of the substance abuse issues relating to these employees. Consequently, management recognizes that a drug-free workplace program will help improve workplace safety and health. These programs also play an important role in fostering safer and drug-free families and communities. To assist HR in developing a

drug-free workplace program, visit this website at www.dol.gov/workingpartners.

1. What are the key components that should be included in your company's drug-free workplace program to best meet the needs of both employees and the company?
2. Identify the steps a manager should take if an employee's actions create a suspicion that the employee has reported to work under the influence of substances.

CASE

Dealing with Workplace Bullying

Work-related responsibilities can be challenging for many employees, managers, and executives for numerous reasons. It is not uncommon for all of these people to face challenges in balancing personal and work-life demands, as well as extensive job demands. But the pressure can be increased when "bullying" by bosses or employees is present.

Bullying in workplaces occurs when people are insulted, frightened, pressured strongly by comments, or face numerous other questionable actions by others. The occurrence of bullying is extensive, according to some surveys. For instance, of more than 50 million workers surveyed, about 37% of them said they had been bullied at work. Many of the incidents were by executives, managers, or supervisors who were their bosses. Examples of bullying by bosses included criticizing employees personally with insults or yelling, and making excessive demands. In a smaller study in San Francisco, 45% of 1,000 employees said they had worked for bullying bosses. This illustrates that one important issue of HR policies is how to deal with abusive managers and supervisors.

The differentiation between a demanding, intense boss and one who is a bully is how behavior, comments, and actions are seen by employees. If a manager demands high performance of all workers, rather than just selected ones, this may not be seen as bullying. However, when a boss uses power and aggressiveness to consistently

insult and irritate a few people, the boss's actions may be seen as inappropriate. Conduct that can be seen as bullying includes:

- Frequent emotional comments and outbursts
- Use of "power" for self-interest rather than for job- and employer-related issues
- Aggressively demanding tasks and results from subordinates and other managers

A growing HR legal concern is if workforce bullying violates the civil rights of protected class members. Women, racial minorities, older people, individuals with disabilities, and others may be able to file equal employment legal complaints. More than a dozen states have introduced legislation to address bullying through "healthy workplace" requirements. Some lawsuits have been won by workers who have been bullied. For instance, an Indiana hospital employee won an award because of a surgeon who communicated through screaming, cussing, clenched fists, and by other inappropriate means.

However, bullying is not limited to that done by bosses. Employees can be disciplined for how they treat customers, clients, coworkers, and even their managers. Examples include inappropriate or nasty comments, gestures, and other actions.

It is important that employers adopt and reinforce antibullying codes of conduct and policies. Additionally, training all bosses and workers about inappropriate bullying actions can help to

reduce incidences of bullying. HR professionals should be proactive and take seriously individuals' complaints of bullying-related actions. Bullying

has always occurred in workplaces, but now it has grown into another important HR employer/employee rights and responsibilities issue.⁵⁸

QUESTIONS

1. Based on your work experiences, identify examples of bullying that you have observed by managers, supervisors, and/or coworkers. Discuss what was and was not done, both appropriately and inappropriately, by your employers.
2. If you were an HR professional doing training, what content and policies regarding bullying might you present to employees and managers?

S U P P L E M E N T A L C A S E S

George Faces Challenges

This case describes the problem facing a new department supervisor when HR policies and discipline have been handled poorly in the past. (For the case, go to [www.cengage.com/management/mathis.](http://www.cengage.com/management/mathis/))

Employer Liable for “Appearance Actions”

This case discusses a California court ruling on terminating a female for her personal appearance. (For the case, go to [www.cengage.com/management/mathis.](http://www.cengage.com/management/mathis/))

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