

How to Use Progressive Discipline to Enforce Workplace Safety Rules



What's At Stake: Why Progressive Discipline Is Crucial to OHS Compliance

There's no point in having safety policies and procedures (which we'll refer to collectively as 'policies') unless you use discipline to enforce them. In fact, as far as liability goes, having policies that you don't enforce is worse than having no policies at all because it demonstrates failure to meet your own standards.

Example: A subcontract worker standing on a cross-member of a scaffold falls off and breaks his arm and elbow. The constructor says it's not to blame because the victim broke an express rule requiring workers to stand on 2 planks when doing support work on scaffolding. But the Ontario court nixes the constructor's due diligence defence because while it had good rules, it didn't *enforce* them. Violations happened all the time and the constructor just looked the other way, promoting a 'culture of discretion' [*Ontario (Ministry of Labour) v. Reid & DeLeye Contractors Ltd.*, [2011] O.J. No. 3817].

But, while essential to OHS compliance, discipline is also fraught with legal peril under employment and labour laws, especially if the worker belongs to a union. Chances are, you'll end up having to defend your action before an arbitrator or court.

The good news is that there's a technique you can use to ensure that the disciplinary actions you use to enforce your safety policies stand up to legal challenge. Better yet, this technique can help you straighten out unsafe workers without *need for* litigation or arbitration. The technique is called progressive discipline and here's what you need to know to use it effectively.

What Progressive Discipline Is

Progressive discipline is a series of gradually sterner punishments. It usually starts with warnings for a first offence, mounts to suspensions and ultimately dismissal. At each stage you confront workers, explain what they did wrong,

impose the appropriate punishment and warn of more serious discipline if they fail to clean up their act.

Progressive discipline works best against workers who commit repeat offences that aren't egregious or immediately life-threatening, such as not wearing hardhats or safety glasses. It's not appropriate for seriously dangerous safety violations that call for stronger and more immediate action even if they're a first offence. Arbitrators and courts will generally allow you to dispense with the warnings and suspend or even dismiss a first offender if the potential consequences of the safety violation are serious enough and if you punish all similar offences the same way, lawyers say.

By the same token, you need to consider 'mitigating factors,' that is, circumstances calling for more lenient treatment like long service, lack of previous offences, admission of wrongdoing and remorse. In short, you must apply progressive discipline flexibly, not by the numbers and make sure each of your decisions is justifiable and consistent.

Setting the Stage for Progressive Discipline

You must notify workers in advance that you use progressive discipline and explain the steps. If workers belong to a union, you'll likely have to negotiate the terms as part of the collective agreement. If workers are non-union, you should be able to impose the terms but need to ensure you clearly communicate them to workers as part of your HR policies or manual. [Click here for a Model Progressive Discipline Policy](#) that you can adapt.

You also need to keep records'memos, letters, notes from supervisors, photographs, etc.'each time you apply the policy and discipline a worker to justify the action and ensure you can defend it in court or arbitration. This is especially important if you wind up terminating the worker. You'll be courting disaster if you try to reconstruct events during the proceedings without written documentation to back you up, lawyers warn.

How to Implement the 4 Stages of Progressive Discipline

A basic progressive discipline policy provides for at least 4 levels of punishment: verbal counseling, written warning, suspension and termination. But there's no one way to do it and policies may vary depending on the company and collective agreement. For example, you may provide for multiple written warnings or impose an intermediate penalty like demotion between suspension and termination. For simplicity's sake, let's focus on the basic 4-level policy.

Step 1: Verbal Counseling

Workers who commit safety violations should get verbal counseling. While it's akin to a warning, counseling is a softer, non-disciplinary process in which you simply have a conversation and bring a problem to the worker's attention. Specifically, you need to:

Explain specifically what the worker did wrong (or didn't do right) and why it's a problem.

Ask for an explanation. Make sure the violation isn't the result of a misunderstanding. For example, the worker may not have been trained how to use

the equipment properly and the counseling should be directed to the supervisor. Lack of communication can lead to precisely what you want to prevent—a legal dispute. And getting the worker's side of the story will also help you prepare in case a grievance or complaint is filed.

Ask the worker not to do it again. Don't be hostile during counseling and keep in mind that your goal is to correct, not punish, especially at this stage when you don't know if you're facing a chronic problem or an isolated incident.

Write a memo describing what you said and the worker's explanation. Give a copy to the worker and the union and keep another copy in your files. [Click here for a Model Note to files documenting verbal counseling.](#)

Step 2: Written Warning

If the worker commits a safety violation after receiving verbal counseling, escalate by issuing a written warning:

- Remind the worker of previous counseling and briefly describe the circumstances;
- Indicate that you're issuing the written warning because of the worker's failure to heed the previous counseling;
- Explain what the worker did wrong;
- Warn of further discipline if the problem continues; and
- Ask the worker to sign the warning to acknowledge receipt and understanding of the warning.

Keep a copy of the signed warning in your files and give a copy to the worker and the union, if there is one. [Click here for a Model Warning Letter.](#)

Step 3: Suspension

When and if the worker violates another safety rule, send a formal suspension letter.

- Summarize the previous incidents;
- Say how many days you're suspending the worker without pay;
- Make it clear that this is the final warning and that further misconduct may result in dismissal; and
- Send the letter to the worker and the union via certified mail, return-receipt requested.

Keep a copy in the files. [Click here for a Model Suspension Letter.](#)

Step 4: Dismissal

If the problem continues, be prepared for the ultimate stage of progressive discipline: dismissal. Tell the worker you want to hold a formal meeting to discuss dismissal. The worker can then decide whether to have a union official or other representative attend.

At the meeting, go over all previous incidents and disciplinary actions. Indicate that the worker hasn't responded to the previous discipline and that the problem persists. Describe the most recent incident and cause dismissal. Give the worker or representative a chance to respond. If you're dissatisfied

with the explanation, indicate that the worker is terminated.

Take careful notes of everything that happens at the meeting. Make sure at least one member of management attends as a witness. When the meeting ends write a final memo for the files summarizing what took place including your case and the worker's defence. If you send the worker a formal termination letter, be careful not to say anything that may box you in if the case goes to court or arbitration. For instance, indicate that the listed reasons for termination are 'partial and not exhaustive,' in case you want to bring up other grounds during the proceeding.