

Does Inconsistency Always Kill the Cat?

Article By:

Spoiler alert - this article doesn't have anything to do with cats. But it is about something you hear all the time from employment attorneys. You have to be consistent when it comes to enforcing your attendance policies and plant rules. **You have to treat all employees the same.** If you don't, there is a huge risk you won't be successful in defending your disciplinary decisions in **labor arbitrations and employment litigation**. As a general rule, this is excellent advice.

Does this mean, though, that you absolutely have to be consistent 100% of the time? If you make an exception to your attendance policy by giving a particular employee one last chance (other than for reasons relating to the ADA or the FMLA), will that be the end of your ability to enforce the policy?

Will excusing a violation of a plant rule in one instance mean you can never enforce it? Will your company be a victim of the "no good deed goes unpunished" rule?

The answer is that if you make exceptions sparingly, and wisely, you will probably be okay. Here are some tips that will put you in a better position to defend the (very) occasional exception:

1. Make sure you have a compelling reason for making an exception, something that really makes this employee's situation very different from other cases (e.g., some combination of a long service employee, an otherwise outstanding overall record, and a believable and sympathetic explanation from the employee as to why there was a problem and why it won't be repeated).
2. Document why you made an exception. Two years from now, when you are defending an employment litigation and the plaintiff is pointing out how he/she was treated "worse" than the employee for whom you made an exception, you will be in a far better position to remember and explain why you made the exception, and have a judge or jury decide the exception shouldn't be held against you, if you have contemporaneous documentation explaining the exception.
3. Be extremely judicious in your use of exceptions. If lack of consistency becomes the rule, rather than the exception, you are going to have a very hard time enforcing your policies and rules.
4. Make sure the circumstance in front of you today (when you are not making an exception)

really is different from the circumstance where you made an exception two years ago. In other words, if the employee you are considering disciplining now is in substantially the same boat as the employee for whom you made an exception, you should rethink whether to impose the discipline.

None of this is meant to minimize the problems that can be caused by inconsistent treatment. Even the [EEOC](#), however, recognizes that there are circumstances where disparate treatment is justifiable. Enforce your rules and policies consistently, but don't be afraid to make an exception where circumstances, and fairness, demand it.

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National Law Review, Volume IX, Number 217

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