

Chapter 11

Complaint procedures

Although employers are not legally obligated to provide their employees with an internal grievance procedure, many choose to do so in an effort to satisfy employee complaints and to stave off union organizing campaigns. Employees who feel they have no way for their workplace problems and concerns to be heard are more likely to turn to a union for assistance in obtaining a means to voice their concerns. On the other hand, employees who are satisfied that their employer is concerned about issues affecting them and will make a good-faith effort to resolve legitimate grievances are less likely to be interested in a union or in filing a lawsuit. The problem solving procedure is designed for employers who are relatively free from concerns about unionization, while the fair treatment procedure, which reads more like a typical collective bargaining agreement grievance procedure, is designed for employers with a greater expectation of union organizational activities.

An internal grievance procedure also may have advantages for an employer in the context of discrimination claims. An employee who has access to an internal complaint policy and procedure may be less likely to turn first to an outside agency for assistance. Further, if an employee alleges discrimination or harassment but fails to utilize the employer's internal complaint procedure, this could help the employer demonstrate that the employee did not truly believe she was being harassed or discriminated against and that the employee was not adversely affected by the alleged harassment or discrimination. This is especially critical in the context of harassment claims, where the existence of an effective complaint procedure is a key element of an employer's potential affirmative defense to harassment claims.

The no retaliation statement contained in the sample fair treatment procedure gives employees assurance that the employer will not retaliate against them for making a complaint or filing a grievance. Such a statement could be beneficial to an employer involved in a lawsuit with a former employee who claims that he or she was afraid to use the grievance procedure for fear of recrimination. The no recrimination statement allows the employer to refute such an assertion by demonstrating that the company's policy forbids such retaliation.

THESE ALTERNATIVE POLICIES ARE LEGALLY DESIRABLE

SAMPLE COMPLAINT POLICY

(Option 1)

Problem Solving Procedure

ABC Company is concerned with any situation affecting the employment relationship. The Company is committed to correcting any condition or situation that may cause unfairness or misunderstanding. It is inevitable that problems and misunderstandings may occur. Therefore, the Company has provided an orderly manner for an employee to voice an opinion or discuss a problem with management without prejudice or fear of retaliation.

If an employee has a problem or complaint, the employee should discuss it with his or her immediate supervisor as soon as possible.

If the problem is not satisfactorily resolved or the problem is with the supervisor, the employee has the right to discuss it with his or her department manager.

If the problem still is not satisfactorily resolved, the employee then has the right to discuss it with the Human Resources manager.

If the problem still has not been satisfactorily resolved, the employee may make an appointment to discuss the situation with the president of the Company for a final resolution. The Human Resources manager will assist the employee (if requested) in the presentation of the problem to the president.

Not all complaints can be resolved to everyone's satisfaction. However, in each case, the reason for the decision will be clearly explained to the employee. Also, Human Resources personnel are available, at any time, to discuss and/or provide assistance on any complaint, problem, or concern that an employee may have.

No one may criticize you, penalize you, or treat you differently in any way for using this problem solving procedure.

SAMPLE COMPLAINT POLICY

(Option 2)

Fair Treatment Procedure

ABC Company intends to treat each employee fairly. We will do all we reasonably can to make this a good place to work. If you have a problem or complaint concerning your employment, or if you believe you are not being treated fairly, you are expected to take the appropriate steps, as set forth below, to see that the matter is resolved. Remember, even if you think your supervisor should be aware of your problem, your problem may not be resolved unless and until you take the appropriate steps.

Procedure

1. **First Step.** Any problem or complaint concerning wages, hours, working conditions, fair treatment, or other work-related matters ordinarily should be raised first with your immediate supervisor. It is important that any problem be discussed with your supervisor immediately – if possible within three working days of the date you first learn of the basis for your complaint.

You may, if you wish, file a formal grievance concerning any complaint about wages, hours, working conditions, fair treatment, or other work-related matters. This is done by filling out the pink form indicating that you wish to file a grievance, then giving that form to your supervisor. You then have the option of writing up the grievance yourself or, if you wish, having another employee or your supervisor write up the grievance.

Your supervisor will then discuss the grievance with you in an effort to resolve your grievance, unless you wish to proceed directly to the Second Step.

All grievances, whether written up by the employee or the supervisor, must be submitted by the supervisor to the plant manager, along with all relevant information, within 24 hours of its filing, even if the complaint is resolved to the employee's satisfaction. Regardless of the outcome of the grievance discussion with the supervisor, the plant manager will schedule a follow-up interview with the employee within three working days of receipt of the grievance form. If the plant manager does not follow up with you, then you should contact the plant manager about the matter immediately.

2. **Second Step.** There may be times when the nature of a particular problem is such that you do not feel you can discuss it with your supervisor, your supervisor does not give you a prompt answer, or your supervisor does not give you a satisfactory answer. If so, then you should take your problem directly to the plant manager by arranging an appointment with him or her.

When discussing your complaint with the plant manager, you may, if you wish, bring along a co-worker to assist you in presenting your problem. The plant manager will attempt to resolve your concerns as well. The plant manager also will make a record of the discussion, which will be submitted to the president within 24 hours.

3. **Third Step.** If your problem or complaint has still not been resolved to your satisfaction in the Second Step within three working days, then you should take your problem directly to the president of the Company by arranging an appointment with him or her. When you discuss your complaint with the president, you may, if you wish, bring along either your supervisor, the plant manager, or one co-worker to assist you in presenting your complaint.

The president will give you an answer within 24 hours of the discussion, or if he or she is away from Company premises on business, within 24 hours of his or her return. The president's decision on any grievance or complaint will be final.

No Recrimination Statement

No one may criticize you, penalize you, or treat you differently in any way for using this fair treatment procedure.

This procedure is not intended to prevent you from discussing any matter with any level of management, including the president, at any time, but you are encouraged to follow the procedure as set forth in the First, Second, and Third Steps of this policy.

Jury waiver provision

Employers who have not been satisfied with arbitration agreements may want to consider implementing a jury waiver agreement as an alternative dispute resolution tool. Used as an alternative dispute resolution tool, the employer requires employees to sign a jury waiver agreement as a condition of employment. The agreement could be included in the employment application.

Under a jury waiver agreement, employees retain all substantive and procedural rights to sue their employers, except the right to request a jury. Instead, they agree to have their claims tried before a judge, who is the ultimate decision-maker. The judge decides all

motions as if the case were ultimately being tried to a jury. All possible remedies remain available to the employee; the only difference is avoiding the risk that a jury might award high compensatory and punitive damages based on emotion or anti-corporate sentiment. If the judge errs in making a judgment, appeals are subject to full review – just as in jury cases. This is a key difference between decisions under jury waiver agreements and arbitration decisions; the latter are subject to a very limited standard of review.

A study released in April 2004 by the U.S. Department of Justice strongly supports the premise that employers fare better in bench trials (cases heard by a judge) than in those heard by juries. The study, which analyzed civil trial cases and verdicts in seventy-five of the country's largest counties from 2001, found that winning plaintiffs in employment discrimination cases received a median award of \$218,000 from juries, but only \$40,000 from judges. In addition, jury trials lasted 4.3 days on average, compared to only 1.9 days for bench trials. Just as important, the time between filing the case and its ultimate disposition was shorter with non-jury cases. During 2001, 78 percent of bench trials were disposed of within 24 months of filing, compared to only 57 percent of jury trials.

Some courts have enforced jury waivers in employment agreements, but the case law is limited. Employers should consult with legal counsel before implementing a jury waiver, to determine whether such a waiver should be included as part of the application for employment or presented in some other context, such as part of an agreement to mediate workplace disputes at the employer's cost.

THIS POLICY IS OPTIONAL

SAMPLE JURY POLICY

Employee and ABC Company hereby knowingly, voluntarily and intentionally waive any right either party may have to a trial by jury with respect to any action or proceeding related to or arising out of Employee's employment with ABC Company, including without limitation the termination of Employee's employment with ABC Company.