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Factors to Consider When Disciplining People for a Compliance Violation

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The chart below chart appears in the Society of Corporate Compliance and Ethics' *The Complete Compliance and Ethics Manual 2024*.^[1] It's part of an article excerpted below, and was written by Theodore Banks and Gretchen Winter.

Attributes of the Disciplinary Program

A decision about employee discipline will usually come about after an investigation of an alleged wrongdoing. Although beyond the scope of this chapter, it is important to note that the investigation process must be conducted by competent and fair individuals. They do not need to be lawyers, but they should be trained in the basic elements of conducting an investigation. The people who investigate should prepare a report of their investigation with the facts they have uncovered, but the investigators are not usually the ones who determine the punishment for the violation.

After there has been a determination of misconduct (whether or not it resulted in criminal liability) the decision about the extent of discipline will depend on several factors. Employees should be warned in advance that violation of laws and company rules will subject the employee to discipline, up to and including termination.

Punishment for a compliance infraction can take a variety of forms, including training, verbal warnings, written reprimands, job reassignment, suspension with pay, suspension without pay, and termination. The severity of the punishment would depend on several factors, including the type of violation and its effect on the organization, and the impact of the violation on other employees. For repeat offenders, the severity of the discipline can be increased on subsequent occurrences. The organization's history of discipline for the violation may be a guide, except in instances where there is a history of not imposing punishment for an obvious violation.^[2]

When imposing discipline for a compliance violation, the employer should act reasonably promptly. Here are some of the factors that can be considered:

Attribute	Impact	Comment
The employee committed the infraction due to ignorance.	Mitigating	If the employee was ignorant of the impropriety of their actions and the company had failed to inform the employee, this should be a mitigating factor unless the act was commonly known to be improper.

The employee committed the infraction willfully.	Aggravating	If the employee knew the conduct was wrong but went ahead regardless, this factor may be considered an aggravation.
The employee certified that they would follow the applicable company policy.	Aggravating	This indicates that the employee knew the conduct was wrong but went ahead anyhow, or the employee signed a certification with no intent to pay attention to the substance of what was signed.
The employee had a senior management position.	Aggravating	Managers have an obligation to lead by example, and, based on their position, can cause great harm to the organization.
The employee was directed to engage in the conduct by a manager.	Mitigating	The extent of the mitigation might also depend on the degree of the employee's knowledge about the impropriety of the act and the threats (implicit or explicit) from the manager.
The employee obstructed the investigation.	Aggravating	The investigation policy should make it clear that all employees are expected to cooperate in internal investigations.
The employee retaliated against a whistleblower.	Aggravating	A compliance program depends on the security that employees feel knowing they can come forward and report suspected wrongdoing. Retaliation undermines the foundation, and it is also a signal that the retaliator was trying to deter or cover up disclosure of wrongdoing.
The employee cooperated in the investigation.	Mitigating	An investigation in which the employee cooperates is more likely to achieve a fair and accurate result, and an incentive for cooperation can be a motivator.
The employee was a mere bystander.	Mitigating	The employee's minor role in the violation can be a mitigating consideration; instigation of the violation may be an aggravating factor.
The employee had not committed an infraction previously.	Mitigating	Repeat offenses would be an aggravating factor.

The manager consciously disregarded wrongdoing.	Aggravating	“An individual was 'willfully ignorant of the offense' if the individual did not investigate the possible occurrence of unlawful conduct despite knowledge of circumstances that would lead a reasonable person to investigate whether unlawful conduct had occurred.” USSC § 8A1.2, Application Note 3(J)
The employee was motivated by personal gain.	Aggravating	The employee was willing to damage the organization for personal benefit.
The employee observed other employees engaging in the same conduct.		This is not a justification for the conduct, but it may go to the issue of corporate culture and whether there was an adequate education and business control system in place.
The employee intentionally avoided training on the subject.	Aggravating	This shows a disregard for the compliance program, and there should be consequences.
The employee engaged in the action due to financial hardship.	—	Not a justification, but a reminder to the organization that it should have systems in place to assist employees with personal problems (e.g., employee assistance programs for drug abuse) or financial problems (e.g., credit unions available to make hardship loans).
The violation was severe.	Aggravating	The aggravation (or mitigation) should be in proportion to the seriousness of the violation.
The violation caused material or personal damage/injury.	Aggravating	The aggravation (or mitigation) should be in proportion to the extent of the injury/damage.
The manager negligently failed to stop violation.	Aggravating	Awareness combined with a failure to act shows a breach of the manager's duties.

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