

**Note: Delete this page and following pages (total 3 pages) once you complete tailoring the template for your own business**

The Performance and Misconduct Policy sets out the process to correct unacceptable performance or conduct (other than in situations where summary dismissal is appropriate).

Having a company performance and misconduct policy provides some protection from claims for unfair dismissal or, in the case of award-free employees, claims of wrongful dismissal or breach of contract under common law.

It is important the employer defines the type of behaviour it considers to constitute misconduct in the workplace. Applying the proper process under the policy is also important when conducting, say, an investigation into an employee's alleged misconduct.

### **Small businesses**

Employers with **fewer than 15 employees** are also able to use the Small Business Fair Dismissal Code (*available on the ACFA website under the Workplace Resources Tab/Performance Management*) when terminating an employee's employment. However, the Performance and Misconduct Policy offers more comprehensive guidance and can be used by both small and large employers.

### **Related documents**

- Code of Conduct

This template describes the minimum standards of behaviour and conduct expected from employees and contractors in their dealings with customers, clients, co-workers, management and the general public.

### **Talking points**

#### **1. What does 'misconduct' really mean?**

There are various degrees of behaviour which fall under the general description of 'misconduct', ranging from employee behaviour justifying a first warning to behaviour justifying summary dismissal. The common law has long recognised that where an employee is guilty of a serious act of misconduct the employer does not have to provide the employee with the period of notice of termination and may forfeit certain entitlements normally due on termination of employment.

#### **Definition of 'serious misconduct' – Fair Work Act**

The Fair Work Regulations 2009 (reg 1.07) defines 'misconduct' as:

wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment; conduct that causes serious and imminent risk to the health and safety of a person, or the reputation, viability or profitability of the employer's business; theft; fraud; assault; the employee being intoxicated (alcohol or drugs, other than prescribed drugs) at work; and the employee refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment.

The courts have generally determined that "misconduct" involves something more than mere negligence, error of judgement or innocent mistake.

Both in law and in ordinary speech the term “misconduct” usually implies an act done wilfully with a wrong intention, and conveys the idea of wrongful intention. Whether a particular course of conduct will be regarded as misconduct is to be determined from the nature of the conduct and not from its consequences. It has also been said to mean ‘wrongful, improper or unlawful conduct motivated by premeditated or intentional purpose or by obstinate indifference to the consequences of one’s acts’.

## **2. Breaching the company policy**

Not every breach of policy will provide a valid reason for termination of employment. However, in circumstances where the policy is both lawful and reasonable and an employer has stressed the importance of the particular policy to the business and made it clear to employees that any breach is likely to result in termination of employment, then an employee who knowingly breaches that policy will have difficulty making out an argument that there is no valid reason for termination. See *Woolworths (t/a Safeway) v Cameron Brown PR963023 [2005] AIRC 830*.

### **Getting it wrong**

The NSW Court of Appeal ruled the ANZ Bank required objective evidence of serious misconduct to justify summary dismissal of an executive. It could not just rely on an assessment by senior management. This contravened the internal investigation rules under the company’s serious misconduct policy. The executive was awarded \$110,000 damages. See *Bartlett v Australia and New Zealand Banking Group Limited [2014] NSWSC 1662 (24 November 2014)*

### **General Information**

- Employers can manage these risks in the following ways:
- the employee should be given sufficient particulars of the concerns or allegations regarding their performance or conduct;
- the employee should be given an adequate opportunity to respond to any concerns or allegations;
- the employee should be given advance notice of any disciplinary meetings/interviews;
- the employee should be able to have a support person at any meeting if they wish;
- the employee’s response to the concerns or allegations should be considered and any further enquiries or investigations should occur promptly; and
- whatever the form of the disciplinary action (eg written warning, dismissal), the employer should ensure that the reason(s) is/are valid. That is, the reason(s) should be sound, defensible and well founded. The reason(s) should not include any considerations that constitute unlawful discrimination.

### **How to complete this template**

#### **Designed to be customised**

It is completely customisable based on your specific requirements.

#### **Include what you must and can comply with**

This document should be used in conjunction with your contract of employment, and any specific company procedures and processes. Only include the commitments you are confident you can comply with, make sure you update and review the document regularly.

**Important:** You may have legal obligations to your employees under an employment or industrial agreement such as an award, workplace agreement or employment contract. Make absolutely certain what's written in this document is consistent with these. If you're unsure what covers your employees, ACFA Members can contact ACFA's workplace advice team on 1300 342 248 or on 02 4340 2000 for further advice/assistance.

**To complete the template:**

1. Using Word's Replace function, search for (INSERT COMPANY NAME) and replace with your company name.
2. Replace (items in brackets) with your own wording.
3. Once you have finished work on the template, delete the first TWO pages of the document.

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## Performance and Misconduct Policy

### 1. Purpose

- 1.1 The objectives of (insert company name) Performance and Misconduct Policy ('Policy') are to:
- a) improve the standard of an employee's performance and/or correct an employee's conduct where (insert company name) deems this appropriate or necessary; and
  - b) provide employees with an opportunity to improve their performance or correct their conduct (other than in situations where summary dismissal is appropriate).

### 2. Commencement of Policy

- 2.1 This Policy will commence from XX/XX/XXXX. It replaces all other performance and misconduct policies of (insert company name) (whether written or not).

### 3. Application of the Policy

- 3.1 This Policy may be varied from time to time by (insert company name). This Policy does not form part of any employee's contract of employment.
- 3.2 This Policy may be used as guidance for the process or manner in which (insert company name) may discipline an employee because of their poor performance or inappropriate conduct in any circumstances that can be connected to, or impact upon, (insert company name).
- 3.3 Consequently, employees need to ensure that they exhibit appropriate out-of-work conduct where the circumstances or event can be connected to (insert company name), such as a work-related function.
- 3.4 A work-related function is any function that is connected to work and includes events such as work lunches, dinners, conferences, Christmas parties and client/customer functions. This Policy also applies when employees go to other workplaces in connection with work, for example, when visiting a supplier, client or customer.
- 3.5 If an employee's conduct involves a potential breach of any Australian law, (insert company name) may notify the police or other relevant government authority.

### 4. Grounds for disciplinary action

- 4.1 Disciplinary action may be taken in response to any:
- a) unsatisfactory performance;
  - b) unacceptable conduct; and
  - c) wilful or serious misconduct.

**\* This is only a preview of the document, you will need to purchase the document to see all the content.**

*\*Please Note: As a Business Plus or Premium ACFA Member you can download all the policies on our website for free or have them customised specifically for your business at no additional charge. ACFA Members can also request policies and resources which are not on our website through our HR Department. This is just one of the many services that are included with our annual membership subscription.*