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Problem Employees – Develop or Dismiss?

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Richard D. Alaniz, JD • Jun. 14, 2021



Not until the last several years, while intermittently dealing with an acute lack of available applicants to fill job vacancies, have employers begun to more frequently

struggle with the decision of whether to discharge a poor-performing or problem employee or give the employee yet another chance. While always a distressing event, while there was an continuous stream of job-seekers applying, and the knowledge that employees were employed at will – the relevant concerns about terminating an employee did not include serious ramifications on operational capacity.

However, by early 2020, shortly before the Coronavirus shattered our world, the unemployment rate had fallen to approximately 4%, its lowest point in almost 50 years. An estimated 7 million jobs remained. Employers in almost every industry were desperately seeking to retain current employees and attract new employees through measures including wage increases. More employees were voluntarily leaving to jump to another job than at any time since 2001. Many new hires never even completed their probationary period before leaving for greener pastures.

The COVID-19 pandemic turned the job market upside down almost overnight. The mandatory closure of all but essential businesses forced millions of people out of work. The unemployment rate promptly rose to over 14% nationally and substantially higher in some, localized markets. While the unemployment rate has fallen to around 6% due to the ongoing reopening of businesses across the country, millions remain unemployed. Despite this fact, many employers in a variety of industries are still reporting difficulty in finding new hires. As the economy continues its recovery, competition for workers will intensify, exacerbating the hiring problem.

Replacing employees, no matter the reason for their departure, is costly and time-consuming. In addition to the direct costs of recruiting, hiring, and training of new employees, there are the indirect and hidden costs of lost productivity and diminished employee morale among the remaining, overworked employees who may question whether they too should be seeking other employment.

While employers may not be able to prevent the voluntary departure of an employee seeking a perceived better opportunity, employers can control the loss of an employee in what may be an unnecessary or hasty termination. Discharging someone who is underperforming or has violated work rules may seem to be a necessary and commonplace event at first blush. However, given today's highly litigious environment, even a routine discharge generates a certain degree of risk. No employer action has a greater likelihood to precipitate legal scrutiny than firing an employee.

The number of workplace laws and regulations protecting employees from unfair or arbitrary termination, and the number of federal and state agencies that enforce them has never been larger. Employment related legal actions are among, if not the most, frequently filed today. Whether they are administrative charges filed with workplace enforcement agencies or lawsuits filed in the courts, they can be astronomically costly to defend even when the employer's actions were perfectly lawful.

There are obviously some circumstances where the dismissal of an employee is the only viable option. Severe threatening or harassing conduct, acts of violence, theft, serious or continual insubordination, and similar serious misconduct cannot be tolerated. Yet in many cases the situation is not one of flagrant or serious misconduct. Attendance issues are the single largest cause for employee terminations. Given the potential for legal fallout and the costs of replacing someone, especially in a tight labor market, perhaps a better alternative, at least in some cases, would be to rehabilitate the problem employee. Helping an employee through performance or conduct issues to become a productive member of the team could often prove much more rewarding and certainly more cost-effective than summarily ushering them out the door.

Unfortunately, there is typically no speedy or simple process for developing a problem employee into a model participant in the workforce. It requires the time and careful attention of someone close to the issues, usually the employee's immediate Supervisor or a competent and conscientious Lead Person. Whoever acts in this role should have an intimate knowledge of the job and how it should properly be performed. They should also be in a position to observe and promptly correct any conduct issues that may persist. In addition to the personal coaching and guidance needed, the supervisor/lead person should also be prepared to use progressive discipline if necessary.

When properly utilized, progressive discipline can help correct and extinguish unacceptable performance or behavior problems well before they leave no possibility other than termination. At each stage of the progressive discipline process, if problems continue, the candid conversation with the employee should be commensurate with the level of discipline being issued. Too often this type of critical, pointed discussion does not occur, or is so perfunctory as to be of little or no effect in actually correcting the offending behavior. To be successful the employee requires much more clarity.

Employers attempting to salvage a problem employee also sometimes fail to take advantage of other available processes to address performance issues. One recommended step used by numerous employers is a Performance Improvement Plan (PIP). These should be considered any time an employee is struggling. Employers can implement PIPs for a wide range of reasonable time periods and include whatever benchmarks the employer deems appropriate to track and measure the employee's progress.

It should provide the employees the information needed to understand his/her performance deficiencies, the performance goals, and the actions necessary to meet the performance and behavior goals. In the unlikely event that the personalized coaching and a PIP are unsuccessful in achieving the desired progress and termination is looming, the employer may want to consider a "last chance agreement." As with a PIP, it can be for whatever length of time and can include any benchmarks that the employer feels are suitable.

The understanding is that any continued unacceptable performance or behavior will automatically result in immediate dismissal. Ultimately, the goal is to avoid losing an employee who, if given the opportunity (or even opportunities) and needed guidance, can become a productive team member, helping to contribute to the success of the business.

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Mr. Alaniz has been at the forefront of labor and employment law for more than 40 years representing employers in a variety of industries. He began his legal career in the Office of the Solicitor of the U.S. Department of Labor enforcing the Fair Labor Standards Act (FLSA) as well as the Occupational Health and Safety Act (OSHA), served on the President's Cost-of-Living Council, and has held prominent posts within the National Labor Relations Board (NLRB). Following his time in these roles with the federal government, Mr. Alaniz has worked in private practice and spent decades representing employers across the country. Mr. Alaniz is Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization, and he is a member of the state bars in Wisconsin, Nebraska, Colorado, and Texas. He contributes dozens of articles per year on labor and employment law to trade journals and conducts numerous seminars each month for client companies and

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