

What should you do if an employee gets arrested?

by Susan K. Lessack, Pepper Hamilton LLP

It's Monday morning, the coffee has yet to be brewed and already a huge problem has dropped onto your desk.

An employee left a voice mail saying he has been arrested. He doesn't say what happened, but the very next message is from a local newspaper reporter asking for details about the employee's work history.

The office rumor mill is up and running, with whispers of the arrest and a possible firing.

After the initial shock wears off, the employer has to figure out what to do next, not only about the arrested employee but also all of its other employees, who are no doubt watching to see how the employer will react.

With a record number of Americans now in prison—almost 2.2 million in federal or state penal institutions—and crackdowns underway nationwide against drugs and drunk driving, more employers are finding themselves unprepared to answer the question: “What do I do now that one of my employees got arrested?”

Gut instincts may be wrong

Pure instinct and knee-jerk firings or suspensions can lead to bigger problems, particularly if the charges against the employee should later prove to be false. Instead of reaching for a pink slip, employers need to reach for the telephone.

The first step is to consult legal counsel.

As to the employment issue, take a step back and consider all available options before making any decision on the worker's job status.

Also, be mindful of the arrested employee's rights. Making the wrong decision can result in a costly lawsuit and/or a demoralized staff.

6 steps and questions

In addition to consulting legal counsel, here are the do's and don'ts of handling employee arrests, plus some questions employers must consider:

1. **Don't talk to uninvolved third parties, such as the media or nonmanagement employees.** You're obligated to safeguard employees' legal rights, including not harming their reputations. Disclosing unnecessary information could result in a defamation claim if the employee is later acquitted or the charges are dropped. If employees don't have supervisory or decision-making status, don't include them in discussions related to a colleague's arrest. Under no circumstances should employers discuss an employee's arrest with the media or anyone who doesn't need to know about it.
2. **Determine the seriousness of the offense.** Employers are typically more tolerant of alleged crimes

involving poor judgment, such as recreational drug possession charges. But they're more likely to take disciplinary action against an employee who is accused of a more serious charge, such as one involving violence or dealing drugs.

3. **Consider whether the alleged offense relates to the employee's job.** If it does relate to the job, then you may be more justified in terminating the employee.
4. **Determine whether a contract or union ties your hands.** Employment or union contracts may limit your organization in pursuing a termination or other disciplinary action. An employment agreement might cite specific grounds for termination, and an arrest may not be among them, meaning an employer could face financial exposure for terminating an arrested employee. Taking action against a unionized employee usually must satisfy a "just cause" standard in a collective bargaining agreement. If the union feels this standard hasn't been met, it might file a grievance. This may be the case if the alleged offense occurred outside the workplace.
5. **Consider the arrest's potential impact on your work force.** Co-workers may be reluctant to work next to someone accused of a violent or other serious crime. Some businesses may not want such a person selling their products or interacting with their customers.
6. **Treat the arrested employee fairly.** Management must be aware that other employees are monitoring the situation closely to see how it is being handled. They will be watching to see whether the arrested employee is fairly treated, and whether the employer reviewed all of the facts related to the case before making any disciplinary decision. Ultimately, employees are concerned about how *they* would be treated by management if they are ever in the same situation.

Bottom line: Should you get that dreaded Monday morning phone call, take a deep breath and consider all the options before making an employment decision.

It might just save your company from a costly lawsuit—and save your employee embarrassment should the allegations prove false.

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