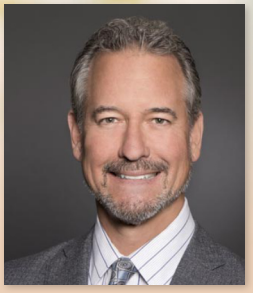
When HR Is Caught In The Middle Of Employee Issues – What DO you do?



Jonathan Fraser Light is the Managing Attorney of LightGabler, specializing in representation of management in employee claims and providing day-to-day advice and counsel to keep out of litigation. He may be reached at jlight@lightgablerlaw.com.

"Senior Management" wants Mike fired NOW. He's been a poor employee for months, but of course no one alerted HR, no one wrote him up, no one even told him he was underperforming. He's been there for five years and received decent reviews for overall mediocre work and attendance -- because most managers don't like confrontation and often managers inflate review grades. Mike is 55, has some health issues, and his new supervisor is in a different ethnic category.

So where is the good news here? There isn't any. And some of you weren't supposed to be in HR in the first place; you were just the smartest person in accounting who got tabbed, "You're it!" to learn HR and handle all that entails. That's a relatively common approach in smaller companies who can't really afford (or need) a full-time person dedicated exclusively to HR.

If HR "mishandles" Mike's departure, Senior Management blames HR when the lawsuit comes and the employment practices liability insurance is cancelled or the carrier raises the premium astronomically. So, how do HR folks bring Senior Management around to a safer departure approach, proper documentation and, God forbid (according to Senior Management), offering severance in order to get a release of claims?

One of my favorite approaches is to suggest a bang-up probationary memo (performance improvement plan, or PIP) coupled with a strong suggestion to Mike that he might want to consider taking some severance ("If we can persuade Senior Management" – approval for which HR should already have). Of course, Mike must sign a release to get the money. But, he may well jump at severance to avoid trying to survive a daunting set of requirements in the probationary memo. You generate the laundry list of problems and we incorporate them into one of my patented probationary memos that, among other things, requires the employee to provide a written response to the probation as to how he intends to improve, what he needs from the company to achieve improvement, etc. The employee's response, if any, will speak volumes about whether they are committed to the process.

If Senior Management still insists on Mike's termination, you'll need to prepare a termination memo to him chronicling, usually more gently than in a PIP, the infractions driving the decision. No, you can't just call it a layoff or say "It's not working out," "We're going in a different direction," "Your job is eliminated - just ignore the Indeed ad we posted to fill your position," etc. If you go with the vague mush above, what happens when Mike sues for wrongful termination? You have no documentation of the business reasons why you let Mike go. Now, you're back-filling with this information and it looks manufactured. It is ALWAYS appropriate to provide specific reasons, with examples, of the business decision to terminate. Even if it's a job elimination, you picked Mike because he was a weak performer and whatever he was doing can be absorbed elsewhere and you don't have anything else for him. Explain all that in simple terms. You can also allow Mike to call it a

"resignation" for public consumption. He will still receive unemployment benefits, as a "resignation in lieu of termination."

Under either strategy, you still must convince management to put some severance money on the table. As laid out in my last installment, you don't want the employee going to an attorney and have this blow up into a major one-off lawsuit or class action.

So what are your talking points with management? Here are a few:

1. "No, 'at-will' isn't a 'thing' that will fully insulate the company. We need a reason, documented. If the employee claims any of the wrongful termination tort claims—harassment, discrimination, retaliation—at-will isn't a defense even if he is new. You are required to lay out the legitimate business reasons for the decision in order to protect against such claims; and that's best done in writing."

2. Juries, opposing counsel and the investigatory agencies—EEOC/DFEH—more easily believe paper before live testimony. Without solid paperwork, you are in a much weaker position. So we need time (probationary memo!) to build that paper trail. If we must move immediately, we still need to build a similar memo, with the conclusion as termination instead of probation. "We don't have all that in place, so it creates risk without getting a release signed in return for severance. And there is no guarantee that the employee will sign."

3. A month's pay for a $60k worker is $5k. Is that worth it to buy immediate peace, stop spending corporate down time on this, and eliminate the risk of who-knows-how-much in corporate downtime to deal with a lawsuit?

4. "Do we really want to get our lawyers involved to defend us? they're expensive. Talk is cheap, until you talk to a lawyer. Let's use them to craft an up-front solution and not force this into litigation that drags on, is expensive to defend, and drains time and energy from pursuing business, profit, etc."

5. "It's going to affect our EPLI renewal when it's mostly the carrier's money that will fund a settlement if we let this drag out."

6. Senior Management: "I'd rather pay my lawyer than this @%$#%$#@, so let's fight." Terrible strategy 99% of the time. The reality is that over 98% (true statistic) of filed civil lawsuits settle before they go to trial. So if you can provide severance now at $5k-$25k versus $100k in legal fees --and you will **still** settle after all that for $25k-$100k (or more) later—what's the better business strategy?

7. "We don't have arbitration in place, so a jury is going to hear this. Employee Mike is going to be a sympathetic witness. His boss is a somewhat pompous blowhard. Who is going to play 'best' with the jury, especially when most jurors are predisposed against the company, at least at the outset of a trial?"

8. Sometimes we can spread out the payments so it's not quite the big cash flow hit immediately.

9. If you can't find or don't anticipate finding a replacement soon, then paying severance isn't a double hit on the budget because no one else is in the position yet. Often the work is absorbed because this person was a low performer anyway, so you don't need someone else.

In many cases, especially tort claims, the truth lies somewhere more toward the middle than either party cares to admit, suggesting that early settlement is a good idea. I have found that over the life of a lawsuit, the onion is peeled away more and more and additional issues surface – especially in wage and hour cases. The plaintiff attorney keeps digging because the company won't settle early, and they find more and more "gotchas" that Senior Management had no idea existed. I can't tell you how many times Senior Management (and HR) assume one practice is in place for field workers (construction, janitorial, landscape maintenance, e.g.), only to find out when we dig into the case that the field superintendent says, "Well, that's not exactly how we handled it because we needed to get the work done." Plaintiffs' attorneys will find something to support their case, and even small mistakes can be expensive depending on the number of workers and workweeks involved.

Assuming the company is worried about lack of documentation and would pay some severance, then paying out even "too much" severance isn't much different than if this poor performer stayed in the position for another month or two. I'd rather overpay to get a release of claims and have them out, than have them linger with weak performance and further aggravation. This last point is counter to my belief that probation is a good stopgap measure, but this assumes you have been documenting and had given a strong warning or put them on probation.

If the employee has been disciplined appropriately, sometimes Senior Management is still overly fearful of a claim (the employee just came off a pregnancy or a work comp claim, e.g.). My belief is that if the employee is going to come after you now, then they will later, also. So take your medicine, get them out, do your best on the paperwork, hope they sign the severance agreement, and move on. Don't delay the pain; you'll feel much better very quickly, and often they actually do sign the severance with some solid accompanying documentation about performance, attendance, or whatever is the basis for the decision. And if they don't, you've created a solid paper trail to defend the decision.