

THE GOLDSTEIN LAW FIRM, A.P.C.

Established 1977

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IMPORTANT ISSUE OF CONCERN FOR FAMILY BUSINESSES

JULY 4TH SPECIAL REPORT PART II

“Family Business – What Do You Do When the Target of a Workplace Complaint, Lawsuit, or Administrative Action Is A Member of Your Own Family?”



“Family Businesses: What Do You Do When the Target of a Workplace Complaint, Lawsuit, or Administrative Action is a Member of Your Own Family”

The Goldstein Law Firm, PC has represented many family businesses over the years. With over 80 years of collective legal experience we have found that dealing with employee personnel issues that involve employees of family owned and operated businesses presents unique legal challenges that must be handled with care. As a multi-generational family business ourselves, we have a unique knowledge of the complexities and nuances associated with operating and managing a workplace with employees who are also family members. Based on our experience, when the target of the complaint, lawsuit, and/or administrative charge is related to an important manager or supervisor, how you respond may be the difference between having to pay costly legal fees and damages, or being able to properly defend yourself against a frivolous demand.

Every family business owner dreams of running his/her company with a mind towards handing off the reigns of control one day to the next generation. *However, what does a family business do when it receives a complaint by another employee against a family member also employed by the company? In this article, I will provide you with a “7-STEP ACTION PLAN” that provides guidance on how to properly deal with these sensitive issues in the workplace involving: (1) family members related to the founder of the company; (2) family members related to the officers, directors, and executives at the company; and/or (3) family members related to majority or minority shareholders of the company.*

You own a family business and in addition to trying to make a profit in a difficult economy you receive an e-mail or telephone call on a Monday morning from your company’s Human Resources Director concerning the following issues:

- (1) A female employee sends an e-mail to your HR Director and says, “Tom, the son of the owner of the company and my manager, keeps asking me out and I told him that I have a boyfriend and am not interested. He says he doesn’t care and if I want to keep my job I’ll make him happy.” **What do you do?**
- (2) Jose, a fifteen (15) year employee is passed over promotion so that Cynthia, the owner’s daughter can be promoted to the open position? HR receives a complaint alleging age discrimination. **What do you do?**
- (3) Bob, a newly hired employee and the brother of the company’s largest shareholder, is given Susan, a five (5) year employee’s lucrative sales territory, and Susan is given a new sales territory with compensation for her transition period. The new sales territory is closer to Susan’s home but has not yet been developed into a lucrative

territory by the previous sales person. Susan contacts HR and alleges disparate pay and gender discrimination allegations. She also says she has spoken with an attorney and believes she is owed money for the company's violations. **What do you do?**

These are all examples of issues that we have addressed numerous times as more family businesses are faced with issues involving allegations of harassment, discrimination stemming from nepotism, and complaints that arise from non-family employees. The way that you respond to these allegations may be the difference between being able to avoid defending against a costly lawsuit and either not having a lawsuit filed in the first place or having the best possible defense that will allow you to resolve the matter before it becomes the basis for costly litigation.

STEP #1: CONTACT COUNSEL AND DEVELOP STRATEGY ACTION PLAN

Before you take any action regarding any complaint you should always contact legal counsel first to discuss how to proceed. This way you will not set in motion a chain of events that could lead to being subjected to an outside investigation by the EEOC, DFEH, Dept. of Labor, and/or California Labor Commissioner's Office and/or in some cases a lawsuit.

With the assistance of legal counsel, develop a strategy action plan of how to tackle the investigation that you will need to undertake regarding the complaint from the specific employee. *Unlike other types of investigations involving non-family employees, when dealing with investigations involving relatives employed in family businesses, different rules may apply. For instance, you will want to construct a wall between the HR Director's investigation and the higher levels of management involving your investigation of a family employee.* This means the HR Director should not send e-mails, correspondences, communications, or have any telephone calls that could be later subpoenaed or requested in litigation and/or in administrative investigations by attorneys and/or government agents. In short, with the exception of putting the head of the company on notice regarding the complaint, all matters related to the scope, substance, and nature of the investigation prior to the results should not be provided to the head of the company and/or high-level family relation of the accused employee.

STEP #2: WHETHER TO SUSPEND THE FAMILY EMPLOYEE WITH OR WITHOUT PAY

In order to demonstrate the equal application of your company's policies to all employees regardless of their family relationships, you may have to suspend the family member (*even if it later turns out that they did nothing wrong*) during the investigation depending upon the severity of the complaint. You can lessen the burden on the family member by applying the same set of rules that you apply in other similar cases, such as suspending the employee "with pay" and trying to complete the investigation as soon as

possible, so that if exonerated the employee can return to work. You may also allow the employee to work from home *with pay* if this is an option for your business and the employee can perform remotely his/her normal job duties with minimum contact with the business. Also, if in the past you have suspended similarly accused employees “*without pay*” you may need to do this regarding family employees in order to demonstrate that you treat all employee equally pending an investigation regardless of family connections at the company.

For instance, suspension *with pay* would be appropriate for a sexual harassment investigation to underscore to the alleged affected employee that your company takes complaints of sexual harassment seriously. However, suspension may not be necessary to investigate a claim of age discrimination or gender bias based on simply promoting a family member over another employee. Therefore, please consult us prior to determining whether to suspend an employee pending investigation.

STEP #3: BEGINNING YOUR INVESTIGATION AND WHERE TO START

Now you are ready to begin your investigation, but where do you start. *First*, contact the alleged victim or complaining employee by e-mail (always maintain a written record) and tell him/her you take all complaints seriously and have taken action (if applicable) by suspending the other employee involved pending investigation of the complaint. This will show that from the start no employee is receiving special treatment regardless of their family relationship to other employees. *Second*, ask the alleged victim or complaining employee to provide you with a statement regarding his/her allegations, first in writing and then later during a formal interview with the HR Director. Also, request that if there were any witnesses to the alleged events or occurrences that gave rise to the incidents in question, ask the employee to provide their names and if not current employees (contact information) for your investigation. *Third*, contact us to go over the categories of questions that you may *legally* ask so that you do not run afoul of areas of the law involving employee privacy or other protected areas of concern. You may wish to send us a list of questions you intend to ask ahead of time prior to commencing interviews. *Fourth*, always start by interviewing the alleged victim or complaining employee first. This way you have his/her story straight and have a witness (another non-family employee and preferably someone from the HR office) to take notes during the interview. You should then inform the alleged victim or complaining employee that it may be necessary to conduct a second interview with him/her towards the end of the investigation and that in any event he/she will be made aware of the results of the investigation, and what, if any, action is taken against the other employee. *Fifth*, interview all remaining witnesses and then when you have all of the facts interview the family employee last just as you would if the complaint was lodged against any non-family employee. *Sixth*, if there are any discrepancies, concerns, or issues that arise during the interviews, contact us for clarification on how you should best proceed prior to taking any action that could affect the outcome or be used later to attack the fairness of your investigation.

STEP #4: DRAFTING A FINAL REPORT, RECOMMENDING DISCIPLINE, IF ANY, AND REVIEW BY COUNSEL

Now that you have conducted all interviews, it is time to draft a final report on the results of your investigation and to implement any recommendations for corrective action, up to and including termination, if applicable. Any final reports and recommendations should be reviewed by us for the following: accuracy; legal compliance; potential recommendations to avoid future litigation, such as severance, release and settlement agreements; and alternative remedies are discussed prior to implementation. Also, by having us review any drafts of final reports of workplace investigations, these may arguably be excluded from later court and/or administrative proceedings because they are covered by the Attorney-Client Privilege and/or Attorney Work-Product Doctrine.

STEP #5: MEETING BETWEEN COUNSEL AND FAMILY PRINCIPLE OWNER, OFFICER, DIRECTOR, EXECUTIVE, AND/OR MAJORITY OR MINORITY SHAREHOLDER(S)

If the report finds merit to the alleged victim and/or complaining employee's issues or complaints and recommends terminating the family member, this is time for us to have an in-person discussion with the family principles at the company to discuss the investigation and results. This meeting and the conversations that take place with us as counsel for the employer will be covered by the Attorney-Client Privilege and any notes taken during this meeting will be covered by the Attorney-Work Product Doctrine

During this meeting with counsel, the family principle (including owners, officers, directors, and/or majority shareholders) will have to decide how they want to proceed forward. They will either: (1) agree with the recommendations; (2) disagree with the recommendations; and/or (3) take no position on the recommendations. However, at this time, the family principles should be prepared to talk about whether they want to engage the family member in discussions to voluntarily quit in lieu of being fired, accept severance, and/or execute a mutual release and settlement agreement as part of terminating this employee with a reasonable amount of pay commensurate to the family employee's time of service. No matter what actions are taken, it is important to have a united front, and to speak with one voice no matter the personal, emotional, or familial relations with the affected employee.

STEP #6: NOTIFICATION OF ALL PARTIES REGARDING RESULTS OF INVESTIGATION AND IMPOSITION OF DISCIPLINE, IF ANY

With the assistance and review by counsel, the HR Director should notify in writing the alleged victim and/or complaining employee regarding the results of the investigation and

what actions, if any, has been taken against the family employee. If the employee has already retained the services of an attorney, a copy of the correspondence announcing the results of the investigation along with any actions taken against the family employee should be sent to the attorney. Also, at this time, a letter notifying the family employee of the results of the investigation and what actions, if any, are being taken against him/her.

STEP #7: WHAT TO DO IF YOU RECEIVE A LETTER FROM AN ATTORNEY OR ADMINISTRATIVE AGENCY REGARDING THE COMPLAINT

Now that the investigation is over and you have implemented the HR Department's recommendation with our assistance, that will hopefully be the end of the matter. However, if for any reason you receive a demand letter from an attorney or outside administrative agency, or become the target of a lawsuit filed by any employee involved in this matter who did not agree with and/or like the results of the investigation and recommendations, then you should immediately contact us. By having us respond to these "threat letters" and/or lawsuits or administrative charges, based on the actions that your company has taken to date, you put yourself and your company in the best possible position to either resolve the case early or to have the best possible defenses to defeat any complaint or claims filed in court or before an outside administrative body or tribunal.

By knowing how to lawfully proceed when faced with an issue involving a family member of your business, you are in the best position possible to answer those questions, posed by your Human Resources Director on a Monday morning without panic or delay.

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