

**THE GOLDSTEIN LAW FIRM, A.P.C.**

*Established 1977*

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**IMPORTANT ISSUE OF CONCERN FOR YOUR BUSINESS**

## **JULY 4<sup>TH</sup> SPECIAL REPORT PART I**

# **“How to Deal with Unproductive Long-Term Employees: What are Your Options?”**



## **“How to Deal with Unproductive Long-Term Employees: What are Your Options?”**

Every employer hires an employee with the hopeful expectation that he/she will evolve into a dependable, productive, and consistent employee who will grow with the business. However, as the years pass some employees either leave voluntarily, are terminated, and/or in the best case are promoted and given greater responsibilities at the company.

After several or many years, some employees’ productivity and profitability to the company substantially decreases, either due to lack of motivation, diminishing work ethic, physical constraints, and/or due to family or personal reasons. The question then becomes how to deal with these types of long-term employees and what are your options? This article will explore how you either help the employee become better at his/her job to meet their goals with strict requirements or how you prepare for the inevitable of having the employee leave voluntarily and/or through a termination for poor performance. The goal of this article is to provide you with the greatest amount of legal protection against being subject to future lawsuits and/or administrative complaints for your actions.

At the end of this article you should be able to adequately prepare, with the assistance of legal counsel, a strategic action plan for any of the following scenarios:

- (1) Tom, a thirty-year (30) employee, works for a wholesaler as an outside sales representative. Over the last 3-5 years his sales have decreased drastically in his sales area. He is a loyal and valuable salesperson for the company who in the past has brought in a great deal of new customers. However, he has been excessively absent and the sales levels in his territory are falling. He puts the blame on the slow economy and a lack of interest by customers in the company’s line of products. **What are your options?**
- (2) Maria, a ten (10) year employee, is an on-site manager at one of your stores and while the store’s sales remain in positive territory you feel

that she is not putting in her full effort to maximize profits. Some of the employee's at the store have reported that Maria spends a lot of time on her cell phone with her boyfriend and is constantly fighting and having to leave work early to deal with personal issues. **What are your options?**

- (3) Jerome, a five (5) year employee, is the night shift supervisor for your most important production line at the company's headquarters. He was originally hired to work on the night shift production line, then promoted to lead, and is now the night shift supervisor, who reports to the Plant Manager. Jerome has told other employees that he feels that he was passed over promotion to day shift supervisor because of his race, is not paid equal to other shift supervisors, and does not feel that he needs to have the employees on the line work harder and faster to increase the profitability for the company since he does not benefit directly. **What are your options?**

The above-described situations are real life examples that have been reported by clients in various industries during this time of global expansion, increased government regulation and taxation, all of which has brought considerable pressure on business operations in California and throughout the United States. Also, these situations have occurred during a time in our nation's history where for the first time employees expect to live and work longer and do not see retirement as a viable financial option. With these constraints in mind, it is time to review the firm's "**6-STEP PROCESS**" on how to deal with underperforming long-term employees.

### **STEP #1: HOW TO PROACTIVELY IDENTIFY UNDERPERFORMING LONG-TERM EMPLOYEES**

On a quarterly, or if possible a monthly basis, every business should be auditing their sales, production, accounting, and management departments throughout the company to determine which employees are underperforming to expectations. In order to ensure that your company's audit is legally compliant you should develop an audit form in coordination with legal counsel that can be used by all department heads, supervisors, managers, and executives. After developing and distributing a proper audit form throughout the company, all

department heads should meet monthly to discuss the results of those audits and to identify employees that may be underperforming in each department.

Over the course of at least 4-6 months any employees whose name is consistently discussed at these meetings for potential underperforming issues should be identified for further counseling and action plans as discussed below. For each employee identified as repeatedly underperforming for at least 4-6 months, the department head in charge of supervising this employee should maintain a list of the areas of concern for the employee, as well as identify any personal, family, or work-related issues that he/she is aware of or should be aware of which may be adversely affecting the employee's job performance.

## **STEP #2: COUNSELING AND DEVELOPING AN ACTION PLAN FOR THESE EMPLOYEES TO INCREASE PRODUCTIVITY AND PROFITS**

Once you have identified potential underperforming employees, it is time to provide counseling and develop a strategic action plan to first attempt to help these employees improve their job performance which should also help to increase the company's profitability. Depending on how long the employee has been employed and the employee's history of being disciplined for prior incidents of misconduct or poor performance, it may be necessary to combine counseling and an action plan for improvement with the execution of a "Last Chance Agreement." As discussed below in Step #3, Last Chance Agreements essentially give the employee a set of conditions and goals to achieve within a certain period of time, outlines the steps taken by the company to help the employee achieve those goals, and states in no uncertain terms that failure to achieve these goals will result in termination.

In order to give your company the best possible opportunity to turn around the performance of an individual it is important that you schedule an in-person counseling session with that employee in his/her supervisor's office to go over areas of concern, develop a list of goals to achieve in a specific time period, and to take into consideration any issues raised by the employee as potential impediments to achieving these goals (i.e. pre-planned time-off for vacation, personal issues such as alcohol or substance abuse, family issues such as caring for a sick spouse, lack of reasonable accommodation for employee's

actual or perceived disability, actual or perceived racial, sexual, age, or gender based discrimination by management, other supervisors, customers, or employees, etc.). Also, you should keep notes of your meeting that will later either be incorporated into the Last Chance Agreement or be placed in the employee's file. At this meeting, if applicable, you should discuss the consequences of what will happen if the employee does not meet his/her expected goals.

After this meeting, depending upon what issues are raised by the employee, you should confer with legal counsel to develop a legally compliant action plan for how you intend the employee to reach his/her productivity levels over a set period of time. Your meeting with the employee as well as action plan constitute good faith attempts to counsel and provide support to the employee to reach his/her productivity goals which can later be used as a defense that you set impossible goals without guidance for this employee as a pre-textual basis to terminate their employment. It is better to discuss all concerns with legal counsel now, then to have to defend the action in court or before an administrative body for failing to ask a question first before taking action.

### **STEP #3: LAST CHANCE AGREEMENTS – THE BEST DEFENSE**

In order to ensure that you are not merely wasting time on an employee who thinks due to their longevity of service to the company that they are “untouchable” and can continue do “the bare minimum” while still receiving disproportionate high levels of compensation and bonuses – a Last Chance Agreement should be executed by this employee. This is the only way to significantly reduce an employee's success in later arguing that they were never told, after so many years on the job that if they did not turn things around in a certain period of time that they would be terminated from their employment.

Specifically, a Last Chance Agreement is a document narrowly tailored by the firm that takes into account your specific needs, objectives, and the employment history of the affected employee. This tool is very useful for employees who believe that they have a right, after a certain period of time on the job, to “effectively retire” and still to be paid as though they were working

at full-steam. The Last Chance Agreement incorporates all of the terms and conditions for the employee's continued employment and incorporates the counseling and goals that the employee's direct supervisor previously provided to the employee and discussed at the meeting discussed above in Step #2.

The Last Chance Agreement also ensures that the employee is well aware of their individual responsibilities, expectations, goals, and what steps the company has made or what assistance the company has provided the employee with to help him/her achieve the desired results. Also, the Last Chance Agreement explains what will happen to the employee if he/she fails to achieve the desired result, which in most cases is the termination of the employee's employment from the company.

Finally, the Last Chance Agreement ensures that any and all disputes arising from and/or related to the employee's employment or the Last Chance Agreement are decided by a neutral Arbitrator, and not by a jury. This particular provision further benefits the employer from subsequent threats of lawsuits by attorneys who may lose interest if they realize early on that their client's case will not be tried before a jury compromised of predominantly employees, but instead before an experienced arbitrator with a background in labor & employment law.

#### **STEP #4: THE DECISION TO TERMINATE EMPLOYMENT**

At this stage, the employee has either turned around his/her performance by achieving the company's goals or usually, and in many cases, finds yet another excuse not to achieve the previously stated goals. Also, and more disconcerting to employers, the employee who realizes that they may be terminated under the Last Chance Agreement, may attempt to create a record in his/her Personnel File by reporting "false or phantom complaints," including but not limited to: (1) complaints that the employee suffered a workers' compensation injury during the course and scope of his/her employment; (2) accusations of harassment or discrimination against the employee by his/her supervisors, managers, employees, and customers, based on the employee's actual or perceived race, sex, age, and/or gender; and/or (3) **commencement of the "blame game" as to what is wrong with the company's product or business model that is stopping the employee from reach his/her full potential**

**and satisfying the goals previously laid out for him/her by the company.**

When you start to receive complaints from the employee, you need to alert your legal counsel as to the scope, substance, and nature of the complaint as it may require investigation and legal recommendations. Frivolous complaints must be investigated; documented and the employee must be given notice of the employer's findings; conclusions and any action taken by the company. The document which documents the employer's findings and conclusions should be placed in the employee's file to the extent that it does not disclose confidential information that is protected by the right to privacy, confidential business information and/or trade secrets.

**Now that you have legally, on the advice of counsel, taken away the ability of the employee to attempt to escape the consequences of their workplace failures, it is time to terminate the employee.** A written record of the termination and that payment has been made of all wages and benefits due and owing at the time of termination should be recorded and placed in the employee's file. If an employee believes that he/she will be terminated under the Last Chance Agreement, an employee may quit rather than having to explain to future potential employers that they were fired by their former employers. However, be careful, a voluntary quit can easily be changed to a later constructive discharge claim by employees who are seeking to sue their employers and also seeking to collect unemployment benefits. Regardless, if an employee quits, with very few exceptions, the California Labor Code requires that all wages and benefits due and owing must be delivered to the employee within 72 hours of the employee quitting his/her job.

### **STEP #5: SEVERANCE, SETTLEMENT, OR NOTHING**

With employees who have been with the company for many years and who in the past have helped the company grow, it may be appropriate to give some type of severance package to assist these employees to transition from their employment with the company. Many companies no longer have retirement plans, 401(k) s, or other types of retirement accounts for employees, and a severance package is a humane way to give a small amount of additional monetary compensation in exchange for the employee's voluntary quit and execution of a mutual release and settlement agreement not to sue the company

or its officers, directors, shareholders, managers, supervisors, and employees for a broad category of claims including but not limited to age discrimination.

From my experience, employers may usually offer long-term employees a severance package that consists of 1-2 weeks of additional pay for every one (1) year of service to the company and in some cases even more depending upon the contributions of the employee to the company and/or organization. Also, if the employee owns stock or shares in the company, severance may include buying back their stock or shares at an agreed upon price. The benefit of severance is that it allows the employee to leave with dignity by voluntarily resigning in lieu of being fired and receiving additional monetary compensation that would not otherwise be given to the employee in exchange for signing a mutual release and settlement agreement that protects the company against future liability.

In the rare cases where there is merit to a potential “false or phantom complaint” as discussed above in Step #4, prior to terminating the employee it may be advisable to discuss with legal counsel offering more than the usual 1-2 weeks of severance payment for each year of service in order to settle all potential claims without the filing of costly and burdensome litigation by this employee once he/she is terminated.

Before offering an employee severance, you should contact legal counsel to discuss how to approach the topic of severance with the employer and to draft an up-to-date mutual release and settlement agreement on your behalf and if the employee refuses to accept the severance offered, or counters directly or through counsel with a completely absurd offer, you should discuss your next steps with legal counsel.

If the employee does not want to accept severance and agreed to a mutual release, and the employee has engaged in a material violation of the Last Chance Agreement, you may decide to terminate the employee and give the employee no severance. Employers are not required by federal and/or state law to provide severance to employees who leave their employ.

**STEP #6: MAINTAIN ALL FILES AND DOCUMENTS FOR USE  
IN ANY FUTURE LITIGATION OR DEFENSE**

No matter what steps you take to deal with underperforming long-term employees, every business should have a plan of action and should maintain all files and documents related to their actions and efforts to counsel these employees. The documents and files that you retain of your company's actions will provide you with the best support for the company's defenses based on the employee's poor performance and what efforts, if any, were taken to help the employee improve his/her performance. Without this documentation you will find yourself in the position of having to explain why you terminated a long-term employee who will argue that he/she gave his/her life to the company and was fired for a variety of pre-textual and unlawful reasons.

Whatever you decide, always check with legal counsel first and have a plan of action.

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