

THE GOLDSTEIN LAW FIRM, A.P.C.

Established 1977

ATTORNEYS AT LAW

8912 BURTON WAY • BEVERLY HILLS, CALIFORNIA 90211

(310) 553-4746 • cgoldsteinesq@gmail.com

IMPORTANT ISSUE OF CONCERN FOR EMPLOYERS

SPECIAL HOLIDAY REPORT

“How to Trim Employee Holiday Fat and Increase Profits and Productivity”

NOVEMBER 2016



Between Halloween and New Years' there exists a considerable slowdown in workplace performance that costs employers lost profits every year. While employees spend countless hours surfing the web for "Black Friday Deals," planning holiday events, and attempting to "look busy" at work while in reality they are simply "coasting to the end of each workday" employers are facing considerable stress on their businesses from both overseas and local competitors.

Consequently, in order to increase productivity and profits during the period of time from Halloween to New Years, instead of accepting the status quo, it is time for employers to stop coddling unappreciative and unproductive employees. Employees that are fortunate enough to have jobs should be held accountable during this period of time and not allowed to merely "coast through the end of the year."

At the end of this article you should be able to start to take action to trim employee holiday fat against unproductive and unprofitable employees that continue to lag behind your other employees and/or lag behind more productive employees working for your competitors.

STEP #1: IDENTIFY THE FAT TO CUT

After ten (10) months of 2016, you should be able by now to identify which employees in every department are underperforming and need to increase their productivity to improve the company's bottom line. If you have not already done so, you should immediately have a meeting with your executive team and key managers in which they should be prepared to discuss the performance and productivity of each employee under their direct supervision, control, and/or authority. If they have employees who are underperforming these employees should not be able to avoid being held accountable for their lack of performance because of the holiday season.

Each member of your executive team and key managers should provide you with recommendations as to which underperforming employees require counseling and goal setting due to their low productivity and poor performance. You should also be made aware of any affected employee's prior work history, behavior, and performance issues. The holiday season should not be a time when you let down your guard and avoid making hard decisions that may include counseling poor performers to assist them in becoming more productive and thereby creating increased profits for your business. The holiday season is not an amnesty period for poor or underperforming employees. Your executive team and key managers should be prepared to make formal recommendations to implement performance improvement plans for underperformers during this time.

STEP #2: CORRECTIVE COUNSELING AND SUBSEQUENT DISCIPLINE

Now that you have identified the least productive employees in every division of the company, it is time to take action to assess whether they will stay or be terminated before the New Year. The first order of business is to meet with each employee to set realistic goals that they must meet before the end of the year in order to continue their employment. Simultaneously, management must establish a written plan on how to provide the employees with all of the necessary support if required, to achieve their goals. This approach is intended to motivate employees who are marginal performers to recommit themselves to improving their performance during the holiday season

instead of merely marking the time counting down the days until the holidays.

If the employee embraces the challenge, you may have successfully served the dual purpose of increasing your profits, while helping an otherwise vulnerable employee save their job. However, if on the other hand the employee resents being told they are underperforming, argues that the goals set forth are unreasonable, blames other employees or the company's products for low productivity, and/or simply refuses to commit to achieve these goals, then it may be time to terminate this marginal employee, rather than paying this employee through the remainder of the year. You should not have to wait to take action into the first quarter of next year to terminate an employee who is adding nothing to your bottom line.

STEP #3: CONTACT COUNSEL BEFORE TRIMMING THE FAT

We recommend that in this litigious environment, before you terminate any employee who does not meet their goals, you should immediately contact counsel to review the basis for the termination and that you have completed and documented the proper steps prior to taking this action. If you are delinquent or deficient in any aspect of the counseling and discipline process then you may need to return to a previous step in the process. Proper documentation is essential to show every action you have taken during the performance improvement period has been for legitimate non-discriminatory business reasons. Creating complete and accurate documentation is an important and necessary step for defensive purposes should the employee take any administrative or civil action against the company to challenge his or her discipline and/or termination.

STEP # 4: GIVING THE EMPLOYEE THE OPPORTUNITY TO RESPOND BEFORE TAKING ACTION TO DISCIPLINE OR TERMINATE POOR PERFORMERS TO TRIM THE FAT OUT OF YOUR COMPANY

Once you have all of the information regarding whether employees who were marginal performers have met their goals, you can determine which employees should be disciplined up to and including termination. For those employees who are to be terminated, you should have a letter drafted that advises the employee why you are proposing to terminate them and that gives the employee an opportunity to respond in writing and/or in person before you make a final termination decision. This step is necessary to give the employee their "due process" right to be heard before you make a final decision. This process gives the employee the right to explain why they failed to meet their performance goals and why termination would be unfair. It is better you hear the employee's challenge to the reasons why you want to terminate them before a decision is made that you can alter if warranted, rather than, when first responding to an attorney demand letter, in a lawsuit, or before an administrative tribunal.

STEP #5: TIME TO CUT THE FAT

Now that you have followed Steps 1-4 above, it is time to cut the fat. This means making a final decision of what, if any discipline up to and including termination, you will impose and informing the employee of your final decision. If you have made a decision to terminate the employee the best way to communicate your decision in an unambiguous way is in writing that includes the employee's final paycheck comprised of all monies owed the employee including any

accrued, but unused vacation. If the employee is paid by commission you are required to pay the employee within a reasonable period of time necessary to calculate commission.

If lesser discipline is being imposed you could communicate your final decision to the employee with a witness present in the Human Resources Directors Office or the office of the employee's direct executive, manager, and/or supervisor. You should explain the basis for the imposition of discipline less than termination.

The reason why you should have a witness present and taking notes is so that there is never any after-the-fact allegation of misconduct by management falsely created by the employee or their counsel. Also, with a witness present, the employee will be less likely to argue, fight, or act out in a dangerous or threatening manner. The employee witness can be a member of the HR Dept. or if no alternative is available, another executive, manager, and/or supervisor of the company.

If you decide to convey a decision to terminate an employee in person, the reason for termination given to the employee should be brief and to the point. You should have a letter of termination setting forth the reasons for the termination. You should request the employee to date and sign the letter acknowledging that the employee has received the letter and his/her final paycheck. If the employee refuses to sign the acknowledgement of receipt simply write "Refused to Sign" and put your initials next to the notation. Then provide the employee with his/her final paycheck for all accrued and owing wages and request the employee return any company property, such as identification cards, corporate credit cards, keys, corporate issued cell phones, laptops, notebooks, etc.

Finally, to ensure the safety of other employees do not let the employee return to their work station to collect any personal items, but instead simply notify the employee that you will send their personal belongings by Federal Express to whatever address they provide you at that point. At this point you should have the employee escorted off the premise for good so that they do not create a scene disrupting your workplace on their way out. Do not let the employee stop and talk with other employees as this will only spread rumors, gossip, and slow productivity of your other employees. That is why Friday terminations are better because they come at the end of the week instead of on Monday terminations when employees are just beginning their work week and are more prone to distraction.

STEP #6: HOW TO SOFTEN THE BLOW FOR LONG-TERM EMPLOYEES

Sometimes, even after you have counseled and assisted an employee so that they will become more productive and profitable to the company, the employee still simply fails to accomplish the goal. This may occur among some older long-term employees who believe that you owe them a job and that they can merely coast to retirement. Long-term employees are most likely to initiate an administrative complaint and/or file an age discrimination lawsuit against the company. This is because there is simply nowhere for many long term employee to go in the job market as companies tend not to want to hire older employees at higher wages when they could simply hire younger workers for less.

That is why it makes both fiscal and legal sense to attempt to work out a severance agreement

with long-term employees, in some cases even when they do not meet performance goals outlined by management. Whether or not to offer a severance agreement that includes some compensation that reflects the employee's years of service while releasing the company from potential liability must be determined on a case by case basis. Severance Agreements should be carefully prepared by experienced legal counsel to fairly reflect the agreement between the departing employee and the company and specifically deal with and preventively resolve the issues that may create a future dispute between the employee and the company.

From our experience, employers who recognize that respect for long term employees' commitment to the company, even if they have recently not experienced success, is a key component to any severance arrangement that protects the interests of the departing employee and the company. Some employers offer long-term employees a severance package that consists of 1-2 weeks of additional pay for every year of service to the company and in some cases even more depending upon the contributions of the employee to the success of the company. Also, if the employee own shares in the company, severance may include buying back of their stock at an agreed upon price.

STEP #7: FINAL THOUGHTS

No matter what steps you take to deal with underperforming employees, every business should have a plan of action and maintain all documents related to their actions and efforts to counsel these employees. These documents 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 their performance. Without this type of documentation you will find yourself in a defensive posture instead of being able to go on the offense against a former employee and their counsel who challenges your right to terminate a poor performed.

Whatever you decide, always check with counsel first and have a plan of action to cut the fat and improve your bottom line.

For further information, please contact Charles H. Goldstein, Jonathan A. Goldstein, and/or Joseph A. Goldstein of The Goldstein Law Firm, PC at (310) 553-4746.

THE GOLDSTEIN LAW FIRM – EXPERIENCE AND SUCCESSFUL REPRESENTATION OF EMPLOYERS SINCE 1977 COUNTS.

**Employment Law, Wage and Hour Law, Labor Law,
Business Litigation, Contract Disputes, Arbitrations, Corporate and
Transactional Law, Shareholder Disputes, Commercial Law, Appellate Law,
Corporate Investigations, Wrongful Death, Training & Workshops**

**The Goldstein Law Firm
8912 Burton Way
Beverly Hills, California 90211
Telephone: (310) 553-4746
Facsimile: (310) 282-8070**

**cgoldsteinesq@gmail.com
josephgoldsteinesq@gmail.com
jonathangoldsteinesq@gmail.com**

LEGAL DISCLAIMER

The Articles contained in this Newsletter presents general information about particular subjects and is not intended as legal advice, nor should you consider it as such. The Articles are neither legal advice nor opinion on specific legal questions, and should not be relied on as legal advice or opinion by any recipient or reader, but is being furnished and provided only as general information on areas of interest. The applicability of the legal principles discussed in these Articles may differ widely in specific situations. Therefore, the information contained in these Articles cannot be construed as individual legal advice. These Articles do not create an express or implied contractual or legal attorney-client relationship with any recipient or reader of the Articles. In order to contract for legal services, a recipient or reader must contact with the Goldstein Law Firm, PC and sign a Legal Services Agreement with the firm. Neither the transmission alone nor the receipt alone (nor the mere transmission and receipt) of information to or from The Goldstein Law Firm, PC constitutes either an attorney-client relationship or a contract between the sender and receiver.