

Exit Stage Left: Avoiding the Drama in an Executive Termination

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1. PowerPoint Presentation
2. For more information on labor and employment matters, see Dorsey's Quirky Questions Blog at <http://quirkyemploymentquestions.com/>

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Scenario #1 Take Aways

- **Company Policies:**
 - **Confirm existence of clear company policies regarding nonuse of personal email,**
 - **no expectation of privacy in company email or server;**
 - **mandatory cooperation of employees in any investigation.**

- **Represented Employee Witness:**
 - **Consider how to involve counsel in a manner that aids (without impeding) the Company's investigation.**

Scenario #1 Take Aways

□ Communication with Whistleblower:

- Assure the whistleblower that the issues raised will be reviewed and that the whistleblower will suffer no retaliation for good faith reporting, but make no other guarantees or substantive updates.
- Remind appropriate personnel of the non-retaliation policy.
- If adverse employment action was already in the works, consider whether to suspend the action, or, verify your confidence that adverse employment action is not only necessary but that the basis is real, consistent with policy and practice, and fully, properly and accurately documented.

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Scenario #1 Take Aways

□ Initial Disclosure:

- Consider whether disclosure should be reported to management, board, audit committee, auditors, and/or authorities, and if so, when and how.

□ Who Conducts Investigation:

- Consider whether the investigation should be handled by management/board/audit committee; if management, consider level of reporting to board, audit committee or auditors.

□ Outside Retention:

- Consider whether investigation should be done in-house, or by outside counsel, and/or others.

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Scenario #1 Take Aways

□ Investigation Integrity:

- Take steps to protect integrity of investigation and Company: protecting privilege and work product.
- Protecting against destruction of evidence.
- Protecting against claims of retaliation, claims that raise potential conflicts (proper selection of outside counsel – and experts where appropriate – and proper delivery of Upjohn warnings).

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Scenario #1 Take Aways

□ Termination:

- Take action against any wrongdoers that is consistent with company policy and practice.
- Depending on the severity of the infraction, consider how authorities (and the press) would react to action taken.
- Further consider whether to disclose the infraction to the appropriate authorities.

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Scenario #2 Take Aways

□ Same-Actor Inference:

- The same-actor inference occurs when the same decision-maker engages in positive actions and then takes an adverse action.
- The same-actor inference changes the law and burden of proof, for some discrimination theories.
- This inference can be managed in advance, if done carefully and truthfully.

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Scenario #2 Take Aways

□ Trade Secret Protections:

- Executives often have myriad information on personal and corporate devices.
- New trade secrets laws permit some agency disclosures (SEC, others).
- Beyond BYOD policies, companies should review technology options to delete data.

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Scenario #2 Take Aways

- **Post-Employment Restrictive Covenants:**
 - **If non-competition or non-solicitation are important business goals, companies should review non-compete jurisdictions, agreements and process.**
 - **Consider mandatory choice of exclusive venue.**
 - **New California considerations.**

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Scenario #3 Take Aways

- **Periodic Leader Assessment: allows you to identify problematic behavior before a claim is raised**
- **If performance review of prior and current year will deviate by X, have leader ready to explain (with examples)**
- **If performance issues are around subjective attributes (vs. objective), leader must be able to explain deficiencies in concrete terms**

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Scenario #3 Take Aways

- Look into whether this leader has a history of issues with the protected class/risk factor at issue**
- Get input of prior supervisor (if appropriate)**
- Be prepared to identify the decisionmaker(s)**
- Be prepared to articulate the reasons**

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Scenario #3 Take Aways

- Consider economic and non-economic terms**
- Ensure business concerns addressed (e.g., nondisparagement etc.?)**
- Make sure the termination is well-choreographed**
- Establish one point of contact post-termination for the departing employee**

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