

WHAT SHOULD YOU DO IF AN EMPLOYEE IS CHARGED WITH A CRIMINAL OFFENCE?

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Handling the matter of having an employee charged with a criminal offence is not as black and white as you may assume; Fire him you say? There are some grey areas and noteworthy tips you should be aware of if such a situation arises. An employee being charged with a serious criminal offence is unlikely to be considered by itself as sufficient justification for a summary dismissal. The charges could be dropped or the employee acquitted. An employer would be best advised therefore not to dismiss summarily in such circumstances, unless it can be clearly established that the charge itself is likely to impact negatively on the enterprise or on the performance of the employee.

Navigating the situation will be dependent on a number of factors as there are a plethora of anomalies which should be taken into consideration, some of these include:

- The level of, and nature of work of the employee
- Can the event impact the business' operations in a negative way?
- Can the company take any precautionary action?

Beyond the general probing questions, the central issue would be to determine whether the nature of the charge serves to destroy the mutual trust and confidence that should subsist between employer and employee. A prime example of a straight forward instance would be: a financial controller being charged with money laundering.

In most cases employers should wait for the outcome of the initial hearing, since the time factor will play a critical role. Where an employee has been granted

bail there may not be any plausible reasons why he/she should not be allowed to resume work. An employer is however entitled to make suitable adjustments – no customer contact, agreed leave of absence – so as to protect the reputation of the enterprise and customer confidence.

Where bail is denied and an employee remanded into custody, an employer should consider the probable impact on the business' operations. The length of time an employee may spend on remand could lead to frustration of the contract. An employer could reasonably argue that the continuation of the employment contract did not contemplate extended periods of absence and the hiring of a substitute would not be practical. It should be noted that even if the contract is not frustrated the employer is not obligated to pay the employee since he/she is not available for work.

The complexity of every case will differ, thus no blanket response can be advised. It would be better advised that companies consider the following steps if facing such a scenario:

- 1) **Consider the legal implications** – It is important to be aware of your employee's legal rights and to be sure you act in accordance with them. Contracts of employment or collective agreements may affect any disciplinary action you're considering; check the terms of such agreements carefully. Don't talk to uninvolved third parties such as the media or non-management employees; unnecessary disclosure of information could result in a defamation claim if the employee is acquitted or the charges are dropped.
- 2) **Consider the case on its own merits.** Was the alleged offence major or minor? Does it mainly revolve around poor judgment, or is it a more serious

charge involving violence or theft? Does the employee admit, deny, or provide an explanation for the allegations? What do you know of the employee's history and character, both personal and professional?

- 3) **Determine the possible impact on your business.** Consider the employee's position in the company and the nature of his or her duties and responsibilities. Is the offence with which they're charged related in any way to the kind of work they do? Are they a potential threat to other people or property? Take into account also the reactions of other employees and the potential effect on morale and productivity. How do the charges impact on your brand identity and reputation?
- 4) **Decide on appropriate action.** Your decision will of course depend on the specifics of the case. You may choose to treat an arrest or an incarceration either as issues of absence or of personal leave, and you'll then need to decide whether the employee is to be paid for the time off or not. If there is a clear and justifiable conflict between job function and the nature of the offence, you could place the employee on inactive or suspended status without pay, providing for reinstatement upon acquittal and for termination if convicted.

Hopefully it is not a situation you may encounter too often; nonetheless it would be good to have some general rules and/or procedures in place. Beyond what has already been suggested, the policy could include some guidelines for employees: requiring employees report charges or an arrest to you within a specified timeframe, providing supporting documentation, and could state that an employee who is unavailable for work due to incarceration will be suspended or fired. You could address the option of reinstatement after release, if appropriate.