

The Embattled Executive: Strategies for Protecting Compensation and Careers

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In the not so distant past, it was not uncommon for successful executives and professionals to spend decades, if not their entire career, with one organization. Increasingly, however, that is not the case. These days, many executives, at one point or another, see their career, compensation, and reputation jeopardized amid allegations of wrongdoing – whether based upon individual performance, overall business performance, or allegations of misconduct.

While ideally the best strategy for protecting one’s career is to demonstrate consistently strong performance, maintain positive and productive relationships, and avoid any appearance of impropriety, even the most high-performing, well-respected and responsible executives may find themselves embattled, suddenly on the opposite side of the organization to which they have dedicated their professional lives. In those circumstances, developing a strategic plan to navigate the next steps is critical for preserving one’s career, compensation and reputation. While the first reaction may be to go to “war,” especially if one has been misjudged or unfairly treated, the wiser strategies – often, for all concerned – are usually more nuanced. One does not often read in the press about a legal strategy where an executive, accused of wrongdoing, emerges quietly with compensation meaningfully preserved and an unhindered career path. This is precisely the point. If that is your goal, consider the strategies set forth below.

EXERCISE RESTRAINT & RETAIN COUNSEL

Upon learning of allegations of misconduct, an accused executive is often inclined to take immediate and extreme positions, whether in the form of a “defense” or going on the “attack.” Rather than prematurely responding to the allegations, the executive is well-served by initially taking an “ears open, mouth shut” approach. By collecting as much information as possible, the executive will be better prepared to respond to the allegations.

Likewise, an accused executive should resist the temptation to become angry or commence his or her own investigation, such as by approaching colleagues who may have reported concerns. This course of action will reflect negatively on the executive, potentially raising concerns about his or her temperament, judgment and, possibly, retaliation against “whistleblowing” colleagues. At this juncture, it is best to exercise restraint and retain legal counsel to assist through the internal review or investigation process.

PARTICIPATION IN THE INTERNAL REVIEW/INVESTIGATION

Depending on the nature of the concerns, the executive may be asked to cooperate in an internal review or investigation. Particularly if the concerns have legal implications, the employer may involve the executive’s legal counsel, such as by sharing information, allowing the executive to respond in writing to specific questions, or allowing the executive’s counsel to be present during an in-person interview. Sometimes, however, the executive may be asked to sit alone for an interview, in which case, he or she should speak with counsel to determine the best course of action for responding to such a request.



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REVIEW AND EXERCISE EMPLOYMENT RIGHTS

If accused of wrongdoing, many executives have rights pursuant to employment contracts and/or employer policies or practices. For example, the executive may be entitled to an opportunity to respond, or to attempt to rectify the situation. Likewise, executives may have compensation protections – especially in the case of termination – such as notice pay, severance pay, and rights to equity/deferred compensation. In a recent decision, the Massachusetts Supreme Judicial Court held that an executive, who was terminated for cause for having a relationship with a subordinate, should have been given the opportunity to remedy the situation, and was permitted to keep his equity compensation because his conduct did not necessarily harm the company. [1] Accordingly, reviewing all relevant documents with counsel is critical to preserving the executive’s rights and/or compensation.

ENGAGE IN COMPENSATION/CAREER PRESERVING NEGOTIATIONS

In many instances, the employer is willing to negotiate career/compensation preserving arrangements so as to avoid protracted, possibly public, and likely unnecessary disputes. An executive’s leverage points for such negotiations include, without limitation, the “optics” of the situation, the manner in which the employer handled similar allegations in the past, and equitable considerations, such as the executive’s lengthy, successful tenure with the company.

The executive may also, of course, have legal claims that can serve as leverage. For example, if the employer selectively enforced a policy so as to rob the executive of the fruits of his or her contract, he or she may have a contract-based claim for breach of the covenant of good faith and fair dealing. [2] Likewise, if the employer treated similarly-situated individuals differently (such as by imposing a lesser-degree of discipline), an executive may have a discrimination claim. [3] Even the manner in which the executive is treated may provide the basis for a legal claim. For example, an employer who dramatically and publicly escorts the executive from the building, without any written or public communications, may face exposure for defamation. [4] All forms of potential leverage should be discussed with counsel so as to best position the executive for negotiations.

KEY “TAKE-AWAYS” FOR THE EMBATTLED EXECUTIVE

Learning one has been accused of wrongdoing is an upsetting and worrisome situation in anyone’s career, but the executive should strive to stay calm, gather as much information as possible, and consult with legal counsel. Strategies for moving forward will vary by case, and the pros and cons of each should be thoroughly vetted as soon as possible. By approaching the situation with a carefully considered strategic plan, the executive will be in the best position to preserve his or her career, compensation, and reputation.

[1] See *Balles v. Babcock Power, Inc.*, 476 Mass. 565, 577-79 (2017).

[2] See *Williams v. B & K Medical Systems, Inc.*, 49 Mass. App. Ct. 563 (2000) (applying the covenant of good faith and fair dealing to challenge the selective enforcement of an expense policy used to deny severance benefits to departing employee).

[3] See *Trustees of Health and Hospitals of the City of Boston, Inc. v. Massachusetts Com’n Against Discrimination*, 65 Mass. App. Ct. 329, 336 (2005) (disparate application of policies and procedures actionable under discrimination laws)

[4] See *Phelan v. May Department Stores*, 44 Mass. 52, 56 (2004) (finding physical actions, such as escorting accused about in front of colleagues, without written or spoken communications, may give rise to defamation claim).

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