Legal Help with Labor and Employment Disputes

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**Scenario No. 1:** One of your key employees e-mails you to tell you the stress of the job has given her medical problems, and that this situation is made worse by the breakup of her relationship with one of your managers. You were not aware of this relationship. Her e-mail is sent in reply to your e-mail asking her — again — to sign the non-compete agreement you recently decided to require of employees.

**Scenario No. 2:** You get a text from a number you don't recognize. The text just shows a screen shot of the Facebook post of one of your employees. In the post, the employee complains about pay and benefits, says his supervisor is a "jerk," and that your customers are worse. Two employees "like" the message.

**Scenario No. 3:** You receive a letter from an attorney for a former employee who was discharged for poor performance. The attorney alleges you discriminated against the employee on the basis of her age, learning disability, race and sex. She has given you 10 days to provide all records in connection with her client's employment and told you to preserve all electronic records.

Legal issues like those presented above can be faced these days by company executives and human resource managers, who in turn often contact their labor and employment law attorneys for advice.

Your lawyer should initially give you an opinion on the merits and legal ramifications of the issues presented. For example, counsel may advise the employer in Scenario
No. 1 about how to deal with an existing valued employee who nevertheless presents multiple, complex and possibly ongoing legal issues.

In Scenario No. 2, counsel may advise the employer of the NLRB's new cases holding that disparaging Facebook posts under certain circumstances may be "protected."

In Scenario No. 3, counsel should address exactly what your obligations are in this scenario, and when and to what extent you should respond.

Your employment lawyer should always provide you with an assessment of possible courses of action and outcomes, considering the applicable law, the company's workforce, its business strategies and the individuals involved.

Counsel is ethically required to leave the ultimate decision as to what to do next up to the client, however. Most legal scenarios are therefore ultimately addressed by means of a "business decision."

How should executives go about making these "business decisions" as they sort through legal issues? What factors should be considered in deciding whether a certain course of action is worth the legal risks involved?

Though final decisions must be made by the client, legal counsel can be of considerable aid in identifying factors to be considered in addressing legal matters. Many of these factors apply to all legal issues faced by businesses. Some, however, are unique to the employment field because of the ongoing nature of the employment relationship.

**Costs:** How much money is at stake, win or lose? What types of damages are potentially recoverable? Are "pain and suffering" or "mental anguish" damages a possibility? Can the company be liable for the other party's legal fees? How much will the company's own legal fees be? Will the issue eventually be tried before a judge or jury unsympathetic to the employer and thus willing to "up the ante" on damages? Does the situation involve novel or sophisticated legal issues that are likely to trigger a lengthy appeal process? What is the cost of not proceeding?

**Hidden costs:** This "cost" side of a legal cost/benefit analysis must include time that company personnel will spend in depositions, in conference, on the telephone, keeping records and reviewing records.

**Precedential value:** How important is a certain outcome to the company? Is the dilemma likely to come up again? Does it need to be effectively addressed immediately or will there be a more opportune time?

**Importance to and effect on employees:** It must be remembered that the employment relationship is an ongoing one and all employees are often affected by decisions made in what may look like isolated situations. Thus, always ask whether, and in what form, word of the company's decision will filter down to employees. How will they react to the decision? Does this reaction make a difference?

**The company's future plans:** What impact does the decision have on the company's future plans? Is there an overriding business strategy? Will the significance of the issue decrease over time?
**The corporate philosophy:** If the company has a particular philosophy or approach to employee relations, does it compel a certain result?

**Counsel's advice:** Sympathetic labor counsel can view various issues from management's perspective without losing objectivity. Clients should feel free to ask their lawyer what he or she would do given the circumstances. Responsive lawyers are problem solvers, and sophisticated clients use this resource in a cost-effective and timely manner.

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