Change in the ranks

When your company makes an executive personnel move, preparation is critical.

Nothing is as certain as change. The key is adapting to unforeseen occurrences in a proactive manner and leveraging strengths while reducing risks. This is where thoughtful preparation comes into play before a termination.

When a top-level executive suddenly leaves or is terminated, it is imperative that a system is in place to handle the proposed departure and ensure a seamless transition, says Mary Lee Wegner, a partner in Alschuler Grossman Stein & Kahan LLP's business litigation department.

"Separating an employee - even if it's amicable - is more complicated than it appears," says Wegner. "Employers need to consider how to address several important issues before a termination happens."

Smart Business spoke with Wegner about the importance of handling executive separations.

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In the case of an executive termination, what factors should be considered before acting?

The starting place is whether the executive has a contract, and if so, what the contract says about the circumstances in which the executive can be terminated. Even if the employee has no contract or is at-will, I still advise employers to think through the potential issues before discharging someone.

Consider whether the employee is in a protected class or recently has engaged in protected activity, like taking a disability leave or complaining about sexual harassment, just to be sure there isn't some type of discriminatory or retaliatory motive that taints the discharge decision. Also check to be sure that there are memos and performance evaluations to substantiate the reason for the termination.

If the employer can document a legitimate business reason for the decision - like monetary-based layoffs, performance issues or the desire to change business direction - there shouldn't be an issue.

If an executive leaves, voluntary or otherwise, what steps should be taken to protect a company's intellectual property, client base and reputation?

Hopefully, the company has had its executives sign some type of confidentiality and nonsolicitation agreement as a condition of employment. When an executive is on the way out, give the individual a memo that attaches whatever agreement has been signed or that, at the very least, reminds him or her not to use or disclose confidential information (or solicit employees, if applicable).

Ask the employee to sign a statement verifying the return of all confidential documents or data, including copies or summaries. Additionally, make sure your IT people are ready to shut down the individual's access to the computer network and e-mail and voicemail systems.

Collect the employee's office keys, security passes, parking cards, Blackberries, laptop computers, credit cards, and anything else that could compromise physical or technological security.

If a company uses a noncompete agreement, what should be included?

In California, as a general rule, covenants not to compete are not enforceable except in very limited circumstances, such as when they are accompanied by the sale of the good will of business. For example, if a business owner sells and executes a noncompete for a reasonable period of time, that probably would be enforced.

On the other hand, if an executive signs an agreement not to solicit employees or clients for a limited period of time after employment ends, those agreements can and will be enforced. The agreement needs to be reasonable in time (usually a year or two), scope and manner. It can't be so restrictive that it essentially prevents the executive from competing in the industry.

Are there any instances in which you can extend the length for the agreement?

In California, most employers don't ask for more than a year or two with respect to a nonsolicitation agreement because the courts have found two years to be reasonable. Again, if a business owner sells his or her business or there is another situation, like sale of a partnership interest, where a noncompete would be legitimate, then the buyer also might be able to get more than a two-year nonsolicit from the seller.

What should a CEO do to keep morale high and prevent a mass exodus following the departure of a popular executive?

The CEO needs to let people know about the change immediately and explain how the transition is going to be handled. People always have a certain degree of fear about change, even if they disliked the executive who is leaving.

They want to know that someone is in charge, has thought about the issues and is prepared to tell them what is expected of them. If the separation is voluntary, the CEO and the departing executive may announce it in advance together and provide details about a proposed succession plan.

If the separation is involuntary, then immediately after the executive's departure, the CEO should issue an announcement, either orally or in writing, and provide instructions about how the departing individual's responsibilities are going to be handled.

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