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EMPLOYMENT PRACTICES HOTLINE

Employee's Illness Complicates Termination

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A manufacturer located in Orange County, Calif., is experiencing higher employee benefit costs, declining sales and decreasing margins on its products. The company, which has 2,500 employees, decided to save costs by decreasing the size of its management team and selecting one of its high-level executives for termination.

The employee at issue is a 25-year veteran of the company, over the age of 60, and one of the highest paid executives. He earns approximately $175,000 per year and is entitled to a $50,000 bonus per year.

He has a range of stock options, some of which have vested and others which are due to vest within 60 days. His past job appraisals do not evidence any significant performance problems, but the appraisals for the executive team are not very thorough.

The company determined he was the most expendable of all of the members of the management team and decided to terminate him within the next 45 days.

A few days after the company made this decision, the employee suffered a stroke and was hospitalized. He took a leave of absence and is expected to be able to return to work within 45 to 60 days, although he has lost the use of his non-dominant hand due to the stroke.

The company has no documentation to substantiate its decision to terminate the executive prior to his taking of a leave of absence. The company called the EPL hotline for advice in proceeding with the termination.

EPL Counseling Advice:

This is a situation fraught with risk. The executive is protected by federal and state laws prohibiting age discrimination, disability discrimination and retaliation for taking a leave of absence.

In the event of legal action, the financial exposure presented by such claims is also significant.

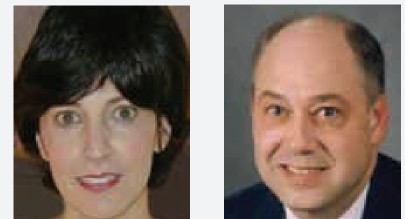
Damages under age discrimination laws include back pay and front pay, plus a doubling of these damages if the executive proves that the company acted willfully.

Compensatory and punitive damages are also recoverable for disability discrimination, and while such damages are capped at $300,000 under the applicable federal law (the Americans With Disabilities Act), California state law (the California Fair Employment & Housing Act) has no cap on damages.

Similar remedies are recoverable for retaliation against an employee who takes a leave of absence pursuant to federal law or state law.

On top of that, the executive would be entitled to prejudgment interest (compounded daily at the prime rate) if he were successful in his case, along with an award of attorney's fees and costs. Given the executive's total compensation package of approximately $225,000 per year, potential damages are easily in the seven figure range.

It is also common for plaintiff's attorneys to argue that one element of damages includes the loss of the value of stock options that the executive could have exercised had he remained employed and could not exercise but for the discriminatory termination. Stock options, insurance benefits and fringe benefits are forms of monetary relief included within "back pay" and "front pay" for purposes of employment discrimination laws. Assuming the stock appreciates, this could push potential damages even higher.



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The company certainly has a legitimate reason to terminate the employee if his performance is less than satisfactory. Complicating this issue, however, is the fact that there is no one act or event which is the "straw that broke the camel's back" to prompt the firing decision.

The case appears to be one of a highly compensated executive whose once acceptable performance is no longer sufficient to warrant the company keeping him on the payroll. The fact that his performance was satisfactory over the past 25 years is a factor in the executive's favor, but performance which was once acceptable and then declines over time is sufficient to support the decision to fire an employee.

The crucial issue is whether or not the employee was performing in a satisfactory manner at the time of his termination.

Putting aside these legal principles, the risk in this situation is a function of the company's proof (or lack thereof).

The company's case could be strengthened significantly if it had prepared contemporaneous documentation to evidence the fact that it had put the executive on notice of his performance deficiencies and provided him with an action plan to

remedy those problems (or, alternatively, put him on notice that continued poor performance could result in a firing).

While the lack of documentation is not fatal, the company must be prepared to demonstrate that it selected the executive for termination because his performance was not as strong as the other members of the executive team. Assuming the company has anecdotal evidence to demonstrate that fact, it should have sufficient grounds with which to defend its personnel decision.

Timing issues are also important in this situation. The executive's stroke is not necessarily something that makes him "termination proof," as the company made the decision to terminate the employee prior to the time he suffered a stroke. The company will need to demonstrate that its decision was not "made up after the fact," i.e., due to the leave or the medical problem.

While its decision was not documented contemporaneously, there had been a meeting where the issue was discussed and a decision was made well prior to learning of the event precipitating the leave. Presumably, several members of the management team can testify that the meeting occurred and that the decision was made.

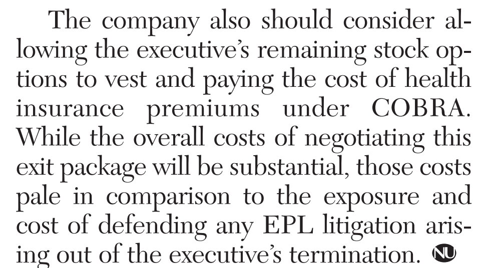
While the employee had an absolute right to take the leave, the employer also has a right to terminate the employee on his leave if the company had already decided to terminate the employee.

In order to minimize its EPL exposure, the company may wish to consider keeping the employee on the payroll through his leave of absence and for a short time after his return to the workplace. This will assist the employee in transitioning to another position or minimizing the financial impact of his termination.

The company should notify the employee of its termination decision once the employee's medical condition is stable. It is better at this point to be up-front with the employee than to "ambush him" when he returns from his leave of absence.

Given the monetary exposure and the circumstances of the termination, it is highly likely that a plaintiff's lawyer would be interested in prosecuting a lawsuit on behalf of the executive. Therefore, the company should expend considerable effort to negotiate a severance package with the employee in return for a release of claims. Given the financial exposure of the potential legal action, it is not unusual in these circumstances to pay up to a year or more of compensation to a high-level executive to secure a release.

The company also should consider allowing the executive's remaining stock options to vest and paying the cost of health insurance premiums under COBRA. While the overall costs of negotiating this exit package will be substantial, those costs pale in comparison to the exposure and cost of defending any EPL litigation arising out of the executive's termination.



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