Legal Matters®

Business
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Dos and don'ts when a worker is arrested

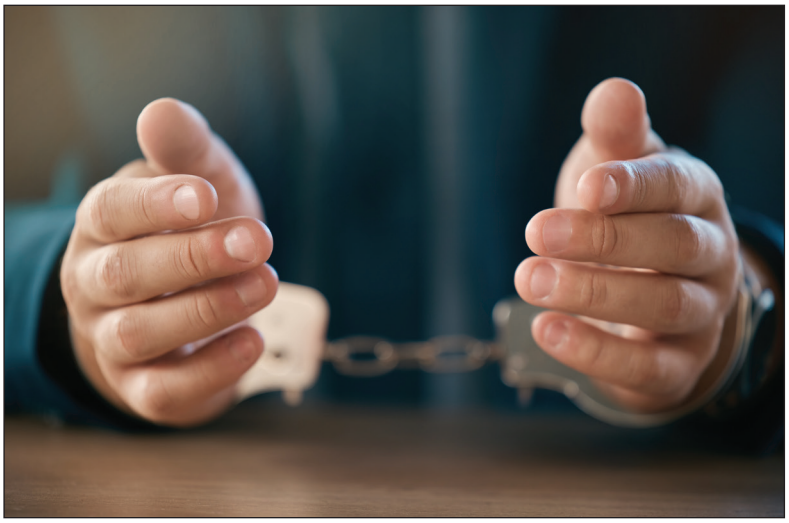
You've just received notice that someone who works for you has been arrested. A local news outlet is calling to confirm the person's employment history and the rumor mill is already active.

Now what?

First, consult legal counsel. If the incident is mishandled, you run the risk of being sued for defamation or discrimination. Your attorney can advise you on next steps.

Pay attention to the following:

- Don't make assumptions. Remember, an arrest is simply an accusation, not proof of wrongdoing. Knee-jerk reactions can cause bigger problems down the road, particularly if the worker is later cleared. Give the employee a chance to explain. If desired, conduct an internal investigation to determine if the information provided is reliable.
- Manage information on a need-to-know basis. Exercise caution in how you gather information and be careful not to spread misinformation. Only workers with supervisory or decision-making roles should be included in conversations regarding another worker's arrest. Unnecessary disclosure could lead to a defamation lawsuit if the individual is found not guilty or the charges are later dropped.
- Determine impact on the worker's job. As an employer, you can make employment decisions based on the conduct underlying the arrest, if it makes a worker unfit for the position. For example, an arrest for a DUI does not relate to someone's duties as a receptionist, but it may warrant termination for a delivery driver. Meanwhile, an arrest for check fraud would be relevant to someone involved in an accounting or money-handling function.
- If there is a clear and justifiable conflict between the nature of the employee's job and the alleged offense, you may want to put the employee on suspension during an investigation. Alternately, it may be appropriate to move them, at least temporarily, into a less public role.
- Remain consistent. Make sure any actions you take are consistent with how other workers with similar arrests and similar job functions have been treated.



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OSHA fines store for safety violations

The Occupational Safety and Health Administration (OSHA) has ordered Dollar General to pay approximately $1.3 million due to workplace safety issues at three Georgia stores.

The news of these significant fines is a wake-up call for companies nationwide to ensure they are meeting all safety requirements.

The penalties were issued for violations of the Occupational Safety and Health Act. These penalties are difficult to predict for companies because they vary based on the extent of the hazard, the size of the business, and any history of violations, among other factors. In rare situations, violations can lead to criminal prosecution.

OSHA issued the fines in this case for four willful violations and seven repeat violations, including obstructed exit routes, unsafe stacking of boxes of items for sale, and difficult-to-access electrical panels.

In a statement, OSHA said that the agency's inspectors have frequently found "unsafe conditions that put workers at risk."

After the recent order of fines, Dollar General said in a statement: "Following these inspections, we took immediate action to address issues and reiterated our safety expectations with store teams. The safety of our employees and customers is of paramount importance to us, and we will continue to work cooperatively with OSHA."

In further enforcement actions, OSHA also slapped fines on one of Dollar General's competitors, Family Dollar, which is owned by Dollar Tree. The company must pay $1.2 million in penalties for safety violations at two Ohio stores, including unstable stacks of goods, blocked exits, inaccessible electrical equipment and fire extinguishers, and cluttered work areas.

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Steelworker's retaliation claim revived after cellphone search

A cellphone search is playing a central role in a Pennsylvania steelworker's retaliation case.

In September, a federal appeals court held that a reasonable jury could determine that Samuel Grossi & Sons Inc. was looking for an excuse to fire Joseph Canada when it searched his text messages.

Canada filed a charge with the Equal Employment Opportunity Commission in 2019 and subsequently filed a complaint in district court. He alleged that the company interfered with his rights under the Family and Medical Leave Act, preventing him from accessing forms and harassing him when he took leave. Canada, who is Black, also claimed race discrimination. He was fired a few months later.

Canada says his employer broke into his locker and searched his personal phone while he was on vacation. Grossi & Sons claimed they cut the padlock off Canada's locker in an effort to move it.

An HR representative from the company took the phone — allegedly to determine whether it was a company-issued device — guessed the password and searched it. When that search suggested that Canada had solicited sex workers during work hours, he was fired for violating company policy.

Canada denied the allegations and, in his amended suit, alleged he was fired in retaliation. In 2020, a district court granted summary judgment in favor of the company, finding that no reasonable jury could conclude that the defendant's reason for terminating the worker was pretextual.

On appeal, the appellate court reversed, finding that the company's motivation for searching Canada's phone could be relevant to pretext. The court held that a "convincing mosaic" of evidence could convince a reasonable jury that Canada was a victim of unlawful retaliation.

Further, the court pointed to the company's policy, which only allowed searches if there was a reasonable suspicion that a worker was engaging in misconduct. Although the defendant had a legitimate reason for moving the plaintiff's locker, it did not have one for searching the locker or the worker's cellphone.

While the company alleged that it searched Canada's phone to determine whether it was company property, the court described that argument as "weak," claiming the "breadth of the search alone" undermined plausibility.

DOL proposes change to independent contractor definition

The U.S. Department of Labor (DOL) has issued a notice of proposed rulemaking related to classifying employees as independent contractors.

The change could result in more workers being classified as employees and therefore entitled to certain federal protections such as minimum wage, workers' compensation and overtime pay.

The rules would effectively undo a Trump administration-era ruling that took effect in January 2021. Under the 2021 rule, an "economic reality test" is used that depends largely on two core factors — control over work and the opportunity for profit or loss. Other factors could be taken into consideration but were given less weight.

Now the DOL has proposed returning to a "totality of the circumstances" evaluation under which applicable standards do not have a predetermined weight.

Additional factors can include:

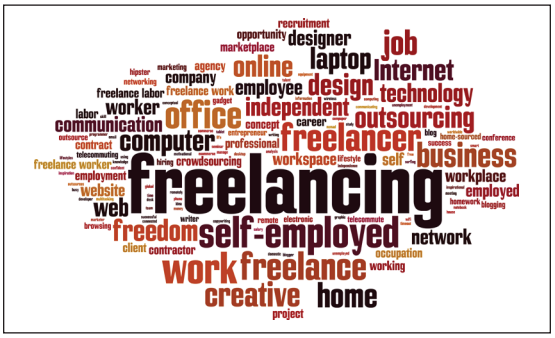
- Permanence of the work relationship
- The worker's investment in equipment or materials required for the task
- Whether the work is an integral part of the employer's business
- Worker skill and initiative

Analysts have said the proposed rule will have the biggest impact on businesses that rely on gig workers, such as Uber and Lyft.

However, statements from both Uber and Lyft imply that the change is merely a return to the status quo.

In advance of an expected 2023 effective date, businesses should review contract language in which they "reserve the right" to control aspects of a contractor's work.

Under the proposed rules, such language could constitute an employee relationship, even if you don't actually exercise that control.



OSHA expands severe violator program

The U.S. Department of Labor (DOL) is expanding the criteria for placement in the Occupational Safety and Health Administration's Severe Violator Enforcement Program (SVEP). Businesses can now be placed on the list for violating any hazard standard. Previously, a business could be in the program for failing to meet a limited number of standards. The changes will broaden the program's scope with the possibility that additional industries will fall within its parameters.

The OSHA program targets companies that repeatedly disregard worker health and safety. The violator list is updated quarterly, and businesses can be included even when their case is under appeal.

The revisions empower OSHA "to sharpen its focus on employers who — even after receiving citations for exposing workers to hazardous conditions and serious dangers — fail to mitigate these hazards," said OSHA Assistant Secretary Doug Parker in a statement.

Program updates will also impact how long a business stays in the SVEP program. Specifically:

- Potential removal from the SVEP now begins three years after verification of hazard abatement. Previously, removal could occur three years after the final order date.
- Companies can reduce that time to two years if they consent to an enhanced settlement that includes the use of an OSHA-approved safety and health management system.

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- Consider policies addressing arrests. Some companies maintain specific policies for instances of arrest and incarceration. Under such policies, you may require that a worker reports an arrest, and that misrepresentation of the circumstances can serve as grounds for dismissal.

Be aware, however, that a policy that automatically suspends or terminates an employee after an arrest may run afoul of Equal Employment Opportunity Commission (EEOC) laws.

Make sure you understand what's allowed under federal law and the laws of your state and/or local municipality.

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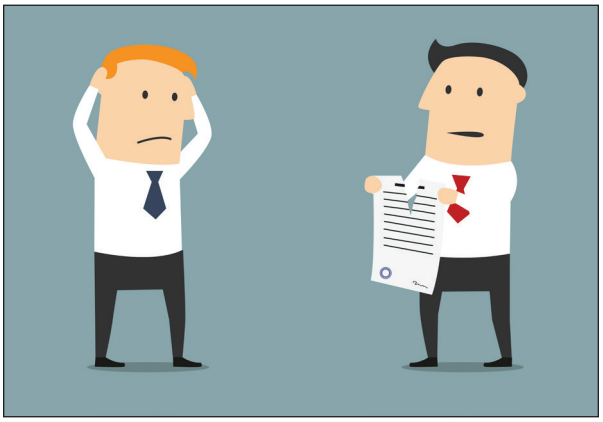
Hear workers out before disciplinary action

When dealing with misconduct issues, be sure to allow workers to tell their side of the story. Failure to hear a worker out could increase organizational risk.

Generally, it's best to:

- Conduct a thorough investigation. If you don't interview the accused, a court could later rule your investigation was insufficient.
- Wait before acting. Wait until the worker has had their say before drafting a disciplinary action or termination letter. Terminating a worker immediately after an interview could suggest your decision was pre-determined, regardless of their defense.
- Document the worker's side. It's possible the worker may admit to wrongdoing during an interview. Even if they don't, it's best to document their story. That can help protect the company from workers who later change their story after filing a grievance or legal complaint.
- Adhere to union expectations for due process.



In a union environment, failure to give a worker a fair hearing could be criticized by an arbitrator, triggering a reversal of any disciplinary action.

No matter how strong the evidence against a worker, it's a good idea to give them an opportunity to explain their actions. You never know what a worker will say. Even if it doesn't change your course of action, it demonstrates a level of fairness and due process that could protect your company down the road.