

What to do When Your Employee is Getting Divorced

Dentons Davis Brown | JoEllen Whitney & Tyler Coe | November 22, 2022

Maybe you noticed that an employee needs more time off lately or has seemed extra stressed or distracted. Perhaps they even told you they are having a tough time in their personal life and are divorcing their spouse. While this is certainly highly disruptive to the employee, there can also be issues employers should consider if your employee is going through a divorce or separation process.

Performance and Leave

A divorce is a stressful process and employees may have court dates, and meetings with attorneys during work hours, or may experience performance issues due to stress. Employers need to assess the leave needs of the employee and consider these issues when an employee makes leave requests. In the case of domestic abuse, while Iowa does not have specific leave statutes, the EEOC has stated that failure to take these circumstances into account could form the basis of a sex-based claim. Domestic abuse hearings often happen twice, once for the initial protective order and the second for the determination of the final protective order. Sometimes, safety for your employees could become an issue. From spouses calling to see if your employee is at work or somewhere else, be sure your front office staff, or whoever answers the phone, knows not to divulge information. Other times, spouses in divorce proceedings attempt to surveil the comings and goings of their spouses. This includes waiting outside your place of business and waiting to see if their spouse leaves and with whom. So be aware of these issues and be prepared to address them if they occur.

Communication

Communicate with your employee - if they are having workplace issues and/or other performance problems or need leave as a result of a divorce, it is important to speak with them directly to determine how that employee wants to communicate the situation with others. If this is a situation where the spouse is friends with those in the workplace, this may require planning with permission. Divorce is one of those things that can certainly involve a community including your workplace community. If a spouse has been part of social or workplace events and friendships developed, your employees might start taking sides. You should communicate with the employee undergoing the divorce to determine how they want to address this issue and what type of communication should be provided. Basic elements include cautioning your employees against gossiping or spreading misinformation and reminding them that the workplace is the workplace, and unless you provide divorce services, the issues don't need to be discussed.

Privacy, Security, and Confidentiality

One of the issues with taking sides is that an ex-spouse can sometimes ask other employees to provide them with information about company operations, wages, benefits, or similar items. This information is typically considered confidential, and employees should be reminded that confidential company information may not be shared outside of the company even if it is with a friend who is getting a divorce. Employees may be requested to provide everything from another employee's FMLA requests, and ADA statements, to performance evaluations to the divorcing spouse, none of which is appropriate for them to share. Information of this type can be obtained through legal channels such as via a subpoena directed to Human Resources. An employee should not be handing anyone anything under the table.

Employer Subpoenas

In a divorce case, it's not uncommon for an employer to be subpoenaed for items such as an employee's work history, benefits, current wages, bonus structure, and similar items. If you receive a properly drafted and directed subpoena, those items will need to be provided through the employer to the attorney or other party issuing the subpoena. It is important to inform your employee in a civil case of this type that you have received a subpoena and give them a copy of it, so they know what items have been requested.

In general, you should not receive a subpoena and simply turn the items over within a few minutes or hours. The employee should be made aware of the nature of the subpoena and the employee, or their attorney, should be given time to object to the production of any items or documents. Do not "internally" produce information. Remember that pursuant to statute, current employees are entitled to a copy of their personnel records with the exception of references simply upon request.

Affidavits

What happens when you get asked for an affidavit on behalf of your employee or you are requested to testify? First and foremost, when requested to provide an affidavit, or to testify, you should tell the truth. However, in many instances, employers may not know how an employee interacts in public, social settings, or how they treat their children. If you don't know, you can't testify to it.

Additionally, when giving recommendations of any type, whether that is for your employee at trial, to a charitable organization, the licensing board, or anything else, employers need to assess how their statements impact the workplace, culture, and environment and whether or not there are existing employee issues that such issues may not relate to the content of the affidavit but could be problematic in other settings. In other words, don't write a glowing reference for an employee you are about to fire. If your employee's spouse asks another employee to write an affidavit on their behalf, you cannot restrict them from doing so, but beware it could lead to increased workplace acrimony.

Process

Post-divorce there may be orders for child support, a potential wage garnishment for certain types of support, medical support, and similar items. Employers need to have a process to address these items. It is not appropriate to terminate an employee because there is an existing support order, and you may not ignore properly issued support orders. Choosing to ignore a support order or paying an employee under the table creates employer liability. If you choose to do this you could be liable for the amount of unpaid support.