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"Quiet Firing": A Bad Idea

Better to have the courage of your convictions.

I'm sure you've heard of "quiet quitting," when an unhappy employee does the bare minimum to get by and keep drawing a paycheck, but doesn't care much about the job beyond that.

(When "quiet quitting" was all the rage a few months ago, I was just puzzled. Who knew that mediocrity was a new phenomenon?)

But a counter-trend has been in the news: Quiet firing. This is when an employer does whatever it can to make the job distasteful to the employee, in the hope that the employee will "voluntarily" quit.

Wow. Sounds great, Robin! We'd like to fire Dustin, but we want to avoid all that unpleasantness associated with a firing, not to mention the price of a separation package. We'll just make his life miserable so he'll voluntarily quit, and then we won't have to pay him a dime. And, since he'll be quitting, even Dustin will go away happy. It's a win-win-win! This blog is fantastic!

Whoa. This "new thing" is old as the hills. There is even a legal term for it: Constructive discharge.

What's a "constructive discharge"?

Generally, the courts will find that an employee was "constructively discharged" when the employer deliberately makes working conditions so intolerable that a reasonable person in the employee's position would feel compelled to resign. (This standard may vary a bit depending on your jurisdiction, but that's the general idea.)

If a court finds that a resignation was actually a constructive discharge, then legally it's the same as if the employee was out-and-out fired. That means an employee who is constructively discharged can usually collect unemployment benefits. If any alleged illegal motive was arguably involved, the employee can also sue for wrongful discharge, and file a charge or administrative complaint, and recover damages as if he or she was fired. (Notice that I said "and," not "or.")

Of course, any good employer has to do things that employees find unpleasant. It may have to make (and enforce) workplace rules. It may have to give a "quiet quitter" a poor performance review. It may have to make changes in its operations for business reasons that employees don't like. It may not be able to find applicants willing to fill certain vacancies, which may overburden everybody else. It may have to require employees to go through training that the employees find both tedious and excruciating. This is not what we mean by constructive discharge – er, I mean, "quiet firing."

But what about these?

- Pervasive temper tantrums, verbal abuse or worse, directed at an employee.
- Failing to address known unlawful harassment in the workplace.
- Reducing the pay of a Department Manager to the minimum wage.
- Requiring your VP of Sales to scour the toilets. Full time. Using a dishrag.

Terrible, right? If an employee working under these conditions quits, a court is almost certain to find that the employee was constructively discharged.

Those last two examples were extreme, and all four were pretty obvious. Here are some that are more subtle:

- When you hired Alfred, who lives a four-hour round trip away from the office, you told him that he could perform his job remotely except for major meetings that might occur three or four times a year. Alfred has done a good job working from home and is reliable and accessible. Now that COVID is over (or is it?), you tell Alfred that he has to come to the office in person every day.
- You need to eliminate 20 jobs in a 30-person department, but you eliminate only 10 because you are hoping that 10 more will be so stressed out and anxious that they'll quit, saving you the cost of severance pay.
- You impose arbitrary, and sometimes conflicting, expectations on Jennifer, to the point that she feels she can never do anything right no matter how hard she tries.

These actions may or may not amount to a constructive discharge. There could be legitimate reasons for requiring employees to return to the office, for conducting a reduction in force (even a partial reduction in force) or for imposing expectations that the employee may perceive as unreasonable. But if the goal was to get folks to resign, that will work against the employer in court.

Why is "quiet firing" a bad idea?

Believe it or not, you may actually have more legal protection as an employer if you just fire. For example, let's say Betty Lou is a lousy employee. You provide her with constructive negative feedback with suggestions about how she can improve. (All documented, natch.) Let's say you do this, preferably more than once, and Betty Lou stays bad. You eventually fire her for poor performance. Then Betty Lou sues. What will happen in the end?

- You have documentation showing that Betty Lou was a poor performer.
- You have documentation showing that you went over this with Betty Lou and gave her a reasonable chance to improve.
- Betty Lou didn't improve, so you fired her.

Betty Lou may claim discrimination, or retaliation, or wrongful termination, but you have proof that she wasn't doing the job and that is why you fired her. You are very likely to win.

And here's something even better. Let's say Betty Lou claims intentional infliction of emotional distress because the termination was so traumatic and upsetting to her. And it no doubt was. But in most states, firing an employee is not the type of "extreme and outrageous conduct" necessary to support an intentional infliction claim.

So you win (after spending a few years in court) and live happily ever after.

On the other hand, if you decide to get cute and do a "quiet firing," here's what could happen:

- You have nothing but your word to show that Betty Lou was a poor performer. (Betty Lou insists she was the greatest.)
- Betty Lou has evidence of all the mean, petty, crappy things you did to her while trying to get her to quit.
- As a result of your actions, Betty Lou has been diagnosed with depression and anxiety.
- And, yes, Betty Lou resigned, but any reasonable person in her shoes would have done the same.

You might win, but there is a very good chance that you will lose. And the mean, petty, crappy things you did to get Betty Lou to quit can be the basis for an intentional infliction claim even though a straightforward firing usually cannot.

The moral: Don't be chicken.

Employers, it really is best to be (1) fair and (2) honest. If you need to fire, then fire (after making sure you can justify the decision, with the help of your employment counsel, if necessary). If you need to conduct a reduction in force, then do it (again, with the help of counsel).

If you act with the courage of your convictions, you'll be better off in the long run. "Quiet firing" is not an easy out.

Source: Robin Shea, partner with the law firm Constangy, Brooks, Smith & Prophete, LLP, and editor and primary author of the blog Employment & Labor Insider, www.constangy.com/employment-labor-insider.

BUSINESS MANAGEMENT

Bill's Short Attention Span Sales Tips: Prepare to Negotiate

"I love to negotiate," said no one. Ever.

Negotiation means confrontation and disagreement. Negativity swirls all around the subject and it causes a lot of discomfort. What's more, the net result can mean you've won the order but have suffered a loss of some kind as well.

Now, I could give you the top five sales tips on the subject, but you could Google that just as easily as hearing it from me.

I could—and will—advise you to read an excellent book on the subject, "Never Split the Difference," by Chris Voss. Interesting, engaging and entertaining, Voss is a former FBI hostage negotiator who brings his skills to the business world.

But in all the research I did for an upcoming Sales Vault workshop on the subject, nowhere did I find the advice you are about to hear:

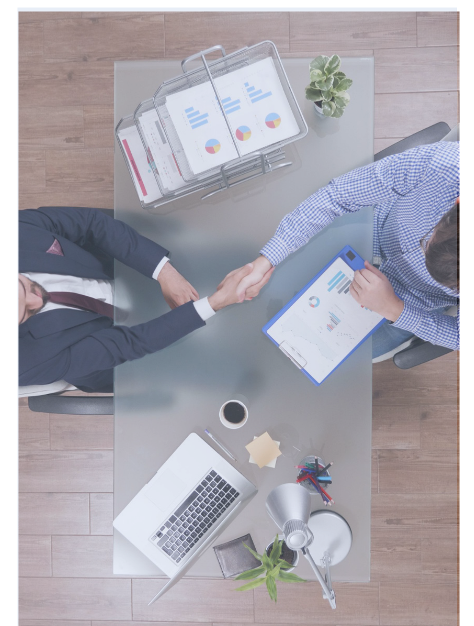
Expect it.

Expect to negotiate. You see, I find sales reps are often blindsided when they encounter push back. This is especially true for existing customers. They just accept the reorder, get a quote and send the number over to the client. But when the customer says, "We've gotten other quotes," they panic. Or when a new customer asks, "Is that your best price?" their immediate reaction is to lower their bid.

You need to approach every encounter with the understanding and expectation that you'll be confronted with a negotiation. Be ready with a response, gang, because when you give your price, it's game over. Your choices are to lower the price or substantiate it.

So, be ready.

Source: Bill Farquharson, The Sales Vault, https://SalesVault.Pro.



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For more information contact Nadine Mora at 323-728-9500 ext. 262 or nadine@piasc.org.

HR Questions Roundup

How can you show employees that their feedback is heard and valued?

First, thank them. This lets the employee know you received their input and that you appreciate their taking the time and energy to give it. If you plan to act on the feedback and employee assistance is feasible, ask the person or people who suggested the change if they'd like to be involved in executing it. Employees who identify a problem may have ideas about the solution.

Second, when you make a change based on employee feedback, make sure all affected employees are aware that it was a motivating factor. If appropriate, give credit for the idea where it's due. If you're unable to make a desired change, explain why.

In short, reward feedback with appreciation, transparency and the chance to participate in the change.

Can you ask employees about their medications?

More specifically, can you ask employees if they are taking any medications that may impair their abilities to do their job? Generally, the answer is no.

The Americans with Disabilities Act restricts employers from asking medical questions of employees and protects the privacy of medical information. Asking about prescription medications would fall into the category of a medical-related inquiry and should only be done if job related and consistent with business necessity.

For such an inquiry to be job related and consistent with business necessity, you must have a reasonable belief, based on objective evidence, that an employee's ability to perform essential job functions will be impaired by a medical condition or that an employee will pose a direct threat to employee or public safety because of a medical condition. A direct threat is a significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation.

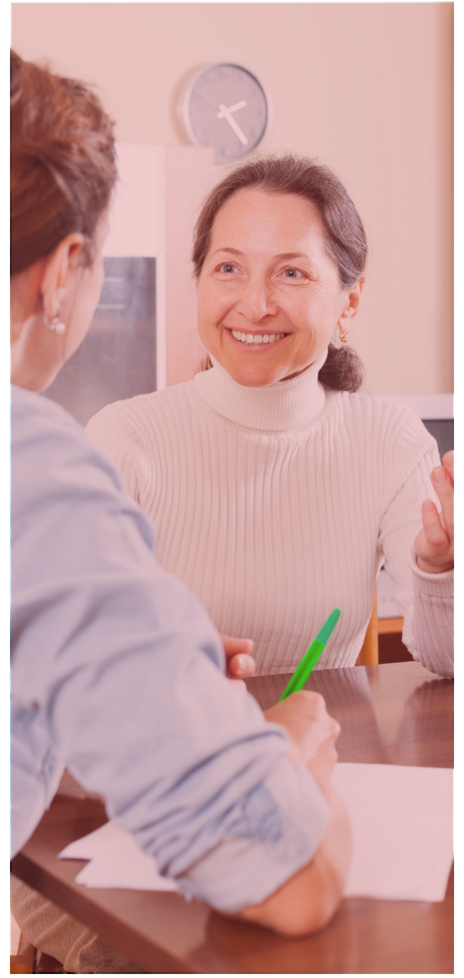
For example, an automotive repair facility could require mechanics to report when they are taking medications that may affect their ability to operate heavy machinery safely. However, they would not be able to require administrative employees to do the same.

Can you store completed Form I-9s electronically?

Yes, you can store completed Forms I-9 electronically. However, per U.S. Citizenship and Immigration Services, any electronic storage system must include the following:

- Reasonable controls to ensure the system's integrity, accuracy and reliability. For instance, you would need to ensure that only authorized personnel have access to the records and have a backup plan to recover records in the event of information loss.
- Reasonable controls that prevent and detect any unauthorized or accidental changes. In practice, the system should create a secure and permanent record when an individual makes any changes and this record should include the date of access, the identity of the person who accessed the electronic record and the particular actions they took.
- An inspection and quality assurance program that regularly evaluates the system and includes periodic checks of electronically stored Forms I-9, including electronic signatures, if used. In other words, periodically verify that the storage system is working as intended.
- An indexing system that allows users to identify and retrieve records maintained in the system.
- The ability to reproduce legible and readable paper copies.

Source: HR|BIZZ



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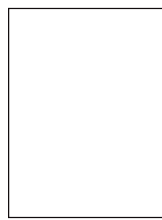
GOVERNMENT AND LEGISTATIVE

On Our Radar

Approved regulations and other issues that we've been following:

- **California pay data reporting portal is now open** – Each year employers with at least 100 employees and at least one California employee must report pay, demographic and other workforce data to the state's Civil Rights Department. Pay data for the 2023 reporting period is due by May 8, 2024. Access the portal, as well as the updated FAQs, templates and user guide, at bit.ly/CAPayData
- **Covid-19 isolation requirements reduced** – On January 9, 2024, the California Department of Public Health issued a new Order that drastically reduces the isolation period for Covid-19 cases. For more information, see the article at bit.ly/COVIDiso24.
- **Don't forget to post your 2023 Form 300A** – Unless your business is exempt, you must post your annual summary of work-related injuries and illnesses from February 1 through April 30, in a visible and easily accessible area at every worksite. You can download the form, instructions and more at bit.ly/OSHAPublications.
- **Mandatory arbitration is still allowable** – AB 51, the law that had attempted to criminalize employers' use of mandatory arbitration agreements, was permanently enjoined by the California District Court. What this means is that as long as the Federal Arbitration Act applies and governs the agreement, employers can require arbitration agreements as a condition of employment in California.
- **New form for non-exempt employees** – California has released a new form for complying with the requirement that you inform non-exempt employees about their right to paid sick leave and other things about their pay. You can download the new form, which reflects the new expanded sick leave requirements, at bit.ly/LaborNotice.
- **NLRB joint employer test** – Are two employers joint employers under the National Labor Relations Act (NLRA)? The National Labor Relations Board (NLRB) recently released a finalized rule establishing a new standard for answering this question. This rule can be found at bit.ly/JointEmployer24, and a helpful summary is at bit.ly/JointEmployerTest.



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Business Management — BILL'S SHORT ATTENTION SPAN SALES TIPS:PREPARE TO NEGOTIATE
Human Resources — HR QUESTIONS ROUNDUP
Government and Legislative — ON OUR RADAR

Events CALENDAR

Paper and Substrate Show
THURSDAY, MARCH 28
5:30 - 9:00 PM PT
Irvine, CA
www.piasc.org/papershow/

Drive Leadership in Print: Master Class
APRIL 2, 9, 12 AND 23
11:00 AM - 12:00 PM PT
Online
www.piasc.org/events

Provide Customer Service with Care: Master Class
APRIL 30, MAY 7, MAY 14 AND MAY 21, 2024
11:00 AM - 12:00 PM PT
Online www.piasc.org/events

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FOR FULL LIST OF EVENTS, PLEASE VISIT WWW.PIASC.ORG/EVENTS

Graphics Night
THURSDAY, MAY 2
Yorba Linda, CA
5:30 - 9:00 PM PT
www.piasc.org/graphicsnight

Americas Print Show 2024
WEDNESDAY - THURSDAY, MAY 8-9
Cleveland, Ohio
americasprintshow.com