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Dilg, Joe

From: Jordan, Carl
Sent: Friday, August 24, 2001 7:02 PM
To: Butcher, Sharon (Enron)
Subject: Confidential Employee Matter

ATTORNEY CLIENT PRIVILEGED COMMUNICATION

Sharon:
Per your request, the following are some bullet thoughts on how to manage the situation with the employee who made the sensitive report.

1. I agree that it is a positive that she has requested reassignment to another department. Assuming a suitable position can be found, I recommend documenting in memo form that the transfer is being effected per her request. This would be worded to convey that the company has considered and decided to accomodate her request for reassignment. See comments below re additional items to be addressed in the memo.
2. I suggest that the memo also name a designated company officer for her to contact in the unlikely future event that she believes she is being retaliated against for having made the report. Case law suggests that she then will have the burden of reporting any perceived retaliation and allowing the company a reasonable opportunity to correct it before quitting and asserting a constructive discharge. (Note: If there is any chance that the decision might be made in the future to discharge the employee for making the report -e.g., if the company concludes that the allegations were not made in good faith- then this assurance probably should not be given, at least until later when (if) the company is satisfied that the employee was not acting in bad faith or otherwise improperly.)
3. The memo should contain language that conveys that the other terms of her employment -specifically, its at-will status- remains unchanged. This is to avoid any future claim that the understandings surrounding the transfer constitute a contractual obligation of some sort.
4. The new position, as we discussed, should have responsibilities and compensation comparable to her current one, to avoid any claim of constructive discharge.
5. As we discussed, to the extent practicable, the fact that she made the report should be treated as confidential.
6. The individual or individuals who are implicated by her allegations should be advised to treat the matter confidentially and to use discretion regarding any comments to or about the complaining employee. They should be advised that she is not to be treated adversely in any way for having expressed her concerns.
7. You indicated that the officer in charge of the area to which the employee may be reassigned would probably need to be advised of the circumstances. I suggest he be advised at the same time that it is important that she not be treated adversely or differently because she made the report. And that the circumstances of the transfer are confidential and should not be shared with others.

You also asked that I include in this communication a summary of the possible risks associated with discharging (or constructively discharging) employees who report allegations of improper accounting practices:

1. Texas law does not currently protect corporate whistleblowers. The supreme court has twice declined to create a cause of action for whistleblowers who are discharged; however, there were special factors present in both cases that weighed against the plaintiffs and the court implied that it might reach a different conclusion under other circumstances.
2. Regardless of the whistleblower issue, there is often a risk of a Sabine Pilot claim (i.e., allegation of discharge for refusing to participate in an illegal act). Whistleblower cases in Texas commonly are pled or repled as Sabine Pilot claims - it is often an easy leap for the plaintiff to make if she had any involvement in or duties relating to the alleged improper conduct. For example, some cases say that if an employee's duties involve recording accounting data that she knows to be misleading onto records that are eventually relied on by others in preparing reports to be submitted to a federal agency (e.g., SEC, IRS, etc.), then the employee can be subject to criminal prosecution even tho she did not originate the misleading data and does not prepare the actual document submitted to the government. Under such circumstances, if the employee alleges that she was discharged for refusing to record (or continuing the practice of recording) the allegedly misleading data, then she has stated a claim under the Sabine Pilot doctrine.
3. As we discussed, there are a myriad of problems associated with Sabine Pilot claims, regardless of their merits, that involve allegations of illegal accounting or related practices. One is that the company's accounting practices and books and records are fair game during discovery - the opposition typically will request production of volumes of sensitive material. Another problem is that because accounting practices often involve judgments in gray areas, rather than non-judgmental applications of black-letter rules, there are often genuine disputes over whether a company's practice or a specific report was materially misleading or complied with some statutory or regulatory requirement. Third, these are typically jury cases - that means they are decided by lay persons when the legal compliance issues are often confusing even to the lawyers and

experts. Fourth, because of the above factors, they are very expensive and time consuming to litigate.
4. In addition to the risk of a wrongful discharge claim, there is the risk that the discharged employee will seek to convince some government oversight agency (e.g., IRS, SEC, etc.) that the corporation has engaged in materially misleading reporting or is otherwise non-compliant. As with wrongful discharge claims, this can create problems even tho the allegations have no merit whatsoever.

These are, of course, very general comments. I will be happy to discuss them in greater detail at your convenience.

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