

Employee arrested: Now what?

by Jodi R. Bohr
Tiffany & Boscoe, P.A.

One of our employees has been arrested but not convicted. It doesn't appear he's going to be released in the near future. Is it better to put him in an unpaid "leave" status or fire him?

Whether an employee who has been arrested should be terminated or placed on unpaid leave depends on the circumstances. Does he have a contract dictating when his employment can be terminated? If so, you must follow the agreement's terms. If not, you may want to consider the circumstances under which he was arrested before making your decision.

Generally, employers may terminate an incarcerated employee for job abandonment, violation of an attendance policy, or virtually any other reason if he is at will. You indicate it's unlikely he will be able to return anytime soon, so placing him on unpaid leave status may cause the situation to languish. Under the circumstances, termination may be a better option to allow you both to move on—and to allow you to fill the position and remove the uncertainty of when he can return.

Under Arizona law, an employer that terminates an employee because of incarceration for a period in excess of 24 hours, when the available evidence tends to establish he committed the offense, is discharging him for "misconduct." Under those circumstances, the employer won't be charged for an unemployment claim by the employee. Other states may take the approach that the termination was for personal compelling reasons and award unemployment.

Regardless of your decision, you should safeguard the employee's privacy and not share the incarceration status with individuals who don't have supervisory authority or decision-making status. If the employee is placed on unpaid leave, you should have a plan regarding how to address the prolonged

absence and when unpaid leave will result in termination if the incarceration continues.

At the end of the day, as long as you are treating him the same as you have treated other similarly situated employees, either course of conduct would be OK.

[Jodi R. Bohr](#) is a shareholder with [Tiffany & Boscoe, P.A.](#) She practices employment and labor law, with an emphasis on litigation, class actions, and HR matters, and is a frequent speaker on a wide range of employment law topics. She may be reached at jrb@tblaw.com or 602-255-6082.