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12 key takeaways

Employees facing criminal allegations

Rachael Levene and Amy Smith recently gave a talk to employment lawyers about how best to manage employees who have collided with the criminal justice system. Here are some key takeaways.

— Employment law — Nine Chambers, Manchester

Speaker

Rachael Levene

Barrister, Nine Chambers

Speaker

Amy Smith

Barrister, Nine Chambers

Contact our clerks

0161 955 9000

To instruct our barristers

Key takeaways 1–3 of 12

Employees facing criminal allegations

01 Check whether the employee was under a duty to tell you, and if so whether they did.

If so, check whether the employee has been honest and upfront about his or her position. If the employee has withheld information or failed to notify the employer at all, this may be grounds for a conduct investigation.

02 Make sure you understand the position.

Is it an arrest, a voluntary interview, a caution, a Sexual Risk Order (SRO), a charge, or a conviction? Each of these requires a different thought process as to the employer's next step.

03 Remember that it isn't a static process.

A charge may be dropped. A voluntary interview may turn into something more serious. Keep a close eye on its progress.

Employees facing criminal allegations

04 Gather all the information you can.

The employee is likely to have what you need, such as the bail conditions or terms of the SRO. Ask for it in writing. Alternatively, speak to the officer in the case. Make sure you have notes of all conversations and agreements.

05 Be cautious about investigating.

You may not intend to, but if you inadvertently tip off witnesses or give the employee a chance to destroy evidence, that could harm the prosecution and attract a complaint from the police.

Anything you "publish" could be seen as contempt of court if it relates to ongoing criminal proceedings. That could include an intranet notice or social media post.

Further, anything you create as part of an investigation could be sought by police or the defence. Make sure to keep your records intact and ring-fenced.

Key takeaways 6–8 of 12

Employees facing criminal allegations

06 Bail conditions might force your hand.

If the bail conditions mean the employee cannot reasonably do his job (such as being banned from a location, or from speaking to a particular person, or not being able to access the internet), that might mean the employer's process moves faster. It could be SOSR (some other substantial reason).

Please note, it is important to investigate whether this is actually the case or whether you could just move the employee to another site.

07 A lengthy custodial sentence may frustrate the contract.

08 If there are safeguarding or regulatory risks/consequences, you must act on those promptly and notify the relevant organisations.

Key takeaways 9–10 of 12

Employees facing criminal allegations

09 Be careful of a knee-jerk response.

Even a serious charge does not give the employer an automatic right to dismiss. A fair process and a careful weighing up of all the key factors are essential. However, it is not normally necessary to await the outcome of a prosecution before taking disciplinary action.

> **“Even a serious charge does not give the employer an automatic right to dismiss.”**

10 Damage to reputation is also not a slam-dunk argument, even if the charge is notable.

There must be a connection between the matters alleged and the potential damage to reputation. Secondly, the risk must be reasonably and actively assessed. Finally, assess whether suspension could reasonably mitigate that risk.

Key takeaways 11–12 of 12

Employees facing criminal allegations

11 Paying the employee.

Double-check the contract. Suspension is the employer's decision to keep the employee away from work. Unless the contract expressly permits unpaid suspension, the employee remains entitled to full pay and benefits throughout. Withholding pay without a contractual right is an unlawful deduction and a breach of contract.

If the bail conditions or the fact that the employee is on remand means they cannot attend work, unpaid leave might be defensible.

> **"Withholding pay without a contractual right is an unlawful deduction and a breach of contract."**

12 Document everything!

Especially important is documenting the thought processes of the decision makers.

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Get in touch

Need advice on an employee facing criminal allegations?

Rachael Levene and Amy Smith are employment barristers at Nine Chambers. To instruct them, please contact our clerks.

Call our clerks on 0161 955 9000

Contact our clerks

Telephone
0161 955 9000

Website
ninechambers.com

Address
Freetrade, 37 Peter Street,
Manchester M2 5GB

The speakers

Rachael Levene
Barrister, Nine Chambers

Amy Smith
Barrister, Nine Chambers

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