In this series, we are reviewing some of the implications of personnel management for information security. In several previous articles, I discussed practical considerations in how to terminate employment with the least possible suffering and the lowest threat to security and I made reference to legal issues. In this article, I want to look at the legal issues in employment termination in a bit more detail.

There's another dimension to employment termination that depends on local laws and the litigation environment. The United States, for example, is said to be one of the most litigious nations on the planet, perhaps because of the high number of lawyers per capita.

Now, let's be sure everyone understands the obligatory disclaimer to avoid going to jail for dispensing legal advice without a license: I am not a lawyer and this is not legal advice. For legal advice, consult an attorney.

However, simple experience does teach one some principles even without going to law school. Here are some pragmatic guidelines for preventing legal problems related to firings:

- Build a solid, documented case for firing someone before acting. Keep good records, be objective, and get the opinions of several trustworthy people on record.
- Give the employee clear feedback long before considering firing.
- Offer the delinquent employee all reasonable chances to correct his or her behavior.

Timing is important in employee relations, as it is in almost everything else we do. In particular, if an employee is found to be behaving improperly or illegally, there must be no marked delay in dealing with the problem. Such a person could sue the employer and individual managers. They could argue in court that the very fact that there was a delay in firing them was proof that the firing was due to other factors such as personality conflicts, racism, or sexism. A well-defined procedure for progressing through the decision will minimize such problems.

The critical legal issue is consistency. If rules such as those described above for the day of the firing are applied haphazardly, there could easily be grounds for complaining of unfairness. Those to whom the rules were strictly applied would justifiably feel implicitly criticized. How would we feel if we were singled out by having guards check what we took home from our desk -- if everyone else got a party and two weeks notice? Such inconsistency would be grounds for legal proceedings for defamation of character. The company might lose and it might win, but what non-lawyer wants to spend time in court?

Another issue that arises in connection with firings and resignations is non-disclosure agreements. All such agreements must be included in a contract signed before the prospective employee begins work; it is impossible to force an existing employee to sign such an agreement. I remember one
employer approaching me two years into my contract with them and asking that I agree that all patents I might develop -- even those resulting from work at home in off-hours--would belong to the employer. I refused, and there was nothing they could do about it (well, fire me, maybe). Any attempt to threaten an employee with dismissal could result in a successful lawsuit for breach of contract and, if the threat were carried out, wrongful dismissal.

You, your legal department and your personnel department should study the necessity and feasibility of instituting a legally-binding contractual obligation to protect your company's confidential information for a specified period of time after leaving your employ. You cannot impose indefinite gags on people, but one year seems to be normal. For this measure to be meaningful, you must include a clause in the initial employment contract that requires the departing employee to reveal his new employer, if there is one at that time.

Non-competition agreements require the employee to refrain from working for direct competitors for perhaps a year after termination of employment. The key to a successful clause here is that there be a strict, operational definition of "direct competitors." Because this limitation can be an onerous impediment to earning a living, many jurisdictions will forbid such clauses.

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