



FEATURED ARTICLE

July 2006

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HOW TO FIRE THE BOSS

Hiring staff, particularly executives, is among the riskiest decisions a company can make. Firing the CEO and other senior employees is even riskier. Getting the employment agreement right in the first place is key. Ensuring that employment contracts are tailor-made to the individual and the role help protect the employer by putting a good exit strategy in place if the relationship breaks down and give the company flexibility when dealing with senior staff.

Staff can be fired either on notice – after several warnings and the employee being given the opportunity to improve – or being dismissed summarily, when there is a serious breach in the relationship. However, most employers are not willing to risk damage to the business by a three- to six-month “performance management” process with the non-performing managers. Instead, “controlled exits,” which limit loss to the company, are an attractive alternative.

Provided the employee is not given the impression that they are being told to resign or be fired, it is perfectly acceptable for an employer to have a confidential “fireside chat” with the non-performing manager, and negotiate an exit. The objective is to give the employee sufficient reasons to conclude an agreed exit or retirement is sensible. However, the danger is in giving the employee grounds to sue for constructive dismissal. Thus, any decision made by the employer to retire or resign must be with their agreement and almost certainly this will require some form of payment by the company.

The “fireside chat”

At the meeting the employer should be able to spell out clearly why the company wants

a change of leadership.

Other key messages could be:

- The company/division is performing unsatisfactorily under the CEO’s leadership and has been for some time;
- Having given the matter considerable thought, the employer has genuine concerns about whether the employee’s style and approach are right for the business and whether these issues can be addressed and corrected over time;
- The status quo is not acceptable and change is needed;
- The company would like the employee to take some time to consider where they stand in the organisation and whether it is in their best long-term interests to stay;
- If the employee agrees there are philosophical differences in the style and leadership needed in the future, the company would be willing to consider a fair and reasonable exit arrangement to allow the part amicably.

At the end of this meeting the employer should stress this is not an ultimatum but part of a negotiated process and the employee should be told to go away and consider the discussions, seeking independent advice if they wish. The exit proposal should not be put in writing yet.

At the next meeting, the employer should emphasise they are still meeting “without prejudice” and any comments the employee has about the offer should be discussed. The employer might need to be flexible on the proposed exit package. If an agreement is reached, the employer should discuss their proposals for the leaving process. After this meeting, the employee should confirm he has retired or resigned and the

employer should acknowledge the terms in a separate note. A simple but full and final confidential settlement agreement is then signed.

Contract clauses for senior employees

- Gardening leave (recognised as acceptable and enforceable by the courts – within reason);
- Restraint of trade clauses. *Prima facie* void but enforceable if the employer can establish they are reasonable in time, place and scope;
- A confidentiality clause;
- A suspension clause. There must be an expressed provision in the contract, or agreement by the employee;
- An incompatibility/personality conflict clause. The courts say it is a ground for termination but it is rare and the employer will need to show extremely disruptive conduct;
- An intellectual property clause;
- A directorship clause. This designates that when the employment ends, the employee must resign from any directorships of the employer company and related companies;
- A performance review clause. Laying down the process and stipulating who will do the review;
- A parachute clause. This allows the employer to specify the percentage change in their company’s shareholding needed before an employee can elect to end an employment agreement;
- A conflict of interest clause. Do this before hiring the senior employee;
- Fixed-term employment agreements (limited scope in New Zealand).

ACKNOWLEDGEMENTS: With thanks to The Independent, 5 July 2006.

FLEET & PARTNERS LIMITED
New Zealand owned & independent

9th Floor, 290 Queen Street, P.O. Box 5265, Auckland, 1141, New Zealand
Telephone (+64 9) 309 3691 > Facsimile (+64 9) 307 5696
Email: recruit@fleetpartners.co.nz
Website: www.fleetpartners.co.nz