

What To Do When an Employee Is Jailed

Your phone rings and it is an employee's spouse calling to report that the employee has been arrested, is in jail, and is, therefore, unable to report for work. If the employee is back at work in a day or two, the only consequence may be addressed by your attendance system. But if the incarceration continues, you may have some decisions to make about retaining the employee. The decisions should be carefully reasoned taking into account your company policies, as well as legal factors.

Begin by reviewing your policy on absences. Organizations that excuse some absences must examine the criteria they use for excusing absences and determine whether the employee's incarceration meets their criteria for an excused absence. If the absence is unexcused or a no-fault attendance system is used, an employee's absence due to incarceration can be treated like any other unexcused absence. If the employee is unavailable for work long enough, he or she will accumulate enough points or discipline for termination due to unavailability for work or violation of the attendance policy.

Some companies grant personal leaves of absence under certain circumstances. These companies must determine whether the employee's incarceration meets their requirements for granting a personal leave.

Consider the application of these legal concepts to the situation:

Arrest record discrimination. In most states, an employer cannot discriminate on the basis of an employee's arrest record. An individual is innocent until proven guilty. Pending charges or convictions can be considered only if they are substantially related to the individual's employment.

Disparate impact. There may be a disparate impact on some minority groups because, statistically, some minority groups have a higher incidence of arrest when compared to Caucasian employees.

Employment-at-will. Where the employment relationship is employment-at-will, company policies may be developed to deal with employees who are unavailable for work. Typically, these issues are treated under attendance policies. When an incarcerated employee is terminated under one of these policies, the termination is the result of being unavailable for work, not of being arrested.

Should the arrest result in a conviction, there can be a positive result in terms of expected attendance. An employee who is convicted of certain types of criminal acts may qualify for a jail work-release program. These employees typically arrive at work on time every day and are willing to work as much overtime as possible. This can be a positive experience for both the employer and employee.


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Employers may ask for the reason the employee is incarcerated, and they may ask for documentation. However, treating an employee differently depending on the reason for the incarceration can be a slippery slope. Proceed with caution. For example, would you feel differently about granting leave if the charge was:

- Back child support?
- Possession of illegal drugs?
- Possession of and intent to sell illegal drugs?
- Assault?
- Domestic violence?
- Driving under the influence?
- Unpaid parking tickets?
- Bounced checks?

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