SUSPENDING OR DISCHARGING THE ARRESTED EMPLOYEE -
Considerations for Employers

You pick up the morning paper and read the headline: "ABC Company Employee Arrested for Child Molestation." There it is, in big bold letters for everyone, including your clients or customers, to see - - that one of your employees has been arrested for a crime. What are your rights in such a situation? You are now faced with a dilemma -- do you suspend or discharge the employee based on this information in hopes of doing some "damage control" in order to protect the goodwill of the business or do you allow the employee to continue working for fear that some type of lawsuit will be lodged against the business? Well, the answer seems to be for you to tread very carefully on this ground before making these decisions.

Why must employers be so careful when deciding whether to suspend or discharge an employee based on an arrest? To take such action may result in a multitude of lawsuits -- including wrongful discharge, discrimination or even defamation. Such lawsuits would probably occur if the company has any rule that calls for an "automatic" suspension or discharge if an employee is arrested. Any rule that calls for automatic suspension or discharge is extremely suspect under the equal opportunity laws.

The questions then become, how can an employer avoid the possible violations of law and get around the charges or lawsuits that may be filed? The following criteria should be considered before suspending or discharging an employee based merely upon an arrest:

⇒ The policy or rule should not be "automatic" and any decision to take adverse action should be made on a case-by-case basis. Blanket suspension or discharge rules may be found unnecessary and the correlation between the employer's business and the arrest may be too remote to justify the consequences of automatic suspension or discharge.

⇒ Confirm the accuracy of the report of arrest before taking disciplinary action.

⇒ The seriousness of the offense should be weighed against the position and job requirements of the arrested employee (e.g. traffic versus sexual assault).

⇒ Consider the potential impact on the business the arrest may have (i.e. damage to goodwill, client or co-employee fears). The charges against the employee may be so serious that suspension or discharge may be a reasonable and necessary response.

⇒ Make sure that the policy or rule does not discriminate against any group of employees. Generally, suspension or termination of an employee arrested for a crime will not be found to violate the anti-discrimination laws if action is taken after a case-by-case evaluation of the circumstances.

Employers should be careful to make sure that their rules and practices are both flexible and consistent. Also, decisions should be consistent with any polices that have already been adopted and consistent with the way other people who have been charged with similar crimes have been treated in the past. The consequences of either suspension, discharge or choosing to take no action should be flexible and based upon the factors mentioned on the preceding page. Employees should be aware that the employer has the discretion to treat each case differently, so that arrests for traffic violations may be treated differently from an employee arrested for sexual assault or on drug charges.
Employers who choose to suspend arrested employees make it clear on the front-end how the employee will be treated during the suspension, for example, whether the suspension is with or without pay and the length of the suspension. In addition, employers must decide what the employee's status will be in the event the charges are dropped for whatever the reason, or the consequences if the employee is convicted. Answers to these and other related questions should be considered before taking the action of suspending an arrested employee.

Finally, employers must be aware that some states have laws that specifically say that employers may not suspend, discharge or take other disciplinary action based on the fact that the employee was merely arrested.

An employer is in a difficult position when an employee has been involved in a crime. On the one hand, if the employer does not take careful action when deciding to suspend or discharge the employee, he or she may wind up facing discrimination charges or lawsuits. On the other hand, employers may find themselves liable later on if the employee commits a wrongful act against a fellow employee, a customer or client since the employer already learned through the arrest, of this employee's potential violent or criminal tendencies. This dilemma is no reason for despair. If an employer objectively analyzes the situation under the five criteria discussed, the result should be a solid, defensible employment decision.