

# Good negotiations need faith more than fear

## *5 tips for HR professionals preparing for a phone call with a lawyer*

BY TED FLETT

AS EMPLOYERS tighten their purse strings while the business impacts of the coronavirus (COVID-19) pandemic take hold, in-house HR professionals are likely to see a reduction in budget and resources. Some have already. The pre-COVID-19 days of punting a file to external counsel in which an employee, or former employee, has lawyered up may be long gone. Today's HR practitioner is being called on to represent the employer's interests in the dispute, in a cost-effective and efficient manner.

Whether it's a negotiation on the terms of a termination settlement, or with respect to the conditions of a workplace investigation interview, the thought of talking to a lawyer of a former or current employee by phone is about as compelling as public speaking naked. However, putting a pause on a letter-writing campaign — where one can hide behind a keyboard — and taking a matter to a phone call could help clear an impasse in a negotiation.

The prospect of such a call could conjure up fears of thinking that you're about to enter a booby trap in which the lawyer will trip you up, trick you into a confession or twist your words later. And the stakes are not insignificant. The phone call can forge a path toward resolution or could ignite greater conflict in equal measure. The latter is more probable with inadequate preparation.

But HR practitioners should summon confidence in what they bring to the table in a negotiation or a discussion with a lawyer. When an employer's HR specialist, rather than a lawyer, responds to my correspondence, I see a clear opportunity to resolve the matter amicably; not to mention comparatively faster and cheaper. And it's not because I plan to bamboozle the person.

There are approaches that an HR practitioner can adopt to maximize the call. Here are five helpful tips to prepare for and manage the dreaded phone call with a lawyer. Of course, your standby negotiation techniques — from BATNA (best alternative to a negotiated agreement) to MESOs (multiple equivalent simultaneous offers) — still apply.

**Limit the scope of the call.** If the communication has been through letters or by email and the lawyer requests a phone call "to discuss the matter," be available while also following your workplace procedures. In advance of the call, ask whether there is a particular topic or position that the lawyer wishes to discuss, if

such is not obvious. This clarification will help provide scope to the conversation and guide your preparation. Have relevant documents on hand for the call, including all correspondence exchanged, and review these in advance.

**Determine who leads.** While some subscribe to the theory in a negotiation that it is best to lead by speaking first, there are benefits to active listening. When the call begins, if the lawyer has requested the call, let them start the conversation. Pre-supposing what opposing counsel will argue or say is a mistake, particularly if there has been a moderate passage of time between the request for the call and the call itself. The employee's position or circumstances may have changed since then.

### HR practitioners should summon confidence in what they bring to the table.

Conversely, if you have requested the call, be prepared to start the dialogue as to what you are seeking and what information you feel is helpful to provide. Organize your thoughts in a few bullet points.

**Write it down.** Take careful and detailed notes of what the lawyer is saying to help organize your thoughts for a response and to assist with formulation of future arguments. If some information shared by the lawyer is surprising or seems out of context, ask to confirm it to ensure you understand correctly.

**Formulate your response.** Take confidence in knowing that you are likely closer to the true and precise facts of a story than the lawyer. You have the benefit of a documented history on the employee, buttressed by the employee's HR file, information from colleagues and wit-

nesses. This is not lost on the lawyer who will naturally have some expectation that you will be more apprised of some of the finer points relevant to the matter at hand and will inquire accordingly.

However, knowledge of the information does not require you to disclose it. Ascertain what information you feel can be disclosed in advance of the call. Take pauses during the call to formulate your thoughts and answers; do not feel rushed. If in doubt during the call, advise that you must follow up with the lawyer later. If you don't know the answer, don't make one up or speculate in the moment.

Do not allow the lawyer to leverage a supposed power imbalance. Label interrupting when it happens.

Consider whether documents that are requested by the lawyer are best provided during the call via a quick email or afterwards. Sending documents in the moment without careful review is not recommended, as this may result in disclosing more than you had wanted. Further, the transmission may extend the call unnecessarily as the lawyer reviews them hurriedly, without sufficient time to read them in their entirety.

**Concluding the call.** At the end of the call, confirm any outstanding matters for follow-up. Establish feasible deadlines to help prioritize yourself and keep the lawyer accountable to you.

Should the call get out of hand, driven more by passion than reason, or if you feel you are making no progress and speaking in circles, wrap up the conversation and suggest that you reconnect at another time once you have had the time to reflect, consider the matter further or have sought additional advice.

Special thanks to a handful of astute HR professionals with whom I have negotiated in my practice who spoke to me on the condition of anonymity.

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