



Managing HR Issues In An Economic Downturn: Don't Let Down Your Defenses!

By now it is quite obvious the recession is here to stay, at least for the near term. Many businesses are aggressively seeking ways to reduce their expenses and become more efficient. Because payroll and benefits expenses are among the most significant cost components in most businesses, many cost reductions at employers around the country will involve either a reduction in the number or a reduction in the amount of work hours or benefits for employees who remain on the payroll. Indeed, corporate America announced the layoff of roughly 100,000 employees in the last week of January, and the press has reported numerous accounts of employers who have eliminated 401(k) matching contributions or otherwise reduced the perks or benefits available to employees.

As pressure increases to reduce employment costs, corporate counsel and human resources managers should remember that it is more important than ever to wisely manage human resource issues. Most employment litigation arises when employees are angry and feel they have been treated unfairly; and, employees are most likely to have such feelings when they are in economic distress or believe they (or their colleagues) have been unfairly affected by arbitrary decisions. As a result, economic downturns are almost always accompanied by an increase in employment-related lawsuits. In this particular recession, the risk of such lawsuits is likely to be amplified by changes in federal law that may make it easier for employees to file and prevail in such lawsuits, and to recover even larger amounts of money.

The cost savings associated with a reduction-in-force ("RIF") can easily be wiped out if even one successful lawsuit is filed by an employee. With this in mind, we offer the following reminders about how best to manage HR issues in an economic downturn:

Review The Performance Documents Before Making Decisions:

An economic downturn is not the time to take shortcuts when it comes to making discharge decisions. Too often, litigation arises after a RIF because a manager sees an opportunity to get rid of a purportedly weak employee with a 5-year track record of excellent annual performance reviews. If that purportedly weak but looks-good-on-paper employee is a member of a protected group (or has engaged in protected activity) the employer may soon be faced with a discrimination or wrongful termination lawsuit. Whenever an employee is dismissed--in a RIF or otherwise--the employer must be able to prove that its decision was lawful. So make sure the reasons for any employee dismissal are defensible and well-documented.

Know And Follow Your Company Policies:

If an employer has written policies and procedures regarding RIFs, the employer should review and comply with that policy whenever it implements any such RIF. A failure to comply with written policy statements could reflect poorly on the employer and its credibility in the event of subsequent litigation. If a review of company policy suggests the policy needs to be revised, such changes should be made before any RIF is implemented.

Tell The Truth:

Although certain popular TV shows may suggest otherwise, it can be extremely difficult and unpleasant to meet with an employee to say "you're fired." Too often, managers and HR professionals try to soften the blow by offering reasons that aren't quite consistent with the truth. Then, when the employee files a lawsuit, the truth comes out and the employer's credibility is blown. In litigation, a loss of employer credibility too often leads to an adverse verdict. Thus, our advice is to always tell the truth. And remember that whatever reason you give to an employee on his or her last day of employment will be the reason you need to use throughout the course of any litigation that follows.

Don't Get Cute:

RIFs are often accompanied by reorganizations and job title changes. These changes sometimes tempt managers and HR professionals to provide explanations that won't withstand scrutiny. For example: An employer dismisses a 20-year sales manager because the "sales manager" position is being eliminated. After being dismissed, the employee discovers the company replaced the "sales manager" position with an almost identical "sales director" position, and the new sales director is 10 years younger than the employee who was dismissed. A wrongful termination and age discrimination lawsuit is almost certain to follow, and a payout of some kind to the employee who files that lawsuit is almost as likely as the actual lawsuit.

Don't Forget To Conduct A Disparate Impact Analysis:

Employers are often confident they have no "intent" to discriminate against women or minorities in a RIF or any other reorganization that adversely affects certain employees. But this "lack of intent" may not be enough to protect the employer from an adverse verdict in the event of litigation, because employers must avoid actions that have a greater negative impact on women or minorities even if that greater impact is accidental. Before implementing any reorganization or RIF, HR should review the particulars of any such proposal, and should determine whether women or minorities (including employees age 40 or over) are being disproportionately impacted by the proposal. If so, the employer should confer with counsel before deciding whether and how to proceed.

Don't Forget Benefits Costs and Requirements:

When the company runs the numbers, it should be mindful of the benefits costs associated with a RIF. If a RIF is particularly large, this could trigger automatic vesting provisions in the employer's pension or 401(k) plan, and could also result in increased claims under the employer's group health plan as employees attend to medical needs before their health care coverage expires. Congress is currently considering dramatic extensions of COBRA's continuation coverage requirements, and those changes could potentially have a significant cost impact on employers. Employers should also remember when implementing RIFs that employees must timely receive Notices of Creditable Coverage and appropriately worded COBRA notices.

WARN Your Employees:

The federal WARN act requires employers with 100 or more employees to give at least 60 days notice (or 60 days pay in lieu of notice) to employees who are being negatively affected by a large-scale RIF, and proposed changes to federal law would require many smaller employers to comply with the WARN requirements. Employers in these circumstances must also provide local authorities and the state unemployment office with advance notice of any such layoff. Some states (including California) have more onerous requirements. Employers with multi-state RIFs should understand the rules that apply in each state in which a RIF is taking place.

Protect Your Trade Secrets And Confidential Information:

Angry or fearful employees may try to take advantage of the situation by using or disclosing the company's confidential information. Employers should take special care in an economic downturn to protect their trade secrets and proprietary information. Because courts are less likely to enforce broadly worded non-compete agreements when an employer fires an employee, employers should identify the most significant competitive risks associated with the loss of each employee, and

should act wisely to address those risks. Confer with counsel to understand your options.

Pay People Correctly:

An NPR report the other day described a restaurant whose employees decided to help the owners weather the downturn by working one day without pay. While the employees' intentions may have been honorable, any such action is clearly against the law! And if the employees later get angry with the owners, they can turn around and sue the employer for twice the amount of unpaid wages plus payment for their attorney fees. Don't make this mistake! Take great care to comply with state and federal wage/hour laws, as well as all collective bargaining agreements and company policies that describe the company's pay practices.

Use The Correct Release Forms:

RIFs generally require special release language and special notices, especially where affected employees are 40 years or older. Some states (most notably California) also have their own special requirements regarding release agreements, and a failure to comply with those requirements may invalidate the employee's waiver of claims against the employer.

If you are preparing to implement a RIF, please let us know how we can assist you by drafting appropriate releases, conducting an appropriate disparate impact analysis, or by helping you to review the facts necessary to make decisions that will limit your employer's exposure to litigation.

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