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Analyzing The Economic Downturn from An Employment Law Perspective: A Primer for California Employers Seeking Options in Tough Times

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Companies around the globe are reviewing budgetary options as they face an unprecedented economic crisis, one which will undoubtedly create long-lasting reverberations affecting profitability and viability. As it relates to the workforce, companies are assessing whether a layoff/reduction-in-force is necessary, whether they are legally permitted to select certain employees over others for layoff or termination, and what options short of layoff are available. Employees are suffering as well, faced with concerns about job security, frozen salaries, diminishing bonus pools, and disappearing benefits.

One way to successfully negotiate through the rough waters of a down economy is to understand the many employment options companies have, as well as the laws that attach to each option. This article offers an overview of options available to California companies facing difficult times and it describes the significant and employment laws that may apply.

The most difficult decision facing employers is whether to let employees go in response to the budgetary constraints. The first part of this Article addresses practical and legal considerations for those companies considering layoffs. The second part of this Article addresses options short of layoff.

Reducing Personnel

A. Performance-related terminations: First, management and Human Resources staff should meet and discuss whether there are certain employees who are not meeting expectations. These are the employees who, for example, regularly arrive late, or don't have the skill or aptitude for the job duties, or display a rigidity in their willingness to learn new skills, work with a team or perform certain job duties. After giving these employees a reasonable (and legitimate) opportunity to cure their deficiencies over a period of time, termination should be considered.

This is not the same as a layoff, which occurs when a category or group of employees are let go due to business reasons. A performance-related termination is just that – employee(s) are separated due to their failure to meet performance and related expectations.

TIP: Start documenting "problem" employees now so that if you need to make quick decisions down the road the files will already be documented with any performance concerns that were raised and addressed by management.

B. Layoffs: Second, management must decide whether certain positions, groups, offices, or departments should be reduced. Again, layoffs are a legitimate business response to economic or business constraints. The goal is not to pick one or two employees who are not performing well. For that situation, see point 1 above. The objective in a layoff situation is to reduce a group or category of employees.

The legally "safer" category of layoffs occurs when an entire group or department is let go. For example, if the work performed by an entire department can be absorbed by employees in another department, then a layoff of all of the personnel in that first department would be legitimate from a business perspective and less risky from a legal perspective. The "riskiest" layoff occurs when part of a department is let go: Who decides who stays and who goes? What is the process? What criteria should be used? What documentation is required or appropriate? Are there advance notice requirements?

Answers to these questions and additional details are outlined below.

1. *Are there Advance Notice Obligations?*

As an initial matter, regardless of the type of layoff at issue, larger companies have notice obligations under the California and federal WARN Acts. The California and federal WARN Acts require larger employers to give 60 days advance notice of a "plant closing" or mass "layoff," as those terms are defined in the statutes. As is often the case, the California statute covers more employers -- those with 75 employees -- in contrast to the federal WARN Act, which covers employers with 100 employees. Cal. Labor Code §§ 1400-1408; 29 U.S.C. § 2101. The California statute also contains more triggering events and more notice obligations than the federal version. There are certain (extremely) limited exceptions to the 60-day notice requirement.

While this Article does not address the specifics of the statutes, be aware that there are detailed eligibility and notice requirements that must be analyzed for California companies with 75 or more workers, including notice to the affected employees, the Employment Development Department, the local workforce investment board, and/or the chief elected official of each city and county government

within which the termination, relocation or mass layoff occurs. Companies are well-advised to involve their attorneys early on in the process.

2. *What is the process for selecting employees for layoff?*

Employers contemplating layoffs should put a management team in place to handle and oversee the process. As noted, this author also recommends that companies bring their inhouse and/or outside counsel into the process early on. Here are some items to consider in making layoff decisions:

- First, all pre-existing documentation should be reviewed: the handbook policies on layoffs or reductions in force, contracts, collective bargaining agreements, and any other documentation that might relate to company obligations when laying off employees. In addition, review immigration requirements, policies and procedures if foreign personnel are being laid off.

- Second, management must decide the process that will be utilized for the layoff. For example, what is HR's role? What is upper management's role? Will direct supervisors have input? What departments or groups will be affected? What criteria will be used to decide which employees are let go? Who applies that criteria to the employees? Who is the final decision-maker on which employees will be let go?

- Third, management must execute the process that is going to be used in a consistent, reasonable and fair manner. Most often, management uses a written policy that contains guidelines for conducting the layoff. Often the guidelines list the relevant criteria and employees are then rated according to that criteria. Those employees who fall short on the list are let go.

- Fourth, the entire process usually should be documented. For those companies using a lawyer, some or all of the written documentation of the process can be protected under the attorney-client privilege.

3. *What documents should be created during the process?*

- If there is not a layoff policy already in place, consider whether to create and roll one out before the layoff occurs (if a new policy is rolled out, consideration should be given to using a "recall" process where employees can be recalled under certain circumstances).

- There should be documentation of the business justification for the layoff (for example, a Memo from the CFO to the President outlining the financial crisis and the need to reduce staff).

- The process for selecting employees should be put in writing. As mentioned, many companies develop criteria by which to evaluate the employees (for example, skill set, versatility/flexibility, last performance review rating, seniority if all else is equal). Often, a chart is created that lists the rules of the layoff, definitions, the rating process and then each employees' name and rating for each category (on a 1-5 or 1-10 scale). Employers sometimes "weight" the categories by importance, so that, for example, if flexibility/versatility is critical, that category will count for 30 or 40% of the total rating. The managers who rate the employees must be trained on the rating process and their ratings should be critically reviewed by another member of management as well as HR.

- An adverse impact analysis should be conducted and put in writing, where each proposed affected employee is analyzed in comparison to those remaining to ensure that a protected class of employees is not being targeted for layoff, purposefully or not. This is typically an HR role and should be conducted with attorney oversight. If so, the process can be confidentially maintained under the attorney-client privilege.

- Layoff paperwork must be created for each employee, which often includes a cover letter, final paycheck, older worker data, if applicable, and a severance package, described below.

4. *Should a severance package be offered?*

Again, policies and existing contracts should be reviewed to determine whether the company is already obligated to provide severance. If so, the company needs to do so. If not, and if financial circumstances permit, it is a good idea to offer employees severance packages. Under these packages, the employee will be entitled to receive "enhanced" benefits or payment that she or he would not otherwise be entitled to. In exchange, the employee releases the employer from claims or lawsuits. There are specific rules governing such agreements and employment counsel should be involved in the drafting process.

The "enhanced" benefits or payment could be money, benefits such as COBRA continuation, outplacement services, and the like. Companies should make sure that any severance agreement clearly delineates which payments/benefits are unconditional and which are conditional on the employees signing a release. Some companies create two documents to give to the affected

employees, one which overviews those payments and benefits to which the employee is entitled regardless of whether they sign a release, and a separate release agreement which offers the enhanced payment or benefits in exchange for the release of claims by the employee.

5. *What about older workers?*

Older workers (those over 40) are members of a protected class and this is one of the categories that needs to be assessed during the adverse impact analysis, mentioned above. A separate and lengthy article could (and has been) written to address older worker rights, particularly as they relate to group layoffs and release agreements.

As it relates to releases, there are various provisions that must be included in release agreements created pursuant to a layoff situation to ensure it is “knowing and voluntary” release as required by the Older Workers Benefit Protection Act (OWBPA). The OWBPA provides detailed rules for waiving claims under the Age Discrimination in Employment Act (ADEA). For example, claims under the Age Discrimination in Employment Act (ADEA) must be specifically referenced in the release agreement and an extended period to consider the release agreement (45 days for “group termination” and 21 days for individual terminations) must be provided. In addition, older workers must be given 7 days to revoke the agreement after signing it and they must be advised of their right to consult with an attorney prior to signing the release. See these and additional requirements in the Age Discrimination in Employment Act at www.access.gpo.gov/nara/cfr/waisidx_01/29cfr1625_01.html, posted by the EEOC.

Further, older workers who are subject to being laid off due to a “group termination” are entitled to receive data under the older workers’ laws. The employer must provide information about the ages (not the names) and job titles of those employees selected and those not selected in the “decisional unit.” Broadly speaking, a decisional unit consists of the group of employees that were considered for layoff, such as a specific department. The rules on this issue are complex and can be located at 29 C.F.R. sec 1625.22(f).

TIP: Layoffs must be executed in a consistent and methodical fashion. Give your attorney as much advance notice as possible. Make sure management and HR are trained on how to properly conduct a layoff. Develop a layoff plan that includes written documentation of the process and thoughtful execution of fair and neutral criteria evenly applied to all employees who are potentially affected by the layoff.

Options in Lieu of Layoffs

If companies can avoid reducing personnel through a layoff, they look to less draconian options to save on costs. The following are some examples that companies should consider in an effort to reduce costs and overhead:

1. Alternative Workweek Schedule

In this author’s experience, some of the companies with highest morale and lowest turnover are those which implement a 4-day/10 hour per day workweek without the payment of overtime. Employees working under this arrangement must be paid overtime of no less than one and one-half times their regular rate of pay for any work in excess of their regular daily hours (up to 12 hours) and for any hours in excess of 40 in a workweek. They are also entitled to double their regular rate of pay

for any work in excess of 12 hours per day and for any work in excess of 8 hours for those days worked beyond their regular work schedule.

California employers have the ability to propose a “menu” of work schedules for the affected employees to choose from; alternatively, the employer can propose only a single work schedule for all employees. In addition, an employer has options to propose more than one alternative schedule to different “work units” within the company; indeed, it can divide the workforce into separate “work units” and propose different schedules for each.

There are strict requirements which must be followed to properly implement an alternative workweek schedule and therefore avoid overtime liability for certain hours which would traditionally require overtime pay. These requirements include providing a detailed notice and proposal to the affected employees, a special meeting at least 14 days before the election, a secret ballot election, and notice to the California Division of Labor Statistics.See Labor Code § 511; applicable Wage Order.

2. Telecommuting

Telecommuting is also becoming more popular. While many employers are reluctant to implement such a policy due to the loss of control over the employees’ work, others have found it to be beneficial and cost-effective. If your company is considering this option, a sound policy should be put in place that describes the procedure, the expectations and the responsibilities of the employee who telecommutes. The employees should sign off on the policy or enter a separate agreement with the company regarding their obligations while telecommuting.

Some provisions to consider are: eligibility requirements for employees to participate (such as 12 months of employment; full-time employees; performance criteria); use of (and company obligation to pay for use of) a home computer and home telephone; reporting requirements; time-keeping procedure; termination of the arrangement; workers compensation and OSHA obligations for work from home.

3. State programs

Most states offer programs to assist employers in dire need. One such program in California is the Employment Development Department’s “Work Sharing Program.” Under this program, eligible employers may reduce employees’ working hours and the affected employees receive partial unemployment benefits (the employer’s EDD reserve account is used for these funds, which means higher payroll taxes as the employer must make higher employer contribution rates to make up for the loss). For example, if a company has 100 full-time employees and wants to reduce the work week for all employees by one full day, there would be a 20% reduction in pay and hours. The employees would be eligible to receive 20% of their weekly unemployment insurance benefits.

At least two employees must be affected and there must be a minimum 10% reduction of the regular permanent (not temps) workforce and a minimum of 10% reduction of wages and hours.

Employers must fill out a Work Sharing Plan Application, which can be obtained from the EDD’s Special Claims Office. The EDD offers a “Guide for Work Sharing Employers.” www.edd.ca.gov/pdf_pub_ctr/de8684.pdf.

4. Temporary Shutdowns/Forced Vacation

The general rule of thumb is that a company can shutdown for a short period of time if it is done correctly. Temporary shutdowns or furloughs for non-exempt employees raise minimal issues as there is no need to pay them for regularly scheduled hours if they are not actually worked (of course, collective bargaining agreements and relevant policies must be reviewed). It is not clear as to whether non-exempt employees can be forced to use accrued vacation during the shutdown with only little or no notice, but many employment lawyers concur that this is possible, especially if the vacation policy indicates that the employer can schedule vacation.

Exempt employees, however, can lose exempt status if they are not paid for the full week in which they work. If an exempt employee works any part of a workweek, then they are entitled to their salary for that workweek (with some exceptions). As a result, exempt employees subject to a week-long shutdown must be instructed to perform no work during the workweek, and this includes calling in, checking emails, corresponding or telephoning others, etc.

Note, too, that exempt employees cannot be forced to use vacation without “reasonable notice” before requiring the use of accrued vacation. This has been deemed to be at least 90 days or one full fiscal quarter, whichever is greater, of advance notice. The safest practice is to not force or require the use of vacation for any employee without 90 days advance written notice.

5. Hiring Freezes, Wage Freezes & Wage Reductions

Many companies have implemented hiring freezes. Employment laws permit this; however, if the company needs to make “exceptions” to the freeze, then such “exceptions” should be well-justified and documented (some companies create an “exception” form or the like which must be submitted to HR and/or upper management).

Separately, salary freezes are becoming more common as well. The employer basically informs employees there will be no raises until further notice given the financial constraints. Again, companies are well advised to review policies, offer letters, contracts, collective bargaining agreements and any other documentation that might limit its ability to freeze salaries.

Wage reductions are also taking place on occasion across the state. However, they must be implemented consistently and fairly so that certain employees are not disproportionately impacted. Certain industries also have legally set minimum wages. Moreover, salaries for exempt employees must still meet the minimum salary requirements in order to maintain exempt status. Finally, as mentioned, policies and contracts, including collective bargaining agreements, should be reviewed prior to reducing salaries.

6. Minimizing expenses

In addition to things like cutting holiday and similar company gatherings, many companies are revisiting their benefits, reimbursement, travel and training policies. For example, vacation is not required to be given by California employers. While the employer may not take away vested vacation, it can change the policy going forward, with adequate notice in advance of the change. The same is true of sick days.

Employers are also tightening up their policies, checking documentation more thoroughly and eliminating travel and training when possible. Some employers are going “paperless” where possible

in order to eliminate hard copy costs.

Finally, employers are reviewing their benefit plans to determine if there are benefits that can be changed or if there are new benefits that can be offered to employees at little or no cost to the employer. Many such benefits are available to companies and they can offer a morale boost in a time when employees across the state greatly need one.

TIP: Alternatives to layoff can substantially reduce overhead and increase morale. Employers should develop a team which includes an HR and benefits person to critically analyze costs and savings potential for these types of programs.

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