

## **Navigating Employment Law in a Softening Economy**

**By Anessa Abrams, Esquire**

**Paul M. Heylman, Esquire**

**Ira M. Shepard, Esquire**

**Saul Ewing LLP**

Given today's economic climate, employment related litigation will likely increase. Not only is the economy soft and continuing to move downward, but the legal landscape of employment law is increasingly more favorable to employees. Companies must assess the risk of liability each time a significant employment decision is made, and should consider all options to avoid or minimize potential liability.

### **Options to Consider Before Implementing a Reduction in Force**

It is always best to avoid downsizing, if possible. But if downsizing becomes inevitable the employer will always be able to paint a better picture before a jury sympathetic to an unemployed former employee if it can detail the steps it considered and took as alternatives to laying off employees. One alternative to consider is a hiring freeze and reassignment of incumbent employees. Employers can also offer voluntary retirement programs, though the company may lose some highly skilled employees. In addition, employers can consider alternative work arrangements – part-time, shortened work weeks, job sharing – all

of which may enable the company to reduce expenses while possibly maintaining employee morale and productivity levels.

### **Legal Considerations in a Reduction in Force Retaliation Claims and “Me Too” Evidence**

Retaliation claims are always extremely difficult to defend. The potential admissibility of “me too” evidence makes them even more difficult to defend and makes it easier for plaintiffs to prevail. “Me too” testimony is admissible on a case-by-case basis, giving plaintiffs the potential to parade in other employees who claim that they also were subjected to the same type of discrimination/harassment/retaliation. In age discrimination cases, the onus is now on the employer to prove as a defense that the action was taken for a reasonable factor other than age.

Accordingly, it is important for employers to take proactive steps to try to prevent discrimination and retaliation claims. Employers should have a zero tolerance policy for discrimination, harassment and retaliation, which is communicated to all employees and managers, and upon which the entire

organization is trained. Employee complaints must be taken seriously, and allegations and investigations should be kept confidential to the extent possible. Before any adverse employment action is taken, employers must determine whether selected employees have any pending claims or have opposed any practices that could serve as the basis for a retaliation claim. One of the safest courses of action is to obtain releases from terminated employees in exchange for enhanced severance.

### **Disparate Impact Claims, Analysis & Privilege**

Unlike disparate treatment, which requires an employee to show intentional discrimination, disparate impact claims are based upon neutral policies or practices that have an adverse impact on a protected group even without an improper motive. This makes them easier for plaintiffs to win, but preventable from the employer's side if appropriate planning steps are taken. Accordingly, companies must analyze those employees initially selected for a reduction in force to determine if there is a disproportionate impact on a protected class. It is important to remember disparate impact claims can be

*continued on page Extra 2*

based on age, gender, race, or national origin. In conducting this assessment, the employer must determine whether it wants the analysis to be privileged. If so, the question remains whether the analysis should be conducted by in-house or outside counsel. Utilizing outside counsel virtually guarantees that the analysis is privileged, but if litigation ensues, this counsel may likely be unable to serve as the Company's litigation counsel. If the analysis is conducted by in-house counsel, in-house counsel must be acting in his or her capacity as an attorney and not one of the Company's business people.

### **ERISA Issues**

Section 510 of the Employee Retirement Income Security Act ("ERISA") prohibits discrimination for, or interference with, attaining employee benefits – including pensions and medical benefits. Employees close to vesting or eligibility for a new benefit (such as early retirement) are typical plaintiffs in Section 510 cases.

Companies with 401(k) plans should also consider the possibility of stock drop cases. In these cases, the 401(k) participants sue to recover losses in their 401(k) plans that they allege were caused by the failure of company fiduciaries and directors to properly advise the participants. These are most likely where the participants have invested in company stock. The participants allege that company officers knew of the company's financial instability and had a fiduciary duty to prevent additional investment in company stock and/or to advise participants to sell company stock. The courts have so far held that Section 510 stock drop cases are not subject to the restrictions that Congress imposed to deter securities law claims. An employer can reduce its risk by delegating certain 401(k) functions to independent fiduciaries or executives who do not have insider information on company stock.

### **WARN Requirements**

The Worker Adjustment and Retraining Notification Act ("WARN") applies to larger employers (100 or more employees) and is full of pitfalls for the unwary. WARN requires that employers provide 60 days advance notice of plant closings and mass layoffs. A mass layoff is a loss of at least 50 jobs constituting 33 percent of active employees at one location, or 500 employees at one location regardless of percentage. Damages for failure to comply with WARN include back pay for the number of days the notice is late, and medical benefits. Some states also have plant closing laws, and these can impose additional requirements.

### **Wage Payment and Collection Laws**

Employers must also consider state wage payment laws in any downsizing. Upon termination, employees are due all wages earned, potentially including accrued but unused vacation. The timing of such payment varies by state – it could be due at the next regular pay day after termination, at the time of termination, or some other time. Moreover, companies with agreements or policies requiring an employee to be employed on the day bonus payments are due as a precondition to receiving the payment may not be enforceable. Some states have specifically outlawed this practice and care must be taken to check applicable state law.

### **Final Thoughts: General Advice**

A reduction in force carries risks, but prior planning can reduce these risks. Employers should develop tests that are as objective as possible to determine who should be laid off. The managers making the actual selection decisions should be aware that they may need to explain each decision in deposition

on hostile cross-examination. As the employees are selected, the employer and its legal counsel should conduct a disparate impact analysis. Supervisors and managers must be trained to properly communicate the layoff decision to employees. They should be instructed by in-house counsel about the do's and don'ts of what they can communicate to employees, as ill-considered statements by lower level supervisors during a layoff are often fertile ground for a plaintiff's lawsuit against the Company.

Public relations and internal communications are also important. These can be used to the company's advantage in portraying the decision in the best light possible to protect and strengthen the long-term employment of the company's core work force as well as the company's commitment to its remaining employees for strength and success in the future.

*Anessa Abrams and Paul M. Heylman are partners in the Washington, D.C., office of Saul Ewing LLP, and Ira M. Shepard is co-managing partner of the Washington, D.C., office of Saul Ewing LLP. They all have extensive experience as employment and labor attorneys representing management in numerous industries. Anessa Abrams can be reached at aabrams@saule.com. Paul Heylman can be reached at pheylman@saule.com. Ira Shepard can be reached at ishepard@saule.com.*

*Saul Ewing LLP is a 2008 Emerald Sponsor of WMACCA. Saul Ewing is on the web at [www.saul.com](http://www.saul.com).*