Preparing for Employment-Related Issues in a Down Economy and Under a Labor-Friendly Administration

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The current downturn in the economy is presenting businesses with unique employment-related issues. These issues are likely to be compounded should President-Elect Barack Obama and the Democratic majorities in the U.S. House and Senate push through planned labor-friendly legislation. Whether your company is facing a reduction in force or a wage and hour audit, is seeking to safeguard confidential information or may be a target for a union organizing drive, it may be prudent to be proactive to protect your organization. This Alert addresses some of the areas of concern for many businesses. While all of these issues are not applicable to every company, some of the following may be worth considering.

Implementing Reductions in Force

The current economic downturn may require your business to consider a reduction in force ("RIF"). First, a successful reduction must be in compliance with intricate provisions of the Worker Adjustment and Retraining Notification Act ("WARN") and its state law counterparts. Second, it must comply with any collective bargaining or employment agreements, all of which should be carefully reviewed before moving forward with a RIF Plan. Third, to be in a position to withstand legal challenge, a RIF should be thoughtful and well documented. Documentation should include clearly stated business reasons for its occurrence; explanation for reductions in specified company departments, divisions or locations; and defined employee-selection criteria. A business should also consider whether a severance plan enabling the company to secure releases from claims is prudent.

Alternatively, businesses may consider a compensation reduction program. This type of program must, however, comply with federal and state wage and hour laws.

In some states, including California, employers may be able to reduce overhead by implementing a work-sharing or "partial unemployment" program. This type of program gives the employer the option to, instead of discharging an employee, allow the employee to work a reduced schedule and collect the percentage of his or her weekly unemployment insurance benefit amount equal to the percentage reduction in wages for that week. In addition, the employee would maintain his or her job, and the employer would benefit from the employee's experience and availability for additional hours when economic conditions improve.

Review Immigration Policies and Procedures Related to Layoffs and Terminations

Be aware of all of the affirmative immigration-related obligations that apply to the company based on the types of foreign personnel being laid off or terminated. Different visa categories have different requirements when terminating employment, and a failure to comply could result in continuing wage obligations, steep fines and other financial liability. The H-1B rules require notice to the U.S. Citizenship and Immigration Services ("USCIS") upon termination along with other steps to effect a legally sufficient termination. If foreign personnel will be laid off for a period of time, the immigration regulations require that they continue to be paid pursuant to the terms of the H-1B visa petition. Benching is not allowed. Filing an amended H-1B visa petition may be an option to keep the employee in a part-time capacity. Provide foreign personnel who will be laid off as much advance notice as possible. Foreign personnel can then take steps to obtain another visa status, allowing them to remain legally in the U.S. without having to spend time out of status or leaving the U.S. Most visa categories do not have a grace period; technically, at the time termination, the employee may be considered to be out of status. Often, employers learn that by keeping foreign personnel employed for a few more weeks or months, the employee can obtain immigration benefits that would take years to reprocess if the employee has to start over. Prepare a proactive strategy regarding the immigration consequences of downsizing to allow for a smooth transition and mitigate legal liability.

Perform a Self-Wage and Hour Audit to Ensure Compliance with State and Federal Laws

Performing a self-audit of white-collar exemptions under the Fair Labor Standards Act ("FLSA") and its state law counterparts may be a smart way to ensure accurate classification of jobs - exempt and nonexempt - to meet the FSLA's overtime, break and mealtime requirements. Likewise, by reviewing salary basis compliance for exempt employees and overtime tracking and payment requirements for those who are non-exempt, businesses may self-correct any wage payment errors before they become problematic. By performing a self-audit and making required changes now, businesses are likely to avoid expensive enforcement actions and class action lawsuits based on technical or unintended wage and hour law violations.

Implement Union-Avoidance Training and Measures Designed to Thwart Union Organization

Companies should be proactive and not reactive with their goals to maintain union-free workplaces. Managers and supervisors should be properly trained now to look for the signs of union activity and take appropriate steps to avoid union organization in the future. This may have added significance given President-Elect Obama's stated intention to support and sign the Employee Free Choice Act, which makes organizing much easier for unions. Unions would be entitled to representative status with simply a showing of a majority of signed authorization cards, rather than having to win a secret-ballot election, and would be entitled to interest arbitration to set initial terms and conditions of employment if a labor contract is not reached within 120 days of the onset of negotiations.

Review Employment Agreements and Confidentiality Agreements and Policies

Employers often enter into restrictive covenants with their employees that are overly broad. The unfortunate result of this practice is that courts often do not enforce these agreements in total. Employers may maximize their chances of enforcing post-employment restrictive covenants by narrowly tailoring them to be restrictive to only those matters that need protection.

Employers may also want to review their confidentiality policies to ensure that confidential information is maintained under "lock and key" and is made available only to those with a business need to know. This is likely to go a long way toward enforcement of confidentiality policies should a former employee attempt to misappropriate confidential business data upon employment termination.

Review Employment Policies with Respect to Separation and Severance Arrangements

Prior to any anticipated terminations, employers may want to review their employment policies to ensure that their existing policies and practices conform with applicable law. Employers should be familiar with state and federal laws with respect to the timing and payment of final wages, notification with respect to unemployment rights, and the Consolidated Omnibus Budget Reconciliation Act ("COBRA") that gives workers and their families who lose their health benefits the right to choose to continue group health benefits provided by their group health plan, at their own cost, for limited periods of time under certain circumstances.

Severance agreements should be reviewed to ensure that businesses are including necessary provisions with respect to releases, confidentiality, return of company property and non-disparagement. Special attention should be paid to severance agreements for group terminations and for older workers to ensure compliance with the Older Workers Benefit Protection Act.

Review Anti-Discrimination Policies and Procedures

Now is the time for companies to review and update anti-discrimination and harassment policies and procedures and to implement training of all managers, supervisors and staff so all clearly understand the company's lack of tolerance for discrimination and harassment. When faced with employment termination, employees frequently assert discrimination claims. A company will be best prepared to defend against such claims if it has in place strong policies and procedures designed to prevent and effectively redress workplace discrimination.

Review Executive Compensation, Benefit and Stock Option Plans

Consider executive compensation packages. Now may be the time for companies to implement compensation policies that encourage hard work and reward those executives making a positive impact on the business, while curtailing the compensation of those who are not. Many companies are examining how to reduce or eliminate the compensation expense associated with average or marginal performers.

Some public companies are considering repricing options (or replacement grants) or the granting of other equity incentives, given their current market price and potential loss of executive work incentive.

Confirm that plan administrators are meeting their fiduciary duties for 401(k) plans and pension plans, given the market movements.

Boards may wish to review stock ownership guidelines to confirm that executives hold the proper value and amounts, given current share prices.

Many executives and business owners are reviewing their estate plans to take advantage of reduced asset values.

Seek Appropriate Counsel

Given the complexities of state and federal laws, employers may want to seek legal counsel prior to making decisions about employment terminations or the other policies identified above. A few hours of advice may assist the company in avoiding expensive employment-related litigation.

For Further Information

If you have any questions regarding the issues presented above or other ways to potentially improve profitability during these challenging economic times, please contact any member of the Employment & Immigration Practice Group or the attorney in the firm with whom you are regularly in contact.

To read more about areas of concern for corporations of all sizes, including issues regarding finance, mergers and acquisitions and corporate governance in a down economy, please see the Alert from Duane Morris' Corporate Practice Group.