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IN FOCUS

LABOR & EMPLOYMENT

Some employers are seeking alternatives to layoffs

Work force reductions are expensive and can hurt a company's future.

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SPECIAL TO THE NATIONAL LAW JOURNAL

AS EMPLOYERS STRUGGLE in the most challenging economic climate the United States has seen since the Great Depression, they face difficult cost-cutting decisions on a daily basis in an effort to survive. Most common among those decisions is whether an employer should reduce its work force to minimize costs. It seems as if not a day goes by without employers from various business sectors deciding to reduce their work force by tens, hundreds or even thousands of employees in order to avoid having to close their doors forever.

While a work force reduction certainly is an alternative for many employers, it is an unpleasant option that takes an economic and emotional toll both on employers and employees. Work force reductions often require an employer to provide employees with notice periods required by statute, contract or business needs. In addition, employers are often required to expend a significant amount of money in severance payments to employees who are included in the work force reduction. An employer may be forced to spend considerable amounts in legal fees to make sure that the work force reduction is conducted in accordance with applicable employment laws. Furthermore, work force reductions can significantly damage employee morale as employees see trusted co-workers and friends lose their jobs and begin to worry about the security of their own positions with the company.

Employers should understand that, even in this economic climate, there are alternatives to

work force reductions. Many of these options allow employers to accomplish some or all of their economic goals without taking a measure as extreme as reducing their work force. These alternatives include:

- Temporary furloughs.
- Prohibiting overtime and/or reducing work hours.
- Reducing compensation.
- Instituting hiring freezes and allowing for attrition.
- Establishing exit incentive programs.

Each of these alternatives, and the potential risks and legal ramifications that should be considered with implementing these options, are discussed below.

Temporary furloughs

A temporary furlough is a short period during which an employee is required to take an unpaid leave of absence. The employee remains an active employee of the company, but is not required to report to work during the furlough and is not paid during such time. A furlough can take a variety of different forms. For example, some employers require employees to take furloughs in weekly or monthly increments. Other employers choose to shorten the employees' work week to three or four days.

Furloughs have been commonplace in certain industries during economic downturns, including retail and manufacturing. Virtually every level of government has implemented temporary furloughs during economic downturns including, most recently, the state of California and the city of Newark, N.J. Employers in a variety of other areas are considering furloughs as a way to cut costs without having to lay off numerous employees.

Temporary furloughs can provide employers with a number of benefits. Employers can save a

substantial amount in payroll costs and related expenses. They also can avoid the expense of providing employees with the severance payments commonly offered in a work force reduction. In addition, employers can keep their skilled workers at a reduced cost as opposed to losing those workers permanently through a layoff. Finally, by keeping their employees through the use of furloughs, employers can remain prepared to take advantage of an increase in demand by having numerous experienced and well-trained employees ready to resume a full-time schedule.

Employees likely will not react positively to being told that they are required to take a furlough. However,

when considering the alternatives, employees likely would prefer an unpaid furlough with the security of knowing that they will be able to return to their jobs when the furlough ends, as opposed to being included in a work force reduction. Moreover, employees who are given a furlough may be able to receive unemployment benefits in some states, which will also help to soften the economic impact the furlough has on such employees.

Eliminating overtime

Pursuant to the Fair Labor Standards Act (FLSA) and applicable state and local laws, nonexempt hourly and salaried employees must be paid 1.5 times their regular rate for hours worked in excess of 40 hours per week. Therefore, an option for employers looking to cut costs without reducing their work force is to prohibit employees from working overtime hours. To the extent that an employer does not already have such a policy in place, the employer should implement a policy prohibiting employees from working overtime without prior written authorization from the company. The employer then needs to make sure that its managers strictly

Furloughs and pay cuts are among the alternatives.

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enforce this policy. The unused overtime hours can be transferred to other employees who need the work in order to have a full work week.

If the employer's work force does not work a lot of overtime hours, then the employer may want to consider reducing its employees' regular hours. For example, an employer seeking to reduce labor costs might reduce the hours of its work force by 10% to 20% in order to keep its employees gainfully employed, albeit at reduced pay. The ultimate percentage of reduced hours will be determined by the employer's business needs and productivity considerations.

Similar to the use of temporary furloughs, opting to prohibit overtime or reduce work hours will allow an employer to cut costs while keeping its entire work force employed. This will allow the employer to remain prepared to increase production when needed, and employee morale will not be as badly hurt as it would in a work force reduction.

Employers also may seek to avoid work force reductions by reducing their employees' compensation. Clearly, employees who are told that their compensation is being reduced will react negatively to such news at first. However, when faced with the choice of having their pay reduced by a certain percentage or losing their job, most employees will gladly choose the former. This is especially true given the challenging job market resulting from today's economic climate.

Before implementing a compensation reduction program, the employer should carefully analyze its payroll and set reasonable goals. Although employees may be willing to accept a single round of salary reductions, the employer runs the risk of alienating its work force and giving employees an incentive to jump at the first opportunity to work elsewhere if the employer miscalculates its payroll reduction goals and is required to implement multiple compensation reduction programs.

Hiring freezes and attrition

Another option is to implement hiring freezes, thereby capping the employee head count. This course of action might not immediately lead to a reduction in head count and employer costs. However, a hiring freeze coupled with normal marketplace attrition may eventually lead to cost savings for the employer, as employees leave for other opportunities, retirement or for other reasons.

This option may not be feasible for an employer that needs to reduce its costs immediately, as it may take time for a hiring freeze plus attrition to provide significant savings. This is especially true in today's job market, where more employees are choosing to remain at their current jobs for the lack of alternative prospects. However, this may be an enticing option for employers that are trying to avoid being put in a position where they have to reduce their work force or use one of the other

options listed above. A hiring freeze plus attrition will have a relatively minimal effect on employee morale, compared to other options. None of the employer's employees would be subjected to a job loss or reduced compensation, and this should help to decrease employee concerns about job security. In addition, this option allows the employer to avoid the costs associated with having to provide terminated employees with notice periods and/or severance payments.

Even if an employer decides that the best course of action is to reduce its head count, that does not necessarily mean that the employer must implement an involuntary work force reduction. The employer may instead opt to implement an exit incentive program. Exit incentive programs are similar to involuntary work force reductions in that the goal is to reduce head count. However, an exit incentive program provides the employees with the opportunity to step forward and volunteer to have their position eliminated in exchange for severance pay and/or other payments and benefits.

Some employers may be surprised by the number of employees willing to accept an exit incentive package in exchange for the termination of their employment. Every work force has employees who, for example, are looking for a fresh start at a new company or in a new field, are contemplating moving to another city or considering retirement. Many of these employees may gladly accept the opportunity to receive an exit incentive package and carry out their personal plans. This option will require an employer to absorb certain costs, including the payments and benefits provided to the employees who volunteer for an exit incentive package. However, by providing packages only to employees who voluntarily agree to leave, employers can reduce damage to employee morale. Employers who decide to establish an exit incentive program are advised to require each employee to execute an agreement whereby the employee waives all potential claims against the employer arising from the employee's employment and the termination of such employment.

Depending upon employee reaction, an exit incentive program may still be insufficient to bring the employer's head count and payroll costs to an acceptable level. When faced with such a predicament, the employer may choose either to increase the value of the exit incentive package or supplement the program with involuntary work force reductions. Nevertheless, even if the employer must supplement the exit incentive program with some involuntary terminations, the employer can at least reduce the number of involuntary terminations by having some employees agree to accept the exit incentive package.

Caution called for

Regardless which options an employer chooses in its attempt to reduce costs, an employer must abide by the applicable federal, state and local

employment laws. Whether implementing a temporary furlough, reducing working hours or compensation or offering exit incentives, many legal issues can arise. Such issues include, but are not limited to, the following:

- With respect to compensation reductions, an employer may jeopardize the exempt status of a salaried employee under the FLSA if it reduces the employee's salary below \$455 per week.

- An employer may incur liability for unpaid wages if it allows an employee to work from home (or another remote location) or review work-related e-mails while out of the office on an unpaid furlough or other leave of absence.

- Reductions in working hours and the length of temporary furloughs must be accurately tracked to ensure that federal and state notice requirements (i.e., under the Workers' Adjustment Retraining and Notification Act) are not triggered.

- In connection with any of the job actions discussed above, employers must conduct appropriate disparate impact analyses to ensure that their conduct does not disparately affect a particular protected group.

- Employers must document the decision-making process to ensure that they can properly defend against any claims arising from their decision to subject certain employees to one of the above options.

- Employers with a unionized work force will need to make sure that they comply with any applicable collective-bargaining agreements and the National Labor Relations Act prior to and during the implementation of any of these options.

- When implementing exit incentive programs, employers should make sure that any release agreement tied to a severance offer complies with various employment laws, including the Age Discrimination in Employment Act and the Older Workers Benefit Protection Act, to ensure the agreement's enforceability.

- Employers must review any employment contracts or other agreements with individual employees to ensure that they do not breach such agreements by implementing any of these options.

As employers continue to grapple with the challenge of surviving in today's economic climate, it is important for them to understand that there are options other than reducing their work force. If implemented properly, the above alternatives can provide an employer with the opportunity to reduce its costs while keeping its employees actively employed, maintaining strong employee morale and remaining prepared to immediately increase production when necessary. Sufficient planning and the effective use of employment counsel can help to ensure that the employer complies with applicable laws and can help to put the employer in a better position to favorably resolve any potential litigation that may arise. **NLJ**

Employers should analyze payrolls and set realistic goals.