Pitfalls of Employer Measures Aimed at Avoiding Layoffs

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In these tough economic times, many companies have been faced with the necessity of cutting costs, while struggling to retain valued employees who will be needed when their economic situation improves.

According to the Labor Department's Bureau of Labor Statistics, in February 2009, 295,477 workers lost their jobs as a result of 2,769 mass layoff actions taken by employers. However, a recent survey by Watson Wyatt revealed that the number of companies planning future layoffs has fallen from 23 percent to 13 percent. While there are many examples of this trend, the widely reported choice made by Boston-based Beth Israel Deaconess Medical Center is illustrative. When faced with a possible reduction in force, Paul Levy, the President and CEO of the hospital, proposed that some employees give up a portion of their salary or benefits in order to avoid the lay off of other employees. His proposal was met with overwhelming support, and other companies are following suit.

Employers are seeking cost-cutting alternatives to layoffs in increasing numbers. According to the Watson Wyatt survey, 56 percent of companies have implemented hiring freezes, and 42 percent have implemented salary freezes. Companies also are reducing salaries and/or work hours, reducing or eliminating bonuses, asking employees to pay a larger share of health care premiums, lowering their 401(k) match, and instituting furloughs.

While there are many good reasons to consider layoff alternatives, companies should evaluate these options carefully with counsel to avoid the potential pitfalls. The best option for the company will depend, in part, on the employer's obligations in any applicable collective bargaining agreements (CBAs) or other employment agreements. In addition, employers must comply with state, federal and local laws prohibiting discrimination and regulating employee wages and benefit plans. Otherwise, the resulting exposure to the company may outweigh the intended savings.

Reduction in Pay and/or Hours

An employer considering rolling back salaries or reducing the work week must be aware of state and federal minimum wage and overtime laws in order to avoid inadvertent violations. For example, an employee who is exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA) must be paid his or her full salary for any week in which the employee performs any work. Moreover, exempt employees must be paid at least $455 per week, and many states' laws establish a higher minimum weekly wage for an employee to qualify as exempt. If a reduced work week results in an exempt employee being paid less than his or her full salary or the applicable minimum wage, that employee's exempt status will be jeopardized and the employer may unwittingly run afoul of wage laws that carry stiff penalties.

To avoid problems, the company must make it clear that employees' salaries are being reduced along with any reduction in the work week, and must avoid cutting salaries below levels established by applicable law. For example, if a company is implementing a 10 percent reduction in pay for all employees, it may reduce the salaries of lower paid employees below minimum wage or salary requirements for exempt employees, inadvertently triggering a statutory violation. To avoid this, the company should consider implementing a scaled reduction in pay (i.e. lower paid employees will be subject to a smaller reduction in pay than more highly compensated employees) to insure that the salaries of employees on the lower end of the pay scale do not fall below any statutory minimums. Also, any reduction in the work week, and resulting reduction in salaries, may not be made based on a short-term lack of work or day-to-day or week-to-week determinations of the

operating requirements of the business. An employer may make deductions from an exempt employee's salary for full-day absences only, and not part-day absences, without jeopardizing the employee's exempt status.

Reductions in pay and work hours are examples of adverse employment actions that may expose an employer to liability under anti-discrimination laws. Employers must be careful to avoid options that disparately impact employees in a statutorily protected class or adversely affect those who have engaged in activities protected from retaliation.

An employer of a unionized workplace will have to bargain with the union over any reduction in employee pay or hours, unless the relevant CBA expressly permits the employer to take such unilateral action without bargaining.

If a reduction in hours affects an employee's eligibility for healthcare benefits, it may trigger an employer's obligation to comply with notification and other provisions of the Consolidated Omnibus Budget Reconciliation Act (COBRA). For qualified beneficiaries who experience a qualifying event between September 1, 2008 and December 31, 2009, employers must also provide notice of the availability of the federal COBRA premium subsidy made available by American Recovery and Reinvestment Act of 2009.

Furlough

Alternatively, an employer may consider a furlough, such as a temporary layoff or mandatory unpaid holidays or vacation during which employees retain their benefits but do not receive their regular pay.

To avoid wage and hour infractions, an exempt employee on furlough must be directed not to perform any work, including the most minimal of tasks, such as checking e-mail or voicemail.

CBAs and other applicable contracts can limit an employer's right to unilaterally implement a furlough. A CBA or federal labor law may require an employer to bargain before implementing a furlough, and a CBA may contain provisions relating to the use of vacation or paid time off during the furlough.

When an employer implements a long furlough, or an employee's hours are reduced by more than 50 percent, the federal Worker Adjustment and Retraining Notification Act (WARN) and similar state laws (applicable to certain mass layoffs) may apply. These laws generally require an employer to give advance notice (usually 60 days) to its employees that such a furlough will be implemented some time in the future.

Employee Benefit Cuts

Another option for companies looking to cut costs is to reduce employee benefits. A company may increase the amount employees must contribute toward health care coverage or decrease employer matching contributions to 401(k) plans.

In implementing changes to employee benefits, employers must be aware of the Employee Retirement Income Security Act (ERISA). ERISA applies to retirement, health and other welfare benefit plans, such as life and disability insurance, and imposes standards of conduct on the fiduciaries who are responsible for administering these plans. ERISA also contains provisions that assure that plan participants who qualify receive the benefits to which they are entitled. An experienced employee benefits lawyer can help guide employers on the proper implementation of cost-saving measures that may implicate ERISA or related regulations.

Again, employers should consult any CBAs or other applicable contracts, which may contain provisions guaranteeing certain employee benefits.

Employers Should Avoid Pitfalls of Layoff Alternatives

While many employers wish to avoid layoffs to be good corporate citizens in tough economic times, even decisions

motivated by noble intentions can be fraught with landmines. Regardless of the cost-cutting measure considered, companies should be wary of the risks associated with these measures.