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Has Your Company Done Everything It Can to Minimize Its Exposure to Employment Claims in the Current Economic Downturn?

With the worldwide economic crisis mounting, it seems that every day another company either files for bankruptcy or terminates hundreds or thousands of workers to stay afloat. As many companies are discovering the hard way, the economic downturn is resulting in more disgruntled workers and, not surprisingly, a spike in employment claims. While the solution to the world's economic malaise is elusive, there are proactive steps that employers can take to significantly reduce their exposure to employment claims in this perilous economic environment.

We encourage you to contact any of our employment and labor lawyers regarding the issues discussed in this alert.

WORKFORCE REDUCTIONS

Employers considering a potential workforce reduction should be aware of several key federal and state statutes. For example, the federal Worker Adjustment and Retraining Notification ("WARN") Act requires that employers with at least 100 employees provide a minimum of 60 days' prior notice or pay in lieu of notice before effecting a reduction in force or plant closing, as those terms are defined in the statute. It also is important to note that some states have their own, more restrictive versions of the federal WARN Act. California's WARN Act, for instance, applies to employers with at least 75 employees, while Colorado's WARN Act applies to employers with at least 50 employees.

In addition, once a company has decided to implement a workforce reduction, there are a number of other key steps and considerations (below) that should help to minimize a company's exposure to employment claims:

- *Confirm the business rationale for the layoff* (including the extent to which the WARN Act might apply, and any possible WARN Act exceptions)
- *Establish a formalized process for the layoff*
- *Consider and implement alternatives as appropriate* (see Alternatives to Workforce Reductions below)
- *Establish objective criteria for selecting employees for layoff and make sure that the criteria are followed*
- *Perform a disparate impact analysis and "fairness review" before finalizing who will be laid off*

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- *Confirm details of any severance program that may be offered*
- *Effectively communicate layoff decisions to employees*

ALTERNATIVES TO WORKFORCE REDUCTIONS

Workforce reductions are not the only option available to a struggling employer. Options such as voluntary exit incentive programs, temporary shutdowns, reduction or elimination of overtime work, hiring freezes, or reduction of benefits may meet an employer's needs to trim costs without resort to a workforce reduction. However, each of these alternatives has significant legal implications and must be carefully considered and implemented to avoid potential claims.

UPDATING EMPLOYMENT FORMS

Employers should also consider updating standard employment forms, including separation agreements and releases, to ensure compliance with federal and state law because forms that are out of date or that use unclear language may be invalid. *See, e.g., Kruchowski v. Weyerhaeuser Co.*, 446 F.3d 1090, 1095-1096 (10th Cir. 2005) (waivers of age discrimination claims signed by more than 30 employees ruled invalid because employer failed to accurately describe the "decisional unit" for purposes of the layoff).

PROTECTING INTELLECTUAL PROPERTY

Employers should also make sure that all employees have signed agreements to protect the company's proprietary, trade secret, and confidential information. Employers should also review and update these agreements periodically to keep up with recent changes in the law. *See, e.g., Raymond Edwards II v. Arthur Andersen LLP,* 44 Cal.4th 937 (2008) (non-competition agreement narrowly drawn to allow employee access to a substantial part of the market nonetheless struck down because any restraint is unlawful under California law).

MITIGATING RISKS OF WAGE AND HOUR, DISCRIMINATION, AND WHISTLEBLOWER CLAIMS

As with other economic downturns, we are seeing an increase in the number of wage and hour, discrimination, and whistleblower claims filed as the economy sours. This calls for a renewed focus on prevention. Employers can prepare for potential wage and hour litigation by carefully reviewing wage and hour practices to ensure compliance with federal and state law. Employers should review their practices to ensure that independent contractors and temporary employees, as well as exempt and non-exempt employees, are correctly classified and receiving all of the benefits to which they are entitled. In addition, employers should take special care to document and review performance problems, discipline, and employee complaints so as to minimize any potential exposure to discrimination and whistleblower claims.

Lawyers from our Employment and Labor Group stand ready to assist at your convenience. ■