



Law Offices of Mary L. Topliff

Workplace Wave



Reducing Risk During Uncertain Economic Times

By Mary L. Topliff, Esq.

The current financial downturn highlights the importance of employers keeping their respective houses in order since even in the best of times, a lawsuit can wreak havoc on the bottom line. As cost-saving efforts are explored, it is important to be mindful of their legal implications. Furthermore, certain workplace issues tend to arise during periods of significant changes.

The next Workplace Wave will address significant recent legal developments and changes in store for 2009, including the recently updated (and extensive) Family and Medical Leave Act regulations.

Legal Implications of Cost-Saving Measures

The following is a non-exhaustive list of various cost-saving steps that employers may take, including layoffs. It does not address issues involving collective bargaining agreements or public sector employers, nor are bankruptcy options discussed.

- Reductions in pay: Announcing a reduction in pay for the management
- Reductions in scheduled hours: Employers may consider reducing

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Public Speaking

Ms. Topliff will be presenting a workshop on "All About Time Off and Leaves of Absence" for the Northern California Human Resources Association in San Francisco, CA on 1/22/09.

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group as a step to avoid (or delay) layoffs can create considerable goodwill amongst the staff. In some cases, reductions in pay are necessary for the entire employee population. The same percentage or dollar amount should be applied to avoid any potential discrimination claims. This must be done on a prospective basis with advance written notice to the impacted employees. Any deferred compensation arrangements have tax implications that must be reviewed in advance by tax professionals.

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scheduled hours of nonexempt, hourly employees rather than simply reducing their pay and expecting the same level of work. Consider the impact of group benefit plan eligibility by such a change. For example, if an employer's benefit plan required employees to work 30 hours per week to be eligible, a reduction in hours of less than 30 per week would result in the employee no longer being eligible (without a revision to the eligibility criteria). Keep in mind that reducing scheduled hours is not likely to be an option for salaried, overtime exempt employees classified under the Executive, Administrative or Professional exemptions who must be paid a weekly salary that is not dependent on specific hours of work.

- Changes to nondiscretionary bonuses and commissions: Any changes must be made prospectively with written advance notice after counsel has approved them. Wage and hour law dictates the scope of changes that may be made.
- Changes to discretionary bonuses: A "true" discretionary bonus means that there are no terms and conditions for such a bonus, but rather, an employer may decide at any given time to issue a bonus -- or not. Employers who believe that they issue discretionary bonuses should double-check with counsel before announcing any changes. Furthermore, these bonuses are sometimes referred to in offer letters or other employee compensation documents, which

should be reviewed before making any changes.

- Changes to Vacation or Paid Time Off (PTO) Banks: Another cost-saving measure involves reducing the accrual rate of vacation or PTO banks. This must be done on a uniform, prospective basis following written advance notice. Any change that involves an employee losing vacation or PTO time already accrued violates California law.
- Forcing Employees to Use Vacation or PTO: The California Labor Commissioner interprets the accrual of vacation and PTO as the equivalent of wages earned. As such, this paid time off is taken at the discretion of the employee, subject to scheduling approvals by the employer. The validity of mandatory vacation time may largely depend on whether there is a regular office/plant closure at specified time periods, rather than an announcement of a temporary office closure a few weeks in advance. Of course, employers may strongly encourage the taking of vacation time.
- Layoffs and Reorganizations: Since payroll expenses are often the largest costs of an employer, there may not be a better cost-saving option than to reduce the number of employees on the payroll. Before deciding which employees will be subject to layoff, implement a process to help managers make their selection decisions. Decide what the selection criteria will be, for example, seniority, job skills, past

performance reviews, and the like. Ensure that characteristics protected by law, such as gender, race, age, and disability, are not considered.

Determine whether severance benefits are required per plan or policy, and if not, whether they will be provided. Confer with counsel as this process proceeds. Counsel will provide an appropriate waiver and release of claims to be provided to employees in exchange for their receipt of severance benefits.

- **Office/Plant Closures:** If a layoff results in a closure of an office or plant, the federal Worker Adjustment and Retraining Notification Act (WARN) and the California (or other state) law counterpart may apply depending on the size of the organization. For example, the California law covers employers with 75 or more employees and is triggered for layoffs involving 50 or more employees during a 30-day period. These laws generally require certain advance notice requirements to employees, or pay in lieu thereof, as well as notice to government authorities. To determine if these laws apply, contact counsel.

Workplace Compliance Tips During Times of Change

During periods of significant workplace changes, such as layoffs, certain issues are likely to arise more frequently. It is a particularly good time for employers to ensure that they are in compliance with

employment laws and carefully observe good management practices. Here are some employment law compliance issues to address:

- Assume that employees will be on edge during uncertain times. This can lead to more dissension amongst employees, and productivity may suffer as employees are distracted by speculation about future layoffs and the like. Managers play an important role in promoting a positive and motivated work environment. At the same time, they should be realistic about asking employees to take on greater workloads following reductions in force.
- Layoffs can have some unintended consequences. An employee's job may change substantially as he or she is needed to perform different or additional job duties. This might mean an employee's job becomes more clerical. It is crucial to review the scope of employees' "new" jobs and determine if the employee's overtime exemption classification is impacted.
- Ensure that paycheck processing rules regarding final pay and appropriate deductions from pay are strictly observed. Check with counsel before making deductions from the final pay of employees with negative vacation balances or those with repayment obligations for training or signing bonuses.

For more information on these issues, contact the author at topliff@joblaw.com.