

Rynn & Janowsky

EMPLOYMENT LAW

NEWSLETTER

Layoff and Termination of Employees in a Recession: How Employers Can Minimize Risks of Violating Federal and State Discrimination Laws

Implementing a “RIF”

Recent headlines in the newspapers abound with announcements from corporations about massive layoffs of employees in practically all sectors of the economy. And while most economists predict the downward economy (or “recession”) will not be long term, many employers, large and small, must simply cut labor costs to weather the storm, so to speak. To minimize liability, an employer planning a reduction in force (“RIF”) or corporate reorganization or downsizing should engage in a systematic review of its workforce composition and consider the steps outlined below.

Consider Alternatives to Layoff and Termination

Offering Incentives for Voluntary Termination

An employer planning a reduction in force should consider offering alternatives to involuntary terminations in exchange for a release of all claims. Such alternatives typically take the form of incentives like the following: early retirement plans; severance plans; and enhanced benefit plans. Such incentives to voluntary termination do not violate the Age Discrimination in Employment Act (“ADEA”) of 1967 as long as they are implemented in a nondiscriminatory fashion, are not intended to avoid the dictates of

the ADEA, and do not require the involuntary retirement of employees based on their age.

Employment Law Counsel Should Be Consulted in Drafting Any Release

Imagine paying an employee severance pay after the employee signs a Release only to be sued by the employee thereafter for wrongful termination, or discrimination. The scenario is entirely possible. Employees have been able to keep the funds received from their employers and proceed to sue for additional “damages” when the Release failed to contain the necessary provisions dictated by the ADEA. For example, employees over age 40 must have 21 days to consider the agreement (45 days

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if the employee is part of a group or class) and the right to revoke the agreement 7 days after signing it if they so choose. There are other provisions that must be in the release according to federal and state law.

There are certain claims that an employee cannot waive and will be deemed unenforceable even if the claims are specifically mentioned as “waived” in the Release. For example, an employee cannot waive a claim for wages that is indisputably due under the California Labor Code. Similarly, an employee cannot waive claims he or she may have under workers’ compensation nor can the employee waive the right to file an unemployment claim.

Transfers, Bumping, and Recall

In the absence of a contractual obligation (for example, union contract or employee handbook provision), an employer has no duty to transfer an employee whose position is eliminated as a result of a reduction in force. Nor does the law impose an obligation on an employer to bump or recall employees when the employer has not obligated itself to do so by contract and does not maintain a practice or policy of doing so.

If an employer transfers some employees but not others, however, it must be able to justify its selection. A presumption of discrimination is raised when the employee can show that others outside the protected class are treated more favorably.

Employers that elect to adopt a recall policy should clearly identify the nature and scope of their obligations to avoid later claims of discrimination or breach of contract. For example, the time period in which recall rights may be exercised, whether recall is triggered automatically or by employee application, the positions to which the employee may be recalled, and whether the policy requires the employer to merely consider the employee for the position, to give him or her preference over outsiders, or to hire the employee without regard to qualifications of other applicants are all factors to be considered when formulating a recall policy.

Establish Lawful Selection Criteria for Terminating, Retaining, or Laying Off Employees

An employer that can show it selected certain employees for termination based on neutral criteria will have a strong defense against a discrimination claim. Many employers use a procedure in which they identify specific factors relevant to an employee’s performance and status, assign particular weights to those factors and then release employees with the lowest weighted score.

The “Merit” Factor

One of the most common criteria in selecting employees for layoff or termination is performance. The evaluation of performance should be based as much as possible on objective

criteria applied in a uniform fashion.

The “Versatility” Factor

In a shrinking workforce, versatility often becomes an important criterion and therefore the employee’s ability to perform multiple tasks in a consolidation is often considered a heavily weighted factor.

The “Seniority” Factor

Seniority may be used as a criterion, but it may not be invoked in such a way as to get around the ADEA or Title VII discrimination. Both laws allow for layoffs and terminations based on seniority when the employer has a bona fide seniority system. Usually, employers with union contracts contain bona fide seniority policies.

Beware of the Illegal Factors When Terminating, Retaining or Laying Off Employees

The decision to select employees for layoffs based on their salary may lead to age discrimination claims if older workers are adversely affected. California Government Code sec. 12941.1 explicitly states that “the use of salary as the basis for differentiating between employees when terminating employment may be found to constitute age discrimination if use of that criterion adversely impacts older workers as a group.”

Criteria that is unequivocally illegal includes, age, sex, race,

color, religion, national origin, pregnancy, marital status, sexual orientation, a pension about to vest, disability, medical condition, filing a workers compensation claim, or the employee's exercise of a protected right, such as filing a discrimination claim or unfair labor practice charge, or reporting a suspected violation of the law.

Military Leaves of Absence: What Employers Need to Know

Now that our country is in a war, which President Bush has warned will take years to wage, employers have and will be faced with knowing about the rights of employees who have either enlisted in the armed services or are military reservists subject to a call to active duty. There are two laws that apply to the recent mobilization: the federal Uniformed Services Employment and Reemployment Rights Act ("USERRA"), and California Military and Veterans Code. The latter state law gives California residents a few extra rights not covered in the USERRA.

The USERRA applies to all American employers, regardless of size or whether the employer is situated in the United States. Under the USERRA, an employer cannot terminate an employee because he or she enlists in the military or is called to active duty as a reservist. The USERRA generally allows

employees to take up to 5 years of leave for military service.

There is no requirement that employers compensate employees during absences due to military service. The USERRA provides that employees on military leave are entitled to the same benefits given to employees who take other forms of leave. For example, if employers normally provide continued life or disability insurance benefits to employees on unpaid leave, these benefits must be also provided to those on military leave.

Employers must provide the option of COBRA-like medical coverage for on-leave employees (and their families). Employees returning from military service are entitled to the seniority and other rights and benefits based on seniority that they would have been entitled to had they not taken military leave of absence.

Under the USERRA, an employee is entitled to reinstatement following his or her term of military service. Federal law provides that after completing military service, the employee has a certain amount of time (which varies depending upon the length of the employee's military service, and which may be extended for up to two years if the employee is injured during the course of military service) to notify the employer that he or she is ready to return to work.

After the employee is reinstated, the USERRA in effect converts an employee's status to one that is not "at-will." This is so because the USERRA

provides that any reinstated employee may only be discharged for cause during a specified period of time after he or she returns to work. As with the right to reinstatement, the particular period of time depends on the duration of the leave.

To be entitled to USERRA's benefits, the employee must provide advance verbal or written notice (typically consisting of a copy of the employee's military orders, training notice or induction information).

Exempt or Not Exempt?...That Can be the Million Dollar Question for Employers

Numerous Class Actions Filed

As the 2001 flood of overtime lawsuits and multi-million dollar settlement awards amply demonstrate, employers act at their own peril if they fail to closely examine whether their employees are properly classified as "exempt" from overtime pay.

Certainly, nothing spawns lawsuits more than success, and this year, attorneys who represent employees have been hugely successful initiating overtime litigation against employers. The overtime lawsuits take the form of either class actions or "private attorney general" actions under the California Business and Professions Code. The advantage of bringing the private attorney general action against an employer is that the statute of limitations goes back four years

from the date the lawsuit is filed while the class action is usually limited to three years of back overtime wages. For example, Rite Aid paid \$25 million to settle a class action lawsuit, Taco Bell parted with \$13 million, and U-Haul paid \$7.5 million, and the California Courts upheld a judgment awarding \$90 million to 2,400 Farmers Insurance Exchange claims adjusters.

Many Salaried Employees Must Receive Overtime Pay

One of the principal misconceptions fueling these overtime claims is the false assumption that employees are not entitled to overtime pay if they are paid a salary. However, much more than a salary is needed to exempt an employee from overtime pay, particularly in California. Except in a few narrowly defined categories - - such as highly paid computer professionals - - an employee must meet *both* a minimum salary and a job duties test to be excluded from overtime pay.

In California an “exempt” employee must be paid a salary equal to no less than two times the current minimum wage per month for full time employment. In addition, the primary exemptions from overtime apply only to individuals who are primarily engaged in executive, administrative, or professional duties. Unless an employee meets both of these tests or is engaged in work covered by one of the few job specific and narrowly defined exemptions – such as irrigator, “outside

salesman,” certain truck drivers, and some employees paid on a commission basis – they must be paid overtime. Of course, the puzzle is in the definition of the terms executive, administrative, and professional.

Professional Exemption

The “professional” exemption is fairly easy to define. It is generally limited to employees who are licensed in one of the following professions: law, medicine, dentistry, optometry, architecture, engineering, teaching or accounting. Consequently, accountants cannot claim the professional exemption unless they are licensed CPA’s. Also, pharmacists are not exempt professionals under the California wage orders.

Executive Exemption

To qualify for the executive exemption, an employee must be *primarily* engaged in the following activities: (1) managing a business or a recognized department or subdivision of a business, and (2) regularly supervising the work of two or more employees. In addition, the employee must have the authority to hire and fire, and he must exercise “discretion and independent judgment.”

Many companies run into problems with managers and assistant managers who they classify as exempt executive employees but who also engage in non-management type duties. For example, Starbucks Coffee was recently sued, because its managers allegedly also work the

cash register and make lattes. If the manager spends more than 50% of his or her workweek performing non-management activities, then he or she is not exempt from overtime pay. Similarly, working foreman – such as mechanics who supervise several employees and who also repair equipment the majority of their workday – are also misclassified as exempt. The same holds true for the office manager who spends more than 50% of her time performing routine clerical duties.

Administrative Exemption

The administrative exemption is perhaps the most difficult to understand. To meet the requirements of the “administrative” exemption, an employee must (1) devote at least 50% of his work day to office or non-manual work directly related to management policies or general business operations, (2) regularly exercise discretion and independent judgment, and (3) either directly assist an owner, executive, or administrative employee, perform only under general supervision specialized or technical work requiring a high degree of training, experience or knowledge, or execute under only general supervision special assignments. Personnel directors, purchasing agents, credit managers, and buyers are often exempt, because they make decisions about matters that are significant to the business’s operations or policies. If, however, an employee is engaged in the production work

of the business – they carry out the day-to-day operations of the business rather than run it or determine its policies – they are not exempt administrative employees. For example, a buyer may not be an exempt administrative employee if buying and selling is the company’s business.

Employees Who Discovered Surveillance Equipment In Restrooms May Sue Employer For Violation Of Privacy Rights

The employer in this case, Consolidated Freightways, concealed video cameras and audio listening devices behind two-way mirrors in the restrooms at its terminal in Mira Loma, California, in order to detect and prevent drug use by its drivers. The plaintiffs, who were union employees, alleged that Consolidated’s actions violated California Penal Code sec. 653n and plaintiffs’ privacy rights. In their class action lawsuit, plaintiffs sought damages for invasion of privacy and infliction of emotional distress and injunctive relief to end the use of the surveillance equipment.

The federal Ninth Circuit Court of Appeals, in *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683 (9th Cir. 2001), held that the collective bargaining agreement at issue could not validly sanction the employer’s illegal action and that the terms

of the collective bargaining agreement were irrelevant to the plaintiffs’ claim of violation of their right to privacy. The Court further held that since Consolidated’s conduct was a violation of California Penal Code section 653, it was “per se outrageous” and therefore the claim for infliction of emotional distress could proceed.

Termination of Employees Who Reported Employer to INS Violated Public Policy

The plaintiffs were husband and wife who worked for defendants in the garment business in Los Angeles. They were “laid off” after they reported defendants to the Immigration and Naturalization Service (“INS”) and the INS raided defendants’ business, arresting approximately 40 percent of the workforce.

Plaintiffs brought suit alleging breach of contract and wrongful termination in violation of public policy, winning a jury verdict against defendants. The employer appealed and the Court of Appeal affirmed the judgment, holding that the Immigration Reform and Control Act did not preempt the plaintiffs’ claims and that they were not required to exhaust administrative remedies under the statute.

The Court of Appeal, in *Jie v. Liang Tai Knitwear Co., Ltd.*, 89 Cal.App.4th 654 (2001), also held the evidence was sufficient to find that both husband and wife

had worked for both defendant companies, one a manufacturer, the other a marketer, where both companies were run by the same people, in the same building, using the same employees.

Promise of Performance Review After One Year Does Not Constitute Contract of Employment

Plaintiff, a former purchasing agent for Total-Western, Inc. (TWI), alleged breach of an express employment agreement based upon a representation that was contained in a written employment offer. The offer stated plaintiff would receive a performance review after 12 months’ employment. Upon hire, plaintiff signed an application that contained express termination-at-will language; he also signed an acknowledgement of receipt of TWI’s personnel manual, which also contained at-will language. In *Lenk v. Total-Western, Inc.*, 89 Cal. App.4th 959 (2001), the Court of Appeal found there was no breach of employment contract, reversing the trial court. However, the appellate court rejected the employer’s argument that plaintiff’s emotional distress damages (recovered as a result of alleged fraud) were barred by the Workers’ Compensation Act (WCA). According to the decision, the alleged misrepresentations related to TWI’s financial stability, which induced plaintiff to quit his job

with another employer and join TWI, were not part of the “compensation bargain” of the WCA.

Effeminate Male Employee Prevails in Sexual Harassment Case

In *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (9th Cir. 2001), the Ninth Circuit Court of Appeals held that the plaintiff, who was taunted and teased because of his

effeminate conduct, had been subjected to a hostile work environment within the meaning of Title VII. The employee alleged that he was fired in retaliation for his complaint.

The employer’s remedial actions after receiving the complaint from the employee consisted of telling the plaintiff to inform the general manager if the offensive conduct recurred, and conducting a handful of spot checks in the two weeks after the plaintiff complained.

The court of appeals held that

the employer did not take adequate remedial actions with respect to the harassment perpetrated by co-workers and supervisors because it did not investigate his complaint, did not discuss the allegations with the perpetrators, did not demand that the unwelcome conduct cease, and did not threaten more serious discipline in the event the harassment continued. The court of appeals, however, did find that the plaintiff was not fired in retaliation for his complaint.

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