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Tips To Avoid Risks Associated With Downsizing

Law360, New York (August 06, 2008) -- In light of the economy's continued decline, companies across the country are performing mass layoffs to remain profitable, placing themselves at risk for a plethora of liabilities associated with downsizing and employee uncertainty.

Nationally, mass layoffs are taking place in nearly all industries at small businesses and major corporations from Starbucks and Citigroup to United Airlines and General Motors.

According to the U.S. Department of Labor, 949,639 employees were terminated as a part of mass layoffs from January–June 2008, up substantially from 780,463 in 2007.

Not only is the surge in layoffs a concern, the recent shift in type of layoffs poses a significantly greater threat to employers than in the past.

Unlike typical productivity layoffs — where companies downsize as a result of new business methods, technologies and/or subcontracting — recessionary layoffs take place as a form of subsistence.

Employees who are terminated during productivity layoffs feel their skills will be valued at another organization while remaining employees understand the decision and are confident the company is stronger as a result.

On the contrary, employees terminated as part of recessionary layoffs are uneasy about finding employment elsewhere and staff still employed becomes concerned about the company's outlook, creating a sense of despair among both parties.

During times of economic hardship, when companies are forced to execute mass layoffs, employees are more prone to sue as a result of their inability to find work and meet financial pressures.

Littler encourages employers to be particularly vigilant to ensure compliance associated with reducing workforces and retain top talent despite a potential weakening of employees' confidence in the future of their companies.

We advise companies follow these tips to avoid liability and maintain workplace morale:

— Establish clear selection criteria before executing mass layoffs such as objective skill sets, least to be missed/peripheral, performance (based on past evaluations), multi-level (a linear process that narrows the field), forced ranking and seniority.

— Analyze the impact of selection criteria (litigation risk assessment) including gathering data for a statistical analysis, documenting decision making where necessary, and performing a legal review of selections—if there is an adverse impact on women, persons of color, national origin, age, etc., be sure the criteria can be justified or change the criteria.

— Consider the Federal Worker Notification and Retraining Act (WARN), in which employers with 100 or more employees terminating 50 or more employees are required to provide 60 days' notice prior to a mass layoff, and varying state WARN regulations in California, Connecticut, Hawaii, Illinois, Maine, Minnesota, New Hampshire, New Jersey, South Carolina, Wisconsin and the Virgin Islands.

— Review Employment Retirement Security Act (ERISA) and COBRA compliance involving severance plan issues such as ERISA-covered severance plans, drafting techniques to limit ERISA reporting obligations, payment timing, section 409A and deferred compensation pitfalls, medical insurance, COBRA notice obligations, extended medical insurance coverage periods and/or COBRA, termination of all group medical insurance, and retirement plans.

— Review state obligations that can lead to big surprises. Examples of specific states include California, Hawaii, Maine, Massachusetts, New York and Rhode Island.

— Avoid using outdated releases, and make sure releases are consistent with recent court decisions, and do not recite statutes that provide non-waivable rights. Using old release forms can invalidate the releases, exposing the company to litigation even though employees received cash in exchange for signing a release.

— Communicate with remaining staff their value and importance to the company with particular focus on star employees who are employable and who, upon seeing layoffs, are most likely to begin applying elsewhere if they feel the company is in trouble.

— If bankruptcy and reorganization are also issues, review the status of employees, the status of wages owed, the status of employee litigation and administrative claims, union agreements and possible debtor-in-possession status.

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