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Avoiding The Hazards Of Economy-Driven Decisions

Law360, New York (December 08, 2008) -- Times are tough. The weakened economy has spared few industries, causing companies big and small to re-examine their personnel needs and make tough decisions. Hard times require businesses to strengthen their resolve to avoid the legal tsunami that can also result from such economy-driven decisions. This article sets forth best practices to help your company minimize its potential exposure in five primary areas.

1. Trade Secrets And Unfair Competition

Economic downturn increases the likelihood that senior-level employees will leave your company either involuntarily or voluntarily. Among the critical issues involved with such departures is the fear that a former employee might disclose your company's trade secrets or unfairly compete.

Therefore, businesses must consider whether to seek enforcement of non-compete and non-disclosure agreements, and whether to request that employees who remain with the company sign such agreements.

On the flip side, in the event your company chooses to hire an individual who has recently left another company, you should proactively determine whether the new hire is subject to any restrictive covenants with his or her former employer, and perhaps ask the new hire to certify in writing that no restrictions exist.

That way, your company can minimize potential exposure by avoiding the knowledge or intent that must be shown to support a tortious interference claim by the former employer.

In many states restrictive covenants are not favored. Nevertheless, in those jurisdictions where a restriction on an employee's ability to compete or solicit is governed by a "reasonableness" test, the restriction must be reasonable in geographic and temporal scope,

necessary to protect the company's legitimate interests, and cannot be unreasonably burdensome to the employee being restrained.

Before determining whether to bind an employee to a restrictive covenant, or to seek the enforcement of an already-existing agreement, your company should:

- understand that you generally cannot enforce restrictive covenants against an employee who has been involuntarily terminated without cause;
- ensure that all trade secret and otherwise proprietary information is treated internally as confidential;
- tailor any restrictive covenant to the particular position of the employee, demonstrating that a business need exists which justifies restrictions being placed on that position, rather than using a boilerplate agreement for clerical and senior executives alike;
- include time and geographic restrictions reasonable and necessary to your business and industry, and your company's specific needs, to avoid the perception or reality that you are overreaching and simply acting in a punitive manner; and
- consider "safeguards" such as additional severance to be paid during the restriction period. Doing so may prevent the employee from successfully claiming an inability to earn a living while subject to the restrictive covenant.

2. Medical Leave

The stress caused by the troubled economy may lead to an increase in the number of employees whose productivity diminishes and who may seek a leave of employment.

While workplace stress and anxiety may not be a protected condition alone, stress can manifest itself in other conditions that are protected under the various laws that govern employment leave.

Additionally, increased stress coupled with the significant time spent in the office in a particular day or week, could provide inappropriate outlets in the form of harassment or violence in the workplace.

Recognizing the potential for stress-related conditions in this economic setting, and determining whether certain legal obligations are met, is critical.

Businesses are advised to engage experienced counsel to help navigate the interplay among the relevant laws. On the federal side, the primary sources for leave-related obligations are the FMLA and the ADA.

Many states also have their own version of these statutes, as well as workers compensation and unemployment insurance programs that must be considered.

Indeed, Congress' recent amendments to the ADA and newly-published Department of Labor regulations interpreting the FMLA will expand the number of employees that might be entitled to take a medical leave.

Therefore, your company should:

- understand the nature of its obligations under these laws, and particularly the expansive definitions of "serious health condition" and "disability." Do not dismiss an employee's statements about a particular condition simply because of prejudice or an unsubstantiated belief that the condition is not "real;"
- maintain and regularly communicate policies that set forth the employee's rights and obligations with respect to employment leave;
- engage in a dialogue with an employee who expresses a need for an accommodation due to a medical condition. Many problems can be avoided if the employer and employee communicate from the start about expectations, needs, and the potential for mutually acceptable solutions; and
- document the history of discussions with the employee, and any accommodations that are requested or offered.

3. Mass Layoffs

With the recent news of companies laying off tens of thousands of their workers at a time, large scale terminations and even facility closings will continue to trigger certain notice obligations.

The federal Worker Adjustment and Retraining Notification Act (WARN) requires 60-days notice of a mass layoff or plant closing in certain circumstances.

WARN applies to companies that employ 100 or more full-time employees, and requires

notice when 50 full-time employees lose their positions and constitute at least 33 percent of the workforce at a single site.

States such as California, Illinois and New Jersey have adopted their own version of WARN, with recently-enacted New York legislation, more expansive than the federal WARN, taking effect in February 2009.

Therefore, companies that are considering a large reduction in force, the closing of a particular facility, or even certain types of relocations, should determine whether the planned event requires compliance with federal or state notification laws, including whether any recognized exceptions insulate the company from the notice requirements.

Additionally, employers should ensure that the reasons for the planned event are well documented, particularly from a timing standpoint, and that all covered employees, whether temporary or permanent, part-time or full-time, receive the proper notification.

4. Individual Layoffs

Where economic troubles may not warrant mass layoffs or full operational shut downs, the prospect of terminations on a smaller scale still remains. Without triggering the federal and state WARN obligations, businesses are still best advised to consider whether the termination of even one individual could lead to potential exposure.

Statutes such as Title VII of the Civil Rights Act, the Equal Pay Act, the Age Discrimination in Employment Act, the Uniformed Services Employment and Reemployment Act, and various other federal and state laws, proscribe discrimination against members of a protected class.

Federal and state law also provide redress for individuals who claim retaliation as a result of a company's decision affecting employment up to and including termination.

Companies should take certain steps when deciding to terminate an individual's employment, including:

- performing an impact analysis to determine whether the individual termination(s) affects a particular protected group more negatively, and documenting the reasons that certain individuals, positions or departments have been chosen for elimination;
- complying with all COBRA-related requirements, and determining any state law obligations relating to the timing of final paychecks, payment of accrued but unused sick or vacation

time, and whether any company documents or other property must be returned; and

- considering offering severance or other post-termination benefits to terminated individuals in exchange for a full release of potential claims, to the extent permitted under applicable law. Any severance program must be evenly-applied and provide benefits beyond what the terminated individual would otherwise be entitled.

5. Expanded Workplace Boundaries

Occasionally, businesses will look to cut costs and reduce work schedules through measures other than individual or mass layoffs. For example, companies may offer telecommuting and Blackberries as options to employees who no longer have to commute to the traditional office for a nine-to-five workday.

The decision to permit the performance of work outside the four walls of the workplace, and the explosion of technological advances that keep us all connected 24/7, brings significant concerns as well, particularly when costs are ultimately increased and employees claim they are working longer hours.

One possible pitfall is misclassifying company employees and failing to pay the required overtime premium for hours worked in excess of 40 hours per week.

For example, the hours worked by an employee working from home or traveling with the benefit of a Blackberry or similar PDA, can no longer be monitored from a company standpoint, leaving the company susceptible to claims (legitimate or illegitimate) that the employee performed work in a given workweek for which he or she is entitled to overtime pay.

In addition, courts have recently refused to excuse a company's failure to pay for overtime work, even in the face of evidence that the overtime was not authorized by the company in the first place.

While your company may discipline an employee for violating company policy relating to unauthorized overtime, an employee must nevertheless be paid for all work performed for the benefit of the company.

To that end, there are certain pro-active steps that companies can take to minimize the potential exposure in any future administrative audit or lawsuit.

- Create a well-defined overtime policy that is distributed and communicated effectively to your employees. It is not enough simply to create a policy in a handbook; it is critical that your policy be communicated through regular trainings or meetings with employees, and that distribution of the policy includes an employee's written acknowledgement.

- If your company maintains a strict policy that employees cannot work after hours, don't create a "wink-wink" culture where employees feel they are expected to "check in" at all hours through their home computers or Blackberries, and are frowned upon for not immediately responding to an e-mail sent at 10:00 p.m.

- Verify that the appropriate classifications are made and that the appropriate records are maintained supporting the proper wage classifications for employees. Internal audits should be conducted by job classification, with a focus on the day-to-day job duties that are actually performed, rather than on indiscriminate job titles or out-of-date job descriptions.

- Consider instituting a supplemental documentation procedure for non-exempt employees that certifies whether an employee performed overtime work, so that your company can better account for the number of hours an employee later claims he or she worked.

There also are practices that your company should consider before it provides Blackberry-like devices to the entire workforce. To start, consider giving out Blackberries or similar devices only to those employees that are non-exempt.

Also, you should have a clear and specific policy stating employees are not required or permitted to use the Blackberry outside normal working hours, and that the employee may be required to return the device if it is determined that the employee is using it contrary to the policy.

The company may want to consider monitoring, not the content of employee e-mail, but the amount of usage during certain hours.

While it is an exercise in towing the line to balance the morale that might be lost by the perception of "big brother" with the business need inherent in any monitoring, your company should at the very least create a policy and practice that reflects thought having been given to the conduct of the workplace and the challenges that are being faced.

Times are tough. However, your company has the ability to control many of the decisions it makes and the legal consequences of those decisions, even in a difficult economy. By

Identifying the issues that may arise, and proactively analyzing and creating a plan to confront those issues, your company can ultimately survive this climate and hopefully return to growth and prosperity.

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