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CITATIONS

SEPTEMBER – TWO THOUSAND NINE

HOW EMPLOYERS CAN AVOID MAKING COSTLY HUMAN RESOURCES MISTAKES DURING DIFFICULT ECONOMIC TIMES

By Polina Friedland Bernstein, Esq.

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With the ranks of the unemployed growing larger, the number of employment-related lawsuits has also seen a dramatic upward shift. According to the Equal Employment Opportunity Commission, discrimination claims filed with the agency rose fifteen percent in 2008 to 95,402 (from 82,792 claims filed the year before). This number is expected to increase in 2009 due in part to the fact that discharged workers face greater difficulty in finding new jobs; the current economic realities may lead some of them to consider litigation against their former employers as a means of financial survival. Accordingly, the way employers implement layoffs may end up costing them significantly more in the way of litigation related expenses.

There are, however, steps companies can take to reduce the risk of employment litigation and better defend themselves in the event a lawsuit or claim is filed.

Reevaluate Employee Job Duties to Ensure Proper Payment of Wages.
In order to decrease expenses, companies may choose to eliminate certain positions or change the duties of some employees. These changes may result in certain employees losing their exempt status thereby entitling them to receive overtime pay for hours worked in excess of eight per day or 40 per week. For example, an employee's duties may have qualified her for the executive exemption under California law, i.e. she customarily and regularly directed the work of at least two subordinates, exercised independent business judgment, had the authority to hire and fire, and met the remaining requirements of the executive exemption. If, however, individuals supervised by this employee are discharged, then the company will need to evaluate whether it would be proper to continue to classify her as exempt from receiving overtime pay.

Similarly, the company's financial needs may require employees to perform different and/or additional duties that were previously assigned to employees whose jobs have been eliminated. For example, a manager who previously oversaw a retail company's business operations may need to spend a great deal more time performing the non-exempt duties that the employees supervised by this manager perform, i.e. helping customers, working at the cash register, etc. Depending on the types of duties performed by this manager, the manager may be entitled to overtime pay because with the change in duties he no longer qualifies for an exemption from being paid overtime wages.

Given that it is the employer's affirmative obligation to establish that it has properly designated employees as exempt, employers should review positions on an on-going basis to ensure that employees are properly classified.

Make Sure To Pay All Wages Owed Upon Termination.
The Labor Code specifies that an employee who is discharged is owed all final wages, including accrued but unused vacation, at the time of termination, irrespective of whether the termination is the result of misconduct, performance issues, or a reduction in force. Failure to timely pay all wages and unused vacation may result in the employer having to pay costly penalties equal to the employee's daily rate of pay for each day that the overdue final wages remain unpaid, up to a maximum of 30 days. Therefore, even if financial constraints require employers to act quickly in implementing layoffs, it is important to accurately calculate in advance the amount of all wages and unused vacation owed to employees upon termination.

Take the Time to Properly Implement a Reduction In Force.
Companies desperate to reduce expenses may not take the time necessary to properly plan, implement and document a reduction in force. Employers must use a fair method and defined criteria for selecting among employees in affected positions or departments and to make sure that improper selection criteria do not result in discriminatory or retaliatory layoffs or have a disproportionate impact on women, minorities, older workers or other protected groups. Employees who implement layoffs should be trained to provide consistent and accurate information in a respectful manner to employees impacted by the reduction in force. Employers should also be prepared to discuss the reduction in force with retained employees in a way that will address their concerns without making any guarantees of future job security. Lastly, there may be important legal requirements applicable to a reduction in force, including but not limited to the Worker Adjustment Retraining and Notification Act and state law equivalent, and the Older Workers Benefit and Protection Act if severance pay is offered.

Make Sure To Keep Employee Handbooks Current.
Solid employee handbooks may provide support regarding employee discipline and discharge decisions and demonstrate to plaintiff's counsel and to the court that the employer understands its legal requirements, communicated those requirements to employees, and took proactive steps to comply with the law.

Employment laws change often and employee handbooks should be reviewed and revised to be current. Recently, Congress made significant amendments to the Federal Medical Leave Act and the Americans with Disabilities Act. There were also many important California Supreme Court and appellate court decisions. For example, last year the California Supreme Court in *Edwards v. Arthur Andersen* (2008) 44 Cal.4th 937 determined that most non-solicitation and non-competition covenants are not enforceable in California, even if they are narrowly drawn, unless they fall within one of the statutory exceptions relating to a sale of a corporation or partnership interest. Employers whose handbooks

continue to contain non-competition or non-solicitation provisions may risk being sued for interference with contract or interference with prospective economic advantage by former employees who claim that these policies discouraged potential employers from hiring them. Therefore, it is important that employers regularly audit their handbooks rather than have their out-of-date policies be used as proof in a lawsuit that an employer did not know the law or applied obsolete laws or regulations.

Follow Your Policies and Procedures for Terminations.
There is a significant risk in having personnel policies but failing to consistently apply or enforce them. Although the existence of a well-written and current handbook may provide proof that the employer knew the law, the employer's failure to comply with its own policies and procedures, or comply for some employees but not others, could be just as damaging as not having a handbook at all.

Conduct Performance Evaluations and Document Performance Problems.
Employers should conduct regular performance evaluations of their employees at least once per year. If an employee is discharged because of poor performance but the employer did not conduct any evaluations or the employee's evaluations did not reflect areas where improvement was needed, a jury may be more likely to believe that the termination was actually the result of an illegal employment practice. Employers should also document any performance-related counseling and even verbal warnings, which can serve as proof in an employment lawsuit regarding the reason for a termination, demotion, or decision not to promote. Furthermore, employees who are not given regular feedback and are then suddenly discharged on the basis of their performance may believe that their employment was terminated for an illegal reason and may be more likely to seek legal redress as a result.

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Provide Equal Employment Opportunity Training

California employers with 50 or more employees and/or independent contractors are required to provide supervisors two hours of interactive sexual harassment training every two years. However, employers with any managerial employees would be wise to provide their employees with training to prevent harassment, discrimination, and retaliation without limiting the scope to sexual harassment. Such training may greatly decrease the likelihood of illegal employment practices, increase employee morale and productivity, and reduce an employer's exposure to liability in employment related lawsuits.

Treat Employees With Respect

Employees who are treated with respect and are allowed to leave the workplace with dignity are less motivated to sue their employers. Discharged employees should be allowed to gather their things and say good-bye to co-workers unless there is a reason to suspect that an employee will react violently or try to take confidential information. To the extent an employer can help provide an employee with the means to gain alternative employment, such as by way of training, job search counseling, or referrals to other positions, this can significantly decrease the hurt feelings and fear associated with a lay-off.

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