

HR Banker

FOR HR PROFESSIONALS IN FINANCIAL INSTITUTIONS

December 2008

Vol. 9 No. 12

Executive Summary

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Reductions in force are becoming commonplace in the banking industry, particularly among the largest banking organizations. But even smaller banks may have to reduce their payrolls in the current economic climate. HR Banker interviewed a labor and employment law attorney to learn about the legal risks arising from layoffs. Her comments include the top five tips for mitigating layoff-related risks.

3 HR Resources

The Department of Labor offers a web tool to assist employers and employees affected by the financial crisis.

5 Compliance Corner

The Social Security Administration's Death Master File is a powerful resource to help you comply with the interagency identity theft "red flag" guidance that went into effect on November 1, 2008.

6 Training & Development

The Treasury Department's Advisory Committee on the Auditing Profession has recommended improvements in three areas to modernize the audit profession. Its suggested "human capital" improvements relate to education, licensing, recruitment, retention, and training.



HR Advisor

If Bank Layoffs Are Necessary, Avoid Legal Risk

JPMorgan Chase & Co. announced on December 1 that it will lay off 9,200 employees of Washington Mutual Bank (WaMu). The banking conglomerate acquired the Seattle-based savings bank after WaMu became insolvent in late September, another victim of the financial crisis that has engulfed the U.S. economy. With branches in Washington, California, and elsewhere, WaMu was the largest insured bank in history to fail.

The WaMu job cuts come on the heels of announcements by many other large financial institutions that they will lay off massive numbers of employees. Citigroup announced in November that it will cut more than 50,000 jobs, and Bank of New York Mellon will eliminate 1,800 jobs.

This year alone, the U.S. economy has lost more than 1 million jobs, and the pace of layoffs is quickening. An economist at Wachovia Bank told CNN Money.com that 350,000 positions would be lost from the

economy in November.

These painful job loss numbers among the largest banking organizations are not matched in the community bank sector. Smaller banks in local markets were not as catastrophically affected by the mortgage meltdown because most of them did not make toxic subprime loans. Nevertheless, community banks are feeling the repercussions of the credit crisis and financial turmoil, and some are trimming their payrolls ... or may be forced to do so before the crisis abates. Past recessions indicate that unemployment could continue to rise even after the overall economy begins to improve.

HR managers have the unenviable position of being in the middle of the storm should layoffs become necessary. Now may be as good a time as any to review the legal risks arising from planned reductions in force.

That risk is not just theoretical; after the collapse of Lehman

Brothers Holdings, Inc., in September, the investment bank was hit with a \$5 million class action lawsuit claiming violation of the federal Worker Adjustment and Retraining Notification Act (WARN) and a parallel New Jersey state law.

"In the event of a layoff, employee notifications and many other issues need to be researched and resolved. Human resources professionals have incredible talents and know the answers to many of the questions that come up during a layoff. But there is a point at which they need backup from legal counsel. No company is litigation-proof in a layoff scenario, but legal counsel can help make a bank as defensible as possible," says Wendy E. Lane, an attorney with Rutter Hobbs & Davidoff in Los Angeles, California.

A Litigious Environment

As the financial and economic crisis gained momentum this fall, Rutter Hobbs & Davidoff's Labor and Employment Department issued its "Top 5 Legal Tips for Employers Conducting Layoffs in the Current Economy." *HR Banker* had an opportunity to talk with attorney Lane recently for added insight regarding the legal risks associated with layoffs and some ways to avoid litigation.

As Lane rightly points out, "Layoffs create an adversary situation. There are feelings of fear, panic, anger, and betrayal. Employees are already being affected by higher prices and, in some cases, mortgage payment increases. Their survival instincts may convince them that they should sue. And if they have a legitimate claim,

why wouldn't they?"

Furthermore, when a layoff occurs, it creates a glut of employees in the job market, many of them looking for the same job. A protracted job search or bleak prospects to find a job at all may prompt more employees to consider their legal options. And because a layoff typically involves multiple employees, the threat of class action increases.

Adding to the legal risk is the fact that some employers don't even know they have responsibilities to employees when conducting a layoff, says Lane. "Before announcing a layoff, a bank or other company should thoroughly research all the legal issues that could arise," says Lane. "These include both federal and state laws. In the case of financial institutions that operate across state lines, a variety of state-specific laws may apply."

Knowing What Can Hurt You

The class action against Lehman Brothers invokes a law that has been on the books since 1988, but according to Lane, many employers are unaware of its requirements or the requirements of similar state laws.

The WARN Act is intended to give employees time to adjust to a prospective loss of employment and to seek alternative jobs or training.

In general, the law provides this transition time by requiring certain employers with 100 or more employees to provide 60 days of notice in advance of (1) a "plant closing" affecting 50 or more employees during any 30-day period, or (2) a "mass layoff" that does not result from a plant closing but that will result in

To Mitigate the Risks of a Layoff...

1. Offer Outplacement Services
2. Provide Advance Notice of Layoffs
3. Prevent Discriminatory Layoffs
4. Analyze Potential for Retaliation and Other Claims
5. Avoid Violating Older Workers' Rights

employment loss of 500 or more employees during any 30-day period, or the loss of 50-499 employees if they make up at least 33 percent of the employer's active workforce. Employers should consult legal counsel to determine which of their employees must be counted in determining whether a sufficient number of employees is being laid off to trigger application of the WARN Act.

The WARN Act includes numerous definitions and details about which companies must give notice, who must receive the notice, how the time frame for notice must be calculated, what information the notice must contain, and how the notice is served. What is important for banks to know is that private, for-profit employers such as financial institutions are covered by the Act.

In the current economic environment, exceptions to the notice requirement may apply, permitting an employer to offer notice to employees less than 60 days in advance of a layoff. For example, exceptions may apply if (1) the company is faltering and has been

actively seeking capital or new business; and (2) unforeseeable business circumstances have occurred. The exceptions are fact-intensive, and a company anticipating layoffs should consult counsel before relying on these exceptions.

An employer who violates the WARN provisions by ordering a plant closing or mass layoff without providing appropriate notice may be liable to each aggrieved employee for an amount including back pay and benefits for the period of violation, up to 60 days, although the penalties may be reduced in certain circumstances.

Enforcement of the WARN Act is achieved through the courts, and the federal Department of Labor has no legal standing in an enforcement action but does render compliance assistance. Although no particular form of record is required by the WARN Act, it makes sense to keep records of compliance should questions be raised.

The WARN Act is not the only compliance concern for a company facing layoffs. Employees feeling the sting of losing their jobs may claim violations under many other laws not directly related to reductions in force.

For example, any of the anti-discrimination laws, including the Equal Employment Opportunity Act, the Age Discrimination in Employment Act, and the Older Workers Benefit Protection Act, could be exploited by employees who have been selected for termination in a layoff. Statutory whistleblower protection provisions may also be invoked if an employee being laid off had previously voiced dissent about a compliance, procedural, or policy issue with management. An

employee planning to take leave under the Family and Medical Leave Act might believe that his or her scheduling of the leave caused the termination.

"There are so many nuances," says Lane. "A good employment lawyer can look at a particular situation and identify the hot spots." A team of lawyers, adds Lane, can provide a range of expertise on employment, bankruptcy, reorganization, and other issues relevant to a layoff.

Top Five Tips for Containing Legal Risk

According to Olivia Goodkin, also a labor and employment law attorney at Rutter Hobbs & Davidoff, "There's an inverse relationship between the economy and employment-related claims. As the economy weakens and job

security fluctuates, claims increase. This growing national trend has forced several legal issues to the forefront of consideration by employers in the financial, mortgage, retail, building, real estate, and home improvement industries."

The firm recommends taking the following steps to avoid lawsuits from employees released in a downsizing or layoff.

1. Offer Outplacement Services

Helping departing employees find alternative work through outplacement services helps increase goodwill among staff members, both those who have been released and those who are staying, and thereby minimizes the risk of future litigation.

Lane notes that alternative



HR Resources

Web Tool for Displaced Workers

The Department of Labor (DoL) is participating in a "one-stop" Web tool that offers resources and information to both employers and employees feeling the painful effects of the financial crisis. If your financial institution is forced into layoffs, you can guide affected employees to www.EconomicRecovery.gov. The site compiles information and links on a variety of topics,

including unemployment insurance by state, local job openings, and retirement security information, as well as help available from other government agencies.

Affected workers can also call the DoL's toll-free number at 866-4-USA-DOL (866-487-2365) to obtain the latest information on where to file a claim and access temporary job information. ■■

jobs in banking may be scarce right now, but outplacement services can guide employees toward constructive “soul-searching” to help them figure out their skills or identify other professions or businesses that are complementary. “Outplacement services give employees a sense of hope and possibility,” says Lane, “which in turn holds in check their anger, fear, and frustration.”

For employees who survive the layoff, observing that the company is taking care of co-workers through severance and outplacement services helps alleviate their fears about their own job security. “Fear has a ripple effect, which can lead to litigation,” says Lane. “Outplacement services, including both job search and job counseling, can make a big difference in how a layoff is perceived.”

2. Provide Advance Notice of Layoffs

The time to consider the notice requirements of the WARN Act and related state laws is during the layoff planning stage.

If your institution is not covered by the WARN Act, it does not mean you should not be concerned about providing notice. Congress included in the law language to the effect that, even when notice is not required, it is the sense of Congress that employers should provide notice to the extent possible about any proposal to close a worksite or permanently reduce their workforce.

Thus, the law expects all employers to be sensitive to the need to provide transition time for released employees whenever possible. Giving such notice may also help mitigate bad will between

employers and employees.

3. Prevent Discriminatory Layoffs

Claims of discrimination in layoff decisions are a common source of litigation unless management, when determining which employees to terminate, considers their membership in protected classes under the anti-discrimination laws, documents the reasons for identifying specific employees for termination, and keeps track of the percentages of minorities and other protected groups who are included on the layoff rosters.

“There may be justifiable reasons for releasing protected employees in a layoff situation, but you better have tracked and documented them,” says Lane. “If a lawsuit is filed, you will have to put that information together anyway, so it makes sense to collect and consider the information before the termination.”

Once management has a preliminary roster, it should be looked at to see whether anything jumps out. Are most of the employees proposed for release minorities or over 40? Are people with disabilities or those who have filed a medical claim overly represented? Are there any whistleblowers on the roster, particularly if they voiced their concerns during the last year? Do layoff decisions appear to be arbitrary or capricious?

Another potential risk involves using employee performance as a factor in layoff decision-making, Lane points out. In that case, employers need to be able to point to well-documented performance evaluations on employees identified for release because

of poor performance. An employer that terminates a protected employee for “performance reasons” but has given the employee only good reviews is asking for a lawsuit.

A related problem is using a downsizing as a pretext for getting rid of poor performers. As Lane notes, “If the real reason for termination is performance but you call it a downsizing and then refill the position, the former employee may come back to assert a claim of age, race, gender, or other form of discrimination, especially if the employee’s performance issues are not well documented.”

4. Analyze Potential for Retaliation and Other Claims

Former employees separated in a layoff may be tempted to seek redress by claiming illegal retaliation under the employment laws or by pursuing other claims such as class actions for wage and hour violations. “Employees who willingly put in time beyond each regular workday may suddenly feel ill-used and want to be compensated for past overtime,” Lane says.

To help minimize lawsuits, the layoff plan should consider paying appropriate severance in exchange for a release of claims. But companies should take particular care when preparing payments to affected employees.

“The laws get tricky when you pay severance. Because not all claims can be waived by employees, companies should obtain legal counsel in negotiating a severance package and release of claims,” notes Lane.

“Moreover, state laws regarding what should be included in a final pay check may vary, and it

is easy to make mistakes, particularly if an employer's payroll department is located in another state. For example, in California, the final paycheck must include accrued and unused vacation. Therefore, vacation pay should be kept separate from any severance payments. This is an area where advice of counsel is especially critical."

5. Avoid Violating Older Workers' Rights

For employers with 20 or more employees, the federal Older Workers Benefit Protection Act (OWBPA) places restrictions on separation agreements or severance packages involving employees who are 40 years old or older, including those involved in "group layoffs," broadly defined under the OWBPA as layoffs of two or more employees at one time. The law includes a number of related requirements, including a mandated 21-day consideration period (or 45-day period in a group layoff) for an older worker to review a separation agreement and an additional 7-day period to allow him or her to revoke it.

Again, says Lane, it is worthwhile to ask an employment lawyer to look over separation agreements with older employees. Risk can arise, for example, if an employer releases severance payments before the revocation period ends. If the employee later exercises his or her right to revoke, the employer cannot recover the severance payments already made.

"An employment law attorney can look over separation or severance agreements with older workers to make sure they include the proper provisions under the law," says Lane. With group layoffs,

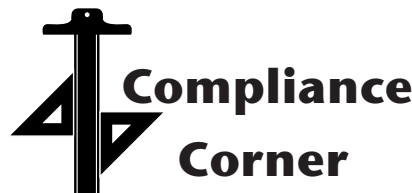
employers covered by OWBPA are also required to provide protected employees with information regarding the ages and positions of employees within departments affected by the layoff and indicate which employees will be, or will not be, released.

Manage Well

"In a layoff, every single person let go has a different story and represents the possibility of a

lawsuit. Moreover, the number of people potentially involved in a layoff sets the stage for class actions," says Lane. "Layoffs inevitably increase a company's litigation risk and they must be managed well and with full awareness of the relevant federal and state laws."

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Checking IDs

The Fair and Accurate Credit Transactions (FACT) Act of 2003 requires financial institutions and creditors to implement policies and procedures capable of identifying potential instances of identity theft. A financial institution's identity theft program must provide for the identification, detection, and response to patterns, practices, or specific activities — known as "red flags" — that may be indicators of identity theft. The compliance date was November 1, 2008.

To assist in verifying personal identifying information provided by new hires or customers, the Social Security Administration's official version of its Death Master File (DMF), distributed by the U.S.

Department of Commerce's National Technical Information Service (NTIS), is available.

The DMF contains the names of over 82 million persons whose deaths have been reported to the SSA. A person presenting information that matches someone in the DMF may be a "red flag" that he or she is attempting identity theft.

The SSA cautions, however, that it cannot guarantee the accuracy of the DMF. The absence of a particular person in this file is not proof that the individual is alive. In rare instances, it is possible for the records of a person who is not deceased to be included erroneously in the DMF. Nevertheless, the DMF is a useful tool for detecting identity theft.

For more information, visit www.ntis.gov/products/ssa-dmf.aspx. Questions can be e-mailed to ecorr@ntis.gov. ■■