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An Empathetic Approach To Layoffs

--By Michael S. Kun, Epstein Becker & Green PC

Law360, New York (February 27, 2009) -- A horrible misconception persists about layoffs. The misconception is that employers enjoy conducting layoffs. Or that they are unmoved by them, for better or worse. (Is having a black heart worse than having no heart at all? Discuss.)

This misconception is rooted in an antiquated, facile, us-versus-them perception of the employer-employee relationship. On one side: the big, bad employer, barely concealing his wolf's teeth. On the other: the defenseless employee, his bare neck exposed.

The belief that employers enjoy layoffs, or are indifferent to them, demeans both employer and employee. Of course, it is important to recognize the critical distinction between a performance-based termination and a layoff, particularly one motivated by an economic downturn like that which our country is now facing.

Might an employer be indifferent when severing a relationship with an employee whose poor work or poor work ethic has cost that employer significant losses? Of course.

It is basic human nature to feel pleasure — or relief, or something — when ridding yourself of a problem. (Think of how you ended your relationship with the high school girlfriend or boyfriend after you'd simply had enough. Think of the last check you sent to pay off your car loan or student loan.)

But an economy-driven layoff? A layoff of employees with good performance and positive attitudes? A layoff of employees who contribute to the company and, but for the economy, would continue to contribute? Do employers enjoy making these decisions? Or are they indifferent to them? (Black heart versus no heart.)

No. Emphatically, no. A thousand times, no.

We do not live in Dickensian times. This is not *Oliver Twist*. Employers do not resemble Fagin, in appearance or approach. (Reference is made to the character in the novel, not in the ill-advised

and contemptible musical. Children turned into beggars is not something to sing about. Anyone who has seen Slumdog Millionaire should agree.)

Employers wring their hands as if they were trying to relieve aching bones while making layoff decisions. Sometimes unwisely, employers delay considering layoffs as long as possible, hoping that perhaps today will be the day that their fortunes will turn, that a large order will be received, that a similarly suffering client will pay a lingering bill. (And if the check doesn't arrive today, maybe it will arrive tomorrow! Or next week!)

Employers review the lists of potential layoffs over and over. The same refrain is heard repeatedly in closed door meetings: "Do we really need to let So-and-So go?" And small, almost imperceptible smiles appear when So-and-So is removed from the layoff list. So many So-and-So's will never know they came close to being laid off, only to have their managers fight or negotiate on their behalf.

And when the layoff decision is finalized, its announcement is often delayed again, not because the employer is trying to hide something from the affected employees, but because the employer is not-so-secretly hoping — again — that something, anything, will happen to make the layoff unnecessary. (Did the check come in the mail today? Are you sure? Go look again?)

What do employers do when it becomes inevitable that the layoff must go forward after all to preserve the company?

Contrary to the perception perpetuated by some, they do not celebrate, or clink their glasses of scotch, or race off to meet their spouses at the opera, ignoring the impact the decision will have upon the affected employees, their families, their finances, their careers, their plans.

No, they lose their appetites. They stare blankly at their computer screens. They confide in their loved ones. They rethink every step of the process. They worry about whether they made a mistake, whether they could have delayed the layoff further or somehow retained one or two people who were laid off. They worry about what is going to happen to those who are laid off. Some get sick. Some cry. Why?

Because the workplace has changed, generation by generation. Because those managers who are involved in the layoff decisions are employees, too. They are husbands and wives, fathers and mothers, too. And they fully understand the there-but-for-the-grace-of-God nature of layoffs.

In short, the changing workplace has created empathy where, generations ago, there may only have been sympathy or nothing. That empathy should not be set aside by employers in their dealings with the employees being laid off, particularly during these unique economic times.

Yes, in this litigation-crazed environment where employers are often sued for the smallest of perceived slights, employers must be concerned that any — or all — of their laid-off employees might file suit, that the selections and selection processes will be challenged. And, yes, employers must be concerned that anything said to employees could be used in potential litigation.

But, unlike employees terminated for serious and repeated transgressions, people being laid off are people the employers value. These are people who are being let go only because of the economy. These are people who were meaningful contributors — and could be again someday. These are people who employers don't want to file suit precisely because they are people the employer values.

Both experience and studies have shown that two intertwined notions often drive employees to file suit against their employers: the notions that their employers did not treat them fairly and did not treat them with respect.

After being forced to conduct layoffs purely for economic reasons, the last thing any employer desires is a lawsuit — or multiple lawsuits — challenging those layoffs, causing them to incur significant legal fees and face great potential exposure, thus making their financial situation worse, rather than better — and, perhaps, necessitating additional layoffs, keeping a vicious cycle spinning.

With all of this in mind, there are more than a few options employers should consider in carrying out layoffs that will serve the goal of avoiding litigation while also helping these valued employees.

1. Consider Individual, Face-to-Face Meetings

Few things will make employees feel less respected than being informed of a layoff by a letter or mass email. Yes, those methods may be more practical and efficient, but practicality and efficiency may drive a devoted, well-liked employee to file a lawsuit.

For many of these employees, this will be one of the worst days of their lives. Show employees that you respect them and their circumstances by delivering the unpleasant news to them in person.

You say that it would make you uncomfortable to do this? You don't like delivering bad news? If that is so, perhaps you should reconsider whether you wish to be part of management in the first place.

Delivering news, good and bad alike, is part of your job. You must put aside your discomfort for the sake of both your company and these employees. Don't let someone you like suffer in quiet, and don't increase the likelihood that your company will face litigation at the same time because you don't want to be uncomfortable.

2. Talk Positively to the Affected Employees

Assuming the layoffs are driven entirely by the economy, tell that to the affected employees. Let them know why the decisions were made, and that the company did not wish to make them.

Let them know how much their contributions were valued. Remind them of all the positive things they did. Remind them of all their qualities. There is no reason to diminish their self-worth or belittle their accomplishments.

If your layoff decisions were properly motivated and properly scrutinized, you should not be worried about the repercussions of such candor. If you are worried about the repercussions, then perhaps you should review your layoff decisions again.

3. Offer to Act as a Reference

The day after you speak with employees, they will commence job searches in one of the worst environments ever for such searches. Like you, most employers are looking to cut jobs, not add them.

For both humane and legal reasons, you want your former employees to find those few jobs that may be available. You like these people; you don't want them without a source of income. And, not incidentally, laid-off employees who find work swiftly are less likely to file suit and have reduced potential damages even if they do.

How can you help them? Offer to be a reference or to provide a reference letter touting their skills, experiences and accomplishments. Offer to explain to prospective employers that the layoff was motivated entirely by the economy.

In an employment world where employers often receive nothing but "name, rank and serial number" when speaking with former employers about applicants, your kind words can provide your laid-off employees with a meaningful advantage in job search efforts.

4. Communicate Your Willingness to Re-Employ These Employees If and When Circumstances Change

Assuming, again, that the layoffs are driven entirely by the economy, no one can predict what the economy will look like in a year, or two or three. Even the most acclaimed of economists are beginning to look more and more like small-town television weatherpersons as their predictions have proven to be wrong again and again and again.

But what happens when the economy improves? Might you need people with the very same skills as the people you are laying off? Of course you will. And might the laid-off employees' institutional knowledge of your company be an advantage? Of course.

Why not communicate this to these employees? Why not reaffirm how much you respect them and provide them, cautiously, with some amount of hope as they deal with their personal crises? The benefits of the simple comment that "we may be able to bring you back if and when circumstances improve" are many and not unimportant.

First, reinforcing employees' worth will give them no small amount of confidence as they begin their job search efforts.

Second, their ability to show other employers that they are valuable and desired will bolster their candidacies with those employers (which, again, will help them find jobs more swiftly, make it less likely that they will sue, and reduce damages were they to do so).

Third, employees will be less likely to sue if they believe they may be able to return to work. Fourth, if and when circumstances change, your efforts to fill available positions may be very simple. You can call these valued people back.

5. Reconsider How Severance Pay is Paid Out

Many, if not most, employers will offer severance pay to laid-off employees. Rightfully, severance packages invariably include releases; there is no reason for an employer to give an employee money to fund a lawsuit against itself.

How will laid-off employees respond to severance packages in these unprecedented economic times?

There are two contradictory theories: (1) employees are likely to accept virtually any severance package knowing that they are bound to be unemployed for some time; and (2) employees will only accept those severance packages they believe to be significant enough to carry them through to their next job, which may be far off in the future.

Which theory is correct? Both perhaps. It will likely depend upon the employee. One employee may want to get some money in hand, while another may focus more on the amount.

But know this: an employee who rejects a severance package is an employee who is likely contemplating litigation. Simply, there are few reasons for employees to refuse money, particularly in this difficult economy, unless they believe they can obtain more.

And how do employees obtain more from their former employers? Through litigation or threatened litigation. With this in mind, employers should consider offering employees something other than the standard lump-sum severance payment.

Yes, your accounting department prefers lump-sum payments because it is easier for them to process. Tell your accounting department that nothing's easy these days. Tell them that you're trying to help these former employees and that you're trying to put together severance packages that they will find more appealing. If the employees find the packages more appealing, they are more likely to sign them and provide you with the releases you want.

Instead of a lump-sum payment, consider paying severance over time, perhaps even providing a slightly larger sum with the provision that the payments will be terminated or reduced once the employees find new employment.

Think laid-off employees will appreciate getting a regular check? Of course. Employers normally are concerned that employees would not make diligent job search efforts while they receive severance, choosing instead to sit back and collect checks. Might that happen now? Perhaps. But, most, employees are well aware of how bleak our nation's economic picture is these days. Only the foolhardy would not commence job search efforts in short order.

And it's unwise to assume the people you are laying off are foolhardy. Remember, they weren't let go for performance reasons. They were good employees who would have remained employed, but for the economy.

Consider other ways you can put together a package that will help them get to their next job, or that will be otherwise appealing to them and their families. Don't forget how important medical benefits are to employees and their families in crafting a severance package.

Don't forget the value of employee assistance programs and hotlines. Your employees may want to talk with someone about their fears and concerns. Giving them someone to talk to — other than a plaintiffs' attorney — could be invaluable.

6. Offer to Make Yourself Available to Help These Employees

You didn't want to lay off these employees. You had to do it. You don't have ill feelings toward them. You want them to find new jobs. You want them to succeed elsewhere. And, if they do, they are less likely to sue.

Why not let the laid-off employees know that you will be glad to talk with them if they need help? Why not let them know that they should feel free to call you if they want to discuss their job searches or prospective employers with you? Did you feel terrible telling an employee that he or she is being laid-off? Did you lose sleep? Imagine how you will feel if you help that same person find a new position.

We are in uncharted economic territory. There is no experience that any of us can call upon to guide us through it. None. And anyone who tells you otherwise should be viewed with skepticism we normally reserve for fortune tellers (and, now, economic experts).

Will the layoffs necessitated by this deep recession lead to more litigation? There is no reason to believe they won't, and every reason to believe that litigation will only make the economic crisis worse.

Will tried-and-true approaches to layoffs and severance agreements work in this new economy? Perhaps. Perhaps not. Perhaps the old, say-as-little-as-possible-to-laid-off-employees approach, in this context, will fuel litigation, rather than prevent it.

A more empathetic, more interactive approach may seem too touchy-feely for some. Some will scoff at these suggestions. It's not difficult to predict who those persons will be: attorneys who want to represent your company in defending litigation, rather than preventing it. Of course, a law firm will make more money helping you defend a lawsuit than helping you avoid it.

Think of this instead: Among the many things no one can accurately predict is how juries will react to lawsuits arising from layoffs in this economy.

It is reasonable to assume that they might be even more sympathetic than ever to employees, particularly those who had great difficulty finding new employment or are unable to do so. It is reasonable to assume that they might scrutinize layoff decisions even more closely or be even

more generous in damage awards, particularly in cases where they believe the employer was callous.

It is more important than ever to try to avoid litigation. And if there is litigation, it will be more important than ever for employers to be able to present themselves as compassionate, caring corporate citizens to a jury. Empathy may be the difference between avoiding a lawsuit and facing one. It may be the difference between winning and losing that lawsuit.

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