

## **Cut Jobs, End Up In Court?**

The recession that began in December 2007 has been unusually severe. Through March 2009, employers shed more than five million jobs. In January 2009 alone, businesses took more than 2,000 mass layoff actions (actions affecting more than 50 workers.) Some affected workers have responded by claiming that their employers illegally discriminated against them. The federal Equal Employment Opportunity Commission reported a 15 percent increase in discrimination claims in 2008, bringing the number of claims to a record level. The largest increases were in the areas of retaliation and age discrimination.

These lawsuits can cost businesses dearly. A 2008 report showed that, between 2001 and 2007, almost half of all court verdicts favoring employees exceeded \$250,000, and almost a third exceeded \$500,000. Half of all age discrimination verdicts exceeded \$250,000, and almost a fifth exceeded \$1,000,000. By 2007, almost two-thirds of age discrimination suits resulted in plaintiff victories. Even more dangerous for employers are retaliation claims: More than a quarter of judgments against them exceeded \$500,000. Forty percent were for amounts between \$100,000 and \$500,000.

How can businesses lower the chances that they or their insurance companies will end up on the hook for these payouts? They can start by considering a number of factors before making job cut decisions.

- What will be the criteria for choosing affected workers? Will the decision be based on seniority with the employer? Work performance? Job function? Employment status (part-time, temporary, etc.)? Department profitability? Some combination of these? The criteria must be such that a reasonable person would not find them to be unfairly discriminatory.
- How will the employer select the workers to be let go? Will it apply the criteria strictly, or will it allow managers to use some judgment and flexibility in making selections? How will the employer ensure that all affected areas follow a consistent process? Lack of consistency could increase the employer's vulnerability to successful discrimination suits.
- Assess the risk of adverse impact on classes of employees protected by law, such as older employees or those with disabilities. Because older employees with long tenures with a firm are likely to be highly compensated, they may be attractive targets for a layoff action. However, an action that has a disproportionate impact on these employees may leave the firm open to successful age discrimination suits.
- Early in the process, review the precedents and lessons learned from any prior workforce reductions. An ability to show that it followed precedent in making layoff decisions will give the employer a strong defense in court.
- Obtain claim waivers and general legal action releases from employees to whom the firm will pay severance. Federal law requires these releases to meet certain requirements for workers over age 40.
- Depending on the number of employees affected, the firm may have to comply with a federal law that requires advance notice of the layoff. Employers must give

60 days advance notice of a plant closing, termination of 500 or more employees or termination of fewer employees if they amount to one-third or more of the workforce. Certain employees are exempt from being counted in these figures, so employers should consult with labor attorneys to determine whether the law covers them.

In addition to risk management steps, employers should obtain Employment Practice Liability Insurance to finance those losses that do occur. An insurance agent experienced in placing EPLI and other types of professional liability insurance is a good resource for information and assistance in obtaining coverage. Loss control and proper insurance will help a firm survive a very difficult business decision and any challenges that occur in the aftermath.