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Managing in a Down Economy: Common Sense Won't Detect Every Pitfall

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Special to the Legal

In mid-2008, employers in the private sector began to shed employees as a way to survive the failing demand for their products and services. Public employers followed suit in 2009 as tax revenues declined. Even now, months after the point when the economy should have turned around, the numbers of unemployed and discouraged workers are worse than they were a year ago, and they appear to be growing.

The June 2010 unemployment figure was almost identical to that of June 2009 (14.6 million and 14.7 million, respectively). In both months, the unemployment rate was 9.5 percent. However, during that same 12-month period, the ranks of those so discouraged they stopped looking for a job swelled from 793,000 in June 2009 to 1.2 million in June 2010.

Counting the discouraged and underemployed, the real distressed employee percentage is more than 16 percent of the American workforce. The phrase “jobless recovery” is the accepted term chosen by those who desperately want to use the word “recovery” but cannot explain, without a modifier, the reality that more people are now without employment for longer than almost anyone employed or employable has ever experienced.

The profound effects of an economic downturn are not limited to those who do not have jobs. They also affect those who are working and, by extension, their employers. Managing employees in a down economy requires a skill set that most employers need to build, and many of the wounds that cause unnecessary expense or low employee morale are self-inflicted and avoidable.

During these times, employers must be



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especially vigilant not to manage their employees with vacuous common sense. What may appear to be sensible on paper could well be in violation of one or more laws; what may appear to be advantageous in the necessary pursuit of lower costs could have the opposite effect of shutting down otherwise productive employees.

Driving employees to be more productive is understandable. Even if the economy has begun to recover, it is a fitful recovery at best. As a result, employers justifiably are slow to take on additional costs by hiring new employees or recalling those they had previously laid off. Rather, employers search for ways to increase production without adding to their total payroll. Several of these devices are common, but all are infested with unacceptable levels of risk. These infestations are not apparent when the only prism used is common sense.

For example, employers give their employees laptop computers and hand-held communication devices, expecting that the employees will respond to the demands of supervisors or co-workers and work on or complete projects that the normal workday will not permit. Some employers who cannot

increase productivity by requiring off-site and after-hours work seek to increase work time by reducing or eliminating breaks or choosing not to compensate employees for time actively preparing to work (by donning or doffing protective gear or other specialized garments). The consequence — and objective — is that employees do more for the same pay.

Often these devices/practices violate the Fair Labor Standards Act, or FLSA. Time spent in excess of the seconds it takes to check but not reply to e-mails is, in most cases, compensable under the FLSA. Under most circumstances and unless specially structured, donning and doffing equipment or protective gear is also compensable time. Failure to track non-exempt employees' time and pay them for the time they are engaged in these activities leaves the employer vulnerable to wild allegations of endless hours spent working. Employers who violate these rules may owe employees for the cumulative value of two years of this time (three years if found to have been a willful violation of the FLSA).

Liability for failing to pay non-exempt workers for all time worked cannot be avoided simply by classifying these employees as exempt, and the risks of attempting this course of action are high. The investigation of one allegation of misclassification of one employee or of one allegation that an employee was not paid for all hours worked, by rule, must be expanded by the investigator to include all classifications of employees and all pay and I-9 practices of an employer. Damage awards for the misclassification or failure to pay employees for time worked, either as a result of class actions or governmental enforcement actions, routinely are in the millions of dollars.

Another employer device that is receiving enhanced regulatory scrutiny is the use of “independent contractors” or, as it has become

to be called euphemistically, the “contingent workforce.” When done correctly, the use of independent contractors can produce huge savings to employers. Employers do not have the costs of benefits for independent contractors, do not pay payroll taxes for them, do not have the expense of withholding and remitting income taxes, and are not obligated to comply with anti-discrimination laws that protect only “employees.” Perhaps best of all from the employers’ view: They may feel free to increase and decrease contractor numbers in quick response to the business climate without having to deal with the individuals as employees, complying with mass layoff or plant closure laws or implementing costly employment separation plans.

Bringing back personnel who had been laid off as independent contractors has the additional advantage of recapturing the value of the individual’s training, experience and knowledge at a much lower cost. In recent years, many independent contractors do the same work in the same place under the same supervision as regular employees and, sometimes, as they themselves had done before being laid off.

The misclassification of employees as independent contractors has become one of the most active areas of labor and employment law. Whether in litigation brought by the independent contractors themselves seeking relief from self-employment taxes or inclusion in the employer’s benefit plans or in administrative proceedings to collect unpaid taxes, the practice of having a contingent workforce is high-risk.

The related practice of using agencies to employ workers who are then hired as temporary or agency workers carries a similar high risk. When employment agencies are little more than paymasters, employers may get the worst of both worlds: Paying the agency’s fee while acquiring the obligations of an employer (by being a co-employer with the agency) without the value of protective employee policies.

Employees under the strain of what they believe to be abusive employer practices also react in ways that affect the workplace negatively. Even if they do not hire a lawyer to bring a legal action or file a complaint with a governmental agency, they become emotionally divorced from the employer, and both employee and employer fall victim to an “if the company doesn’t care for me, I don’t have

to care for it” attitude.

The employees take advantage of the Family and Medical Leave Act because they don’t want to be at work. They abuse attendance rules and reduce the speed and quality of their work as part of a pattern of passive aggressiveness or mild insubordination. These reactions are common signs of low employee morale and may be the undoing of many employers’ efforts to squeeze as much from the employees as possible to avoid increasing the actual number of employees.

A cloud of fear, guilt and powerlessness hangs low and heavy over many workplaces during an economic downturn. The fear is over the possibility of their own unemployment. Guilt is a survivor’s guilt. The feeling

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of powerlessness arises from employees who do not see a way out or a way to control their own destiny. When economic times are good, employees have choices and can leave an abusive workplace for one that appears to be better. Employees solve their problems with their feet. When economic times are bad, like they are today, employees do not have that solution to their problems and they, and their employers, must find solutions in their own workplace.

If employers are focused only on solving the economic woes of their companies and ignore or do not solve the fear/guilt/powerlessness dilemma presented by their employees, the employers will lose their best and brightest to their competitors when economic times turn. In the meantime, employees, emotionally divorced from their employers, will likely turn to third parties for assistance, i.e., lawyers and unions. Employment-related claims unassociated

with allegations of discrimination will continue to rise, and union organizers will quickly gain support by offering the employees the power to stop employer abuse.

The sensible solution to the problem of these employee feelings is to create systems that involve employee-participative committees to consider and recommend solutions to work-related problems or to process and present employee grievances as protections against arbitrary employer conduct. Unfortunately, this solution is severely circumscribed by the less-than-sensible National Labor Relations Act. Most employee-participative committees or systems violate Section 8(a)(2) of the NLRA. They are, in short, illegal employer-dominated labor organizations.

In spite of these statutory limitations, well-counseled employers can innovate and develop employee participation programs that do not violate the law. Even when done within the tight restrictions of the law, they can be successful in providing employees with much of the job security they desire and a voice in their present and future. In these times, employers should be willing to give up some of their management prerogatives and to examine these programs to see if they will keep their employees, as frightened and frustrated as they may be, connected to and working for the welfare of the enterprise.

Necessity may be the mother of invention. When managing employees in a down market, however, necessity makes many common-sense methods to increase employee productivity risky. Employers need their lawyers not just to fight for or defend them; in a down economy, employers need their lawyers to help them navigate the shoals of counter-intuitive laws and create prudent solutions to highly complex problems.

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