



Avoid Lawsuits When Laying Off Workers

With the U.S. economy in recession, companies are trying to make up for declining sales by reducing expenses. Workforce reductions, though they may improve short-run profits, may also cause long-term problems if the firm does not handle them with care. Angry former employees may look for justification for legal action. The employees who remain will take on extra work with no additional compensation, while they deal emotionally with the loss of colleagues and fear that the job cutting will eventually hit them. Consequently, companies must approach layoffs with caution.

The company must first determine whether a layoff is the best option. While it may quickly reduce costs, it may also cause the company to dismiss valuable workers. This will hurt long-term productivity, lower the morale of the survivors, and wipe out valuable institutional knowledge. There is also a risk that a layoff will unfairly affect older or minority workers, which could lead to discrimination complaints. Therefore, the company should look at alternatives such as hiring and wage freezes, adjustments to employee benefits, not replacing workers who leave or retire, and job sharing.

If the company decides that it must reduce its workforce, several careful steps are required;

- Establish a specific goal for the layoff to achieve, such as a dollar amount of savings or number of positions.
- Identify those job functions and skills that it will need to operate successfully after the layoff.
- Set a timetable so that the reduction has a clear end.
- Comply with federal and state labor laws.
- Determine which jobs are unnecessary and eliminate them.

When determining which employees to dismiss, the company may legally use criteria such as length of service with the company, the necessity of a certain job classification, employee status (i.e., part-time or temporary), or employees' performance records. Management should review candidates for dismissal to ensure that the cutback does not disproportionately impact classes of employees protected by law. If managers can find no other compelling business reason for terminating those employees, they must seek out alternatives.

Once managers have made selections and the decision to proceed, they must inform the affected workers in a professional manner. They should be able to clearly explain the reasons for the action; workers' entitlement to benefits such as severance, health coverage, and others; and post-employment services available to the workers, such as outplacement. The workers may express emotions ranging from stunned silence to rage; the managers must be prepared to deal with their reactions in a businesslike manner. Remaining employees will have concerns about their own futures and the firm's outlook.



continued on page 2

Welcome to The Chadler Group's Newsletter!

It is with great satisfaction that we bring our newsletter to you. In this issue and the coming quarterly newsletters, we will discuss pertinent insurance topics which affect your business and personal insurance needs. We hope you find this information both informative and useful in your overall risk management practices.



The Chadler Group, Inc.
PO Box 11115
330 Passaic Ave, Ste. 200
Fairfield, NJ 07004

Phone: (800) 706-2478
Fax: (973) 227-4026

Key Coverage Options under Employment Practices Liability Policies

Uninsured employment practices claims can devastate a company. Many organizations find Employment Practices Liability Insurance essential to their risk management programs. Once a firm decides to buy EPL coverage, it must weigh several important coverage options.

A business can buy a stand-alone EPL policy or as an additional coverage on a Directors and Officers Liability policy. Adding it to a D&O policy may be less expensive, easier to manage, and the defense provisions for the two coverages will be consistent. However, a stand-alone policy provides additional limits, offers more flexibility in terms of defense provisions, and may offer broader coverage.

The firm also must choose the deductible amount (also called the "self-insured retention.") A relatively low deductible means lower out-of-pocket costs when a loss occurs but a higher premium. It can also mean even higher future premiums or policy non-renewal if the firm suffers frequent small losses. A higher deductible reduces the immediate premium and may help lower future costs, but can also be a strain on a firm with frequent losses or troubled finances.

Policies can either obligate the insurance company to provide defense when a loss occurs or they can relieve the company of that duty. With a "no duty to defend" policy, the firm controls the selection of legal counsel, decides which claims to contest, and manages its reputation. However, this can involve considerable upfront expense -- the firm must pay for the defense and settlement first, then seek reimbursement from the company. Also, the firm may lack the expertise in claims handling that an insurance company can offer.

Some firms, such as retail stores, medical offices, and restaurants, have frequent exposure to customers. These firms may be susceptible to claims that an employee harassed customers. Standard EPL policies and Commercial

General Liability policies do not provide third party coverage for claims made by people other than employees or job applicants. Therefore, firms like these may want to add this coverage to their EPL policies. This will cost an additional premium, but the additional cost may be much less than the cost of uncovered claims.

Studies have shown that courts award punitive damages in a large number of employment practices cases. These damages can run into hundreds of thousands of dollars. While not all states permit insurance to cover punitive damages, firms in those states that do may want to consider buying it. Insurance companies may offer it subject to the regular policy limits, or only with reduced limits. The cost is normally some percentage of the standard policy premium.

EPL policies provide coverage on a "claims made" basis, meaning that they cover claims submitted to the insurance company during the policy term. The policies normally contain a "retroactive date;" they will not cover claims for incidents that occurred prior to that date. For example, a policy with a retroactive date of January 1, 2004 will cover claims submitted during the policy term if they occurred on or after January 1, 2004. The retroactive date can be the same as the policy's inception date or some prior date. The earlier

the retroactive date, the more claims the policy may potentially cover and the higher the policy premium will be. Firms buying EPL coverage for the first time or switching insurance companies may want to purchase early retroactive dates.

The correct choices for these options will vary greatly, depending on a firm's characteristics and needs. An insurance agent experienced with EPL policies can provide guidance for these decisions. Because employment practices claims can be so costly, it is worth it to weigh these options carefully.

Once a firm decides to buy EPL coverage, it must weigh several important coverage options.



continued from page 1...Avoid Lawsuits When Laying Off Workers

Management should, to the extent possible, explain the reasons for the layoff, the likelihood of additional job cuts, and the business goals the firm seeks to achieve through the layoffs.

The company must take particular care when the layoff involves older employees. Severance packages usually require the employee to waive his right to press a claim under federal law. However, regulations impose procedural requirements that an employer must meet

before a court will consider the waivers valid. Companies must take special care to meet those requirements.

Shrinking a company is an unpleasant prospect that no manager relishes. Employee lawsuits may well result from a workforce reduction. However, if the firm handles the action with care and sensitivity, it can make such claims less likely and will be in a better position to defend itself against claims that do arise.

What the Lilly Ledbetter Fair Pay Act Means for Your Business and Your Insurance



On January 29, 2009, President Barack Obama signed into law the Lilly Ledbetter Fair Pay Act of 2009. Congress approved this law to make it easier for workers to win wage discrimination lawsuits against their employers. What does the law say, and what does it mean for employers? Will a business's employment practices liability insurance (EPLI) policy cover the suits that this law will allow to go forward?

Lilly Ledbetter was a production supervisor at a Goodyear tire plant in Alabama. Shortly before her retirement, she learned that for years the company had paid her substantially less than it had paid male employees for the same job. Because the company calculated her pension benefits based on her earnings while employed, the lower wage affected both her past and future income. Six months before her retirement in 1998, she sued the company for equal pay under the federal Civil Rights Act of 1964. This law imposes a 180-day statute of limitations for filing a discrimination lawsuit, meaning that the worker must file the suit within 180 days of when the discrimination occurred. Ledbetter argued that the company unfairly discriminated against her due to her gender, while Goodyear claimed that it based evaluations only on competence.

The trial court ruled in Ledbetter's favor. Goodyear appealed on the grounds that the law barred all claims for discrimination occurring more than 180 days before she first inquired into it; the appellate court agreed. She appealed to the U.S. Supreme Court, but in 2007 a divided court ruled in favor of the company. Soon after, Democrats in Congress introduced a bill to overturn the ruling. It passed the House of Representatives but was unable to overcome procedural obstacles in the Senate, and the 110th Congress adjourned without further action. The new Congress quickly enacted the bill in January 2009, and it became the first law President Obama signed. It amended the Civil Rights Act to provide that the statute

of limitations resets with every payment of unfairly discriminatory wages. This allows employees to file suits at the time they learn of alleged discrimination, even if the discrimination began years or decades earlier.

An EPLI policy covers an employer for a variety of acts, including discrimination, wrongful termination, harassment, retaliation, and other types of inappropriate conduct. Most policies define discrimination as including violations of federal, state and local laws that give protected status to certain individuals. Because of these provisions, EPLI policies should cover employers for damages they must pay as the result of violations of the Civil Rights Act. In addition, the policy will pay the costs of defending the organization against the claim, even if the claim is groundless.

EPLI policies cover claims made during the policy period, but only if the alleged wrongful act occurred on or after a specific date, known as the "retroactive date." For example, a policy written for the period January 1, 2009 to January 1, 2010 and with a retroactive date of January 1, 2005 will cover a claim made on November 1, 2008 for an act that happened on July 1, 2008. It will not cover a claim made on the same date for an act that happened on July 1, 2001. There is no standard EPLI policy, so the policies will vary by company. An insurance agent can explain the differences among different policies to an employer.

The Lilly Ledbetter Equal Pay Act makes employers more vulnerable to successful wage discrimination suits. To avoid financial loss from this, employers should be certain that their wage practices comply with the Civil Rights Act, and they should obtain a comprehensive EPLI policy from a reputable insurance company.

continued from page 4...Cut Jobs, End Up In Court?

- 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.

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.

continued on page 3



The Chadler Group, Inc.
PO Box 11115
330 Passaic Ave, Ste. 200
Fairfield, NJ 07004

Phone: (800) 706-2478
Fax: (973) 227-4026

Insurance Briefs