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## Weathering the Storm: Employment Issues in an Economic Downturn

By Heather Burror

Recent headlines paint a bleak picture of the economy in the United States and around the world: US Bails Out Fannie Mae and Freddie Mac! US Unemployment Rate at 5-Year Low! WaMu Becomes Biggest Bank to Fail in US History! Dow Plunges to 5-Year Low! Dutch Government Injects \$13.5 Billion into ING Bank!

The recent economic downturn and market instability is prompting many employers to make tough decisions to weather the storm. Struggling employers have a number of options from which to choose: workforce reductions, voluntary exit incentive programs, temporary shutdowns, hiring freezes, and reduction or elimination of overtime work. But whatever the chosen alternative, employers must proceed with caution to avoid legal pitfalls.

Employers should also beware that a downturn in the economy is often accompanied by an uptick in employment litigation. Employers can prepare for potential litigation by updating employment forms, reviewing policies and practices to ensure that their intellectual property is protected, and reviewing wage and hour practices to ensure compliance with federal and state law.

### WORKFORCE REDUCTIONS

Employers considering a potential workforce reduction should be aware of several key federal statutes, including the Worker Adjustment and Retraining Notification (“WARN”) Act, the Employee Retirement Income Security Act of 1974 (“ERISA”), the Consolidated Omnibus Budget Reconciliation Act of 1985 (“COBRA”), and the Older Workers Benefit Protection Act (“OWBPA”). In addition, many states have their own counterparts of these federal statutes, such as California’s WARN Act.

Employers conducting a workforce reduction must take care during the selection process. The existence of a workforce reduction does not automatically protect an employer from legal claims by the affected employees. Although it may be tempting to use a workforce reduction to eliminate poorly performing employees on a selective basis, this practice may make it easier for an employee to claim that his or her position was selected for elimination for discriminatory or retaliatory reasons. The safer approach is to select positions for elimination based on uniform, objective criteria, rather than subjective criteria such as job performance.

Another safeguard is to assign a group of managers to review each position selected for elimination to ensure company-wide consistency. A statistical analysis of the workforce both before and after the proposed workforce reduction is also an invaluable tool to assess the possibility of an adverse impact on any protected group of employees. These precautions can help ensure a fair and objective selection process, which will reduce potential exposure to claims of discrimination or retaliation.

Employers should also be aware that in most cases the WARN Act requires employers with 100 or more employees to provide employees, bargaining representatives, and local government officials with 60 days' advance written notice of a mass layoff or plant closing. For purposes of the WARN Act, a "mass layoff" is any workforce reduction that results in an employment loss of at least 33% of active full-time employees (a minimum of 50 employees) at a single site of employment during any 30-day period. A "plant closing" includes the temporary or permanent shutdown of a single site of employment, or a facility or operating unit within a single site of employment, if that shutdown results in an employment loss of at least 50 full-time employees within any 30-day period.

If an employer fails to provide proper notice, employees can recover their salary and benefits for the period for which notice was not given, up to a maximum of 60 days. Although the WARN Act does not specifically

allow employers to provide pay in lieu of notice, if an employer chooses to do so, no other damages would appear to be recoverable as long as the employees also receive any other employment benefits they would have received during the notice period. As a result, many employers decide not to have affected employees work during the 60-day notice period due to concerns about workplace morale or the potential for misconduct by disgruntled employees, either choosing to provide pay in lieu of notice or placing affected employees on a fully paid leave of absence during the notice period.

Employers also need to take care when offering severance to employees who are laid off. In order to receive a valid release of claims by an employee, an employer must offer the employee some benefit to which the employee is not already entitled. Employers with a preexisting severance plan or policy (even an unwritten one) will need to determine whether severance under this plan or policy is conditioned upon the employee signing a release. If an employee is entitled to receive severance even without signing a release, the employer will need to offer some additional consideration in order to obtain a legally binding release of claims.

Employers must also take care to ensure that the releases provided to employees 40 years or older comply with the Older Workers Benefit Protection Act (OWBPA). The OWBPA lists specific provisions that

must be included in a release in order to obtain a knowing and voluntary waiver of age discrimination claims. These provisions include a 45-day period for the employee to review and consider the release provided in a group layoff (up to 21 days for individual layoffs) and a 7-day period for the employee to revoke the release after signing it, along with various other disclosure requirements.

### ALTERNATIVES TO WORKFORCE REDUCTIONS

Workforce reductions are not the only option available to a struggling employer. Options such as voluntary exit incentive programs, temporary shutdowns, reduction or elimination of overtime work, hiring freezes, or reduction of benefits may meet an employer's needs to trim costs without resort to a workforce reduction. Alternatively, an employer may choose to combine one of these cost-cutting measures with a workforce reduction to further reduce costs.

Employers considering a temporary shutdown should carefully consider the implications on employees pay and benefits. Exempt employees' generally must receive their full pay and benefits for any week in which they perform any work, regardless of the number of days or hours actually worked. Taking a deduction from an exempt employee's pay for a temporary shutdown of less than a week would violate the salary basis test, which may cause the employee to lose his or her exempt status. But an employer is not generally required

to pay employees for weeks in which they do not perform any work. Thus, employers should consider implementing temporary shutdowns in week-long increments to maximize cost-savings and minimize the risk of wage and hour claims.

Employers should also take care when considering cuts to employee or retiree benefits. Employees, retirees, and unions have successfully challenged benefit cuts where the company did not expressly reserve its right to make changes to its benefit plans in the benefit plan documents or in the applicable collective bargaining agreement. Before cutting back benefits or imposing greater cost-sharing on employees, the employer must carefully review plan documents and any applicable collective bargaining agreements to be sure that employees do not have a vested right to such benefits.

### UPDATING EMPLOYMENT FORMS

Employers should also consider updating standard employment forms, including separation agreements and releases, to ensure compliance with federal and state law because forms that are out of date or that use unclear language may be invalid. This is especially important for separation agreements and releases, because if a separation agreement or release is invalid, an employer that already paid an employee severance in exchange for a release may end up in court anyway.

*See, e.g., Kruchowski v. Weyerhaeuser Co.*, 446 F.3d 1090, 1095-96 (10th Cir. 2005) (ADEA release invalid).

### PROTECTING INTELLECTUAL PROPERTY

Employers should also make sure that all employees have signed agreements to protect the company's proprietary, trade secret, and confidential information. Employers should also review and update these agreements periodically to keep up with recent changes in the law. For example, a recent California Supreme Court decision held that a non-solicitation of customers provision in an agreement between an employer and an employee that even "partially" or "narrowly" restricts an employee's ability to practice the employee's trade or profession is likely unenforceable.<sup>1</sup> California employers should carefully review their employment agreements for any such provisions, which may be invalid under California law.

### PREPARING FOR WAGE AND HOUR LITIGATION

A downturn in the economy is often accompanied by an uptick in employment litigation. Lately, there has been an increase in Fair Labor Standards Act ("FLSA") collective actions and state wage and hour class actions, variously claiming that employees have been misclassified as independent contractors, non-exempt employees have been misclassified as exempt, or non-exempt employees have been forced to work off the clock or denied meal and rest periods.

What appear to be nominal damages with respect to a single employee can be overwhelming when multiplied across an entire class of employees.

Employers can prepare for potential wage and hour litigation by carefully reviewing wage and hour practices to ensure compliance with federal and state law. Employers should review their practices involving independent contractors and temporary employees to ensure that these employees are correctly classified and receiving all of the benefits to which they are entitled. Employers should also review employee classifications to ensure that all employees classified as exempt meet the salary and duties requirements under both federal and state law. Employers should also carefully document their efforts to ensure that non-exempt employees do not work off the clock and are receiving all legally required breaks.

### CONCLUSION

Companies that review their current practices and proceed with caution as they consider the different cost-cutting options available to them will be better prepared to weather the economic storm ahead. ■

<sup>1</sup> *Edwards v. Arthur Andersen*, S147190 (Cal. S. Ct. Aug. 7, 2008). *See also* David J. Murphy & James Pooley, *California's Edwards v. Arthur Andersen Decision and the Future for Employee Noncompetition Agreements and Other Post-Employment Restraints*, Morrison & Foerster Trade Secrets Report, August 2008.

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## Redundancies in the European Union – English Law

By Amina Adam

Careful planning is required for companies undertaking redundancies (layoffs) in Europe to ensure that legislative requirements are complied with. If a company is carrying out cross-border redundancies, it will need to coordinate the different processes and timetables if employee relations clashes and PR disasters are to be avoided. The following is a brief outline for the United Kingdom (UK).

### REDUNDANCY

In the UK, if there is a collective redundancy, the employer must inform and consult with employee representatives or trade union representatives of affected employees on the proposed method of selecting employees for redundancy, the period in which the dismissal may take effect, the employer's attempts to avoid the redundancy and search for suitable alternative employment, and the proposed method of calculating the redundancy pay if it is above the statutory levels. A collective redundancy is the dismissal for one or more reasons not related to the individual concerned of 20 or more employees from one establishment within a period of 90 days or less.

Where the company is proposing to dismiss 20-99 employees, consultation

must begin at least 30 days before the first dismissal takes effect, and for proposed dismissals of 100 or more employees, the consultation period is at

**Where the employer is selecting employees to be made redundant from a pool of employees it must apply selection criteria which are reasonable and objective. There are no mandatory selection criteria in the UK.**

least 90 days before the first dismissal takes effect. The employer must also notify the governmental body Business Enterprise and Regulatory Reform of any collective redundancies.

Even where the employer does not meet the collective redundancy threshold, it must nevertheless inform and consult with the employee directly to ensure that the dismissal

is fair. The employer must meet with the employee to discuss the reason for the dismissal (including the selection criteria and scoring) and consider if there is any way to avoid the redundancy by considering alternative measures to redundancy or offering the employee suitable alternative employment if one is available. The employee has the right to be accompanied at the meeting by a work colleague or trade union representative. The employee also has the right to appeal against the dismissal, and the employer must hold an appeal hearing if an appeal is lodged. Failure to follow the statutory dismissal procedure will render any dismissal automatically unfair, and a tribunal will increase any award by a minimum of 10% up to a maximum of 50%.

Where the employer is selecting employees to be made redundant from a pool of employees, it must apply selection criteria which are reasonable and objective. There are no mandatory selection criteria in the UK. An employer may use one criterion or apply various criterias under which the employee is assessed on a point scoring system. Skill, knowledge and length of service are a common method of selection,

This newsletter addresses recent employment law developments. Because of its generality, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

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provided that they are objectively justifiable and not discriminatory.

An employee who has at least two years' continuous service will be entitled to a statutory redundancy payment. The amount is calculated according to a formula based on age and week's pay (which is subject to a cap, currently £330). The employer will also need to review its practice or policy on redundancy pay to see if it gives rise to a more generous entitlement.

#### TERMINATION

The employer must provide the employee with notice of termination or make a payment in lieu of notice. The notice period is generally governed by the contract, but the employer must provide the statutory notice period if it is greater. The statutory notice period for an employee who has worked for more than one month is one week's notice for each year of service, up to a maximum of 12 weeks.

#### COMPROMISE AGREEMENTS

If the employer wants the employee to waive all and any actual or potential claims against the company, the employer must enter into a compromise agreement with the employee. To be binding, the compromise agreement must be in writing containing specific terms, and the employee must seek legal advice on the terms of the agreement. The employer will usually pay, or make a contribution towards, the employee's legal fees. A general agreement by the employee (in a letter, contract, or

any other type of agreement) to waive claims against the company will not be binding in respect of statutory claims such as unfair or wrongful dismissal, redundancy pay, or discrimination. A compromise agreement can be used to reaffirm or include any post-termination restrictive covenants and obligations in relation to confidentiality and intellectual property.

#### INSOLVENCY

Where the employer is insolvent, certain debts owed to the employee are guaranteed by the State and payable from the National Insurance Fund ("NIF"). The NIF will pay up to eight weeks arrears of pay (subject to a cap on a week's pay). This includes any payment of a protective award where the employer has failed to comply with its collective information and consultation obligations and any guaranteed payments or payments for time off to carry out trade union duties. An employee may also claim (subject to the cap on weekly pay) up to six weeks' holiday pay, statutory notice pay, unpaid contributions to an occupational pension scheme, maternity pay, reimbursement for any fee paid as an apprentice, statutory redundancy pay, and a basic award for unfair dismissal. The cap on weekly pay is subject to reduction if the employee has other earnings or is receiving State benefits. ■

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