Avoid Lawsuits, Cut Costs, and Retain Talent:

Managing Staffing Pitfalls in a Down Economy

By Liz Tascio
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Richard H. Block, an attorney who specializes in labor and employment, knew exactly why he faced a packed house when he stood up to speak at the TemPositions' monthly Human Resources Roundtable in January: The topic was how to manage staff in a down economy, and it's a question almost all human resources departments are having to answer.

Block reassured the HR professionals in the crowd that they're not the only ones facing this challenge. "We're seeing a lot of layoffs from companies trying to position themselves going into what, apparently, is going to be a really tough year."

Together with Andrew J. Bernstein, Esq., and David R. Lagasse, Esq., Block gave advice and took questions from roundtable members on three timely subjects:

- how to administer a layoff with a low risk of lawsuits
- how to hold on to star employees during tough times
- how to lower the rising costs of benefits

All three speakers emphasized one overarching practice that can be of huge importance during times of layoffs, budget cuts and stress: a policy of treating employees with dignity.

A few words on the importance of dignity

Just giving your employees a voice in their own layoff can lower the risk of a suit, Lagasse said. One of Lagasse's clients lets departing employees write a public message on the company's "green wall," and the messages range from "This is the best company I've ever worked for" to "Here are the names of the six worst managers here." That company, Lagasse said, has not faced a single lawsuit over a termination.

The importance of helping employees leave with their dignity intact is especially clear now, Block said. "It's going to be a terrible time for people to find jobs, and they're going to feel really vulnerable," he said.

Companies will choose different ways of bringing dignity to layoffs, depending on their own culture and resources, Bernstein said, but they can all start by reviewing their current practices. Could they allow laid-off employees to use their old phone lines and desks for a limited time while they look for work? Could they offer former employees office space and outplacement services?

"I think we should be re-evaluating it all," Bernstein said. "This is a once-in-a-lifetime thing we're going through."

How to keep layoffs from becoming lawsuits

The two types of layoffs – voluntary and involuntary – have different effects on the workplace. A voluntary layoff is much easier on everyone's morale, Block said, but you run the risk of losing your superstar employees. In an involuntary layoff, the employer can choose exactly whom to let go, but these layoffs are harder on morale and carry a greater risk of legal challenges.

For companies planning involuntary layoffs, Block offered a few guidelines that can protect against lawsuits and protect employees' dignity:

- Be honest. Disguising an economic layoff as for-performance can invite legal challenges and generate resentment in the office.
- Select those to be laid off using objective criteria, such as skill set or years on the job.
- Review the layoff for anything that might suggest discrimination, such as a pattern of laying off minorities or older workers. "It's going to be up to you to see the potential problems from an EOC perspective," Block said.
- Your company might want to rehire these employees when the economy improves. During the layoff, show departing employees that they were valued, perhaps by offering accelerated vesting or outplacement services.

Require departing employees to sign releases, in which the employee waives the right to sue the company for monetary gain. In exchange, the company agrees to something the employee wants. The release doesn't bind the EEOC, but it does bind the employee.

A release has the best chance of surviving a legal challenge if it meets these criteria:

- The employee knowingly and voluntarily signed the release.
- The release is easily understood, and even translated into the employee's first language.
- The release contains category-specific waivers and complies with all local legislation; a boilerplate document isn't enough.
- It's effective up to the termination date.
- The employee had time to review the release, usually four or five days.

That last guideline – allowing the employee plenty of time to review the release before signing – is another example of how bringing dignity to the process is better for both parties. An employee who reviews his release and negotiates its terms has had a voice in the process, and might feel more empowered and less wronged – and less likely to sue.

Starting in February 2009, plant and factory closings will be subject to a New York state law that increases employee protections under the federal WARN act (Worker Adjustment and Retraining Notification), including additional penalties and 90 days' notice for employees.

How to keep star employees in tough times

Layoffs are stressful not just for those who have to leave but for employees who remain. Your star employees may get nervous and start looking for other work – and even in tough times, there are jobs available for top talent.

“Get out there, talk with people, be very visible, have honest answers for people,” Bernstein said. “Don’t wait for the phone to ring. Knock on your people’s doors, sit down at their desks and ask them very open-ended questions about what they’re thinking. That is the way you retain talent: Let them know that they’re valued, and that you’re going to do everything in your power to help them succeed.”

Bernstein suggested these practices:

- If possible, do layoffs one at a time instead of en masse; it’s less stressful.
- Ask employees directly about their concerns, and if you don’t have an answer, get one.
- Be fair and honest. Top employees don’t want to feel like their friends were laid off unfairly or that underperformers are getting away with something.

When money is tight, it can be impossible to raise salaries on schedule or reward performance with merit pay. But top talent can be rewarded with executive coaching, stipends, or a written guarantee of higher pay later if they stay on.

Managers can let these employees know they’re valued through consistent, thoughtful, positive performance reviews and honest praise. “It’s finding inexpensive ways to reinforce the message that we care about our people,” Bernstein said.

Though you’ll be trying to show employees that everyone is in this together, don’t sit down and gripe with them, Bernstein warned.

“Bring it to your managers that they need to be careful and mindful that they too represent the organization, and they cannot feed the anxiety of the people who report to them,” he said. Managers can be honest about the company’s situation, but they have to stay positive – and stay open to employees’ concerns.

Research by the University of Chicago showed that the top reason workers choose to unionize isn’t money, Block said. It’s because they don’t feel heard by their supervisors.

“If people feel good about their company, if they feel they can communicate with the company, they can have their problems heard and resolved, they’re going to stay with you,” Block said.

How to cut your employer’s highest costs

The need to trim costs can actually inspire a company to improve the way it handles its top three expenses:

- health benefits
- retirement benefits
- paid time off

Health care is the biggest driver of benefit expense, Lagasse said. The national average is $4,700 a year for individual coverage and $12,700 for a family.

In fact, the cost of health benefits is outpacing inflation and wage growth. Since 1999, employment health insurance premiums have increased 120%, while cumulative inflation has gone up only 44%, and cumulative wage growth went up just 29%, Lagasse said.

Contrast those figures with this one: Half of the 49 million people *without* health insurance spend just $700 a year on their health care, far less than the thousands in premiums they would pay for insurance. However, a large medical cost, like cancer treatment or even a broken bone, can send an uninsured person into bankruptcy.

Employers who offer insurance plans can cut their own costs in several ways, such as:

- Increase employee contributions, deductibles, and out-of-pocket expenses.
- Decrease the number of full-time employees and increase part-time employees.
- Fill at least some positions with temporary workers who get benefits from an agency.

In addition, employers can cut their costs *and* the costs of their employees with these options:

- Adopt a medical reimbursement plan, in which the employee pays the first $1,000 of their own care, a bargain when you consider that many spend just $700 a year.
- Offer a high-deductible plan with a pre-tax Health Savings Account, which rolls over every year. Make it more attractive by loaning employees the money to fund their HSAs.
- Educate employees about the most effective use of their current health plans. One of Lagasse's clients invited local doctors to make presentations to employees on availability and prices.
- Switch to self-insurance. The company then becomes subject to privacy laws and takes on the protection of employees' medical information, which is risky, but it comes with big cost-savings, Lagasse said.

Expensive retirement plans can be updated for significant savings, too, Lagasse said. For example:

- Terminate or convert defined benefit plans, which guarantee lifetime benefits.
- Convert "safe harbor" contribution plans to matching contribution plans.

Above all, talk to your employees about their retirement accounts, Lagasse said. "Get them to understand the time value of money, even in a down market like this, so you can get them to make contributions," he said. "And think very carefully about reducing your contributions, because sometimes those are the only savings people have."

The cost of paid time off can be controlled via a time-off bank, or by limiting accrual, Lagasse said. If you decide to reduce paid time off outright, let employees know that those sacrificed hours actually saved jobs.

Times are hard now for everyone, but with communication and information, HR professionals can help maintain a work environment that supports employees and protects the employer.

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