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Handling Separations Legally and Humanely During Challenging Economic Times

During these challenging economic times there are strategies that can be taken to conduct a healthy separation that alleviates the angst associated with layoffs for employers and employees alike. I have outlined two sets of strategies for companies, HR professionals and employers to consider when laying off employees: (1) Strategies for a healthy separation; (2) Strategies for employers to protect from employee lawsuits.

Strategies for Employers in Conducting a Healthy Separation:

- Be compassionate and treat employee with respect. This may include telling the employee that it is not their fault, that if you had a choice you would keep him/her. This will always make an employee wonder: why are they keeping Colleen and letting me go? It may be better to say the layoff is just a matter of numbers and immediate business decisions and not because you valued one employee over another.
- Don't rush the employee to pack up and leave. Do not make the employee feel as if you are standing over them waiting for them to get out.

- Inform the employee that if the economic situation changed that you would be happy to rehire him/her, and back it up by making sure that the termination agreement has no clause preventing the employee from reapplying to them.
- Request, in a compassionate and respectful way, that the employee provide his keys, access codes, and any passes to employer's worksite.
- When people around you are losing their jobs, you can share the pain too. Take a smaller office. Turn in the company car. Reassign your personal assistant to a revenue generating position. Fly coach. Stay in motels. Sell the box tickets to the ball game. Give your thirty-inch, flat-panel display to a programmer who could use it to debug faster. Do something, however symbolic.
- Conduct a meeting with the other employees and explain the rationale for the layoff or layoffs.
- Allow the remaining employees to see that the company is doing the best it can for the employee who was laid off. This shows the remaining employees that the company they work for is a company that knows that loyalty is a two-way street.
- Give the employee a letter of recommendation; this may assist the employee in finding another job.
- Encouraged the employee to keep in contact with them. Too many times employers and supervisors act like they never again want to hear the names of people who no longer work for them, even if that employee was laid off.
- Provide outplacement services or personal coaching to departing employees (e.g. payment of one-two hour session with a career coach). A personal or career coach can sometimes be a better value than an outplacement service. You have a moral obligation to provide services like job counseling, resume writing assistance, and job search help. There are firms that specialize in helping employees during "transitions," so use them.

- Provide other job search strategies such as a resume writing workshops and company sponsored affinity groups which allow employees to keep in touch with co-workers and fellow employees. Keeping the communication lines open allows the former employee a way to provide updates on their status, their new job profile, and to stay in touch with inside news about the company or organization. The separation does not have to be so cold and calculated such that the employee feels completely cut off from a place that has been their second home and social network.

II. Strategies for Employers

- If there is a conflict brewing in the workplace, conduct an internal workplace mediation.
- Engage in cost saving strategies in lieu of layoffs, such as salary reductions, reduction in hours, pay out of vacation, temporary paid leaves of absence, and temporary shutdowns. Consult with counsel prior to engaging in any of these strategies to insure compliance with applicable law.
- If separation is the only option, conduct an exit interview which includes a previously prepared layoff letter and explanation of benefits, including COBRA, or other benefits your company or organization may provide after the employee is laid off.
- Review the EEOC Web site at www.eeoc.gov, for information on employment law pertaining to layoffs.
- Retain a lawyer. Sound legal advice from a competent business or employment law attorney is your best protection against discrimination lawsuits. Find an attorney through your local bar association lawyer referral service.
- Provide a severance package and waiver. A severance package may include two weeks pay or more for each year the employee worked. The severance package may constitute a pension or welfare plan under the Employment Retirement

Income Security Act (ERISA). The severance package may also be subject to IRS Code §409A. Severe penalties may accrue for failure to comply with these requirements.

Consult with counsel prior to drafting a severance package.

- Do not allow employee to return to the worksite after separation unless he/she is interviewed by security personnel first.
- Document the exit interview and insure that at least two people are present during the interview, in addition to the employee.
- Keep records. Anytime you lay off an employee, maintain a detailed paper trail regarding the circumstances and actions you took. This will serve as evidence in your defense in the event of any lawsuit.
- Give proper notice of layoff or reductions in force. There are certain notice requirements that must followed by your company or organization under the Worker Adjustment and Retraining Notification Act (WARN). The WARN Act is a federal law that offers protection to workers, their families and communities by requiring employers to provide notice 60 days in advance of covered plant closings and covered mass layoffs. Failure comply with the WARN Act may result in stiff penalties for the employer. Consult with counsel to determine whether your company's layoff or reduction in force falls under the WARN Act.
- Immediately upon termination of employment and within 72 hours of resignation, pay employees' wages. In California, failure to do this may result in penalties of up to 30 working days of wages for failure to pay wages upon termination of employment.

Conclusion

Treating employees with dignity and respect and allowing them to be a continued part of the company or organization may

result in a healthy separation. Employers should consult with employment counsel about their legal obligations and the strategies discussed above prior to conducting layoffs, reductions in force, or forced separations.

Karen Carrera is a Bay Area employment law attorney with over 17 years experience assisting and advocating for clients. Ms. Carrera works with employers to counsel them on how to comply with the complex and ever changing employment laws. She conducts neutral fact-finding harassment and discrimination investigations, sexual harassment prevention trainings and workplace mediations. Where there are Spanish speaking employees involved, Ms. Carrera, who speaks and writes fluent Spanish, can conduct trainings, investigations, and mediations in Spanish. For further information about this article, contact Karen Carrera, at www.consultingcarrera.com, or call for a free consultation at 415-789-9798.