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Trying to salvage a sinking ship

Lawyers guide clients through downsizing woes

By Carol Lundberg

Reminiscent of 1930s sit-in strikes by the then newly formed United Auto Workers, more than 200 workers at Chicago's Republic Windows & Doors this month occupied and refused to leave their workplace, three days after the company announced the plant would close.

The demonstration was a real-life warning to economically distressed employers preparing for layoffs and shut-downs: Be conscious of what laws and contracts allow, be mindful of how such drastic changes affect workers.

At issue in Chicago was the employees' claim that the employer did not abide by the federal WARN Act, which requires employers to give 60 days' notice to workers prior to a mass layoff, said Leah Fried, an organizer for Electrical Workers union, which represents the 260 production workers at Republic.

"That's what workers are entitled to when a plant closes down," said Ron Sollish, attorney at Maddin, Hauser, Wartell, Roth & Heller in Southfield. "They need some warning. It's not that the warning would change anything, but it would give the workers the opportunity to get their own lives in order."

Sollish represents employers when they have to cut back. He tries to help them avoid a situation like the Chicago sit-down, or much more commonly, being sued by laid-off workers.

The WARN Act, the Worker Adjustment and Retraining Notification Act, is a source of concern for every employer it covers. It applies to companies with 100 or more employees, not counting those who have worked fewer than six months for the employer.

The Act requires an employer to give notice if the work site will be shut down, and the shutdown will result in job loss for 50 or more employees. The notice is also required before a mass layoff.

Last week, the Chicago workers ended their demonstration after winning severance pay and the payment for unused vacation time.

The sit-in protest drew wide attention, including support from President-elect Barack Obama. Illinois Attorney General Lisa Madigan had launched an investigation to determine if any laws were broken when Republic did not give its workers notice.

"We're all struggling through this morass," Sollish said, "and it's hard to say how giving 60 days' notice would affect the rest of the company. But it often comes down to a question of fairness. Is it fair to put all these workers out on the street with three days notice?"

It's also a question of law.

It's likely, Sollish said, that Republic could have sought an exemption to WARN.

He said the company probably could not have used two of the Act's exemptions, unforeseen circumstances and natural disaster. But it could have tried to claim that it falls under the faltering-company exemption.

That applies, Sollish said, when "prior to a plant closing or mass layoff, a company is actively seeking capital or business, and reasonably in good faith believes that advance notice would prevent it from obtaining such capital or business, and this new capital or business would allow the company to avoid or postpone a shutdown for a reasonable period."

According to a story in Crain's Chicago Business, Republic claimed that its lender, Bank of America, had rejected its plan to wind down operations over several months, which prompted the immediate closing. Republic also claimed that Bank of America had refused the company's request to pay the employees for their unused vacation time.

To resolve the dispute, The Chicago Tribune reported, both Bank of America and JPMorgan Chase & Co. stepped in to provide money to give each employee two months' severance pay as well as pay for unused vacation time. The Chicago Tribune said JPMorgan Chase & Co. is a 40 percent owner of Republic.

Though the sit-in was a more extreme measure than most laid-off workers or closure victims will employ, downsizings, layoffs and plant closures are full of land mines, some legal, and some personal.

John Birmingham, of Foley & Lardner, said that in the last quarter of this year, an increasing number of his clients are calling on him for help in preparing for layoffs.

His client mix looks like a who's who of Michigan's hardest-hit industries: union and non-union automotive manufacturers, home builders and retail property owners.

"This economy is different in that many companies have already laid off most of their poor performers and are now forced to make the reduction in work force decisions from a pool of good employees," Birmingham said. "I have empathy for those people being selected."

"But my job is to counsel employers regarding how to comply with the law and to otherwise help them to make good decisions. If I do this well, it prevents an unfortunate situation from becoming much worse."

Being mindful of the worker on the business end of a pink slip is not only the ethical and humane way to manage such difficult business decisions as downsizings. Sollish said it also probably will protect a client from litigation.

Because the number of layoffs is rising, Sollish said, more litigation and claims of discrimination will follow. Even if the claims have no merit, they're still time-consuming and troublesome. And they can be avoided.

When workers are unionized, employers are calling on their attorneys to help them abide by the contract. Even if the workplace is not unionized, clients sometimes need help making sure that the layoff doesn't break promises made in the employee handbook or other company policy manuals.

Aside from obeying WARN, employers must follow provisions of the Older Workers Benefit Protection Act, which gives workers older than age 40 a period of 45 days to consider the terms of the severance agreement, and seven days to revoke their consent to the agreement.

If workers decide not to consent to the agreement, they may seek legal action and reject the severance pay offered by the company.

"And you must tell them that they can see an attorney before they sign it," Sollish said.

An often-overlooked provision of the Act also requires the employer to inform older workers of the details of the downsizing.

"You have to provide a list of job titles and ages of everyone who was considered for the reduction in force, and everyone who was chosen for the reduction in force," Sollish said. "If you don't comply, the employee can take the severance and still sue for age discrimination. The courts have been very punitive with respect to how they've made these agreements."

In the case of layoffs, employers must ensure that no single group – older workers, minority workers, all women or all men – is being affected more than other employee groups.

Sollish said one of his clients hadn't analyzed demographics before a layoff, and inadvertently laid off most of the men in its warehouse and distribution center. At the same time, the employer was hiring more women in its administrative offices.

"The company did wind up settling with the laid-off workers," Sollish said, adding that the cost was in the hundreds of thousands of dollars.

"Although they may not have a bad or evil intent, employers have to be careful about selecting workers for reduction," Sollish said. To help clients protect themselves from discrimination claims, he provides statistical analysis before the downsizing. "We need to know what the affected workers look like, in terms of demographics, and the remaining work force – what does that look like?

"Every time, I have this discussion with my client. Whenever we discharge workers we do it with dignity. If you handle reductions in a dignified fashion, you do protect yourself. A lot of lawsuits you see are from people who feel they've been kicked in the head on the way out."

If you would like to comment on this story, please contact Carol Lundberg at (248) 865-3105 or carol.lundberg@mi.lawyersweekly.com.

Limiting the rigors of layoffs

Make the easy cuts first


BIRMINGHAM

John Birmingham, Foley & Lardner LLP: "Get rid of temporary and contract workers if you can. Reduce overtime if you can. Reduce holidays or vacations if you can. Absent a union contract, you can give notice that the company will be instituting a 2 percent pay cut and let the workers decide if they want to work under those conditions."

Reserve the right to say 'No deal'

Birmingham: "You can offer early retirements or buyouts, but you have to be careful with that too. You have to retain the right to deny key employees if they accept the buyout offer."

Cut costs carefully


CLEARY

Robert Cleary, Warner Norcross & Judd LLP: "You need to be careful about how you roll out (cost cutting) initiatives, from a cultural standpoint. If you're trying to save money so the company can survive, you need to explain that economic duress to workers. You have to be able to show them something. If you don't, among other things you could be opening yourself up to unionization."

Never ever on a Friday

Ron Sollish, Maddin, Hauser, Wartell, Roth & Heller, P.C.: "Always try to make sure there are one or two business days right after, in case the affected employees need to get counseling or talk to a lawyer. There's nothing worse than being left all weekend with this big problem and no one to talk to about it."

Wait until the end of the day

Sollish: "You don't want to have people leaving during the day with their lives packed up in boxes. It's terrible for the laid-off worker but also for morale among those who are still working."

Give the pep talk


SOLLISH

Sollish: "The process has become so sanitized because of the legal aspects of it that no one knows what they're allowed to say. But you have to keep in mind that in a way, you've ripped apart a family. There has to be a discussion about the future with those who are still working. You need to give a pep talk. It doesn't have to be a long, drawn-out thing. But you do need to give some reassurance to those who are still there."

Bring in counsel early

Birmingham: Often, employers call on their attorneys too late in the process, when they need assistance drafting the severance letters. But not putting enough planning and forethought into the downsizing process, which tends to happen quickly during a crisis, puts clients in a vulnerable position.

"You really should talk with counsel early on to be sure that your selection process for layoffs doesn't impact older workers or female workers or minority workers more than it impacts the rest of the work force, or you could be sued for discrimination."

— CAROL LUNDBERG

Sidestepping the dangers of 'dumbsizing'

Sometimes, a solution becomes a problem

When a company already has taken a good hard look at its payroll costs and has cut through the fat and laid off or downsized its least productive employees, the only place left to cut is to the bone.

But even in dire economic conditions, it's possible to cut staffing levels too deeply, said Robert Cleary of Warner, Norcross & Judd.

A client that eliminates too many workers runs the risk of becoming inefficient and unable to respond when the economy eventually improves.

"What we're trying to do is to avoid 'dumbsizing' instead of downsizing," Cleary said. "A lot of employers are trying to come up with ways to hold onto the fort without losing their talent. And if you lay off workers you run the risk that if you're in the position to resume operations they'll be gone when you need them to come back."

One of the solutions some of his clients have asked him about is imposing a four-day, eight-hour-day workweek, and a 20 percent reduction in pay, for exempt employees.

"The presumption has been that if they're to remain exempt, you can't cut hours and pay. Exempt workers don't work for hourly wages, and they don't get overtime," Cleary said. "If you say that they'll work four days instead of five and you cut the pay by 20 percent, the conventional thought has been that you're measuring hours worked and rendering the exempt status meaningless."

Turns out, conventional wisdom was wrong. Cleary has been able to help clients make such a payroll reduction, but he said it must be done carefully.

One of the caveats is that once a client cuts workers to a four-day week at 80 percent of their former salaries, the change has to remain in place. The employer cannot demand that exempt employees work four days one week, and five the next.

"You can't go to that well too often. If you do, you may run the risk of rendering the exempt status a sham," he said. "If you go back and forth where one week you work four days and one week you work five so your pay changes from week to week, you've established an hourly relationship with pay."

John Birmingham of Foley & Lardner says it's not possible to cut an exempt employee's hours and pay without establishing that relationship. But a company can change just an employee's pay and not his or her exempt status.

"You can simply require employees to take an 80 percent pay decrease, and give them the option to work a four-day week," he said. "If you tie the days worked to the salary, once you start docking people or start timekeeping, they're no longer exempt."

Cleary said the employer has to show an underlying economic motivation for the move, and should be able to demonstrate a business reason for cutting pay and hours worked.

Some of Cleary's clients have also asked employees to voluntarily take unpaid time off. A surprising number of workers agreed to do so during the holidays, and Cleary suspects they will again during the summer.

"But you have to coordinate this with counsel. You have to be very careful about how this is presented to employees," he said.

The problem, Cleary said, is that employees may think that if they take the time off to help the company, the employer will repay them by not laying them off if job cuts later become necessary.

"You need to make sure it's a voluntary function and there will be no negative impact for those who choose to take it or not take it," Cleary said. "The thought could be that if you're a good team player you'll do it. You need to disavow that."

Above all, what Cleary tries to remind his clients is that whatever the cost-cutting measure is, it's likely that there will be more needed.

"While you put the Band-Aid on this problem, do not think for a minute that this may be the only thing you have to do," Cleary said. "If later you have to resort to drastic measures up to and including layoffs and termination, don't cause consequences for yourself downstream."

— CAROL LUNDBERG