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PUT DOWN THE AX

Employers should exercise legal caution when using cost-saving strategies to avoid layoffs

By JILL ESTERBROOKS, Special to the Daily Transcript

Taking a mid-career sabbatical or clearing those unused vacation days off the work calendar used to have a positive impact on employees. But with today's high unemployment and tough economic times, furlough days and reduced work schedules are instant stress-inducers for recession-wary workers.

And where there is workplace stress, employee litigation usually isn't far behind, said Jeremy Roth, a labor and employment attorney in the San Diego office of Littler Mendelson.

In search of creative ways to reduce costs but keep workers on the job, more and more employers are turning to work furloughs, reduced work weeks and mandatory use of vacation or personal time off.

While these job-saving efforts are often laudable, such strategies can lead to a litigation minefield if not done properly.

"Employers who are using these measures -- and there are many of them in California and across the country -- should be sure their strategy doesn't violate any state or federal statues," said Roth, who counsels his corporate clients on myriad issues including wage and hour claims.

Daniel Gardenswartz, head of the employment law department at San Diego-based **Solomon Ward**, agreed.

"Using work furloughs and other alternative work and pay strategies as a way of cutting costs instead of mass layoffs have their own set of challenges, including making sure companies don't violate the Fair Labor Standards Act or other state laws," Gardenswartz said.

The main challenge, he said, is negotiating federal and state wage and hour laws that aren't necessarily designed to be flexible or facilitate the changing realities of today's workplace.

Often times, he said, employers are doing things with good intentions -- such as keeping laid-off or reduced-hour employees "on the payroll books" for medical benefits or job seeking purposes. "But as the saying goes, no good deed goes unpunished," warned Gardenswartz.

Avoiding litigation

There are more wage and hour class actions pending in U.S. courts than any other type of lawsuit.

So what can employers do to avoid the legal pitfalls that can occur when using alternative work schedule and pay scale strategies?

Creating a company policy as well as offering employees as much notice as possible could help minimize litigation risks. And employment agreements outlining specific employee wages and benefits also can help reduce legal actions.

Local labor and employment law experts say employers also need to understand that work furloughs for exempt and nonexempt employees have very different legal implications.

For example, in California, a "use it or lose it" policy on nonexempt employees' paid time off is illegal. Or, overtime might have to be paid if that same employee is using work-issued technology off the clock.

On the flip side, if an exempt employee works any time on any given day (even to make a 15-minute phone call from home or a quick check of e-mails on the Blackberry), they must be paid their salary for the entire day.

While extreme measures such as demanding that employees turn over their laptops and smart phones when off duty might not be practical, employers should clearly communicate what they are and aren't permitted to do both in and out of the workplace.

Crackdown on cheating companies

Several years ago at the onset of the recession, Roth said his office fielded many employer questions about cutting pay across the board, forcing vacation or changing paid time off allotments.

"That has settled down some in recent months since many of the needed cost-saving cuts have already been made," he said.

But now his firm is seeing an increased workload in employee litigation based on some of the earlier furloughs and temporary work reductions companies employed -- sometimes while in panic mode without careful consideration or seeking legal counsel.

"After the economic downturn in the early '90s we saw a lot of age-discrimination lawsuits," noted Roth. "This time around it looks to be more stress-related disability litigation."

Another area of growing legal concern nationwide, he says, is misclassification of employees, specifically companies calling workers "contractors" when they're really full-time employees.

Some labor-force experts predict that 50 percent of jobs created in the economic recovery will go to contractors, consultants or other temporary employees.

By classifying workers as contractors, businesses get all of the advantages, since these "contingent workers" cost 30 percent less than full-time staff.

But President Barack Obama recently allocated $25 million to the Department of Labor to help combat employee misclassification, and the IRS is expanding company audits to crack down on contractor status.

True independent contractors control when and how they work, rather than obeying directives from an employer.

States from Connecticut to California are announcing new initiatives "to find and fine companies that aren't playing fair," Roth said.

Companies that misclassify workers not only victimize workers who don't get the compensation they deserve, but they also hurt honest businesses who are underbid or out-priced by those that illegally cut costs, he said.

According to Gardenswartz, the bottom line is that in today's work force, "there are lots of workers out there who are technically employed but whose job and responsibilities have radically changed."

This could mean a full-employment act for labor and employment attorneys such as Roth and Gardenswartz.

Esterbrooks is a San Diego-based freelance writer.