

NAVIGATING TOUGH TIMES

*A Bottom-Line Analysis
of Critical Workplace Issues*



LABOR AND EMPLOYMENT: MOUNTING PRESSURES IN THE WORKPLACE

Besieged by mounting legislative, regulatory and economic pressures, employers are facing some of their toughest challenges and decisions yet. Layoffs, furloughs, salary reductions and company reorganizations are commonplace – the unfortunate consequence of a declining economy – and employee protections are on the rise. The result: increased responsibilities for employers, and an increased propensity to file lawsuits by employees.

New Leadership Signals More Changes for Employers

- The confirmation of Hilda Solis as the president's new Secretary of Labor — a selection which was strongly supported by Big Labor — signals decidedly more protections and rights for employees and, conversely, more aggressive regulations for management and employers.
- Employers should be prepared for a shift in direction and policies at the National Labor Relations Board with the recent appointment of Wilma Liebman as its new chair. Liebman is widely considered strongly pro-union and has criticized recent NLRB decisions that promote a worker's ability to reject unionization.

Increased Employee Protections Mean Increased Employer Responsibilities

- The broader definition of "disability" under the ADA Amendments Act of 2008 will most assuredly mean more employees and job applicants will be eligible for protection under the Americans with Disabilities Act. As a result, employers will be expected to make more workplace accommodations or face the possibility of increased litigation.

- New Department of Labor regulations related to the Family & Medical Leave Act impose new, and in some cases more stringent, requirements on covered employees. Employers should expect increased requests for leave.
- In a recent ruling that employees who participate in company investigations into another worker's alleged claim of discrimination constitutes a legally protected activity under Title VII, the U.S. Supreme Court now makes it easier for employees to file retaliation lawsuits. Employers need to approach company investigations with even greater vigilance.

Greater Scrutiny of Employee Terminations

- Since December 2008, the Oklahoma Supreme Court has handed down two major decisions which will make it easier for employees to file wrongful discharge lawsuits against Oklahoma employers. Furthermore, with employees now able to file "public policy" tort claims in Oklahoma state court, employers now face unlimited financial exposure in more hostile courtrooms.
- Expect all termination decisions to be closely scrutinized. Involuntary terminations brought on by a troubled economy, such as large layoffs, are especially likely to lead to increased discrimination and ERISA lawsuits.

Labor Union Organizing, Collective Bargaining, and Union Relations

- Introduced in both houses of Congress in mid-March, the Employee Free Choice Act is regarded as organized labor's top legislative priority for 2009. If passed, President Obama has pledged to sign the bill into law, paving the way for increased unionization of businesses without employee secret ballots, government-imposed "fast track" union contracts, and punitive damages for companies, but not unions.
- Employers with collective bargaining agreements expiring in 2009 will push for concessions during negotiations, to include consideration of re-openers when the economic situation becomes clearer, or continues to deteriorate. Likewise, companies that recently completed negotiations may seek mid-term modifications to those agreements.

EMPLOYEE BENEFITS

The downturn in the economy has forced many employers to cut expenses at every corner, including laying off employees, reducing employee schedules, and altering compensation and benefits for both executives and employees. If that wasn't enough, the backlash over the AIG debacle has caused Congress to carefully scrutinize executive bonuses. As a result, employers need to be aware of the ramifications these decisions have on employee benefit plans and their fiduciary obligations.

The Impact of Layoffs and Other Cost-Cutting Measures on Benefit Plans

- When implementing a reduction in force or reorganization – including layoffs, reduced hours, and shorter workweeks – employers need to consider the impact such decisions will have on their retirement plans, medical plans and cafeteria plans. Issues to be considered include the potential partial termination of qualified retirement plans, plan eligibility considerations, the potential to lose a medical policy due to insufficient covered lives, the ability of employees to change elections to health flexible spending accounts, and COBRA considerations.
- Included in the American Recovery and Reinvestment Act of 2009 (ARRA) which President Obama signed into law on February 17, 2009, was a provision for a nine-month subsidy of COBRA premiums for employees who are involuntarily terminated. The law also imposes additional administrative and notice requirements on employers that require immediate attention.
- As an alternative to layoffs, some employers may seek to cut costs by reducing the benefits offered to existing employees. These tactics could take the form of reducing or suspending employer contributions to qualified retirement plans or modifying medical plan coverage.
- To the extent an employer provides new benefits to laid-off or terminated employees, such as severance pay, the regulatory obligations associated with such benefits should be considered.

Increased Fiduciary Risks

- Given the impact the declining market has had on individual and family wealth, retirement plans, executive compensation plans and other employee benefit programs have become subject to heightened scrutiny by plan participants, governmental agencies and other affected parties. As such, plan fiduciaries should carefully and periodically consider their obligations to review, evaluate and monitor their plans, including their investments, investment advisors and plan expenses.
- In these uncertain times, it's more important than ever that employers review their directors' and officers' fiduciary, and other insurance policies to ensure all plan fiduciaries have the necessary coverage.
- Medical plan sponsors have a fiduciary obligation to monitor the expenses of administering their health plans. In that regard, employers should consider benchmarking health/welfare plan expenses, understand the internal underwriting factors of how health plans are underwritten to help hold

market underwriters accountable, and support their buying decisions with adequate due diligence documentation.

- Providing medical coverage to ineligible dependents unnecessarily contributes to rising medical costs. Plan sponsors have both the opportunity and responsibility to verify dependent eligibility as a way to further reduce medical plan expenses.
- The decline of the investment market has battered many pension plans. Employers who provide defined benefit plans need to carefully monitor their plans to ensure they are adequately funded so as to fulfill their fiduciary obligations to their retired workers.