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The New Reality for Employers Caught in the Economic Downturn

By Kathleen M. Paustian, Esq.

A client of mine in the temporary placement industry believes economists miss the mark by omitting the placement rates for agencies such as his to the list of leading economic indicators. It is his theory that temporary employee placement businesses are the "lead dogs" for the direction the rest of the economy is heading. In other words, these companies see the signs of recession about six months before the downturn hits other industries and, conversely, start coming out of recession approximately six months sooner than other business groups. If my friend is correct, we are just now starting to truly climb out of recession, despite the fact the National Bureau of Economic Research says it was over in the summer of 2009. While this economic reality is probably not news to businesspeople reading this, it is still difficult to accept tough economic realities.

These on-going economic challenges have had a substantial impact on employment issues and the decisions employers must make. One aspect of this is the increase in unemployment taxes paid by employers. These taxes go directly to any company's bottom line. In 2005, Congress decided the states were underfunding their obligations in the unemployment arena, and mandated that they increase their pool of money used for unemployment benefits. That necessitated increasing tax rates on employers. So, even before the economic downturn, we saw a push from the states to increase rates for unemployment taxes. That trend has continued with not only the increase in the number of unemployment claims, but also with the federally-mandated increase in the length of unemployment benefits.

Another aspect of the impact of the economy is that employers

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today are far more sophisticated regarding obligations under the federal Workers Adjustment and Notification Act ("WARN Act"). This is the statute mandating that companies provide workers sixty days advance notice of being laid-off in some circumstances. Generally, the WARN Act applies to employers with at least one hundred employees and requires sixty days advance notice of a layoff when a company shuts down a single site of employment or carries out a mass layoff. A "mass layoff" is either 500 or more employees, or between 50 and 499 employees if that number also equals or exceeds 33 percent of the employer's workforce. There are also very technical regulations requiring layoffs occurring at different times to be aggregated for WARN Act purposes, and many states have their own versions of the federal WARN Act, which may impose stricter notice requirements on employers or have different thresholds. According to the Department of Labor Bureau of Labor Statistics, mass layoffs peaked at 2,913 occurrences during March 2009 and continued at record highs for the rest of last year. From the beginning of 2010 through the end of August 2010, mass layoffs have actually been on the decline. However, despite all the plant closings and layoffs over the past two years, there have not been many WARN Act lawsuits. Businesses are apparently now more sophisticated in addressing and understanding their obligations under WARN and are prepared well in advance.

Of course, as the economy improves, many employers will deal with the pleasant task of filling positions left vacant during the recession. However, this endeavor raises the question of re-hiring employees laid off during the recession. It is tempting to bring back available former workers who know how to do their old jobs and who are familiar with the corporate culture. But what about those terminated employees who were not always the best performers? To avoid the potential discrimination issues that accompany selective re-hiring, employers may be wise to hire employees who have never worked at the company.

Meanwhile, while the new economic reality still holds sway, we are working with employers to provide severance agreements for employees at all levels whenever possible. The result, in most states, is no litigation surrounding the layoffs. This practice has been very effective, most likely because people are unsure where their next job will be, so additional money in their pocket makes a severance agreement attractive.

Also, in this tough economy, employers should be proactive in protecting confidential information, trade secrets, trade marks, etc. Basic steps include deciding whether non-compete agreements are appropriate and reviewing existing agreements. In addition, a company should have non-disclosure agreements with its employees, contactors, and vendors. Companies should also work with intellectual property attorneys to insure the protection of their unique brands, patents and information.

Until all employers begin to see the signs of the economic turnaround, they will live with the current day-to-day reality of the employment trends described above. But employers hoping that difficult decisions will end with the recession should beware. After

all, the challenges that lie with a boon can be just as challenging as those that lie with a bust.

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