

MANAGING RISK DURING EMPLOYEE SEPARATIONS

By Stephen Roush, Ed.D., SPHR

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It has happened to all of us. There must be some reductions in manpower, somewhere in the company, and the result is that employees who are not happy about leaving the company will soon be doing so. They won't be terminated for cause, nor will they be resigning. It doesn't matter whether technology has made their job function obsolete, foreign competition has diminished the company's ability to retain other than essential talent or the economy has forced a reduction in costs to maintain margins. Whatever the reason, their job function is no longer necessary and their presence is no longer required.

Once the decision is made, and the employees are identified, the company turns to human resources to reduce the liability, help with their transition and explain the right-sizing. We look into our bag of HR tricks and decide that if management approves, the needed combination of actions is some blend of:

- Outplacement.
- Company-paid COBRA.
- Severance pay.
- Special transitional monies.
- Counseling.
- Job retraining.

And so on.

Whatever the combination of reasons for elimination of work and regardless of the packages that are offered, this is a traumatic time and it has the potential to generate litigation. Even if the employee has been treated with the kindest of intentions and the infamous "Release and Severance Agreement" is signed, you never know if employees will take legal action. The unfortunate part of our legal system is that attorneys can take on any case with a contingency award as their motivation. Employees don't need to pay a retainer or use their own money up-front. They look for an advocate who can get them a financial award beyond what they may have been offered.

The key for HR is to keep the employee from filing a lawsuit or to keep the attorney from taking the contingency case. Whether or not the company has a good case, the law is on the company's side or the case has merit is irrelevant. Financial costs will be incurred in preparing the case, filing the motions, taking the depositions and paying the overhead. Emotional costs will be incurred, especially with regard to those employees still at work who are asked to testify, be deposed or merely take up energy observing the progress of the case. Productivity and time that would otherwise be used on contributing to an already lean organization is used to address the case at hand. It seems evident, then, that the best scenario is to avoid lawsuits.

Assuming that the picture presented is accurate and the groundwork has been laid to carry through with a separation of one or more employees, what can be done to diminish liability? Over the last few years, human resource professionals have learned that it is really a combination of both the little details and the more macro strategic initiatives that tend to minimize litigation risk. The tactical approach minimizes some of the frailties of human nature. The strategic approach discusses the ramifications of employment practice liability insurance.

Tactical Approach

When an employee is notified that they are leaving a company, it is often not a surprise to them. They may have been suspicious that problems were brewing, perhaps by good networking, an effective grapevine or deduction based upon having access to specific facts and memos. In some rare cases, the company may have been very forthcoming with information so that employees are aware of the problems. In the case where reductions in force were to be done by merit, certain employees probably are aware of their personal exposure and see the possibility that they might lose their jobs.

In any of these scenarios, the employee, in an attempt to protect his or her spouse from the anxiety and trauma that could result from this knowledge, will not share the information with those closest to him or her. As a result, when the job loss occurs, the spouse is caught completely unaware and may be emotionally upset. The spouse often experiences the same sense of rejection, failure and loss that the employee does, but he or she experiences it without the context that the employee has had. The shock factor adds an element of intensity that is rarely present for the employee.

While companies expend energy and time preparing the employee to address this transitional period, rarely do they think about the significant and crucial role that the spouse plays in this delicate dynamic. The employee may receive counseling that helps him or her retain or regain feelings of self worth. They are taught skills that are needed in re-entering the world of work. Meanwhile the spouse, without an object to focus on, may be left out of the process and as a result vents frustration in a number of ways.

The natural outcome of this scenario is that, after many months of job hunting, the employee begins to feel that the company should "pay" for this travesty and the spouse is likely to support this feeling. Regardless of how comfortable the company has tried to

make the changeover, the desire for retribution can become strong. The employee ultimately retains counsel, initiates proceedings for an unlawful discharge suit and thus attempts to regain some semblance of peace in the generally stressed home.

Providing outplacement counseling with the spouse present is an approach that is rarely used, but highly recommended. If the spouse is made part of the solution and not merely an adjunct to the process, many subsequent legal entanglements can be avoided. Some providers of outplacement services have already added this essential element to their services. Managers who arrange these services should require that the provider include spousal counseling as a part of the package.

Strategic Approach

The corporate risk management approach is generally to secure a loss-limiting insurance policy (Employment Practices Liability Insurance or EPLI). This inevitably means that once the legal costs of a suit reach a certain level, the insurance company assumes responsibility for concluding the case in whatever manner it sees fit. From the perspective of the insurance company, to be cost-effective, a negotiated settlement must be less than the potential cost of future litigation.

Over time, using this approach sends a message to attorneys that if they can drag a case out to a certain point, there will be some type of financial settlement, regardless of the merits of either case. Many times, a company will get a reputation for managing lawsuits in this manner. This knowledge becomes common within the communities where the company operates. Once the word is out that this method of managing risk is used, attorneys are happy to represent employees who have recently left these companies. The use of EPLI, intended by the company to be a cost-containment measure, can become a pathway to increased cases of litigation, regardless of the competence of the company management in adhering to legal discharge guidelines. Companies known to settle will often be targeted, so long as they agree to mediate or turn the cases over to third party administrators for settlement.

A further outgrowth of this mentality has been perpetuated by the Equal Employment Opportunity Commission's approach to resolving litigation. The new method is mediation between litigant (employee) and defendant (company). Procedurally, employers and ex-employees are asked if they would submit to mediation, rather than to a courtroom setting to resolve the case.

This has distinct advantages of mitigating costs, speeding up the process and hastening resolution. While the EEOC is proud of the fact that it has removed many cases from the courts and has resolved at a low cost to companies what would have generated higher legal fees, this is not necessarily a success. The fact is that companies who are very good at understanding the law and adhering to it are being penalized, while the inept and unethical companies are able to mistreat employees and do so with a trapdoor called mediation. The base line object of mediation is to bring both parties from opposing positions to a common middle ground. It should be understood that each side is expected

to offer up something. Usually the employee has little to offer up, except dropping the case or lowering the demands. The company offers a smaller financial amount than the employee is asking for. The true outcome is that the employee will always get something with mediation. The company will end up providing whatever that "something" may be. If you are truly a company who understands and adheres to the laws, you are still going to pay regardless of how right you may be. The winners in this scenario are companies who have incompetent human resource staff or fail to follow the advice provided by the HR professionals and are trying to minimize their penalties.

If a company takes the approach that its HR systems, processes and procedures are aligned with the law, it can proceed to trial with a clear expectation that it will prevail. If such a strategy is followed, both ex-employees and the attorneys who represent them (nearly always on contingency fees) will soon begin to understand that such companies are not an easy target. While the employees may only have their one-time case to bring, the attorneys interact with companies in a more or less regular basis.

Since the legal community handles many interactions, it does indeed understand when a particular company interprets laws accurately. When a company adheres strictly to due process in all cases of employee separation, attorneys will be reluctant to take cases from that company's employees. If company representatives exhibit a consistent pattern of professional and competent behavior, it will be recognized over time. The legal community will understand that there will be no mediation and that the case will not roll over for handling to a third party EPLI attorney. Individual attorneys will understand that they will be investing a long time on a case that has a low margin for return and they will hesitate or refuse to take the case on a contingency basis. If that is the reception that the potentially litigating employees uniformly find when they search for an attorney to take their case, they will find that their only representation will come when they pay a retainer for legal services. This will indeed separate the whimsical cases from the ones perceived to be genuine.

Summary

In summary, the tactical initiative will provide you with some immediate relief and the strategic approach will provide you with some well-deserved cost avoidance, although you must establish a track record before it begins to work. The key, of course, is to adhere to the law, be consistent in application, treat employees with respect in all dealings and employ human resource professionals who know their business and who can provide expert advice, design top grade HR systems and apply them uniformly.

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