

## **It's Not JUST the Economy!**

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"Bad Economy? Good Excuse" was the title of a story in the New York Times Sunday Styles section on February 15, 2009. It highlighted examples of people using the economy to their advantage:

- to get out of a boyfriend's family trip to Disneyworld or a destination wedding of an obnoxious cousin;
- Holding a garage sale to finally get rid of unwanted gifts from friends and family;
- Not buying a boring ticket for a charity dinner.

Reporter Alex Williams characterized the economy excuse as the "silver lining in the recession cloud." Etiquette expert Letitia Baldrige referred to white lies like those in the story as the "cornerstone of good manners." That said, those on the receiving end are sometimes skeptical.

It reminded me of calls I get every week from clients that go something like this:

"With the economy what it is, we're having to look at cutting back on payroll and we're considering eliminating a staff position in the marketing department and just want to make sure there aren't any problems."

When I start asking questions, it's clear that this employer wants to do exactly what those folks featured in the times are doing: use the economy as an excuse. It's a white lie that the position is being eliminated! When communicating adverse employment decisions these kinds of white lies may seem like a good way to allow the employee to save face; they're certainly easier to pass along. But, they can also get an employer into a lot of trouble.

What kinds of information am I learning when I ask those questions?

- That this isn't so much elimination of a position as it is getting rid of a problem employee when the performance issues hadn't been addressed - or

- That this individual is a minority, the oldest in the department, recently took FMLA leave and now is requesting an accommodation for what might not have been a disability before the fall of 2008 (ADA Amendments Act) but probably is now - or
- There's a plan in 1, 2, 6 months to promote a recently hired temp into that job - or
- The plan to cover the work this person did will actually cost more money than just keeping her on - or
- There are 5 people who have the same position and reasons for selecting this one individual over the other 4 just don't make sense, especially if one of them was just hired 3 weeks ago.

You know where this is going. When you tell this employee it's a position elimination, he/she will have all kinds of evidence that the reason given is pretextual, opening the door for an inference that it was really motivated by protected status.

I'm talking about a decision affecting one employee here, but the same principles apply to company-wide layoffs, elimination of departments or services, or outsourcing functions that affect a group of employees. In each case, the employer should be able to answer these five questions:

1. Is there really an economic need to make this decision? While company has discretion to exercise its business judgment to cut costs, the more likely the layoff decision is to generate employee claims, the more important it is to have some objective basis you can prove.
2. Will the job eliminations actually result in cost savings? Consider severance pay, if any, outsourcing, overtime to remaining employees, loss in revenue, secret plans to hire replacements.
3. Why this position or positions? You should articulate an objective way of selecting positions affected. Seniority is the most objective and easiest to defend, but may not leave the company with the skills and talent necessary to keep the business running.

If the selection criteria is performance, then make sure the documentation fits. One company gave each department manager the task of cutting 10% of his/her payroll based on performance. The eight affected individuals from one department sued for age and disability discrimination. Their lawyer obtained performance reviews for all the employees in that department -

and made a very clever graph of the overall performance ranking numbers over a three year period. The individuals laid off may have been the poorest performers, but the evaluations did not show that. The case settled.

4. Why these people? Take a look at the people affected to make sure that this neutral objective reason isn't having the effect of targeting people in protected categories. For a large group, conduct a statistical assessment of affected individuals under the guidance of legal counsel to maintain attorney client privilege. If only a few employees are affected, look at protected conduct or status - age, race, sex, disability, religion, harassment complaints, worker's comp claims, FMLA leave, etc. - to make certain there's no relationship or pattern.

5. What do you tell those subject to lay-off about the reason? Particularly when a position elimination or layoff affects only a few workers, ask yourself if something amazing happened and sales picked up or there was an infusion of cash, would we bring this person back? If not, why? If it is performance, then maybe that needs to be addressed. This is particularly true if this is someone who might be bringing a claim and their performance will come up in your defense or if they might be likely to reapply in the future.

The bottom line is: resist the temptation to make up that list of employees who've been a thorn in your side and tell them "sorry, it's the economy" when that isn't the whole or real story.