



Layoffs yield more work for employment lawyers

By Maria Kantzavelos

Well before the National Bureau of Economic Research made it official late last year, concluding that the U.S. has been in a recession since December 2007, labor and employment lawyer David L. Lee was making his own declarations about the state of the economy.

"I was going around, in late 2007, saying the economy is tanked and we just don't know it yet," he said.

For Lee — who represents employees in claims of discrimination, harassment, retaliation, and wrongful discharge, and in disputes over pay and employee benefits — the early indicator of a nation in an economic downturn came in the form of an upswing in the number of potential clients turning up at his Chicago office.

"The people who call my office are like the canaries in the coal mine — bad stuff happens to them first," Lee said. "In about late 2007 ... the intakes I had just totally and dramatically shifted. All of a sudden people who, as far as I could tell, were really good employees were being fired for weird, suspicious reasons much, much more than had been true for many years."

While plenty of practice areas are taking a hit from the worst economic downturn in decades, business is up for many lawyers whose practices focus on labor and employment law — an area where the legal work on both sides

is shedding light on the depths of the current recession.

"Right now it is, absolutely, a volatile area," said **Joseph A. Gagliardo**, managing partner of the Chicago management-side labor and employment firm of **Laner Muchin Dombrow Becker Levin and Tominberg**. "When times are bad, and there are reductions in force and increased claims, we get busier."

Weighing in on layoffs

On the employer side, much of the rise in business for **Gagliardo** and other lawyers who represent management has been coming from cash-strapped corporate clients seeking advice on how to reduce their workforces without leaving the door open to litigation.

"The ball really started rolling toward the middle of the last quarter of last year, and it has steadily increased," **Gagliardo** said. "We get calls just about every day [from clients] seeking advice about layoffs."

Most of those calls are coming at the front end of company discussions about the layoff process, he added.

"It's really a far more complicated process," **Gagliardo** said. "There has to be a review of policies, operational needs and goals, and their criteria for layoffs. Then, the impact of those criteria and then, deciding whether those criteria make sense."

The counseling work of management-side lawyers typically starts with an early analysis of the reasons for the anticipated layoffs.

"Is it because they're actually cash-strapped and need to reduce to save funds? Is it that they need to streamline their operations in order to not only save money, but to operate?" **Gagliardo** said. "One of the first questions is: Why do you really need to lay people off?"

As part of the process, lawyers may advise companies on alternatives to staff reductions as a way to cut expenses.

"First, you talk to the employer and listen to what the economic conditions are. Maybe you can make alternative suggestions like, everybody cutting back on their hours. Maybe you can make a suggestion to change some employee benefits offered, but everybody keeps their jobs," said **Thomas Y. Mandler**, a partner at **Hinshaw & Culbertson** who has focused his practice on advising management on labor and employment law matters for more than 35 years.

When an employer is set on proceeding with layoffs or terminations, **Gagliardo** said, management-side lawyers weigh in with an analysis of the makeup of a company's existing workforce compared to how the workforce would look after layoffs — keeping an eye out for the possibility of a "disparate impact" of the layoffs on a protected group, such as people of a common age, gender, or race.

"Where companies have gotten into trouble is where the selection criteria is subjective and vague," **Gagliardo said.**

He pointed out the many legal requirements businesses need to wade through as part of the layoff process.

The types of lawsuits that can arise in connection with reductions in force are typically based on claims that employees were selected because of their race, color, religion, sex, or national origin, in violation of Title VII of the Civil Rights Act; disability, in violation of the Americans with Disabilities Act; or age, in violation of the Age Discrimination in Employment Act.

Litigation can also surface when an employer relies on absenteeism that was authorized by the Family Medical Leave Act; fails to promptly pay final compensation in accordance with wage and hour laws; or fails to comply with the requirements of the Worker Adjustment and Retraining Notification (WARN) Act.

Under the WARN Act, employers are required to provide written notice at least 60 days in advance of covered plant closings and mass layoffs. The idea is to allow workers time to seek alternative jobs or to enter skills training programs.

'Unprecedented economic situation'

For some lawyers, the greater volume of counseling work related to layoffs nowadays is coupled with a demand for a quick turnaround.

"It can be as little as 24 hours — maybe even less. It'll come out of a major business meeting, that we need to act quickly. They know they need legal advice before they just start cutting people," said David J. Rowland, managing partner of the Chicago office of Seyfarth Shaw, where his management-side labor and employment practice focuses on litigation and workplace counseling. "We literally have task forces of people who are ready to go, and are expert in this area, so we can get on top of it.

"In this economy, the difference has been, a lot of them are coming to us late only because the employers are having to make difficult and quick decisions about staffing. They're saying: 'Look --- I've got to cut staff or I'm not going to be in business tomorrow.'"

Although he could not provide figures, Rowland speculated that the firm's labor and employment practice is setting workload records in the area of counseling on reductions in force and workplace restructuring, as the economic meltdown drives the nation's unemployment rate to escalating levels.

"It's an unprecedented economic situation, so we have more clients than we normally would who are seeking advice," Rowland said.

In February, the nationwide unemployment rate rose to 8.1 percent, the worst rate in a quarter century. In March, the nation's jobless rate increased to 8.5 percent.

In Illinois, the unemployment rate by March had climbed from 8.6 percent to 9.1 percent, the highest level since November 1985.

While the economic crisis has impacted the legal profession, with law firms resorting to layoffs of their own, the Chicago office of Littler Mendelson, a management-side firm, hired three lawyers in a matter of three weeks in late February and into March, said Fred Schwartz, the office's managing shareholder.

"Nobody wants to see our clients suffer, and we certainly will welcome the day when our clients are feeling better economically,"

Schwartz said. "But, in the meantime, we're busy handling pretty much soup-to-nuts employment issues: layoffs, furloughs, reductions in force, reduced work hours, reduced pay, reduced benefits — all the bad stuff."

Hiring has also been on the rise at The Law offices of David L. Lee, where the volume of calls from terminated employees or those in fear of losing their jobs has nearly doubled since fall 2007, Lee said.

Rising work-related claims

Management-side lawyers are gearing up for a potential shift in the work that has been taking up much of their time in the last several months — from advising clients on layoffs to managing litigation.

They pointed out the likelihood of a continued rise in workplace discrimination claims filed with the Equal Employment Opportunity Commission, and a high potential for more litigation on the horizon.

According to a report released recently by the EEOC, workplace discrimination charge filings with the federal agency soared to an unprecedented level of 95,402 during its 2008 fiscal year, which ended September 30. The number of charges filed, which includes multiple claims asserted, reflects a 15 percent increase over 2007.

"Those charges — some, not all of them — turn into federal lawsuits. That's the breeding ground for increased litigation," Littler's Schwartz said.

All major categories of charge filings in the private sector increased in 2008, according to EEOC data, with charges based on age and retaliation seeing the largest annual increases, and allegations based on race, sex, and retaliation continuing as the most frequently filed charges.

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