Who stays and who goes?

How business owners decide who to lay off **Interviewed by Dale W. Hlaves**

Economic times are tough and production is down. You come to the grim realization that layoffs will have to be made. By how do you decide who to let go? How important is seniority, and should it overshadow the performances of the workers?

"There are no laws that tell employers how to make those decisions or whom to select," says Kevin T. McLaughlin, a practice group manager for Greensfelder, Hemker & Gale, P.C. "And there are no limits to the number of people you can lay off."

Smart Business spoke to McLaughlin about the difficult decisions involved in employee layoffs.

Kevin T. McLaughlin
Practice group manager
Greensfelder, Hemker & Gale, P.C.

Outside of a union, are there any laws as to how to conduct an employee layoff?

At a certain threshold, there are laws that require specific notice and there are penalties if you fail to provide that notice. The most common law is the federal law known as the Workers Adjustment and Relocation Notification law (WARN), which applies to companies that have more than 100 employees and says that employers must provide notice 60 days prior to the layoff. The law applies in a number of situations.

First, if the company is closing a facility with at least 50 workers or if they are laying off 50 or more employees at a single site and those 50 workers comprise at least one-third of the work force at that particular site. Second, if there is a layoff of 500 people or more, and third, if there is a reduction of hours of at least 50 percent for 50 or more workers at a single site for six consecutive months.

What about collective bargaining agreements (CBAs) with police and firefighter unions?

The only way an employee can legally claim he or she can't be laid off is if they have a contract that legally protects their job. Individuals, particularly CEOs, have those types of contracts. Union contracts almost universally have some type of layoff clause that doesn't necessarily restrict the employer's right to lay an employee off but rather tells the employer the proper way to do it.

Layoffs are always subject to the question of, will the layoff lead to a claim of discrimination? You really see this most often in the private sector, and the most common type of discrimination is age. If you have to lay people off, that decision is usually economically driven and most often that means that the people making the most money are the ones who have been there the longest and typically are your older employees.

One way to protect against discrimination is to have separation or severance agreements with your employees. Many times, when there are massive white-collar layoffs, you will see an offer of severance, such as early retirement, as part of the package.

Are white-collar workers feeling more of the pinch these days?

Certainly, there are more white-collar workers being laid off and that's part of the reason for the response to the mounting pressure to cut costs across the board. And typically your white-collar workers are going to be some of your highest paid employees.

If you're dealing with a field where technology is an issue, many times a more recently trained worker can work cheaper than someone who has been around for a long time. Many of my clients 'run lean,' which means they are consolidating job functions into one position and expecting more out of the workers. These people are affected by the layoffs as well as their job has just become a lot tougher as they are required to perform the functions of two or more people.

How does an employer decide who stays and who goes?

There's a distinct difference between the union setting and the white-collar setting. There is almost always a CBA in the union setting that will tell the employer exactly how the layoff has to happen. And the most common provision in a union contract is seniority. So the newest employee has to be the first to go and the most experienced employee is the first to be recalled. I try and negotiate performance into CBAs as I've had clients complain that they have been forced to get rid of younger employees and lose some of their best workers in the process.

Outside the union contract, the employer tries to balance the need to cut costs with what skills they need to keep in the workplace. At what point can they hit that cost where the layoff is effective without impacting the efficiency so much that they can't get the work done that they need to get done? <<

KEVIN T. MCLAUGHLIN is a practice group manager for Greensfelder, Hemker & Gale, P.C. Reach him at (314) 345-4758 or ktm@greensfelder.com.