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A Fresh Look At Pro Bono

By Libby Saypol

Will pro bono turn out to be one of the most active practice areas in law firms in 2009?

In a perfect world, attorneys and firms would choose to make commitments to pro bono matters because it's the right thing to do, and it enables those who have to give to those who don't. Ours is not a perfect world and 2009 is certainly not a perfect year. But if we are looking for silver linings, pro bono seems ready made.

Professional Development

Law firms learned a long time ago that new lawyers need training and mentoring. Formal programs exist now in most large firms and include many programs devoted to hands-on skill development, including mock deposition and trial programs. However, before firms became employers of 500-1000 lawyers, new lawyers learned as apprentices by watching, listening and learning from their partner/mentors. Many professional development programs seek to replicate that experience. Pro bono practice can actually be that experience! Associates work under the supervision of partners interviewing clients, preparing cases and developing skills that commercial cases (and clients) don't allow them to do in their junior years.

Community service also can be a key component in helping us find balance in our professional life. For lawyers that often means donating legal skills to help others. No other law

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Downsizing the Right Way

Part One of a Two-Part Article

By Henry M. Perlowski and Bruce Jackson

This first part in a two-part series deals with the primary risks of a "downsizing" event. In today's economy, law firms and their clients are implementing reductions in force ("RIFs") in order to cut costs, meet profitability targets and/or correct imbalances created by growth in recent years and the recent economic downturn. In some cases, firms and their clients are simply giving up and are closing units or entire businesses.

Every downsizing event presents specific legal risks and traps for the unwary, as a number of law firms already are facing legal action arising out of the recent flood of layoffs. Therefore, before beginning the downsizing process, firm management should develop a plan that is designed to minimize litigation risk. Implementing a reasoned plan provides the needed transition towards an improved bottom line instead of costly problems.

The Primary Legal Risks Associated with Downsizing Events

The Worker Adjustment And Retraining Notification Act (WARN)

The Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 *et seq*. ("WARN") is the primary federal statute governing "plant closings" and "mass layoffs." Local jurisdictions may have laws that are more expansive than WARN. Thus, the laws of all potentially impacted local jurisdictions should be considered before any meaningful layoff event.

The primary purpose of WARN is to provide workers (and their communities) with advance notice of layoffs so that they may begin to search for other employment or obtain training for another occupation. Accordingly, WARN places specific timing and notice content requirements on employers that are engaging in any defined "plant closing" or "mass layoff." If these procedural requirements are not met, WARN provides for civil penalties, as well as private rights of action for all aggrieved employees.

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Downsizing

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Are You Subject to WARN?

WARN applies to all profit and non-profit enterprises, including law firms, that employ: 1) 100 or more employees (not including part-time employees); or 2) 100 or more employees who, in total, work at least 4,000 hours per week, excluding overtime. The "trigger" number of employees generally is measured on the date that notice must be given to all affected employees. If this number is "clearly unrepresentative," however, then a more representative number, such as an average over a recent period of time, may be used. WARN thus may not be avoided by unusual timing events, such as pre-event layoffs designed to avoid the statute.

Independent contractors and subsidiary employees also may be counted toward the WARN number depending on the degree of independence of the individual from the contracting or parent company. Following traditional methods of proof, the degree of independence relevant under WARN is determined by factors including: 1) common ownership; 2) common directors or officers; 3) *de facto* exercise of control; 4) unity of employment operations; and 5) the general interdependency of operations. Therefore, if the number count is close, employers should not assume that WARN does not apply without first engaging in a detailed review of all non-traditional employee arrangements, like the engagement of contract attorneys.

Is The Event Subject To WARN?

Assuming 100 or more employees, WARN only applies if a statutory "plant closing" or "mass layoff" occurs. A "plant closing" is defined as a permanent or temporary shutdown of all or part of a single site of employment that results in an employment loss at such site for 50 or more employees during any 30-day period. An actual shutdown is not required, as the regulations interpreting WARN state that an "effective cessation" of production or work at a site may constitute a "plant closing." Part-time employees are not included in this calculation.

A "mass layoff" is something less than a "plant closing" and is defined as any RIF during any 30-day period that results in the termination of: 1) at least one-third of all employees at the site, assuming this number equals 50 employees or more; or 2) at least 500 employees regardless of percentage. Again, part-time employees are excluded from this calculation. The "mass layoff" component of WARN is the primary risk facing law firms given the large scale terminations of non-equity partners, associates and administrative staff — the "employees" of the firm.

It is critical to note that the 30-day period for "plant closings" and "mass layoffs" cannot be avoided through the use of creative timing. WARN specifically provides that if two or more events within any 90-day period collectively amount to a "plant closing" or "mass layoff," then WARN is implicated unless the employer can show that the actions were the product of separate causes. Generally speaking, this is a difficult burden for employers to, as RIFs normally are the product of general economic conditions and not distinct events.

WARN Notice Content Requirements

WARN provides that notice of any plant closing or mass layoff must be given at least 60 days before the downsizing event to each of the following persons and entities: 1) to the authorized union representative(s), if any, for the affected employees (defined as all employees to be terminated, laid off for six months or more, or who experience greater than a 50% reduction in hours for six consecutive months); 2) if there is no authorized union representative,

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Parting Friends?

When Partners Must Go

By Jeffrey Lowe

Perhaps the most troubling decision for any partnership's management committee is the determination to force partners from the partnership. Last year, in "The Broken Covenant: A Retrospective — Partners for Life" (*Law Firm Partnership & Benefits Report*, April 2008), I examined the reasons for the breakdown of the "covenant" that formerly governed a law firm's relationship among its partners. The thought of terminating partners because business was slow was once unthinkable. Today, the legal world is a much scarier place than it was only a year ago, and the last remnants of the covenant are under further siege. Layoffs continue at a record pace, and law firms and partners struggle to figure out what's next. If one still believes that the practice of law is a profession, rather than a mere vocation, do law firms owe their departing colleagues something other than a pat on the back and three months of severance? This article examines what law firms can do to assist their partners as they show them the door.

Designation for Departure

There's an old adage that says the best way to find a job is to have a job, and that certainly holds true in the legal profession. Allowing a partner designated for layoff to remain formally associated with the firm for some specified (or unspecified) period of time significantly enhances that partner's value in the lateral partner marketplace.

There are two ways the firm can handle this:

Open-ended Termination

By far the most lenient way to handle a termination is to have a member of the management committee meet with the partner and deliver the message that it is time to move on, but with no definite time set for the partner's departure. Depending upon the firm's culture, this message may or may not be combined with a reduction in the departing partner's compensation and/or the provision of outplacement counseling for the partner (discussed below). Open-ended termination is particularly suitable for partners who have been with the firm for a long time and who are well regarded by their peers. Firm management should also be sensitive to the partner's privacy, and share this message with as few people as possible.

The principal danger of open-ended termination is that the affected partner fails to move quickly enough to secure new employment, and lingers on longer than management desires. In some cases, affected partners may also become vocal critics of management and the firm in general, which will ultimately have an adverse effect on firm morale. Consequently, management should make clear at the outset that the firm's willingness to support the partner during this time of transition is subject to the partner remaining a "good citizen" and taking demonstrable steps to secure new employment.

Closed-end Termination

While open-ended termination may have formerly been the preferred method of "managing out" partners who are no longer productive, in today's economic climate, the closed-end termination is becoming far more common. Unlike open-ended termination, the closed-end termination message is delivered by management with a firm date set for the partner's departure (which may or may not be subject to limited negotiation), typically anywhere from three months to one year. We frequently see this message being delivered along with an immediate reduction in the affected partner's compensation and the immediate provision of outplacement services for the affected partner. The closed-end termination is, of course, far more stressful for the affected partner and tends to focus more quickly on the need to secure new employment.

The mere act of designating a partner for termination raises several issues for both the firm and the partner. First, under either scenario, the affected partner retains both actual and apparent authority to bind the law firm and the law firm retains exposure for such authority. Consequently, the law firm must feel comfortable allowing the departing partner to hold him or herself out to the world as a member of the firm. Second, the designation raises the question of whether the departing partner is required to disclose his or her status to potential employers.

With regard to the open-ended scenario, employment lawyers surveyed for this article felt that the message to move on could be delivered in such a way that the affected partner could honestly say he or she was not being terminated. While this is significantly more preferable for the partner, it can put the law firm at risk if a potential employer seeks a reference check from the terminating firm. Accordingly, under either the open-ended scenario or the closed-end scenario, firm management and the departing partner should clearly define the type of reference to be given at the outset and agree upon a written statement drafted by the departing partner, both to minimize any chances for future misunderstandings and to appropriately limit the firm's risk for providing a negligent reference.

With regard to the closed-end scenario, although there may be no legal requirement to disclose one's impending termination, the departing partner should strongly consider being candid about his or her status. While many law firms are quite large, the legal community is, at the end of the day, quite small, even in cities like New York and Washington. Failing to disclose one's status can seriously undermine one's credibility with a potential employer, especially if the new employer learns of the departing partner's status through back channels, or the departing partners reaches his or her termination date before receiving an offer to join the new employer.

From the firm's perspective, it seems clear that merely designating a partner for eventual layoff requires no special disclosure obligation on the firm's part, especially in those cases where the partner continues to receive compensation and perform legal work. But what about those

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Parting Friends

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situations where a firm simply agrees to let the partner maintain an office or a Web site presence, but the partner is receiving reduced or no compensation and is no longer performing legal work? Firms would be wise to consult with their own labor and employment attorneys to understand the risks involved, and should be especially careful with references. Regardless of how partners and law firms choose to handle departures, it is clear that delaying the severance of the affiliation for as long as possible inures to the benefit of the departing partner.

How Firms Can Help Departing Partners Land Well

Once it becomes clear that departure is inevitable, how can a firm help former partners land on their feet? Making an effort to do so is clearly in the firm's interest, particularly given how small legal circles prove to be.

Outplacement and Career Counseling

One possibility is covering the cost of effective outplacement counseling. For many departing partners, termination of employment is devastating on a number of levels. Aside from the loss of income, the sudden loss of stature can be even more damaging. In our experience, many lawyers are ill-equipped to handle the sudden loss of a job. Kate Neville, a Harvard Law School grad and founder of Neville Career Consulting in Washington, DC, notes why this is often the case:

"A substantial percentage of lawyers went straight from college to law school to a firm through an on-campus recruiting program. Since they have never had to look for a job before, these partners often aren't familiar with how to conduct a job search or make a professional transition. Second, even attorneys who have been unhappy at a firm and have considered leaving for years absorb an ego hit when asked to leave and have a very difficult time dealing with it emotionally — it's always better to be the person making the decision rather than having the decision made for you. Third, while lawyers often know what they do NOT want to do, many still have not identified what type of work they actively want to pursue. Finally, many accomplished lawyers who advocate persuasively on behalf of their clients find it much more difficult to make a case for themselves."

By providing the departing partner with some form of career consultation, coaching or outplacement services, the departing partner is better equipped to identify next steps and stay on a timetable for departure, which ultimately serves both the firm's and the partner's best interests. According to Neville, the initial challenge for many attorneys who are asked to leave is to determine what kinds of positions outside of a firm involve work where they are marketable, that they enjoy, or at least meet their priorities at a given time.

"In order to avoid being pigeonholed by their prior work experience, these lawyers need to be able to: 1) articulate what they are looking for and why; and 2) translate what they bring to the table so their skills are clearly understood by other professionals and prospective employers. Lawyers who have been asked to leave are not necessarily in the mindset to accomplish these steps on their own. Working with a professional familiar with these transitions can make a huge difference, both in the progress an attorney makes as well as his attitude towards his previous employer."

These services can be structured a number of ways. For example, firms may, as part of their severance packages, offer a departing partner a credit for a set number of sessions with a counselor of the individual's choice. Alternatively, firms may establish a relationship with one provider based on proposals for pre-arranged services, and allow the departing partner to work with such counselors for so long as may be necessary. Finally, some firms who hired an in-house career counselor in a stronger market now rely on that person to increasingly provide more of an outplacement service as the economy declines.

Alumni Networks

Law firms with well-developed alumni networks can also prove a fruitful source of opportunities for departing partners. Former Big Four accounting firm Arthur Andersen had (and still has) a legendary alumni network. Over the last several years, we have seen firms take a more proactive role in formally establishing a firm alumni organization, holding periodic events and dedicating a specific section of the firm's website to their former attorneys, including job postings, listservs and networking information. The cost of these programs is fairly small, and the potential rewards are great.

In-house Placement

Perhaps the best way a firm can help a departing partner is to recommend him or her to one of the firm's existing clients for an in-house counsel position. Having a client bring a partner on board can be win-win for the firm and the partner. Of course, a firm should be willing to reach out to its clients only in those situations where the partner is being asked to leave solely for economic reasons and not performance reasons, and where the firm is confident that the departing partner will continue to use the firm as outside counsel. Both the partner and the firm should also remember that making such an overture to a client signals that the partner in question is not long for the firm, and should ensure that this signal won't otherwise adversely affect the client relationship.

Partners should also remember that today's market for in-house jobs is extremely competitive. The number of applicants for each in-house position often runs into the hundreds, and employers have the luxury of being able to wait for the perfect candidate. Having an inside track with an existing client can cut those odds significantly.

Conclusion

The departure of a partner can be a traumatic event for both the firm and the partner. By assisting the departing partner in his or her transition, it is possible that the partner and firm can remain good friends (well, maybe just friends).

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Some Highlights of The Recently Enacted Stimulus Bill

By Richard H. Stieglitz and Tamir Dardashtian

On Feb. 17, 2009, the newly elected President Obama signed into law the colossal $800 billion American Recovery and Reinvestment Act of 2009 (the "Act"). This 1,000-plus-page piece of legislation contains many important tax-breaks and enhancements that can benefit law firms and their clients, as well as individual attorneys and staff members and their families. This article addresses several of these key tax provisions included in the new act that may be advantageous.

For Businesses

Depreciation Changes

Under the 2008 Economic Stimulus Act, the Section 179 expense deduction limit increased to $250,000 and the investment amount at which the Section 179 deduction begins to phase out increased to $800,000 in order to encourage law firms to invest in certain business assets and capital improvements. The new act extends the increased Section 179 limit through 2009. The Section 179 expensing election allows law firms to take a current deduction for newly acquired assets that otherwise would have to be depreciated over a number of years. This election can be claimed only to offset the business net income, not to reduce net income below zero.

The new act also extends the first year 50% bonus depreciation to certain property acquired and placed in service in 2009. This is in addition to any such property that qualifies for Section 179 expensing. The following types of property are qualified for this special bonus depreciation:

- Tangible property with a recovery period of 20 years or less;
- Computer software purchased by the business;
- Water utility property; and
- Qualified leasehold improvement property.

Because both the Section 179 limit increases and the 50% depreciation allowance can provide larger 2009 deductions, law firms may want to consider making major asset purchases this year if their business would qualify for these breaks.

In a February, 2009 article in this newsletter ("The Housing Assistance Tax Act and the Emergency Economic Recovery Act"), we discussed how attorneys' corporate clients were also allowed a new option to swap otherwise allowable bonus depreciation for immediately refundable alternative minimum tax ("AMT") and research and development ("R&D) credits under the Housing Assistance Act of 2008. According to the new act, that option has been extended through 2009. Corporations that elect to accelerate AMT or R&D credits in lieu of bonus depreciation will be able to increase the limit (subject to the cap discussed below) on the credits they can claim by an amount equal to 20% of the bonus depreciation they forgo. (Credits can be more valuable than depreciation deductions because they reduce your tax bill dollar for dollar, rather than just reducing the amount of income that is taxed.)

The allowable credit is capped at the lesser of $30 million or 6% of an amount that's determined using a complex formula based on certain prior R&D credit carry forward amounts and certain minimum tax credits.

Deferral of Certain Income from Discharge of Indebtedness

Under the new act, certain cancellation of debt ("COD") income realized on account of a taxpayer's or a related person's reacquisition of a debt instrument during 2009 or 2010 would be, at the taxpayer's election, deferred until 2014 and then included in income ratably over five years (2014 to 2018). This relief provision applies to debt repurchases for cash, debt-for-debt exchanges (including modifications), debt-for-equity exchanges, contributions to capital and complete forgiveness by the holder of the instrument. COD income is the excess of the old debt's adjusted issue price over the repurchase price.

For example, assuming on Jan. 1, 2009, a business client recognized $100,000 of COD income and qualified for deferral, then it could defer reporting the income until its 2014 tax return. If it were in the 35% tax bracket, this would provide the business with $35,000 in tax savings for 2009. The client would then report $20,000 of income per year for 2014 through 2018. Assuming it remains in the 35% tax bracket, the total tax liability would remain the same, but in essence the client would be getting an interest-free loan on the tax liability.

S Corporation Built-in Gains Relief

When a C corporation converts to an S corporation, it generally must hold on to its assets for 10 years to avoid tax on any built-in gains that existed at the time of the conversion. The S corporation built-in gains tax applies a 35% tax when an S corporation takes built-in gains into income. Built-in gains are items for which a former C corporation had accrued economic benefit on the day its S corporation took effect, but which had not been recognized for tax purposes. For example, if the corporation had a piece of real estate worth $120,000 on the day it became an S corporation, and the property had a basis of $90,000, there would be a built-in gain of $30,000.

Under the new act, for tax years beginning in 2009 and 2010, no tax is imposed on the net unrecognized built-in gain of an S corporation if the seventh tax year in the recognition period preceded the 2009 and 2010 tax years. This will benefit law firms and their corporate clients that were C corporations that converted to an S corporation in 2001 and 2002 if they sell any assets that would have been subject to this tax.

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Net Operating Loss ('NOL') Carryback

Under the new act, businesses with gross receipts of $15 million or less will have the option to carry back NOLs either three, four or five years (instead of the two-year carryback provided under old law). The five-year carry back is effective for NOLs generated in tax years beginning or ending in 2008.

Any loss not absorbed in the carryback period can be carried forward up to 20 years. Businesses also have the option to waive the carryback period and carry the entire loss forward. This may be beneficial if your marginal tax rate in the carry back years is unusually low or if the alternative minimum tax (AMT) in prior years makes the carry back less beneficial.

COBRA Benefits

The new act contains a significant COBRA revision that will apply to every law firm that is subject to COBRA. Under the new act, a former employee would pay a portion of the COBRA premium (35%) and the former law-firm employer would pay the remaining portion (65%) of the premium for nine months. The law firm would be able to credit its share of the subsidy against wage withholdings and payroll taxes (subject to income thresholds). It is therefore recommended that law firms examine their cash flow needs and contact their COBRA administrators and payroll vendors to discuss the steps required.

Incentives to Hire Unemployed Veterans and Disconnected Youth

Law firms are allowed to claim a work opportunity tax credit equal to 40% of the first $6,000 of wages paid to employees of one of nine targeted groups. The new act expands the work opportunity tax credit to include two new targeted groups: 1) unemployed veterans; and 2) disconnected youth. Individuals qualify as unemployed veterans if they were discharged or released from active duty from the Armed Forces during 2008, 2009 or 2010 and received unemployment compensation for more than four weeks during the year before being hired. Individuals qualify as disconnected youths if they are between the ages of 16 and 25 and have not been regularly employed or attended school in the past six months.

For Individuals

Automobile Purchase Relief

The new act provides an above-the-line deduction to individuals purchasing a new car, light truck, recreational vehicle or motorcycle from Feb. 17, 2009 through Dec. 31, 2009 for state sales or excise tax paid on the purchase. The deduction applies to the tax attributable to the first $49,500 of purchase price and begins to phase out at AGI in excess of $125,000 ($250,000 for married couples filing jointly). This means that individual attorneys and staff members can benefit from the deduction even if they don't itemize. While both foreign and domestic vehicles qualify, sales tax paid on a lease do not qualify.

Section 529 Plans

Under the old law, the definition of qualified education expenses did not include laptops and computers and therefore could not be purchased through Section 529 plan accounts tax free. The new act provides that expenses paid or incurred for the purchase of computer technology and equipment or Internet access qualify as qualified education expenses under Section 529 plans for tax years beginning in 2009 and 2010. Attorneys can use these tax-advantaged savings plans to fund college expenses for their family. In addition, other family members are allowed to use the technology as long as it is being used by the college student.

First-time Homebuyer Credit

In the February, 2009 article mentioned above, we discussed how attorneys or their staffs could benefit from this essentially interest-free loan in the form of a refundable credit. Under the new act, the first-time homebuyer credit is extended to apply to homes purchased after Dec. 31, 2008 and before Dec. 1, 2009. The new act removes the repayment requirement for homes purchased during 2009 unless the home is resold within 36 months of purchase. It also increases the amount of the credit from the current maximum of $7,500 to up to $8,000.

Transportation Benefits

The new act increases the maximum monthly exclusion for employer-provided transit and vanpool benefits ($120 for 2008) to the same level as the exclusion for employer-provided parking ($230 for 2009) for 2009 and 2010. These benefits are a tax free fringe if provided by a law firm saving the law firm payroll taxes and the law firm's employee's payroll and income taxes.

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Pro Bono

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practice allows attorneys to choose their clients, choose their causes or choose their time commitments. Don't have much time to devote to a large matter? Volunteer to work at a monthly intake session for a legal service provider. Want to use your writing skills? Sign up to prepare an amicus brief. Want to help a person change his life? There are hundreds of opportunities.

Getting involved in pro bono practice also allows your attorneys to be part of a larger community and can help them learn valuable networking skills. Networking is not a dirty word. We usually talk about networking as a means to developing business, but attorneys can network on behalf of the public interest organizations and legal service groups with whom they are working. In addition to the funding these groups need to support their staffs and programs, they also need volunteers to work with them in many other areas. Whether volunteer lawyers choose to work as members of an advisory board or go out and speak to community groups on behalf of the organization, they will be providing a valuable service to the legal service organization, and at the same time meeting other lawyers and business people who can become important colleagues in their professional future.

Internships and Fellowships

For firms with long-established pro bono programs, giving back to the community has involved donating more than time and money. Many of these firms have created internship programs for their attorneys to work

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with public interest groups and legal service providers. Some firms have established permanent positions at select legal service organizations and rotate associates every three months. Other firms have established relationships with public interest groups to host their associates for three to six month assignments where the associates devote themselves full-time to the pro bono work of the organization.

Two such programs stand out as good examples of how these firms have used an internship or fellowship model to enhance the professional development experience of their associates, while donating hundreds of hours of legal work to the sponsoring organizations. Both firms already had well-developed and active pro bono programs. Both firms have full-time pro bono counsel. While one firm's internship program is long established, the other firm's program is in its early years. I recently asked pro bono counsel at these two firms to talk about their internship programs and what they see as the key benefits to the associates and the firms.

Milbank's First-Year Internship

In 2008, 37 incoming first-year associates elected to participate in Milbank's first-year internship program. According to Joseph Genova, Milbank's pro bono partner, the program, now in its 20th year, gives new attorneys the opportunity to work directly and exclusively with a legal service provider for their first three months at the firm. The incoming associates must apply for the program in the spring preceding their start date. Once accepted into the program and placed with a provider, the associates can expect to spend virtually all of their time at the sponsoring organization. They have no responsibility for billable work but are expected to participate in first year orientation and training programs, allowing for a smooth reentry after completing their internship.

The firm has seen the professional development benefits of the program. The associates who participate in this program get more responsibility and autonomy than they normally could expect in typical first year assignments. They deal directly with clients, solve problems and, in appropriate circumstances, under student practice orders, even appear in court examining witnesses and arguing legal points, all before Christmas. For Mr. Genova, the program accelerates the associates' development both in terms of skills and in terms of confidence and presence. As a result, they are often better prepared for advanced assignments when they return to the firm full-time.

WilmerHale's Mid-Level Fellowships

The Pickering Fellowships were established in 2006 to honor one of the firm's founding partners, John H. Pickering. The fellowships are offered to six mid-level associates each year. Two associates are chosen from each of WilmerHale's Boston, New York and Washington, DC, offices and each associate works full-time at the organization for a period of six months. Christopher Herrling, the firm's pro bono counsel, said that the associates serve as good ambassadors for the firm and in turn can share their experiences when they return to the firm.

Linked Programs

A less common model of coordinating professional development and pro bono is to formally link them in one department. This might be difficult for very large firms, but the concept of combining the two programs can be an extremely effective way to assure that attorneys are working on matters that meet their goals for community service, give them the opportunities to work on cases that have special meaning for them, while assisting them in developing skills they need as they progress in their careers.

Conclusion

For eight years I led the professional development and pro bono programs at Howrey & Simon (now Howrey LLP), seeing first-hand how effective this combined model can be. New and valuable mentoring relationships evolved from these pro bono cases. Junior associates took on responsibilities they would not have assumed for several more years. All of them have benefited from their pro bono experiences and their experiences have benefited many, many individuals who sought their help.

Associates gain valuable skills while helping their pro bono clients, and use these skills throughout their careers. Isn't now the right time to take a new look at pro bono?

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then to each affected employee; 3) to the dislocated worker unit for the states involved; and 4) to the chief elected official of the unit of local government within which the plant closing or mass layoff is to occur. If there is any question as to which unit of local government (*e.g.*, a city and/or a county) is applicable, notice should be given to the unit to which the employer paid the highest amount of taxes for the preceding year.

In terms of content, the regulations interpreting WARN require that all notice forms contain a detailed list of specific information from the nature of the action to the name and contact information of a company official to contact for more information.

The Implications of Violating WARN

WARN provides for a private right of action for aggrieved employees and allows the recovery of lost wages and benefits for the period of violation, up to 60 days, and attorneys' fees. If a WARN violation is clear, employees should have little difficulty finding counsel to represent them. While allowing the recovery of money damages, WARN does not authorize an injunction to stop the plant closing or mass layoff. WARN furthermore provides for a civil penalty of up to $500 per day for failure to give 60 days' notice of the plant closing or mass layoff to the local government.

The Age Discrimination in Employment Act

The Age Discrimination in Employment Act ("ADEA") is one of

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the core anti-discrimination statutes and protects all employees who are 40 years of age and older. The term "employee" is defined by reference to common law tests, and may include non-equity partners depending on the firm's operating structure. ADEA applies to all employers with 20 or more employees.

While all anti-discrimination statutes are implicated in layoffs, ADEA is particularly important because downsizing events frequently impact older (and higher-paid) workers. Employers often choose (or at least want to choose) to terminate the older and more highly compensated salesperson, for example, instead of the younger, entry-level salesperson so that the bottom line may improve immediately. Setting aside whether this decision makes business sense in the abstract or in application, history proves that downsizing events lead to a disproportionate amount of ADEA lawsuits.

Within the RIF context, an ADEA plaintiff generally must show that: 1) he is 40 years of age or over; 2) was qualified to hold a position that existed after the RIF; and 3) there is direct or circumstantial evidence that belonging to the protected age class was a causative factor in the adverse employment decision. Unlike the single-claim context where the evidence often is focused on the individual plaintiff, RIF claims place more positions and more decision-makers under scrutiny. Moreover, RIF claims largely depend on a full analysis of the subjective and objective factors globally considered by the employer, particularly if the "after" group is younger than the "before" group by an amount that is statistically significant. Generally speaking, the focus on the "before" and "after" at the company makes for a more dangerous ADEA claim and places a premium on implementing the reasoned, consistent approach to downsizing recommended in this article.

ADEA allows for the recovery of: 1) back pay, including lost wages and benefits; 2) front pay for future income loss or equitable reinstatement; 3) prejudgment interest; and 4) attorneys' fees. With proof of a willful violation, mandatory "double" damages are imposed. Considering the potential amount of these damages and the potential for multi-plaintiff claims, including class action claims depending on the size of the RIF, ADEA claims present a significant "money" risk of engaging in a downsizing event.

The Older Workers' Benefit Protection Act (OWBPA)

In 1990, Congress enacted the Older Workers' Benefits Protection Act ("OWBPA") to supplement ADEA and curb potential abuses by employers seeking to procure releases of claims from their older employees. If releases are sought, the requirements of OWBPA must be considered. Otherwise, employers may be left with useless releases, at least as to ADEA claims.

For a release associated with a "group layoff" to be "knowing and voluntary" under OWBPA, it must precisely address a very specific list of requirements and issues. It must: 1) be readily understandable by the employee; 2) refer specifically to claims under ADEA and not encompass future claims that have not accrued; 3) be given in exchange for consideration that is over and beyond any benefit to which the employee already is entitled (*i.e.*, more than any existing severance or contractual obligation); 4) advise the employee to consult with an attorney; 5) state in writing that the employee has 45 days to consider release; 6) give the employee seven days after signing the release in which to revoke the release and return any consideration provided to the employee (although consideration should not be paid until after the revocation period has expired); and 7) disclose in writing the employees eligible for the group layoff; the criteria and scope of the layoff; and the job titles and ages of all employees considered (selected and not selected) for the layoff.

If any of these OWBPA requirements are deficient, the release will not be effective and the employee may keep the consideration provided for the release and pursue an ADEA claim.

Other Discrimination Claims

While age discrimination claims are the most common products of downsizing events, other discrimination claims also may be pursued by employees affected by the RIF, or, more dangerously, by classes of employees disproportionately affected by the RIF.

Title VII of the Civil Rights Act of 1964, as amended, provides the primary vehicle for discrimination claims and allows the recovery of: 1) back pay, including lost wages and benefits; 2) front pay for future income loss or equitable reinstatement; 3) prejudgment interest; and 4) attorneys' fees. Compensatory and punitive damages also may be recovered for egregious violations of Title VII, subject to statutory caps. Race claims also may be pursued under 42 U.S.C. § 1981, which does not contain any form of damages caps, making these claims even more dangerous than Title VII claims.

Finally, significant layoff events increase the likelihood that the Equal Employment Opportunity Commission ("EEOC") may conduct an investigation into the RIF. Expansive EEOC investigations are particularly dangerous because findings, depending on the circumstances, may be used against the employer in litigation. While not frequent, the EEOC also could initiate litigation against the employer on behalf of aggrieved employees.

Part Two will discuss implementing a methodical plan for a downsizing event, alternatives to downsizing and going forward with compassion.

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