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Employers should weigh options before resorting to staff layoffs

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An economic downturn means people lose jobs. And those jobs don't magically disappear: Businesses have to decide whom to cut and whom to keep, and they expose themselves to lawsuits in the process.

Downsizing requires discrimination of some sort, but to avoid legal liability, businesses have to make sure their process stays within the law, said Doug Large, a partner in Santa Barbara's Archbald & Spray and head of the firm's employment law practice group. "[Private] businesses aren't in business to ensure they have a politically correct diversity," Large said. "You're trying to find the best horse for the race. If those all turn out to be males in the course of building your business, there's nothing necessarily discriminatory about that."

The problem of just how to go about layoffs doesn't look like it's going away soon. Large points out that "since the current recession began, over 30,000 businesses have substantially downsized their workforces. Almost 240,000 workers lost their jobs in January 2009 alone."

But before employers examine how to conduct a layoff, Large said they should take a hard look at whether they can avoid the process altogether. Large suggests employers consider other cost-reduction measures to make it through tough times: a reduced workweek, the furloughs that have shown up in the public sector, eliminating overtime, salary reductions or freezes, and incentives to reduce staff, such as early retirement programs.

Employers should document their evaluation of alternatives, Large said. If a business ends up in court, that documentation can help prove that the job cuts were necessary and the business carried them out fairly.

But if it looks as though job cuts will have to happen, "the focus of the reduction in force must be the elimination of positions, not employees," Large said. The employer should carry out "an objective, systematic

evaluation of the current structure of its workforce and how it can be more effectively and/or economically reorganized."

The best course, Large said, is for a business to map out more than one option — that is, employers should plan more than one new structure that would work or different levels of layoffs depending on need.

The need to enact some sort of restructuring plan should be well-documented ahead of time, Large said. That can save time and money later if a lawsuit comes up. And of course, the business should document its justification for choosing a particular plan and be able to explain it, Large said.

Once managers have settled on a process that's impartial to protected classifications such as gender and race, they should look at what the plan's impact would be — the appearance of illegal discrimination can be enough to get you sued, even if there was no discriminatory intent, Large said. For example, laying off the highest-paid workers could mean laying off disproportionately older workers.

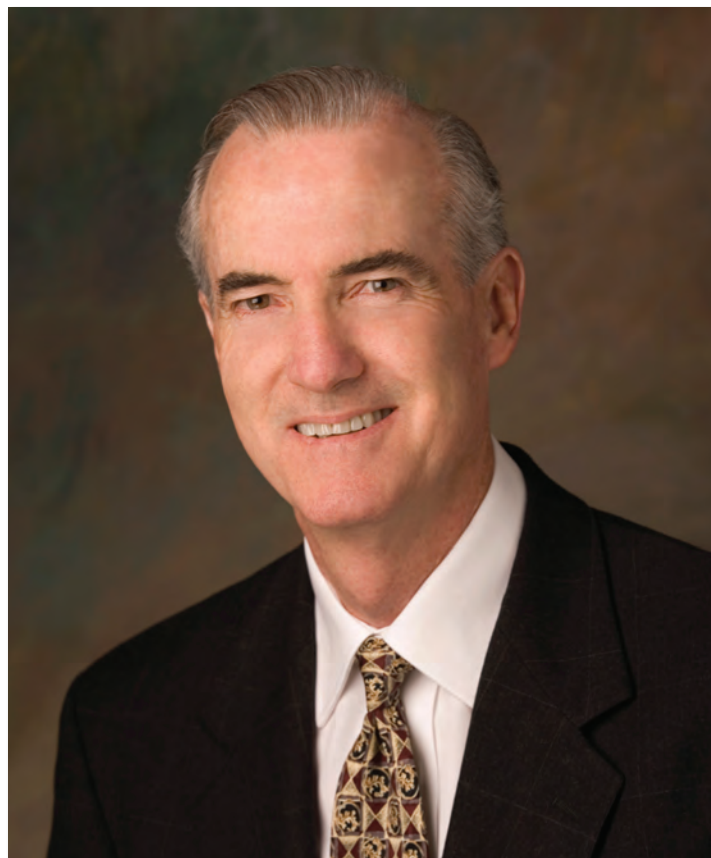
"You need to look at it from the front end to the back — to see how it's going to work, not because that's what the law requires, but because if you're cautious, you want to make sure it doesn't appear you're discriminating," Large said.

Sometimes, though, the chosen process will still have a disproportionate effect on a protected group. That's OK, so long as there's a solid business justification for the plan that's explainable and well-documented beforehand, Large said. "It doesn't mean you won't be sued, but you probably won't be found liable if you do."

Large's last bit of advice for companies contemplating layoffs: Call your employment lawyer sooner rather than later. "Putting the money in there is far better than spending 10 times that amount getting out of a problem," Large said.

EXAMINING AUDITORS

It had to happen: The first lawsuits are rolling in against the big ac-



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Partner
Archbald & Spray

counting firms that signed off on the financial statements of some of the economic meltdown's worst offenders, including funds that invested with Bernard Madoff.

The Ventura County CPA/Law Society's May luncheon will tackle the big question: How culpable were the auditors? On hand to speak will be JoAnne Gratiot, a partner in KPMG's investment management practice.

The talk takes place from noon to 1:30 p.m. May 29 at the Pierpont Inn in Ventura. The cost is \$30 for members of the CPA/Law Society, \$40 for non-members and \$25 for students. E-mail Doug Kulper at dkulper@fco-plaw.com before May 26 to sign up.

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