

# On the Firing Line

## Employers Must Take Steps to Protect Themselves During Workforce Reductions

Kevin V. Maltby & Paul H. Rothschild weigh in below.

By GEORGE O'BRIEN

Kevin Maltby says he's been getting a number of phone calls lately from individuals who have found themselves on the wrong end of workforce-reduction measures taken in response to worsening economic conditions.

Generally, these are people who feel they've been wronged, said Maltby, a litigator and employment-law specialist with the Springfield-based firm Bacon Wilson, who told *BusinessWest* that, while the words and phrases used by the callers vary, what he hears most often is "this isn't fair," "this isn't right," or something to that effect.

What Maltby tells these callers is that 'fair' is a relative term, and that even if a layoff falls into the realm of unfair — at least in the eyes of the terminated employee — it doesn't necessarily enter the category of *illegal*, which is another story altogether.

"In almost all these cases, the people felt that what was happening didn't feel right and didn't sound right to them, but the employer has the right to do it," said Maltby, referring specifically to the fact that, in Massachusetts, all employment relationships are 'at will,' which means, essentially, that either the employer or the employee may terminate the relationship whenever they choose.

There are exceptions to this rule, obviously, and employers cannot violate public policy, said Maltby, who has found himself explaining what the exceptions are with great regularity these days. Meanwhile, he's noted a significant increase in hits to Bacon Wilson's employment-law blog, which has a brief explanation of just what 'at will' means.

All this is a byproduct of the full impact of the recession hit-



Kevin Maltby, left, and Paul Rothschild say that employers must be diligent to protect themselves from possible discrimination cases stemming from workforce reductions.

ting home in Western Mass., forcing many area companies to undertake reductions in force, or RIFs.

Meghan Sullivan, an associate with Springfield-based Sullivan, Hayes & Quinn, a firm that represents employers in employment-law matters, told *BusinessWest* that the firm is seeing its first real surge in RIF work since just after 9/11, when it assisted a number of New York-based companies and nonprofits with layoff initiatives.

"We had gone a long time without seeing anyone discussing a RIF unless they were closing," she said. "But that's all changed over the past several months; we've seen a big increase in RIF-related work."

The uptick in business is a reflection of the staggering job losses being seen on a national

level. Employers slashed roughly 600,000 jobs in January, taking the unemployment rate up to 7.6%. Close to 2 million jobs have been lost in just the past three months, and more than 3.6 million have been cut since the beginning of 2008. Regionally, Sullivan noted that many companies made it through the end of the year without resorting to layoffs, but now find that step unavoidable.

And the current recession represents the first period of widespread RIFs in Western Mass. in more than 15 years, said Sullivan, meaning that many business owners and managers are out of practice. Meanwhile, for younger entrepreneurs and human-resource managers, this is likely the first time they've had to take such a step.

Which explains why the

phones are ringing at firms that specialize in this kind of work, she continued, adding that, for her firm, this means walking the company through the layoff process, making sure that things are done properly, with the intention of making the company better able to withstand the downturn — but with a practical eye toward preventing the discrimination claims that often accompany such reductions.

Paul Rothschild, chairman of the Litigation Department at Bacon Wilson and an employment-law specialist, has been handling many similar assignments. He said the first order of business for employers is to undertake reductions that make sense from a business standpoint.

"I think most employers make a serious effort to treat their labor force fairly," he explained, "but they also have to keep in mind not only profitability, but, in this age and market, *viability*; keeping a labor force that costs you less money is not necessarily discriminatory, but it may be something done just on the basis of economics. Clearly, that's what's driving these decisions now."

### Motivating Factors

Sullivan told *BusinessWest* that, over the years, her firm has helped facilitate dozens of RIFs of varying sizes, from a few employees to actions that fall into the category of 'significant.'

That's a quasi-technical term in this realm, she said, and it's used to describe initiatives that fall under the parameters of the Worker Adjustment & Retraining Notification Act, or WARN. Reductions that amount to at least one-third of the workforce for companies with more than 100 employees must meet

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WARN guidelines such as a 60-day notification period for those layoffs.

While none of the recent RIFs in the 413 area code could be considered 'significant' in the strict legal definition of that word — although a recent action at Berry Tubed Products in Easthampton came in just under that 33% threshold — all of them are significant in the sense that they could have negative consequences for employers if they are not handled properly, meaning within the limits of the law.

And this isn't a particularly difficult assignment, said those we spoke with, noting, overall, that reductions are legal if they are implemented for what are considered 'legitimate business reasons.'

This is a broad category, and another of those technical terms, said Sullivan, noting that if a business owner can state one of these reasons and back it up, he or she can protect their business from possible discrimination claims, especially those in the age-related category, which are quite prevalent as the Baby Boom generation ages.

Indeed, Maltby said that many of the calls he's received on the employee side of the equation have involved what would be considered older workers (those over 40), and that's understandable. This is a protected class, he explained, and also a group of individuals who have good reason to believe it may be very difficult for them to find another job, given their age and the current economic conditions.

"Older workers are looking over their shoulders a little more closely," he explained. "I received one call from someone who has been working for the same company for 40 years and is in his late 70s, maybe almost 80. He's con-

cerned and thinks the company will use the reduction in force to eliminate him, and not necessarily the position."

But while it's easy to understand why workers can have such concerns, business owners and managers can indeed lay off older workers, if the move is supported by one of those legitimate business concerns and is not an attempt to unfairly impact a class of workers, such as the older demographic.

"Just because someone is older and laid off, that doesn't mean the making of a discrimination claim, or a successful discrimination claim," said Rothschild, adding that, while the specter of a layoff for anyone over 40 is a scary proposition, it is usually quite difficult to prove discrimination in such cases.

It all comes down to the stated motivation of the employer, he continued, and if that motivation is to make the company stronger and more resilient, and the actions are consistent with that goal, then the employer is standing on firm ground.

"There's no guarantee in any company or business situation that the older employees will be kept in favor of the younger employees," Rothschild explained. "I've seen decisions where the courts and the Mass. Commission Against Discrimination have found that the motivation for keeping one employee versus another employee was based on the cost of the one that was let go versus the one that was kept.

"They [the courts] said it had nothing to do with age, it just had to do with cost," he continued. "That's OK, but what's built into the law is the presumption that age 40 and above is a protected age group, so people make the presumption that if you're over

40, you're protected over someone who's younger, and that's not necessarily true. However, because of that presumption, employers must be able to prove that the motivation wasn't age — it was just economics."

Sullivan concurred, and drew up an example of a company with salespeople in different parts of the country as an example of how employers should be thinking — and also how motivation can often be called into question, and what employers need to have at the ready when it is questioned.

"If and when someone asks how they chose which people were to be let go, the savvy employer has a reason," she explained. "The savvy employer says, 'sales are down, and I don't need four salespeople anymore.' He says, 'I have four salespeople who work in four parts of the country, and I've only got one part of the country that's buying — so I'm keeping that guy, who has the connections with those customers, and getting rid of the other three.'

"That guy might be the 35-year-old white male, and everyone else might be older or of a different national origin," Sullivan continued. "But the employer has explained why he made his decision and he's not lying about it, so there's no case for discrimination."

Assessing what she's seen in the local market, Sullivan said that employers are quite aware of the impact of layoffs on individuals and sometimes entire communities, and that RIFs are not something they enter into lightly. But they must also take them very seriously from the perspective of possible litigation — and the need to minimize their exposure to such cases.

Maltby concurred, and said that, overall, given the litigious

nature of society, employers must consider possible discrimination claims when they initiate RIFs, and take steps to protect themselves. Boiling this process down to simple terms, he said this means having business-related motivations for terminations, and having the ability to back them up.

And this can be as simple as not replacing someone who has been terminated, but rather spreading that person's work to other individuals. "That's a very good defense for the employer, because it shows they've eliminated the position and they're doing more with less," he explained.

### This Is the End

Summing things up, Maltby said that, in this economy, most companies will need to streamline themselves to effectively survive the current economic turmoil and properly position themselves for the day when conditions improve. But they should be paying close attention to *how* that streamlining takes place.

"They have to make sure that their employment-based decisions are grounded in the economics of the position, and not based on anything such as the age of the individual or the gender of the individual, or any other factor," he said. "You can't stop someone from suing you, but you can put yourself in the best position possible to defend yourself if someone does sue."

And if business owners do all that properly, Maltby, Rothschild, and others will get considerably more practice explaining the difference between what's fair — or seemingly not fair — and what's legal.v

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