

Winter 2002

Workforce Reductions: Getting It Right

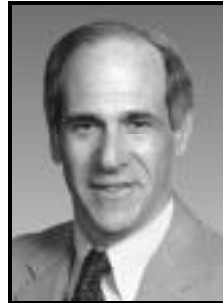
By Paul E. Stanzler

Less is More. Sometimes in business, as in life, this adage proves true, particularly in a stagnant economy where many businesses must reduce payroll costs to remain healthy and competitive. Yet, as is true with so many employment decisions that management faces in a highly regulated workplace environment, a poorly planned or executed workforce reduction can actually increase costs by requiring management to defend against wrongful termination lawsuits or pay penalties for failing to comply with applicable laws. No employment decision is without risks, of course, including the decision to remain fat and happy. "Getting it right," in terms of both workforce size and policy, can bring benefits so as to allow a business enterprise to remain healthy and competitive, even in a struggling economic environment.

Discrimination Claims

Every sentient employer realizes that both federal and state law prohibit discrimination against employees on the basis of a variety of protected factors, including race, sex, religion, national origin, ancestry, age, disability, and sexual orientation. Any employee who belongs to one or more of these "protected classifications" may challenge a workforce reduction as discriminatory. Typically, such challenges involve allegations that a

Paul Stanzler, a member of the Labor, Employment, and Employee Benefits Group, represents employers in all aspects of employment law, including discrimination, civil rights, wrongful discharge, and noncompetition and collective bargaining matters.



disproportionate number of employees in a particular classification have been selected for the layoff, not because of an objective consideration but precisely because of their membership in the protected class. As a practical matter then, management must carefully analyze the statistical impact of a reduction in force to ensure that it will not have a disproportionate adverse impact on a particular protected class of employees. If the intended reduction plan would result in a disproportionate number of employees in a protected class being fired when compared with that group's population in the workforce as a whole, the plan should be re-evaluated. Even the use of seemingly neutral criteria such as salary or seniority may create such an adverse impact, and these criteria should be reviewed with counsel.

Many employers choose to make workforce reductions based on the poor performance of those selected for the layoff. As is true with any employment termination decision, the documentation should provide objective confirmation of the employee's poor performance, lest the decision be challenged as a "pretext" for discrimination or some other unlawful reason.

Federal Limitations

Large reductions in the workforce may trigger obligations under the Federal Workers' Adjustment Retraining Notification Act ("WARN"). Failure to comply with these obligations may trigger significant liability for back pay and other damages. Companies with 100 or more employees are covered by the WARN Act and a "mass layoff," a particularly nuanced term, may require a company to give 60 days advance written notice to the affected employees.

The Human Factor

The manner in which employees receive notice that they will lose their job is often just as important as the legal considerations described above. Treating employees with dignity, offering them severance if the business environment will permit it, and providing them with support for relocating their careers will almost always mitigate against an employee's feelings of ill treatment. A severance package to a laid off employee is a humane gesture and one that signals

continued on page 2

In this issue

Workforce Reductions:
Getting It Right

Division of Inherited
and Gifted Assets in the
Context of a Divorce

Doing Business in Canada

Recession-Era Funding:
Writing the Right
Business Plan

Division of Inherited and Gifted Assets in the Context of a Divorce

By Barbra I. Black

Barbra Black is an associate in the Firm's Divorce and Family Law Group. She handles issues such as divorce and separation, child custody and support, pre-nuptial agreements, and paternity.



When considering the concept of divorce, it's common to think in terms of custody battles, child support and alimony. The division of property, however, is often one of the most contentious issues that can arise in a divorce case. Under Massachusetts law, a judge has broad discretion in ordering an equitable division of the marital estate between husband and wife. Massachusetts is not a "separate property" state, meaning that all assets of the parties, including those acquired prior to the marriage, assets standing in the name of one party alone and assets acquired by gift or inheritance, are included as part of the marital estate and are, therefore, potentially subject to division.

The concept of whether assets acquired by gift or inheritance are divisible is a complicated, and largely fact driven, analysis. Massachusetts, unlike many other states, does not have specific rules governing the division of inherited or gifted assets. There is certainly no obligation to divide such assets, however, judges have discretion to assign to either spouse all or part of the other spouse's estate.

There is also no requirement that the marital estate be divided equally between spouses. Under Massachusetts law, the goal is to fashion an equitable, rather than an equal, division of the marital estate. When formulating an equitable division, a judge is required to take a number of factors into consideration. Such factors include the length of the marriage, the age of the parties, their education,

occupations and vocational abilities, their conduct, the opportunity of each party to acquire assets and income in the future and the respective contributions of each party to the marital relationship.

When determining whether to divide gifted or inherited assets in particular, a judge is likely to carefully examine the contributions of each party to the marriage. This doesn't mean that only financial contributions will be weighed; such an analysis will also include an examination of each party's contributions as homemaker and caretaker of the children. Though traditional stereotypes clearly place the woman in these roles, given the fact that many families now have two working spouses, there is a slowly increasing trend towards a more careful review of the husband's contributions in this regard.

Other important considerations a judge is likely to weigh in determining whether to divide gifted or inherited assets is the source of the assets, each party's participation in managing the assets, and whether the assets were kept separate from the parties joint assets. An examination of these factors will help a judge determine how the parties treated the assets during the marriage, whether the assets were part of the fabric of the marriage, thereby affecting the parties' day-to-day lifestyle and station in life. The importance placed on each of these factors is, once again, within the discretion of the trial judge. If a judge determines that both parties had an active role in maintaining the asset(s)

and/or that the parties clearly relied upon the asset(s) for payment of marital expenses or to maintain a certain lifestyle, it is more likely that such asset(s) will be divided in some way between the parties.

The existence, or non-existence, of other jointly held assets, or individual assets of the other spouse, is also important. A judge is more likely to leave gifted or inherited assets undivided if there are other assets available to assign to the other spouse.

Since the division of inherited or gifted assets is primarily a fact driven analysis, it is extremely difficult to safeguard them from division in the event of a divorce. A pre-nuptial agreement may offer limited protection of gifted or inherited assets acquired prior to the marriage, though such agreements are often difficult to enforce in Massachusetts. Some measure of protection may be achieved by keeping such assets segregated from those of the other spouse, as well as segregated from those that are jointly held, in addition to maintaining control over them and minimizing the use of such assets for payment of marital expenses or to maintain a lifestyle in the marriage that could not otherwise be achieved. ■

Workforce Reductions: Getting It Right

continued from page 1

to the remaining workforce that the company will treat all of its workforce in a humane and dignified manner.

In the end, there are two objectives to any reduction-in-force: reducing costs and reducing risks to avoid potential litigation. Striking the correct balance between the two can be difficult, but getting it right permits the business enterprise to continue without undue interruption. ■

Doing Business in Canada

By Leonard M. Gold

Canada offers business opportunities for companies looking to expand. Many consider Canada an attractive vacation destination but few are aware that this vast nation offers an inviting business climate. Currently, the trading relationship between the U.S. and Canada generates more than 475 billion dollars a year in two-way trade. Canada is the largest exporter to the U.S. with the province of Quebec alone the 7th largest. More than 80% of Canada's foreign trade is with the U.S. A recent study by *EIU, Economist Magazine*, ranked Canada as the 4th best place in the world to do business over the next 5 years. Canada's strength comes from its openness to foreign trade, according to the study.

Both the federal and provincial governments of Canada have aggressively sought U.S. investment. They have made a concerted effort to become leaders in the new economy. Canada offers U.S. investors the following advantages:

- highly educated and stable work force;
- obtainable financing;
- modern transportation and telecommunication infrastructure;
- world-class research centers;
- access to the vast NAFTA market;
- attractive exchange rate;
- aggressive tax incentive programs;
- workforce cost advantage; and
- average business expenses lower than U.S. (i.e. rental costs, industrial building construction costs, and energy costs).

Quebec has become a major international center for aerospace, biopharmaceutical, and information technology and telecommunications. Montreal ranks 4th on a per capita basis for high tech job density among 15 North American metropolitan areas

Leonard Gold is the managing director of Burns & Levinson Canada, a subsidiary of the Boston-based law firm Burns & Levinson LLP. Burns & Levinson Canada provides cross-border consulting services to both U.S. and Canadian companies.



in these sectors. Ottawa, the capital of Canada, has become known as the "Silicon Valley of the North". Many of the leading companies in the information technology industry are located in Ottawa. Ottawa is becoming known to U.S. venture firms because of the great technology being developed and the caliber of entrepreneurs that they find there. The Atlantic Provinces have transitioned themselves from mainly a fishing economy to energy and information technology. Call centers have found Canada a very attractive place to locate due to the highly skilled labor force (including the fact that most people know at least one other language), tax incentives and low business costs.

Quebec offers investors one of the most aggressive research & development (R&D) incentive programs found anywhere in the world. The net cost for a \$100.00 CDN R&D expense can be as low as \$31.00 CDN for a large business in the non-manufacturing sector. The province has also made a concerted effort to become an international financial center. There are exciting tax incentives for financial corporations carrying out international financial transactions in Montreal. Companies that qualify for International Financial Center ("IFC") status are entitled to complete tax exemption on Quebec income, capital and payroll for specialized young employees. IFC status also provides employees with partial Quebec tax exemption in the calculation of income for Canadian employees and five year Quebec tax exemption for foreign employees.

A business seeking to expand into Canada must identify issues integral

to such an investment. These include the following:

- should a business establish a Canadian entity;
- tax exposure in Canada and how to report it;
- labeling and language requirements;
- employee rights and obligations under Canadian and Provincial law;
- rules applicable to the cross border movement of goods;
- immigration issues applicable to workforce personnel;
- registration permits and licensing requirements to conduct a business in Canada;
- real estate issues depending on whether you rent, purchase or build your premises;
- environmental exposure;
- structuring the acquisition of a public or private corporation in Canada; and
- financing your expansion.

It is always challenging and somewhat risky for a company to expand into a new and different business environment. Adding an international component makes this expansion even more challenging. When planning such an expansion organizations should gather as much information as possible, and should be sure to research and explore all of the possible issues and pitfalls that might be waiting for them. Having a network of contacts in your newly chosen environment who are knowledgeable about the laws, the legislation, the issues, the problems, and where to seek help is critical for the success of your company's expansion. ■

Burns & Levinson LLP is a full-service Boston law firm. We serve our clients, who include major international corporations, regional middle-market companies, emerging growth companies, and individuals, in traditional and contemporary areas of practice.

Recession-Era Funding: Writing the Right Business Plan

By Samuel M. Shafner

Anyone who has dipped a toe into today's chilly venture capital waters can attest to the fact that attracting VC (or angel) money today is difficult. Anecdotal evidence abounds that due diligence time frames have lengthened, deal terms have stiffened, and valuations have plunged. The system has ample funds available for investment, but prying it loose at tolerable valuations is increasingly challenging.

The recipe for attracting equity today is simple enough. Take a well-protected "disruptive" technology. Mix in two or three "serial" entrepreneurs with successful "exits" and good reputations to their credit (and, for extra flavor, have them ante in at least \$100,000 each). Finally, add clear access routes to substantial markets with which they are familiar, strain through a convincing short-term sales and profitability path, set it out on the table, and watch the hungry investors gobble it up.

But what about the mere mortal startups, replete with "green" entrepreneurs excited by their technology, patents not yet filed, general ideas for potential markets, heavy on hope and light on everything else? Or, as one bright-eyed entrepreneur once challenged, "How do I show that I am indeed a "serial" entrepreneur, and that this is the first of my series?"

Venture capitalists are busy people. They seldom have time to read a business plan cover to cover. Accordingly, the two-page executive summary at the beginning of the business plan is its most critical component. Rule of thumb: the executive summary should *assert* every fact needed to convince a VC to invest; the rest of the plan must amplify and support those assertions. The executive summary should work as a stand-alone document. It is the graphic equivalent of an "elevator pitch": important not only because

Samuel Shafner is a member of the Firm's Corporate Group. He has significant experience in corporate finance and mergers and acquisitions. He frequently counsels clients in venture capital, private equity financing, and public offerings.



time is short, but also to show you know your business – not just your technology – well enough to summarize its essence in the few minutes of an elevator ride.

After introducing the basic facts of the business (its basic technology, application, market, stage of development, and funding status) in the first 2-3 sentences, the executive summary, and the business plan itself, must cover the following areas:

Product or Service

Describe the business. Any description of the technology should be in terms of how it will help generate revenues and profits, not in the abstract. The status of the protection of the technology should also be mentioned.

Market and Competition – Sales Strategy

Don't say you have no competition; everyone does. Identify the real competitors, whether external or internal. Don't underestimate customer inertia, especially if your technology requires replacement of an arguably inferior but entrenched system.

Management Team

All important. If you can't recruit an experienced CEO or COO with prior entrepreneurial success, show that your team is otherwise ready to deal with the challenges of a startup. Show a full management team. If their involvement is contingent upon funding, and they are now working in another job, say so, but name names. It is not easy for someone with a good day job to risk it by putting their name into your business plan. But it is very difficult to convince a VC to take a gamble on you while your own executive team insists upon playing it safe.

Focus

Focus is published three times a year by Burns & Levinson LLP for clients and friends of the firm. This newsletter provides general information and does not constitute legal advice.

Editorial Board

Angeline Mistretta
*Chief Editor,
Marketing Manager*

Paul R. Morton
Executive Director

David P. Rosenblatt
Managing Partner

Clifford R. Cohen
Partner

Ann M. Fox
Partner

Maria E. Recalde
Partner

Please address comments and inquiries to Angeline Mistretta at:

BURNS & LEVINSON LLP

C o u n s e l l o r s a t L a w

125 Summer Street
Boston, MA 02110-1624
Telephone: 617-345-3694
or amistretta@b-l.com

www.burnslevinson.com

Other Personnel – Directors

Name or describe the engineering team and other key employees. Include names and bios for all directors and Board of Advisers.

Financials and/or Projections

A VC once said that he never believes the projections in a business plan but, before investing in someone, he wants to understand his fantasies. Projections should be well thought out and realistic, and should show optimism, because the reader will discount them anyway. Do not speculate on valuations in the business plan. Also, try not to be too specific about details of the use of proceeds, as this may change as you negotiate.

There are other topics to be covered as well, but these are the most important points. Keep in mind that a start-up must be carefully aimed, like a missile: small differences in the beginning can radically change its vector and ultimate destination. ■