The Risky Business of Layoffs…

Lawsuits, Tarnished Brands & Less than Engaged Employees

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During difficult economic times, companies often have to do whatever they can to reduce and control costs, which typically includes reducing their workforce. Even in good economic conditions, reductions in the workforce remain a cost cutting strategy that many organizations utilize.

Despite being perceived as a "normal course of business" in any economy, leaders take actions, often in haste, that unfavorably affect their workforce, brand image and business results. This can potentially expose the organization to a variety of risks such as lawsuits, tarnished brands and less than engaged employees, all of which can carry a hefty price tag.

In a recent webinar entitled ***The Risky Business of Layoffs - Lawsuits, Tarnished Brands & Less than Engaged Employees,*** Career Partners International, one of the largest talent management consultancies in the world, hosted a panel of experts in the legal, communications and outplacement fields to share advice and strategies to help mitigate such risks.

Cost Containment

Financial risks may well be the most apparent concern for all employers. In the US alone, almost 100,000 claims were filed with the EEOC in 2011[1] – an all-time high and average out-of-court settlement cost of $40,000 for employment-related claims[2]. In addition, in 10% of all wrongful termination suits, plaintiffs were awarded $1 million.[3]

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[1] U.S. Equal Employment Opportunity Commission
[2] *Employment Practices Liability Insurance in Today's Workplace*, Heffernan Insurance, February 2011
[3] *Employment Practices Liability Insurance in Today's Workplace*, Heffernan Insurance, February 2011

Executive Summary

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Mitigating risk, especially during reductions in the workforce, is a crucial consideration to the success of every organization. Yet, despite its importance, some organizations continue to leave themselves vulnerable especially in the selection, communication and re-engagement processes.

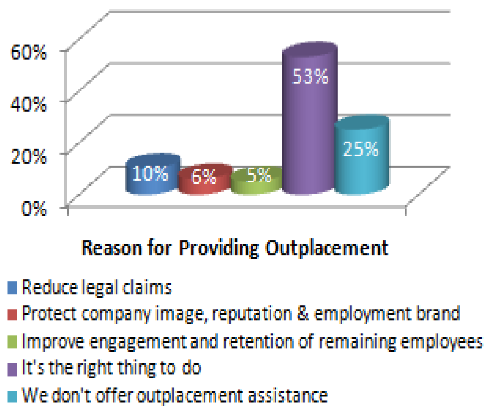
To provide insight into the importance of mitigating such risks, Career Partners International, one of the largest talent management consultancies in the world, facilitated a webinar entitled ***The Risky Business of Layoffs - Lawsuits, Tarnished Brands & Less than Engaged Employees.*** The panel of experts included Scott Baken, Attorney with Jackson Lewis, LLC, addressing legal and financial considerations; Nick Kalm, President of Reputation Partners, discussing communication and brand management; and John Daugherty, Managing Partner, Career Partners International – Kansas City/Overland Park, discussing notifications, the care of departing employees and re-engagement of remaining employees. This document provides an overview of the webinar with aggregate results of several surveys conducted during the session.

While reductions in the workplace have decreased since the peak in 2008 and 2009, analysts predict the US unemployment will hold around 8% into 2013[4] and most of Canada's provinces will hold close to their current levels.[5] These statistics fuel anxiety and insecurity among all employees and can play a role in employees' decisions and behaviors both during and after a reduction in force. This can greatly impact organizations in their productivity, turnover (especially of key employees), and legal claims.

Historically the practice of providing outplacement assistance was utilized primarily by shrewd organizations in an effort to demonstrate good faith and hopefully prevent legal claims. However, support for both the departing and remaining employees has increasingly become an integral part of best-in-class organizations' cultures and a major component integrated into the corporate strategy during a reduction in the workforce.

[4] US Bureau of Labor Statistics
[5] *2012-2013 Economic Outlook*, The Canadian Chamber of Commerce.

During the webinar, a real-time poll of participants indicated that 74% provide outplacement support with more than half stating they do so because "it is the right thing to do."

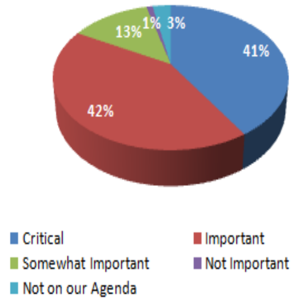


While it may be the right thing to do, some organizations still do not provide outplacement services, claiming they cannot see a clear link back to the business. It appears these leaders have difficulty connecting the dots and building the business case. Research, however, has increasingly shown that these services positively impact business performance.

According to one recent study conducted by Aberdeen Group, 48% of organizations with formal outplacement programs achieved more than 60% in "highly engaged workers" on their employee engagement surveys compared to 33% of those that did not have formal outplacement programs.[6]

This data, along with additional information discussed in this paper, will assist leaders in making the connection between outplacement services and business results. Additionally, this can serve as a foundation not only for providing outplacement services, but for developing a strong business case and strategic approach to mitigate a variety of risks associated with a reduction in the workforce.

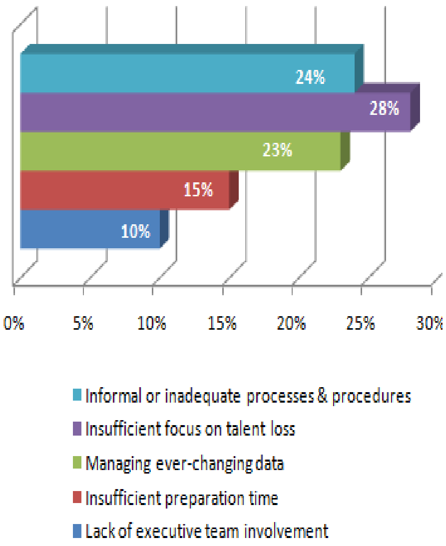
More than 80% of webinar registrants consider mitigating risk during layoffs as "Critical" or "Important" to their organization's strategic agenda.



When asked what their biggest challenge has been in

[6] Aberdeen Group, "*Outplacement Builds Its Value on Engagement*" July 2011

conducting a reduction in the workforce, over 60% of webinar participants indicated that managing the ever-changing data, insufficient preparation time, and inadequate processes and procedures presented the greatest challenges.



Anytime an enterprise-wide initiative as complex as a reduction in the workforce exists, there will be challenges. However, with the continued dependence upon layoffs as a cost containment measure and the importance placed on mitigating risk, it is surprising that more attention is not placed on areas within an organization's control such as planning and the use of consistent, effective processes. Such forethought in preparedness can certainly reduce a company's exposure to risks related to reductions in the workforce.

Legal and Financial Pitfalls

Scott Baken, an attorney with Jackson Lewis, LLC, who specializes in providing counsel and strategy to companies facing reductions, confirmed that "employers assume legal and financial risks whenever they decide to terminate one of their employees and group terminations multiply these risks." Group terminations also challenge employers to reduce personnel expenses without sacrificing indispensable employees.

In his presentation, Mr. Baken shared three key points to help reduce exposure to legal and financial risks:

- consider offering voluntary separations,
- carefully select employees for involuntary reductions based on job-related criteria, and
- conduct disparate impact analyses.

<u>Voluntary Separations</u>

One way employers can manage risk is by implementing voluntary separation programs. These programs provide employees with more control over their employment options, without requiring employers to make adverse employment decisions. Two types of voluntary programs to consider include Early Retirement Incentive Programs ("ERIP") and Voluntary Resignation Incentive Programs ("VRIP").

Most executives know it's unlawful to use age as a basis for discharging employees. What they may not know is that the U.S. Supreme Court upheld the legality of offering favorable benefits to older employees. Early Retirement Programs (ERIP) can be very effective and appealing to older workers as they offer various forms of assistance to support a transition to retirement. Such benefits may include pension plan enhancements, retiree health insurance coverage, and retirement transition benefits.

Organizations may choose to offer "age-neutral" incentives through Voluntary Resignation Programs (VRIP). Eligibility for these programs is usually based on years of service rather than age, and the benefits may include severance pay, COBRA subsidies, and outplacement services.

Organizations who do not want to lose key employees through voluntary separation programs can retain the discretion to reject applicants who hold critical positions, with one exception: when employers offer enhanced tax-qualified retirement plan benefits as an incentive for participating in a voluntary program.

Additionally, prudent employers typically require exiting employees to sign a general release to receive voluntary program benefits.

Involuntary Separations

Involuntary termination decisions increase legal and financial risks such as discrimination claims based on age, gender or race. However, these can be reduced by using objective, job-related criteria in making layoff selection decisions.

For example, identify employees with disciplinary or performance problems, then look at ranking employees based on their ability to perform essential post-reduction job functions such as productivity, proficiency and versatility. Managers can then make selection decisions by choosing the lowest ranked employees.

It's also critical to document the procedures and criteria used to make layoff decisions for defense against any legal challenges from employees. The goal is to retain employees who are best qualified to perform the functions that will enable the company to achieve its business goals going forward.

Disparate Impact Analysis
Unintentional discrimination is another risk, as federal and state laws in the U.S. prohibit employment decisions based on non-discriminatory criteria that have a disproportionate impact on employees within legally protected groups.

Organizations implementing reductions in the workforce can mitigate their exposure to

Canadian Employment Law

Although the U.S. and Canadian legal systems differ in many respects, the legal concepts in this paper apply to employers in both countries.

However, Canada does not follow the employment-at-will doctrine which means that Canadian employers need "just cause" to terminate non-contractual employees without prior notice.

When terminating groups of employees for economic reasons, Canadian employers must provide the employees with statutory and possibly common-law notice or pay-in-lieu-of notice. They may also be required to provide laid-off employees with statutory severance pay.

If Canadian employers terminate large groups of employees within relatively short periods of time, they may be required to provide all affected employees with additional notice or pay. As a result, it's extremely important to consult with Canadian employment counsel before implementing group termination programs in Canada.

disparate impact claims by analyzing their initial selection decisions for unintentional disproportionate adverse impact on employees in protected groups. Disparate impact should be evaluated through statistical analysis or by using the less complicated calculation called the "80% Rule." Under the 80% Rule, a disparate impact occurs when the selection rate of employees in non-protected groups is less than 80% of the selection rate of employees in protected groups.

When selection decisions result in a disparate impact, organizations can make alternative selections in an effort to reduce the disparity, or adhere to the original selections if they can be justified with one of two tests:

- *Business Necessity Test, or*
- *Reasonableness Test.*

In addition to achieving legal compliance, satisfying these tests enables employers to show that they've selected the most qualified staff to perform post-reduction job functions**.**

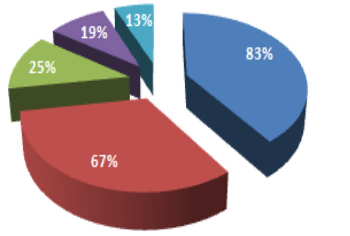
Impact on Brand and Reputation in the Marketplace

Effective communication during a reduction in the workforce is critical to the success of the organization and helps to mitigate risks. Nick Kalm, President of Reputation Partners, emphasized that "through experience and by following best practices, companies have become more adept at communicating through reductions in force; however there is considerable room for improvement."

According to Mr. Kalm, three primary audiences for targeted messages include:

- affected employees,
- remaining employees or "survivors," and
- external audiences.

<u>Affected Employees</u>
When asked with which stakeholders they effectively communicated during their last reduction in the workplace, *departing employees* was overwhelmingly the selection of choice among the multiple



responses webinar participants were allowed to select.

Many organizations believe their communications with displaced employees are effective; however, there are four key considerations according to Mr. Kalm to significantly improve communications with this audience.

First, visibility is absolutely essential to the organization's recovery so senior management needs to "own" the message and be visible before, during and after the layoff. One of the most common mistakes made by many leaders is to be invisible during a reduction in the workforce.

Secondly, it's important to talk about the layoff in the context of the company's business strategy and the specific circumstances that led to taking this action. Too many companies simply announce reductions "due to the downturn" or some similar general statement.

Thirdly, acknowledge other cost-cutting steps being taken to alleviate any perception that the only cost savings is being taken "on the backs of employees."

Lastly, communicating such a message should almost always occur face to face. Since this type of message often catches people by surprise, following up with written communications both documents and ensures the clarity of the message.

<u>Remaining Employees</u>
While 67% of webinar participants felt they effectively communicated with remaining employees following their last layoff, this group is often provided a cursory communication or completely overlooked according to Mr. Kalm.

Remaining employees represent the future for the organization. They require and deserve thorough communication and understanding of the new business strategy. Answering questions and painting a vision of the future helps remaining employees avoid wasting time and energy worrying about their own jobs and how their role fits into the new vision. As much as possible, make it clear whether or not the company expects to make more reductions, in what areas, and in what timeframe.

Additionally, acknowledge not only the impact on the affected employees but the impact on those who remain.

The Importance of Communication – A Case Study

A medical device company planned to relocate manufacturing to Mexico over a 12-month period of time. The company needed to maintain their production, quality, safety and customer satisfaction levels during the transition.

To support this important business initiative, the company partnered with Career Partners International to provide outplacement support, workshops, and coaching months prior to the closure to several hundred employees while they worked to effectively move manufacturing to Mexico.

Working collaboratively Career Partners International developed a communication plan for employees and customers that was deployed at the onset of the project which included channels to keep everyone informed of concerns, progress, expectations and outcomes.

By creating an open forum for communications, customers were able to proactively express their concerns about quality as the facility in Mexico ramped up its manufacturing.

The company worked through these issues and, in fact, delayed the relocation until all quality and production issues were resolved to the customer's satisfaction.

Throughout the entire project (which actually took 18 months), the workforce was kept informed, engaged in the process to ensure success for the customers and supported in their own career transition to ensure their professional success on a personal basis. As a result, the company was able to maintain the levels of performance needed and the customers felt heard, respected and appreciated as did the employees.

A reduction in the workforce often requires shifts in work responsibilities so there's little doubt that the remaining employees will be tasked with additional work. Recognizing this and helping these employees cope with the changes can reduce losses in productivity.

External Audiences

Twenty-five percent of webinar participants communicated their last layoff to customers and suppliers, while only 19% informed investors and even less shared the news with elected officials and the local community.

Customers, suppliers, investors and the community are the lifeblood of the organization's future success, second only to the organization's remaining employees. Proactively communicating the reduction to these audiences assures them of the organization's future and demonstrates transparency and sensitivity to all stakeholders. Share what's changing, what's staying the same and reinforce the organization's commitment which is critical to the organization's future success.

Engagement and Next Steps for all Employees

Having worked with thousands of clients to support departing employees and re-engage remaining employees, John Daugherty, Managing Partner of Career Partners International - Kansas City, reinforced that "careful preparation is essential to a successful notification and re-engagement strategy."

Remaining employees represent the future for the organization.

According to Mr. Daugherty, the following are keys to success:

- prepare managers to make the notification,
- provide support and care for departing employees to move forward, and
- engage remaining employees for future success.

The Notification

For managers delivering the message, the day of notification can be one of the toughest. Planning and clearly thinking through each phase and everyone's role enables the separation to be conducted in a calm, composed and professional manner.

No matter how many layoffs the organization has successfully undergone, to minimize risks conduct each reduction as if it were the first for the organization, paying attention to every detail.

Most formal complaints of wrongful discharge typically originate from a poorly handled notification. It is an emotional time for all involved. Training for managers to effectively deliver the message assures the correct message is delivered consistently and in an appropriate manner. Mistakes often occur when the assumption is made that management knows what they are doing and training is bypassed.

Given the complexity of conducting reductions in the workforce, details can easily slip through the cracks. Twenty-three percent of webinar participants indicated their biggest challenge has been managing the ever-changing data. This increases an organization's exposure to risk and could easily be lessened by following a consistent and thorough process.

Daugherty recommends an implementation team work with legal counsel and use a separation planning checklist to help ensure all bases are covered by the responsible party. A checklist might include items such as:

- identifying and following a sound selection process,
- engaging appropriate departments and partners such as payroll/benefits and outplacement partner, during the planning process,
- identifying personal and/or potential problems associated with selectees (e.g. significant dates such as employment anniversaries, birthdays; medical or family circumstances such as health conditions, terminal illnesses, recent deaths or divorce, etc.), and
- checking the planned termination date's effect on pensions, bonuses and other benefits.

With good communications among the implementation team and a thorough checklist, data can be managed more effectively.

<u>Care and Support for Departing Employees</u>

While this is a difficult time for those delivering the message, it is even more difficult for those receiving this news. Demonstrating care and compassion assists departing employees with the transition, helps remaining employees recognize the value the organization places on their people and reinforces the company's brand as a top employer.

Care and compassion begins by respectfully delivering the separation decision to departing employees based on the company's strategic direction, as noted previously. It continues by providing benefits to support these individuals, helping them to make successful transitions. Best-in-class companies often include separation benefits such as severance pay, pay for unused vacation and/or sick leave, outplacement services, retirement benefits, access to Family/Employee Assistance Programs, etc. Providing these separation benefits, especially outplacement, demonstrates that compassion, fairness and consistency remain a part of the corporate culture, both during and after a lay-off.

There are many reasons why top employers provide outplacement to their

What is Outplacement?

"*Outplacement*" is broadly defined as services that companies make available to assist separating employees to transition to new career opportunities outside of the current employer. A third party firm specializing in these services is typically contracted by the former employer to assist the departing employees. The services usually include career coaching and educational support to guide and improve the preparedness and effectiveness of the employee as they re-enter the job market, prepare for retirement or embark upon an entrepreneurial endeavor.

displaced employees. Outplacement consultants help individuals on the day they are notified to deliver this news to their family.

In addition to this important support, one of the most beneficial aspects is helping to focus the employee toward the future and away from the past, which lends assistance in mitigating risks. Expert career coaching, talent assessments, individual guidance, skills development, cutting-edge technology and job leads are hallmarks of high quality outplacement services.

Engage Remaining Employees

Positioning the organization for success is of the utmost importance at this juncture. As mentioned earlier, the organization's future lies in the hands of the remaining employees. It's vital that they feel valued, be engaged and work collaboratively to drive the organization forward.

Having an engagement strategy is critical. According to a recent report, companies adept in executing their human capital management strategies experience more than twice the engagement scores as their counterparts (87% versus 41%). Additionally, these top performing companies were nearly four times more likely than bottom performers to validate (with data) the direct impact of engagement on profitability or revenue growth (27% vs. 7%)[7].

After acknowledging their feelings and concerns for themselves and their departing co-workers, reiterate the strategic direction of the organization to all employees and the plan for how this will be achieved working together. Clarify exactly how their role is changing, why it is important, and the valuable role they play in the organization's future success. And when the timing is correct, discuss their career aspirations and the development plans to help them achieve their professional objectives.

Ensure all management is well equipped to positively support employees through the transition and into the future. This may require training, new tools or additional resources for their toolkits.

Helping all employees understand their future in the organization as it relates to the strategic objectives of the company helps to further their engagement levels.

Transparent communications go a long way to build trust which makes employees more apt to commit and give their discretionary effort to the success of the organization which is critical following a reduction in the workforce.

Summary

From the time the decision has been made to reduce the workforce all the way through to the re-engagement of remaining employees, planning remains a critical success factor in the effort to mitigate the many risks associated with reductions in the workforce. Key considerations include:

- **Selection process -** a prescribed and well thought out process for selecting impacted employees is crucial,
- **Communications -** effective and continued communications to all stakeholders regarding

[7] Aberdeen Group, "*Outplacement Builds Its Value on Engagement*" July 2011

the reduction is essential, and

- **Employee Engagement -** understanding and supporting the needs of all employees moves the parties forward for respective success.

In addition to following a thorough and judicious selection process, providing on-going support to the remaining and exiting employees emerges as a strong component to:

- revitalize the remaining workforce to high levels of productivity and contribute to the organization's future success,
- maintain a strong corporate reputation in the marketplace, and
- retain the ever-critical customer loyalty.

It takes time and financial resources to develop and implement a sound reduction in workforce strategy that encompasses all of these elements. Much like any business decision, it is imperative that these strategies be linked to the organization's strategic goals. Yet, multiple research studies and survey data support what many see as "the obvious:" if not managed carefully, companies rarely find the needed balance between cutting the workforce and realizing corporate strategic objectives.

For additional information regarding career transition and employee engagement, please contact your local Career Partners International firm.

About the Authors

Paul Sniffin is Managing Partner of New Options Group/Career Partners International – Baltimore/Washington DC. He has over 25 years of experience guiding and developing executives' careers and is one of the most experienced executive coaches in the Mid-Atlantic region. He has served on multiple boards, including Career Partners International, providing growth and leadership development strategies in support of organizational strategies.

Mark Hornberger is Regional Vice President of New Options Group/Career Partners International – Baltimore/Washington, DC. He is responsible for the Outplacement services division and manages client account relationships, as well as developing strategic solutions for clients in the areas of leadership development, executive coaching, team development and career transition.

About Career Partners International
Career Partners International is one of the world's largest providers of talent management solutions with more than 200 offices in over 35 countries around the world. Organizations of all sizes turn to Career Partners International to successfully assess, engage, develop and transition talent using the expertise of more than 1600 highly-skilled experts in the areas of assessment, coaching, leadership development and outplacement. Additional information can be found by visiting www.cpiworld.com.