

healthcare report

VICTOR O. SCHINNERER & COMPANY, INC.

Information and Risk Management Ideas for Healthcare Professionals

THE CONTRACTION OF THE ECONOMY CREATES SYSTOLIC RISK FOR HEALTHCARE ORGANIZATIONS: PART II

Welcome to the second part in a special multi-part series on the effects of the down economy and how healthcare organizations can manage the risks that come with increased pressure to stay profitable while managing staff and patient needs. This second issue discusses employment practices liability. Go to www.DandORx.com/riskmanagement.html to read the first issue on directors and officers (D&O) liability and exposure.

Changing Structure and Staffing Deserves Special Considerations

Economic conditions have forced healthcare organizations to rethink their internal procedures and reevaluate their personnel in order to improve their financial stability. One way hospitals are considering amending their business models involves reducing staff and services and programs offered. Instituting staff changes, however, can result in risk exposures for which some organizations are improperly prepared.

Changing the structure of services provided may create management and marketing difficulties. Changes in staffing may generate significant risk through contractual or labor agreements, and staff changes might create problems with accreditations or approvals. The greatest risk, however, is the ill will created among departed and current employees and in the local community.

Employment Issues Will Challenge Healthcare Providers

Any reduction in staffing has to be appropriately structured, and any actions must be documented carefully to avoid employment practices liability

claims. Allegations of discrimination and wrongful termination soar during periods of economic uncertainty when jobs, and their accompanying benefits, become critical. The same actions that normally do not result in lawsuits during a strong economy are more likely to generate litigation in a weak economy as employees seek to protect their jobs or recover for improper dismissals or other employment actions.

Most hospitals and healthcare facilities are concerned with the possibility of employment practices litigation. In a 2008 litigation trends survey of healthcare companies conducted by the law firm Fulbright & Jaworski, LLP, the leading category of concern was lawsuits related to labor and employment matters. Over 53 percent of those entities surveyed placed employment practices litigation as their top concern ahead of issues such as lawsuits related to patient care, government audits on Medicare and Medicaid, and HIPAA violations.

Reduce Staffing Without Increasing Litigated Losses

In most situations, reductions in staff in a down economy are motivated

by sound business reasons. But what appears to be a prudent and rational course of action for management might appear to an employee (and a court) as the result of discrimination. In these highly-sensitized times, even the elimination of a few positions will not only have a devastating effect on those terminated, but also on the morale of those who remain. If there is a reduction required by an organization's financial conditions, the likelihood of a concerted action to redress what those consider an improper action increases significantly.

A wage discrimination claim filed by nurses in multiple states in 2006 and 2007 (<http://tinyurl.com/yfzphwq>) shows the fine line healthcare facilities tread in balancing the bottom line with staff needs. In all, class action suits were filed in six states alleging collusion by hospital executives to keep nurses' pay down amid a national nursing shortage. The case in Albany, New York (*Fleischman v. Albany Medical Center*) was recently settled (www.AlbanyNursesLitigation.com).

Reductions are a common source of class-action and multi-plaintiff claims.

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Such claims can be expensive in terms of time and defense costs. And the adverse publicity can be devastating to an organization's ability to hire and retain quality staff. Depending on who is selected to be downsized and why, such action can lead to discrimination claims under federal and state laws. The cause of action could be based on improper dismissal or because the criteria used to select those terminated disproportionately affect a certain protected category of employees.

Litigation might not be avoidable, but the actions taken to reduce the staffing of a facility can be defensible. The decision-making process used to determine both the need and procedure for a layoff must be shown to have validity. This is best done through:

- Documenting the business reason for the staffing reduction;
- Developing non-discriminatory, business-related criteria for selecting employees to be affected by the action; and
- Reviewing the criteria to determine if there is a disparate impact on protected groups of employees, particularly the representation of protected groups before and after the selection process.

Be Aware of Contractual and Union Arrangements

In unionized work settings, it is prudent

to give the union the opportunity to engage in decision bargaining as well as negotiation over the effects of any planned reduction. Management should carefully evaluate potential labor contract obligations implicated by a planned reduction. In addition, federal laws, such as the Worker Adjustment and Retaining Notification Act, might require a 60-day notice to a union if the staff reduction is considered a "mass layoff."

In some cases, there may be employment contracts written with specific staff members. Rarely do these include a procedure for termination. Often, the existence of such contracts is unknown to other employees, thus resulting in a situation where some employees are protected by contract that others only see as favoritism. Management must be aware of the possibility of claims based on an informal or oral contract of continued employment.

Age Discrimination Claims May Be a Special Risk

When considering staff reductions special care should be taken to avoid a disparate impact on employees protected by age discrimination laws. Often, such employees are targets for reductions because they have higher salaries. Reduction goals should be stated in numbers of employees or positions to be eliminated rather than

in dollars to be saved. Focusing on a reduction in salary costs by terminating the employment of higher-paid, older employees can motivate a lawsuit. A former employee may be inclined to sue because they retain a sense of abandonment and fear a failure to find equivalent employment opportunities. Even when voluntary exit incentive programs are being considered, care must be taken. Such programs are, at times, perceived as managerial indications that particular people will be considered for potential inclusion in an involuntary reduction in force. The anxiety created, especially among older employees, can nurture the animosity that may lead to employment practices claims.

With every termination of employment, the adversely affected employee's supervisor and others in the decision-making process need to be able to clearly explain the business reason for the termination, why the specific employee was selected, and who made the decision to include the employee in the reduction. If the employee's allegation of discrimination is tried before a jury, the "cold, hard facts" alone could end up creating a negative impression of an insensitive corporate entity and result in a more difficult defense. Certainly, an organization must document sound business judgment, but should complement that rational basis with a history of caring.