

# The Legal Strategist

S. BARRETT & ASSOCIATES, P.C.

[WWW.SBARRETLAW.COM](http://WWW.SBARRETLAW.COM)

FOURTH QUARTER 2008

With the current and future economic outlook pointing to an extended downturn, I thought a timely topic for this quarter would be the issue of downsizing. Each business may face tough decisions in the near future, including forcibly reducing your staff. As with any business decision, there is a right way and a wrong way to approach staff reductions. With a little proper planning, the process can run smoothly and help protect your business from any ensuing legal action by former employees.

As with all of our "Featured Topics" we are only presenting a highlighted overview; if you would like more information on this or any other topic previously covered in our newsletter (which can be viewed on [The Legal Strategist](#) tab of our web site), please contact our office to set up a consultation.

Hopefully, this quarter's topic will enhance your awareness of the need for a well developed plan when you have decided that it is time to downsize your staff. As always, we invite all comments and suggestions as well as ideas for new topics to be included in future issues.

*Scott Barrett*

## FEATURE TOPIC: CAUTION AND PLANNING ARE KEY FOR DOWNSIZING



So you have made the tough decision that keeping your business in a competitive and viable position will require you to downsize your staff. Now the questions and doubts start to creep in. How do you effectively downsize *and* protect your business from potential wrongful termination lawsuits? As with most all legal strategies, there is no magical way to ensure against litigation. However, if you plan carefully and enter the process of downsizing with a well developed three staged termination strategy, you can mitigate your exposure to potential lawsuits.

**Pre Termination Planning:** With planning before the need to lay off staff, you can minimize your risk. Here are a few items to consider:

- ◆ For all at-will employees, have them sign an acknowledgement, usually contained in their Employee Handbook, that Texas is a right to work state and they can be terminated without notice, for whatever reason as long as it does not violate federal or Texas law;
- ◆ Although some situations are unique, standardize your termination procedures and follow them as described in your Employee Handbook. This measure will ensure that each employee is treated equally and thus reduces ammunition for wrongful termination lawsuits.

**Once You Decide to Downsize:** Once you have made the decision to downsize, your next hurdle is to determine the affected employees. Consider:

- ◆ To minimize your legal exposure, establish an objective, nondiscriminatory criteria for selecting the employees to layoff;
- ◆ Be cognizant of terminating employees with actual or perceived disabilities, those who have just returned from a protective leave of absence such as the FLMA, pregnant employees, employees who have reported inappropriate activities such as harassment and employees protected by various federal and state protections, such as the Age Discrimination in Employment Act;
- ◆ If your organization is large enough to qualify and your staff reduction is severe, comply with the federal Worker Adjustment and Retraining Notification (WARN) Act and comparable Texas laws requiring you to provide written notice to employees prior to downsizing.

**Minimizing Your Risk at Termination:** At time of termination, you can further reduce your exposure by following a few simple procedures:

- ◆ Have all employees sign a release. If drafted correctly, this release will relieve you (the employer) of all claims "known or unknown, fixed or contingent, liquidated or un-liquidated, whether asserted or unasserted." When drafted correctly, this is a powerful protective document;
- ◆ In an effort to create goodwill with the terminated employee and diminishing the anger that often leads to litigation, consider offering a severance package to the terminated employee. The package can consist of a lump sum payment, continuation of their salary for a period of time after discharge, help with finding new employment, and help with job training. Any or a combination of these items will go a long way in tempering the discharged employee. This is also used as consideration for the employee signing the previously mentioned release;
- ◆ When informing the employee of their termination due to downsizing, emphasize the decision to release them was due to financial pressures of the company and not their performance (if this is accurate). Have a package ready that includes their COBRA information (if applicable), payment for their unused but accrued vacation, a letter of recommendation and if you desire, indication that they are eligible for rehire when the economic fortunes of the company turn around;
- ◆ Some companies may choose to re-classify the terminated employees as Independent Contractors to reduce the company's cost of benefits and taxes. USE CAUTION! If the terminated employee continues their previous duties in the same manner, there is a good chance the "Independent Contractor" will be classified as an employee, thus exposing the employer to potential tax and penalties from the IRS;
- ◆ Lastly, do not automatically and mistakenly deny an unemployment claim of the downsized employee. Examine each claim to evaluate the risk of denying the claim with potential litigation of a wrongful termination lawsuit.

Downsizing is a hard and unpleasant decision; but with foresight, planning and caution, you can minimize your risk. If you would like more information on managing your risk associated with downsizing, please contact [Scott Barrett](#) to set up a consultation.

### TEXAS ESOTERIC FACTS

- ◆ In Galveston it is illegal to have a camel run loose in the street.
- ◆ Texas has approximately 21 million residents, around 16 million cattle, about 2.5 million deer and 200,000 alligators.
- ◆ Laredo is the world's largest inland port.
- ◆ The least populated Texas county is Loving county with 67 residents.