



BUDGET CUTS:

Could Layoffs Mean Lawsuits?

By Kirk Mylander

Businesses are shuttering. Banks are foreclosing. Builders are not building. For cities in Oregon, this means that tax revenues are decreasing and fee income is disappearing. City councils across the state have been getting out their red pencils to begin the task that elected officials dread: making cuts.

Budget cuts are never fun, and are generally not appreciated. When's the last time a city council candidate announced that they had decided to run for office because they really enjoy budget cutting? It's really an unappreciated part of running a city. In fact, when it comes to cutting jobs, it's one of the areas that can place a city official and a city at the defensive end of a lawsuit.

It can be difficult to significantly cut costs without eliminating jobs. And when jobs are eliminated, lawsuits start popping up. Before a city decides which jobs to cut, city leaders should take time to make sure that the city is prepared to defend the decision to cut each job. That small bit of planning can save even more money for the city, over both the short and long term.

Nationally, the number of laid-off employees filing lawsuits is rising. The main type of case is where the employee claims he or she was selected for layoff for a discriminatory reason, such as the employee's age, race, gender or disability. One twist on this type of case is the employee who claims that he or she was terminated for engaging in a protected activity, such as using worker's comp or FMLA leave.

To minimize a city's risk of being sued because of job cuts, city officials should take care to prepare a budget plan that:

- Explains how much money must be cut and why ("We must cut \$300,000 due to declining property taxes and permit fee income");
- States why jobs must be cut, instead of some other expense; and
- Provides objective criteria to follow when selecting which jobs to eliminate.

The most objectively verifiable reason to select someone for layoff is that they were the most recent person hired ("Last Hired, First Fired"). Defense attorneys love this criteria because

it is so easy to defend. If a city says that it is going to follow that method, and does follow it, how can the employee claim that "I was actually laid off because of my age"? Many union contracts actually require that "last hired, first fired" be the only criteria used.

If a city cannot use "last hired, first fired" for the city as a whole, then it must try to use it whenever it is eliminating one person and leaving another who occupy equivalent positions.

Juries often side with employees when the employer doesn't have adequate documentation of non-discriminatory reasons why one employee was selected for layoff when an employee in an equivalent position was not. When a city is working in the mode of damage control under a cloud of financial crisis, reasons for these types of decisions may seem obvious in the moment. Later, however, many employers find that a jury does not find undocumented, vaguely recalled reasons for termination to be quite so obvious.

People will later evaluate your layoff selections by using statistics. So, a city might as well use statistics now and get a preview of what your critics will see. If a city decides to eliminate 15 positions and 11 of the displaced employees are over age 40, then the chances of a lawsuit rise. If the employees who were allowed to keep their jobs are mostly under 40, the chances of a lawsuit rise dramatically.

It may prove difficult to avoid exceptions to the process. For example, two employees have similar titles and pay, but only the more recently hired employee possesses the certification that the city needs. In such instances, diligent documentation and detailed explanations are necessary for any instance in which the city breaks from the official process. A city should never diverge from its objective criteria due to reasons like "attitude," "likeability," or whether or not the person is a "team player." Telling someone they lost their job for one of those reasons is the equivalent of a city challenging them to a duel, in court, where the jury's natural sympathy will not be with the city.

But even a thoroughly objective selection process, while defensible in court, does not guarantee that laid-off employees won't file losing lawsuits. As a further safeguard, a city may want

to consider offering a severance package to displaced employees. In order to receive severance, which could be a week's pay for each year served, the employee will sign a release of all claims. Such releases give the city certainty, and give longer term employees a bit of extra help in transitioning to a new job. Severance packages also help to maintain goodwill, both in the community and among the remaining employees who may be angry about their friends' job losses.

Finally, cities should simply be careful in how it selects people for layoffs. A city should also be careful in how layoffs are announced. It's best not to say "This is our fault, not yours." Resentful employees can take that statement as an admission of guilt. Instead, a city should stay on the topic of declining revenues due to the economy, and "business necessity." It also helps to avoid engaging in a one-on-one argument with a

confrontational employee when making an announcement to a group. Instead, the city should offer to have its human resources department or its city attorney speak privately with anyone who has concerns about their own situation.

In closing, cities need to beware that there are costs to cutting costs; confused and angry employees are one of them. By planning ahead, adopting an objective criteria, and staying on message, cities can minimize costs, employee confusion, and future criticism.

Editor's Note: Kirk Mylander is an attorney for City County Insurance Services.