CAPLAW Update
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Evaluating Cost-Saving Workforce Options in Leaner Times

By Sheena Knox and Eleanor Evans, Esq., CAPLAW

In the face of potential federal budget cuts, many Community Action Agencies (CAAs) are evaluating cost-saving workforce options – from laying off staff to reducing hours to freezing wages. To help CAAs in their efforts to weather tough financial times and protect themselves against potential employment claims, this article provides an overview of some of the more common approaches CAAs may take to reduce staffing costs, as well as some of the key federal legal issues to consider when weighing these options. Because each CAA's situation is different and state laws vary and may provide more protection to employees than federal law, it is important to consult with an employment attorney in your state before implementing any of these options.

Layoffs

One of the most common responses to an economic downturn is to lay off (i.e., terminate) employees. Layoffs raise a number of legal and practical issues, such as potential discrimination and retaliation claims, decisions about whether and how to pay severance, and, in some cases, compliance with layoff notification laws.

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CAPLAW Conference Prepares CAAs for Future Challenges

By Cara Loffredo, CAPLAW

As Community Action Agencies continue working to improve the lives of low-income communities and families, they face an uphill battle of their own against federal and state budget cuts and increased competition for funding. Over 450 Community Action professionals joined CAPLAW for its 2011 National Training Conference in Minneapolis, June 15-17, to confront these obstacles and to obtain information critical to ensuring good governance, fiscal stability and legal compliance.

The conference's opening session featured a greeting from the CAPLAW board, a warm welcome to Minneapolis from Bill Davis, Executve Director of Community Action of Minneapolis, and remarks by Yasmina Vinci, Executive Director of the National Head Start Association. Mark Greenberg, Deputy Assistant Secretary for Policy at the U.S. Department of Health and Human Services' Administration for Children and Families, delivered the opening keynote address, in which he presented the Obama Administration's perspective on the current climate in Washington and the future of the Community Services Block Grant program.

"[I] Enjoyed the high quality speakers, excellent facilities, and great location in downtown Minneapolis."

Recipients of the Robert M. Coard Conference Scholarship, Joseph Costello of Tri-County Community Action Program, Inc. and Catherine Johnson of Inter-County Community Action Council, were also recognized during the opening session.

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Layoffs may prompt affected employees to file discrimination or retaliation claims against their former employer. These claims typically allege that the employee was treated unfavorably by the employer because of the employee's age, disability, race, color, sex, national origin and/or religion or that the employer terminated them in retaliation for asserting legally protected rights.[1] Proper documentation of the layoff process may help CAAs defend against these types of claims. For example, a CAA should document the economic conditions triggering a layoff (such as cuts in specific grants) and any cost-saving measures implemented prior to the layoff, i.e., where employees are being laid off due to funding reductions or elimination of specific grants, the documentation should mention that fact. It is also important to design and document an objective process for selecting employees to be laid off. CAAs should consider forming a committee comprised of human resources and other key management personnel to design the selection criteria and to evaluate employees using those criteria. Because performance evaluations are often a factor in selecting employees to be laid off, it is important to ensure that they are conducted regularly for all employees and that employees are being evaluated on the basis of uniform criteria.

If your CAA is considering laying off unionized employees, be sure the layoffs comply with the collective bargaining agreement(s) covering those employees.

CAAs laying off large numbers of employees may be subject to the federal Worker Adjustment and Retraining Notification (WARN) Act. In general, the WARN Act applies to private employers (including nonprofit CAAs) with 100 or more employees. (However, this total excludes employees who work an average of fewer than 20 hours a week and employees who have worked for the employer for fewer than six out of the last 12 months.) Federal, state, and local government entities that provide public services (such as public CAAs) are not covered by the law. The WARN Act requires covered employers to provide notice 60 days in advance of mass layoffs and plant closings. This notice must be provided to affected workers or their representatives (e.g., their labor union), to the state dislocated worker unit, and to the appropriate unit of local government.[2] For additional information about the WARN Act, visit the following U.S. Department of Labor website *http://www.doleta.gov/layoff/warn.cfm*. If a CAA is contemplating laying off large numbers of employees, it should consult with an attorney in its state to determine whether the WARN Act and/or a state law equivalent applies.

In some cases, CAAs may want to provide severance payments to terminated employees. Keep in mind that federal grant funds may be used to pay severance only where severance is required by: (1) law; (2) an agreement between the employer and the employee; (3) an established policy that constitutes, in effect, an implied agreement on the organization's part; or (4) the circumstances of the particular employment.[3] Thus, if a CAA wants to provide severance to employees being laid off, it should plan ahead and adopt a policy (or agreements with specific employees) that specifies under what circumstances and to which employees' severance will be paid.[4] It should also budget for severance pay.[5]

Wherever possible, a CAA should make severance payments contingent on the release by employees of their legal claims against the organization. Note that certain laws, such as the federal Age Discrimination in Employment Act (ADEA) require specific release language and procedures; state laws may include additional requirements regarding severance.[6] Therefore, it is important to work closely with an attorney in your state to structure severance arrangements and to draft severance policies and agreements.

Pay Cuts, Reductions in Wages and Hours, Converting Full-Time to Part-Time

Implementing pay cuts, reducing employees' hours and wages on a continuing basis, or converting full-time employees to part-time are less drastic alternatives than layoffs. When considering these options, be aware of the federal Fair Labor Standards Act (FLSA)[7] issues involved and check with an employment attorney in your state about whether any state laws apply.

Generally, the FLSA requires employers to pay employees at least the federal minimum wage for all hours worked and one-and-a-half times their regular rate of pay when employees work over 40 hours within an established work week.

However, employees may be exempt from the minimum wage and overtime requirements if they perform certain duties set forth in the FLSA and if (for most exemption categories) they are regularly paid a predetermined salary of at least $455 a week. Improper deductions from an exempt employee's predetermined salary will require the employee to be treated as non-exempt.[8] An employee's status as exempt or non-exempt will influence how the CAA structures any of these options.[9]

Non-Exempt Employees

Under the FLSA, an employer is required to pay non-exempt employees only for the hours they work. Therefore, an employer may implement pay cuts, reduce the hours and wages of non-exempt employees on a week-to-week basis or convert them from full-time to part-time without violating the FLSA as long as the employer continues to pay them at least minimum wage for all hours worked and overtime pay when applicable. If an employer converts a full-time employee to part-time, it should officially document the change in status and any related reduction in fringe benefits.[10]

Exempt Employees

An employer is not prohibited from reducing the predetermined salary amount paid regularly to exempt employees during a business or economic slowdown, provided that it follows certain requirements when implementing the reduction. Whether the employer is cutting all employees' pay by 15 percent or changing exempt employees' work schedules (for example from 40 hours per week to 25 hours per week) and reducing their salaries accordingly, the employer must follow the same requirements so that any type of salary reduction:

- Is applied on a prospective and semi-permanent or permanent basis;
- Is not implemented merely to evade salary basis requirements;
- Does not bring wages of employees in most exemption categories below $455 per week; and
- Reflects the long-term business needs of the organization (i.e., is not a short-term, day-to-day or week-to-week reduction).[11]

As with non-exempt employees, if the employer converts a full-time employee to part-time, it should officially document the change in status and any related reduction in fringe benefits.

Furloughs

Furloughs – or temporary leaves of absence without pay – are another possible cost-saving measure.

Non-Exempt Employees

Because the FLSA requires employers to pay non-exempt employees only for the hours they work, an employer may furlough non-exempt employees for partial days, full days or full work weeks and reduce their pay accordingly without violating the FLSA. If non-exempt employees perform any work during the furlough period, they must be paid for the actual hours they work.[12] Therefore, a CAA implementing this alternative should communicate and enforce a strict no-working policy during the furlough period – including prohibiting furloughed employees from checking voicemails or emails. One way to facilitate compliance with no-working policies is to require employees to turn in their employer-provided cell phones and personal digital assistants (PDAs) during the furlough period.

Exempt Employees

In general, under the FLSA, an employer cannot deduct from an exempt employee's salary because of variations in the quantity of work performed. So, if an exempt employee performs any work during a workweek, the employee usually must be paid his or her full salary for that week. However, an employer may furlough exempt employees by requiring them to take off one or more entire work weeks. The employer may deduct pay for a furlough week from an exempt employee's predetermined salary as long as the employee performs no work during that entire workweek. Therefore, the employer should implement a strict no-working policy of the type described above during furlough weeks.[13]

Additionally, because the FLSA permits employers to reduce exempt employees' pay for full-day absences from work for personal reasons other than sickness or disability, a CAA may ask for volunteers to take full days off without pay. If an exempt employee volunteers, the employer may take deductions from the employee's salary for those days. However, the choice must be entirely voluntary; the employer must not pressure or coerce exempt employees to take days off. In addition, exempt employees who volunteer to take days off must perform no work on those days.[14]

Public CAAs have somewhat more flexibility in structuring furloughs of exempt employees than do nonprofit CAAs. Under the FLSA, state and local government entities – including public CAAs – may reduce an exempt employee's hours and pay from week to week for budget reasons without destroying the employee's exempt status on a permanent basis. However, during the week(s) in which an exempt employee's

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hours are reduced, the government employer must treat the employee as non-exempt – i.e., require the employee to record all hours worked, pay the employee at least minimum wage for all hours worked and pay the required overtime premium if the employee works over 40 hours during the week.[15]

Reductions in Fringe Benefits

Reducing or eliminating certain fringe benefits is another cost-saving alternative. Some examples of this alternative include: reducing employer contributions to retirement plans; reducing the employer share of health insurance premiums; increasing health insurance co-pays or deductibles; or switching to a health insurance plan with lower premiums. These changes will require working with your CAA's benefit plan providers. They may also require consultations with advisors such as your retirement plan auditor or an employee benefits attorney. (For example, certain changes to your organization's health insurance coverage – such as increasing employee's share of premiums, increasing co-pays or deductibles or switching to a new plan – may have implications under the new health care reform law that your organization should discuss with an employee benefits attorney.) Board approval of the changes and amendments to plan documents may also be necessary. CAAs can also eliminate or reduce other types of fringe benefits, such as employer-provided cars, cell phones or PDAs.

Hiring and Wage Freezes

One of the least disruptive cost-saving alternatives is a hiring freeze. As positions become vacant due to normal attrition, a CAA may consolidate or restructure its operations to spread the work among the remaining employees. It is important to be aware of and acknowledge the extra work placed on the remaining employees and the possible decrease in employee

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on the radar: Are CAAs Required to Comply with E-Verify?

It depends on the state where the Community Action Agency (CAA) is located. E-Verify is a federal internet-based system created to supplement the I-9 Form used to verify that individuals are eligible to work in the United States.[1] The system is free for employers and is operated by the U.S. Citizenship and Immigration Services (USCIS) and the Social Security Administration (SSA). As a matter of federal law, use of E-Verify is voluntary for all employers except federal contractors. CAAs generally receive federal grants and not contracts and therefore are not usually considered to be federal contractors. However, some states have passed laws requiring employers, including CAAs, to use E-Verify. For example, Arizona enacted the Legal Arizona Workers Act in 2007 which requires employers to use E-Verify, with the consequence of suspension or revocation of an employer's business license if it is found to have intentionally hired an unauthorized worker.[2] Earlier this year, the U.S. Supreme Court upheld Arizona's E-verify law.[3]

Even if your state currently does not require E-Verify, there may be federal laws mandating E-Verify in the future. Bills have been introduced both in the House of Representatives and the Senate, which, if passed, would require all employers to use E-Verify and would increase penalties for employers who violate immigration laws. The Senate version seeks to eventually eliminate the Form I-9, replacing it solely with E-Verify.

With all of the recent E-Verify developments, CAPLAW suggests the following action items for CAAs:

- Determine if state laws require your CAA to use E-Verify. Check out these website links for information about states requiring employers to use E-verify *http://www.ncsl.org/?tabid=13127* and *http://www.williamsmullen.com/resources/detail.aspx?pub=686*.
- Even if E-Verify is not required in your state, make sure your employment policies are clear about instructing employees to properly complete all I-9 forms.
- If your CAA decides to use E-Verify, remember that using it does not eliminate the need to complete an I-9 form for all newly hired employees and to pay attention to the differing requirements of E-Verify and the I-9 Form.

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morale as a result. Also note that this approach may increase staffing costs for non-exempt employees if the increased work load results in their working additional hours.

Holding employees' wages at their current level is yet another option. Before implementing a wage freeze, check the terms of any collective bargaining agreements or employment contracts. Also ensure that salaries paid to employees hired during a wage freeze are consistent with those paid to existing employees. Finally, keep in mind that while your organization can freeze non-exempt employees' hourly wage rates, it must still pay them for all hours worked, including overtime pay, if applicable.

Conclusion

In tough economic times, CAAs should consider short-term and long-term goals and work creatively to implement cost-saving measures to help them stay on the path towards those goals. Although the cost-saving measures outlined in this article are discussed separately, a CAA may choose a combination of the options to best meet its needs.

See end notes on this page.

The CAPLAW Update Newsletter is part of the National T/TA Strategy for Promoting Exemplary Practices and Risk Mitigation for the CSBG program and is presented by Community Action Program Legal Services, Inc. (CAPLAW) in the performance of the U.S. Department of Health and Human Services, Administration of Children and Families, Office of Community Services Cooperative Agreement Number 90ET0429 and 90ET0432. Any opinion, findings, and conclusions, or recommendations expressed in this newsletter are those of the authors and do not necessarily reflect the views of the U.S. Department of Health and Human Services, Administration of Children and Families.

Article Endnotes

Workforce Options in Leaner Times

1. *See* Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq.; Americans with Disabilities Act, as amended, 42 U.S.C. § 12101 et seq.; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq..
2. 29 U.S.C. §§ 2101-2109.
3. 2 C.F.R. § 230 (OMB Circular A-122), App. B, par. 8.k.
4. Two U.S Department of Health and Human Services Departmental Appeals Board (DAB) decisions illustrate that failing to have such a policy or agreement in place is likely to result in severance payments being disallowed. *See Alcoholism Center for Women*, DAB No. 222 (1981) and *South Central Florida Health Systems Council*, DAB No. 488 (1983). These decisions are available online at http://www.hhs.gov/dab/decisions/index.html.
5. Note that under federal cost principles and Internal Revenue Code requirements for tax-exempt organizations, compensation – including severance – paid to employees must be reasonable. For nonprofit CAAs, where an employee receives more than $150,000 in compensation (including severance) for the year, information about that employee's compensation, including severance paid, may need to be reported to the IRS on Schedule J of the organization's Form 990. In some cases, states also require nonprofits to report certain severance payments to their state charity regulators.
6. *See* 29 U.S.C. § 621 et seq.; *see also* 29 C.R.F. § 1625.2.
7. 29 U.S.C. § 201 et seq.
8. 29 U.S.C. §§ 206, 207; *see also* 29 C.F.R. § 541 et seq.
9. 29 U.S.C. §§ 206, 207; *see also* 29 C.F.R. § 541 et seq.
10. *See* Department of Labor (DOL) Fact Sheet #70 available online at http://www.dol.gov/whd/regs/compliance/whdfs70.pdf.
11. 29 C.F.R. § 541.602 (a); DOL Fact Sheet #70.
12. DOL Fact Sheet #70.
13. *See* 29 C.R.R. § 541.602 (a).
14. *See* 29 C.R.R. § 541.602 (a); DOL Fact Sheet #70.
15. 29 C.F.R. § 541.710.

Oral Complaints: Casual Workplace Banter or Properly Filed Claim under Wage & Hour?

1. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 179 L. Ed. 2d 379 (2011).
2. 29 U.S.C.A. § 215 (emphasis added).

Employer Liability for USERRA and Other Discrimination Claims Expanded

1. *Staub v. Proctor Hosp.*, 131 S.Ct. 1188, 1194 (2011)
2. 38 U.S.C. § 4311(a)
3. 38 U.S.C. § 4311(c)
4. *See Staub*, 131 S.Ct. at 1191; *see also*; 42 U.S.C., § 2000e-2(a), (m)

Are CAAs Required to Comply with E-Verify?

1. *See* Instant Verification of Work Authorization, U.S. Citizenship and Immigration Services, available at *http://www.uscis.gov.*
2. *Ariz. Rev. Stat. §§23-211, 212, 212.01.*
3. *Chamber of Commerce of the U.S. v. Whiting*, 131 S.Ct.1968.