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BUSINESS DESK

WORKPLACE

As corporate layoffs rise, legal challenges are likely to follow - Attorneys advise on defensible downsizing. Avoid the appearance of bias, one says.

BY CAROL J. WILLIAMS, *Times staff writer*

Lured away from her job in Houston to take an executive position at Dell Inc., Jan Chapman persuaded her husband to quit his job, move with her to Austin, Texas, and buy a house at the height of the real estate bubble.

Seven months later, the computer maker laid off Chapman, whose 25-year career in human resources had been filled with flattering performance evaluations.

Chapman, 59, and three other top female managers have filed a class-action lawsuit against Dell, alleging age and sex discrimination in the company's termination of 8,000 employees over the last year.

The suit, filed in federal court in San Francisco, is one of only a few so far emanating from the mass layoffs sweeping the country.

But labor and employment lawyers warn that a tidal wave of wrongful-termination suits is expected in the coming months as the jobless burn through their savings, run up debt and find few work prospects in the worst economic downturn in decades.

Attorneys specializing in labor law say they haven't been this busy

since the late 1980s, as strapped corporate clients seek their counsel on how to reduce staff without inviting litigation.

"Unfortunately, we're doing a lot of that lately. Nobody is immune," said Jay P. Krupin, who leads the labor and employment practice at Epstein Becker Green's Washington office.

Krupin walks clients through a checklist of laws and company policies that need to be considered in identifying positions to be eliminated, including notification requirements, severance pay provisions and a "disparate impact analysis" to guard against terminating those in a protected class who might have grounds to sue. Title VII of the Civil Rights Act prohibits employers from discriminating on the basis of race, color, religion, sex or national origin.

The 20-year-old Worker Adjustment and Retraining Notification Act, called the WARN Act, requires employers to give at least 60 days' notice of plant closings that eliminate 50 or more jobs, and before mass layoffs affecting 500 employees or more than a third of the workforce. Lawyers and staff members at two San Francisco law firms that have dissolved in recent weeks, Thelen and Heller Ehrman, have sued their former employers, alleging violations of WARN Act terms.

"If you got rid of a number of employees and they all happened to be over 40, they would have a cause of action" for age discrimination, Krupin said. The same could apply to disproportionate dismissal of minorities or women, he said, even if

there wasn't deliberate intent to target those workers.

Companies that regularly evaluate employees and identify underperformers are best positioned to defend their decisions to lay off the laggards. Conversely, employers that haven't documented poor performance -- or have given glowing reports or pay raises to workers they want to lay off -- are likely to have a hard time defending those dismissals.

"You better have an explanation for why you promoted me two weeks ago, said I had a rosy future and then today you come in and say, 'Here's your final paycheck,'" said Robert F. Millman, founder of the Los Angeles office of employment law firm Littler Mendelson.

That said, such bungled downsizing does occur, especially amid rapid economic setbacks like those now afflicting financial institutions, real estate companies, retailers and the hospitality industry, Millman said. He described the current environment as "the worst economic contraction I have ever experienced in 34 years as a labor and employment lawyer."

Rick Brandt, president of consulting services for TalentQuest, an Atlanta-based consulting firm, said employers must take care to make clear, fair and informed choices about which employees to let go and which to keep.

"You need to be transparent about how you made the decisions you made. People tend to undercommunicate in these situations," he said.

One indicator of the heightened concern about litigation has been the rise in policies that employers have taken out for employment practices liability insurance, said Jenny Jones, president of the independent Los Angeles insurance brokerage Elkins Jones. Her agency has seen a 32% increase in policies to cover defense costs in the event of wrongful-termination lawsuits.

As part of the liability coverage, her agency makes employment lawyers available to counsel a company's managers on how to construct a defensible downsizing plan, she said.

"We have only seen the tip of the iceberg here," Jones said of the expected lawsuits.

Law firms, especially those with large real estate and mergers and acquisitions practices -- areas hit especially hard by the recession -- are among the businesses

struggling to downsize without spurring litigation.

Chapman and the other Dell employees who sued the computer maker took action a month ago, saying they waited so their lawyers could develop evidence to show a pattern of discrimination.

Analysis of the 8,000 employees Dell laid off over the last year will show that women and people over 40 were disproportionately affected, said Steve Wittels, a founding partner of the Sanford Wittels & Heisler law firm, which filed the class-action suit seeking \$500 million in damages.

"What occurred at Dell was that women and older workers who had good ratings and favorable performance reviews in prior years suddenly found their reviews were being manipulated -- readjusted and used as a basis for wrongfully firing them," Wittels said.

Dell executives deny the lawsuit's

allegations.

"We take any claims against our recognized efforts to embrace diversity and equal opportunity seriously," said spokesman Jess Blackburn. "We believe the claims in the suit are without merit."

Chapman, who has yet to find new work seven months after her termination, said she remained bewildered about why the company wooed her only to let her go when there was a need for human resources expertise.

"I never expected to be on this side of a case. Never. I have no idea why I was selected for this dubious honor. It certainly wasn't related to my performance," Chapman said. "But I feel very strongly that we will prevail. What occurred to us is illegal."

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