

KERPS, Employee Retention and Bankruptcy: Balancing Stakeholder Interests

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When an organization files for Chapter 11 bankruptcy protection, we often hear about lavish amounts paid to senior employees as stay-bonuses or Key Employee Retention Plans (“KERPs”). These payments are made under the theory that to lose these employees at such a critical time would be detrimental to the organization. This could compromise the organization’s ability to successfully emerge from bankruptcy. In addition, with employees fleeing the company like a burning building, a tremendous amount of institutional knowledge can be lost. The obvious questions about how things are supposed to run become increasingly difficult to answer.

An alternative view is expressed daily in our newspapers. Headlines tell us that senior management personnel receive millions of dollars as rank and file employees, creditors and shareholders carry the bag. Critics claim that to pay these leaders is, in effect, rewarding the very team that led the organization to its current dismal shape. Others claim that to pay individuals bonuses, when they have no intention of leaving to begin with, further damages creditors and shareholder. Moreover, significant morale problems and difficulties with unions can result if it is perceived as the intention of management to create secret reward systems solely for themselves.

An effective employee retention plan in a troubled organization is comprised of more than doling out checks in fear that employees will flee. Specifically, organizations should consider the following when contemplating such a plan.

Who is Most Critical?

The organization needs to truly understand which employees will be most critical to ensure a successful transition. All too often, the organization in crisis has sketchy information on employee performance, knows little about how it got into this mess in the first place, and leaders have little understanding of what is being done on a day-to-day basis by their employees.

Leaders overseeing the transition must quickly gain a full understanding of jobs being done and determine what will be required to be done going forward. For example, focusing on retaining and servicing customers may be a new initiative which was previously not given great importance prior to the organization’s troubles. There will also undoubtedly have been priorities in the past which now are considered unnecessary.

Organizations must also identify the steps they will need to take to emerge from bankruptcy successfully. While this seems logical to the turnaround expert, the organization needs to translate these in to measurable outcomes and assign the specific tasks that employees will get done, often redesigning jobs in the process. There are now more influential stakeholders who impact the organization, and leadership has been forced to give up a certain degree of control. Thereafter, there must be ample

This article is slated to be published online by the Turnaround Management Association on its website, www.turnaround.org, in April, 2005.

communication and follow up. Those employees whose jobs were important in the past may not be as important in the new environment, and vice versa.

Who are the employees who are most likely able to ensure success? An organization may wish to divide the employees into three groups – those that *must* stay, those that management would really like to stay and those that they can live without. A viable retention program will hopefully be able to cover all those in the first category and some in the second. It is possible, however, that the groups will be sorted differently depending upon the availability of financial resources for the program.

The employer must also be able to size up employees relative to their ability to succeed in a new culture. Employees who were successful in the past may not be in the future under a new regime and an entirely new set of circumstances and mandates. That's why past performance data *may not* be the best indicator of who should participate in a retention program. Objectivity at this stage is vitally important. Existing management often focuses on past performance (often subjectively), while retained turnaround experts lack the internal knowledge and history.

What other criteria will be used to determine an award, if any? Some organizations have reviewed length of service, level within the company, and awards for specific functional areas. While these seem cut and dry, the organization should be extremely careful. Why pay out a bonus that's not necessary just because someone happens to sit at a desk in a particular department?

Unfortunately, many organizations focus solely on high-level employees or employees with particular expertise (i.e. technical employees) for retention programs. This shortsightedness fails to recognize the fact that everyone must be on-board with the new direction and mandates. The receptionist answering the telephone and greeting visitors can have a significant impact on how the organization is perceived by vendors, customers, creditors and other stakeholders.

What Will Get Past the Creditors and the Judge?

An effective organization will carefully evaluate what the creditors and the court will view favorably. Are the amounts requested reasonable in this industry, for a company of this size and condition, in this location, for employees with these specific skills? Despite the best intentions, as the development of a plan gets underway, confidentiality never seems to be what the employer thinks it is. Numbers swirl about, and employees and managers gossip and speculate. Typically, the number in an employee's mind just never seems to be what the actual reward is, if any. As a result, organizations should be strategizing well in advance and in such a manner that the reaction from the creditors and the judge is more supportive than negative. Going back to the drawing board only serves to make employees more uneasy and foster the perception that management is in even less control.

The Employee Performance and Strategy Linkage

An effective program should consider carefully what specific behaviors and results it wants to achieve. To provide an award for merely staying and doing the same thing is often wrong. An organizations unique business strategy should influence the decisions

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here as the new world order is translated into new accountabilities and mandates for the organization and its employees.

In addition, the organization should consider how retention bonuses would be paid out. Will they be paid out periodically over time, all at once at a specific date, or after the achievement of specific milestone? While it may be beneficial to hold out and offer a big prize at the end, periodic rewards may serve to reinforce desired performance and remind employees about where the ship is headed.

Public Opinion and Employee Support

Organizations should consider alternatives to help retain employees. What non-monetary incentives or programs can be implemented to encourage employee retention? These might include promotions, development opportunities, or increasing responsibilities for worthy employees. In addition, what communication programs are in place to clearly educate employees on the details of the program? An employee who is not selected and another who feels that his or her award is insufficient will have similar negative feelings. In the second case, the employer is wasting money on an employee who will likely remain disgruntled and possibly leave anyway.

Problems with employee support also stem from the notion that management often thinks that communication is one mass mailing of an employee memo or a large staff meeting. Unfortunately, right after the announcement, employees congregate at the water cooler to decipher what was said. Effective communication is carefully planned, ongoing and tailored for each level, function and employee in the organization. It is two-way and also provides an avenue for employees to have questions answered, succinctly and without conjecture.

Public opinion is often as important as the opinions of creditors, the court and the employees. Recently, the media has lashed out at organizations in bankruptcy who are alleged to have made the leadership wealthy while harming the employees, shareholders and creditors. Unions have also made their voices heard and have provided a tremendous amount of criticism as they have been forced to make considerable concessions in several industries while organizational leadership is accused of padding their own bank accounts. The lack of public support for these programs fosters the perception of a lack of fairness. This ultimately has a significant adverse impact on employee morale, which ultimately will negatively affect a firm's performance.

Conclusion

Organizations have two choices when it comes to employee retention programs in the face of bankruptcy. They can neglect all of the things, including and beyond money, that are important to engaging and keeping employees and put together a program without a true understanding of the employee culture, dynamics and performance requirements that will lead to success. Alternatively, they can do the right thing with a fair, equitable, carefully planned and well-communicated retention program.