

RETAINING AND WORKING WITH OUTSIDE LABOR & EMPLOYMENT COUNSEL

Diane M. Pfadenhauer, SPHR, Esq.



The selection of outside labor and employment counsel is a serious decision for an organization that is best handled in a methodical and well thought out manner. All too often, counsel is selected based upon a few typical scenarios. Selection may be based upon a relationship between internal counsel and his/her former firm. Labor and employment counsel may be selected by the organization's outside corporate firm to handle a specific case. Worse yet, the organization may be faced with a critical need and select counsel without a thorough analysis and miss the opportunity to select a firm that can best meet its needs.

Diane M. Pfadenhauer, SPHR, Esq. is President of Employment Practices Advisors, Inc. based in New York. She has over twenty years of experience as VP/SVP of HR and in-house labor and employment counsel and she speaks and writes regularly on the subject of employment law and its implications for human resources professionals. She is also a member of the graduate faculty in the E.M.B.A. program at St. Joseph's College in New York. She is a member of the NYS Bar Association, Labor & Employment action's EEO Committee.

The purpose of this article is to provide human resources practitioners and other internal management staff with a guide to retaining and working with outside labor and employment counsel and to focus the internal practitioner on determining the right fit. Many of the considerations presented stem from the simple fact that both organizations and law firms are unique. When dealing with sensitive employee issues, the organization must ensure that it has a well-established working relationship with its outside firm that takes into account a variety of internal and external factors.

SIZING UP THE ORGANIZATION

The first step in the process is to analyze the organization. What is the industry? Is the organization publicly traded or privately held? Is it large or small? Are its employees located in a small geographic region? Are employees located internationally? While the answers to these and other questions are simple and obvious, they will lead the human resources

practitioner to begin to evaluate the needs of the organization, and ultimately will help to guide the decision of which firm to use. The uniqueness of an organization is determined by these simple answers as well as the answers to more detailed questions.

Understanding the culture of an organization is another critical step in sizing up an organization. How do the leaders lead? How are people decisions made? How readily and aggressively does the organization communicate its policies and the details of its business plan? How does the organization deal with instances of conduct that could be deemed unethical? What is the level of trust and employee satisfaction with management? What are its core values? On occasion of employee misconduct, what kinds of behavior warrant termination as opposed to a mere reprimand? Answers to these questions will reveal the style in which the organization is managed and ultimately lead to more of an effective analysis of the style of a firm that complements the organization. For example, an organization

that is more open and paternalistic might be better served by a law firm that complements these values. That organization would be ill advised to select the firm famous for slashing employees in a cut-throat manner.

The organization must be prepared to identify what it is willing to fight for and what kinds of precedents it is willing to establish. Unknowingly, and without a planful process, organizations can establish patterns and precedents in how they handle litigation, how they settle disputes and how they resolve employee relations matters. These patterns send messages to the community at large and to employees about how far the organization will go to defend itself, how willing it is to settle, and at what cost.

What is the role of human resources in people decisions? Is human resources an advocate, a decision maker, or an administrator? Is human resources viewed as being more aligned with management or employees? The outside firm can serve to complement the role of human resources within the organization. That role, however, must first be defined. An active human resources function with a well-trained and professional staff will work differently with counsel than a junior administrative staff. The firm will be able to rely on the human resources experts when handling cases to a much greater degree than a more junior staff.

The business and competitive climate of the organization also affects the selection and use of counsel. Industries go through cycles. Over the past decade, a variety of them have undergone consolidation or significant downturns. The simple question of whether the organization will exist over the long haul or be sold off to a competitor

affects its employment practices and planning and, ultimately, its need for counsel and the type of work that will be done.

Quite obviously, the availability of resources to use counsel often is a product of how well the business is doing. These resources may be financial or may be the availability of internal expertise to support the work being done by an outside firm. For example, an organization may have limited resources, yet have an employee relations climate that requires extensive participation by counsel. Or, a small struggling early-stage company may initially think it is better to use a small law firm with lower hourly fees, but may find that the small firm cannot service the company effectively to support its tremendous international growth. When faced with these realities, the organization must analyze not only the use of counsel, but also its internal leadership and human resources infrastructure to effectively confront these issues proactively rather than reactively. For example, for many years a mid-sized company with several domestic facilities operated with only a bare bones administrative support staff and no human resources expertise. When faced with the strategic task of re-engineering and downsizing several facilities, it relied solely on outside labor and employment counsel, at a much greater financial cost than had it been able to rely on a proven human resources infrastructure to work closely with counsel to achieve the necessary staff reductions.

WHAT IS PROMPTING THE NEED?

The organization needs to ask itself why it is in the mode of selecting counsel. Is it the result of a subpoena served on the corporation this

morning? Is it based upon the recognition of upcoming changes in the business plan or organizational strategy and a resulting need for outside expertise to assist in the people issues? Is it the result of dissatisfaction with existing counsel? What is the critical question before it?

THE ROLE OF OUTSIDE COUNSEL

Typically, when asked what lawyers do, the frequent answer is that they give advice. What does that really mean? The question for an attorney should not be one that requires a simple yes or no answer. The question should be one that promotes thought-provoking discussion on the subject matter with a discussion of the alternatives that the business person can evaluate when making a decision. The best lawyers help their clients achieve their business goals, not by telling them "no," but by using their analytical abilities to explore options and alternatives with their clients in order to achieve the desired result or, at a minimum, the best possible outcome.

The good lawyer is also a problem solver. Anyone who has been through a personal or corporate issue and has had to deal with professionals such as accountants or lawyers, knows that the most effective advisor is one who helps solve a problem. Solving a problem includes more than recommendations on how to just make it go away or to sweep it under the rug. It includes helping to prevent it from recurring in the future. The good lawyers will, for example, understand how your business operates, how your compensation systems are designed and how they work, how your human resources policies are developed and imple-

mented and by whom, and will make recommendations taking into consideration all of the unique facets of the organization.

The roles of negotiator and litigator are obvious ones for lawyers. But how will that be done? How active will the organization be in these areas? Who will handle the union negotiations - the law firm, the human resources professional or both? Will human resources attend all depositions or hand off the case to the law firm and have counsel contact them when the trial is scheduled?

The lawyer is also an educator — for the internal human resources staff and management. This occurs on a formal basis as well as an informal basis. The well thought out advice serves to put the management team through a thinking process that will provide them with analytical tools to use the next time. When advising a client on what to do, the effective lawyer explains why or why not in a language that can be understood and applied. As trainers for formalized instruction, the outside lawyer presents an objective view. He or she is not tainted by organizational politics and history, presents the law in an easily understood manner, provides clear examples to guide employee behavior and presents the information in a style consistent with the organization's philosophy.

The human resources department should also be able to rely on the lawyer as its ally. For internal political reasons, it may be best for the lawyer to give the bad news to the boss rather than the internal human resources staff. The lawyer serves as an extension of the human resources department and management team and is available as a resource to complement and bolster the skills of the internal

staff. The effective lawyer will also find that he/she will work differently with various organizations once able to evaluate and truly understand the level of expertise he or she is dealing with.

Lastly, the effective law firm is a trusted business advisor who understands the business and the organizational dynamics. In one scenario, the senior partner of a law firm swore to the new vice president of human resources that he knew the industry in question because he had other clients in the same geographic area in the same industry. Unfortunately, he failed to understand how this organization was different from the others and, as a result, was unable to go beyond reciting the law. The firm, which had had a previous long-term relationship with the company was ultimately replaced by the new vice president of human resources not only because of its demonstrated lack of understanding of the company, but also because the law firm failed to recognize this new individual's role in the organization. The best firm will take the time to truly get to know the business and the people. The result will be more effective advice — not just legal advice, but advice on effectively running the business and ultimately improving the bottom line.

EVALUATING INTERNAL EXPERTISE

The expertise of in-house counsel and the internal human resources staff should be evaluated from the perspective of assessing the role that outside counsel will play. All too often, the internal legal staff finds itself doing labor and employment work yet lacks a significant amount of expertise in this area. In one instance, for example, an internal general counsel was ed-

ucated by a staff level human resources professional about the need to comply with the Older Workers' Benefits Protection Act when drafting employee severance agreements. The general counsel had never heard of the law and was shocked (and disappointed) to learn of its requirements. In another instance, the in-house corporate attorney had never heard of the Fair Credit Reporting Act. He, too, was educated by the human resources department.

The internal expertise of the human resource staff varies considerably from company to company. From conducting investigations, to supporting litigation, an effective human resources professional will be able to coordinate its activities with the outside attorney and should be able to work closely with counsel to handle issues. The inexperienced human resources professional will have to rely upon the outside attorney for much of the analytical work and preparation of materials, thus increasing the expenses for the organization. One time, an attorney was retained to defend an age discrimination claim. When the human resources staff was asked for a detailed listing of employees and their birthdays, they hurried to the task. However, this junior staff misunderstood the request and submitted a list without the years of birth. Organizations would be well served to ensure competent staff that can effectively work with counsel and understand the basics of employment law. Human resources professionals do not need to be experts in employment law, but they need to know when to ask questions or to seek clarification.

Despite the best-trained staff, the lack of time to be able to devote to effectively managing peo-

ple issues, particularly in a crisis, is a real problem. The human resources staff, in the midst of a major strategic event facing the organization, may not have enough hands to manage it all. In that case, it may be worthwhile to use the outside attorney for, perhaps, an investigation that the internal professional may not have the time to devote to. Human resources professionals should be realistic in their expectations of what they can accomplish. All too often, the internal staff, pressed with deadlines and demands, will be unable to devote the necessary effort to conduct an effective investigation. The results of which will not be obvious right away. Rather, during the heat of litigation, the holes in the case and errors committed will become glaringly apparent.

Internal conflicts present yet another quandary for the internal human resources professional. Should human resources conduct all internal investigations? Quite simply, the answer is no. Under no circumstances should a senior human resource professional investigate the conduct of his/her superior. Nor should he/she conduct an investigation of the conduct of a peer with whom he or she is required to work closely. Reporting relationships can complicate matters for the professional with the best intentions. Organizations must take a serious look at how organizational dynamics and conflicts can play a role in affecting the objectivity of decisions. In such instances, issues of territoriality must be set aside and external experts should be used.

SELECTION OF COUNSEL

The organization must be clear with regard to who internally will make the final decision. Who are the stakeholders involved in the

decision-making process and what are their specific needs? The in-house legal department may be concerned with how a firm handles litigation, whereas a human resources department may be more concerned with how the firm will support them on a day-to-day basis with employee relations issues. Once stakeholder needs are defined, they can get to work evaluating firms.

One of the first areas to look at is the expertise of the firm being considered. Does the organization require experience with a particular industry such as health care, construction or the public sector? Must the firm have international expertise? Must it have expertise in several states? A firm that has a great deal of institutional knowledge and, therefore, does not have to conduct extensive research on matters it has never faced, can save a client a great deal in the long run. What might be a simple question for one firm might be a very expensive question for another.

Large corporate firms may possess a broad base of knowledge by having several large departments that can service the organization. However, some of these firms lack significant employment law expertise. In that case, they may retain other labor and employment firms to do the work for them. Who will ultimately decide which labor and employment firm is chosen — the firm or company? Large boutique labor and employment firms may be appropriate in their ability to handle nationwide and international issues as well as possess the depth of experience needed for the company. However, some of these do not possess a strong benefits function. The human resources practitioner needs to ensure that it receives the proper support in both

of these areas (either from one or multiple firms) and that the work is coordinated cost-effectively for the company by using the same firm or coordinating it among several firms.

Small firms may be beneficial from the perspective of their ability to be responsive and nimble and to be able to provide quality services at a cost less than the larger firms. However, the small firm may have to rely on local counsel for an out-of-state case. The internal practitioner should be sure to deal with that eventuality at the outset in order to determine how such instances will be handled. How will the local counsel be selected and retained? Will the out-of-state counsel meet all of the criteria established in the initial selection process for the first firm — i.e. with regard to style, approach, tactics, understanding of the business and the industry, etc?

The style and approach to supporting the client must also be taken into consideration. Not only is each firm different, but also within firms, different attorneys may do their work differently. Will the company staff be working with one attorney? Will it be a partner? Will the company work with associates, and partners only on occasion? In one instance, a law firm had established a relationship where a team of attorneys worked with the client. Throughout the course of the working relationship, the human resource staff would call the law firm and speak with whomever was available. During a crisis, however, the problems with this method quickly became apparent. In the heat of a highly sensitive sexual harassment investigation, the human resource staff spent a great deal of time explaining the minutest details to a senior attorney who guided them

through their investigation. The next day, however, that attorney was out of the office, and had passed the matter onto another attorney who knew none of the history. The staff found it necessary to spend an inordinate amount of time rehashing the issues and facts and bringing the new attorney up to speed on the case. Not surprisingly, this new attorney brought a new perspective to the case. This is not to suggest that an attorney cannot be out of the office, but with proper planning, the needless additional cost and anxiety for the staff could have been avoided.

Does the firm respond to questions in the form of lengthy memos and formality? Does the client expect assistance immediately or does it want to deal with only one attorney, whenever that attorney is available? Is the firm hands-on? Will it do investigations of employee misconduct or will it retain outside experts? Will it be onsite to help manage an employee organization campaign under the National Labor Relations Act or be an outside expert ready and able to provide expertise to the onsite staff that will lead the campaign? While many firms will suggest that they can do it all and in any manner the client desires, each has a preferred working style, which will become apparent after a thorough review. That style should dovetail with the organization's.

Potential firms should also be asked to provide specific details about fee structures, examples of their work and procedures for assigning work to other attorneys in the firm. They should be willing to invest a fair amount of time getting to know the organization during the courting stage of the relationship. Will the firm review handbooks and policy manuals at the outset and at what cost?

LET THE BUYER OF INSURANCE BEWARE

While organizations may have the best intentions in selecting outside counsel, they may also have employment practices liability insurance (EPLI). As a result of the tremendous growth in the number of lawsuits over the years, employers have turned to such policies to insure against liability resulting from employment practices. Under a typical policy, the carrier often reserves the right to choose the counsel who will defend the company faced with a claim. In addition, the contract of insurance may also give the insurance carrier the right to reach a settlement at its discretion. In the event the employer does not wish to settle the case upon recommendation by the carrier, the carrier's liability is limited to the initial amount recommended for settlement. These are both serious issues to address when considering such insurance, and those individuals beyond the risk manager's office who will be involved in the defense of an employment case should be involved in the decision.

The most critical issue when considering the purchase of EPLI coverage is to ensure that the company retains the right to choose the counsel or its choice. Purchasers are advised to specifically resolve this issue at the outset while considering alternative policies. While this freedom may result in higher premiums, it will be money well spent. A company is much better served by working with an expert in the field of employment law who knows the organization and industry well rather than a stranger from the insurance carrier's panel of attorneys who knows nothing of the industry or company.

Regarding settlement, the proactive employer will understand

the pitfalls associated with settling too early, too late or in a manner that is inconsistent with its employee relations philosophy. The interests of the carrier are, obviously, to resolve the claim at the lowest cost. The party in control of the settlement, however, should always be the employer, not the carrier. While keeping this control might increase an employer's costs overall, the employer knows his company best and is in the position to make the right decision for the organization.

DETERMINING RESPONSIBILITIES AND DEVELOPING AN ONGOING WORKING RELATIONSHIP

When the firm and an organization begin to work together, certain ground rules based on the answers to many of the above questions, should be established. Establishing how the parties will work together at the outset will make the more difficult work to be done later go more smoothly. Some additional ground rules include obtaining specific information about fees and how expenses are handled. If the organization is concerned about convenience, the law firm can do much of the administrative work and charge this back to the client. If the client is interested in reducing expenses wherever possible, it should take on whatever administrative work it can. Every year, the client should review its legal expenses and determine whether they are consistent with the level of service being provided. There should be an ongoing open dialog with the firm concerning the cost of legal services provided.

Who will be the lead contact person at the firm and at the organization or will it be shared responsibility? For example, in many

instances bills for litigation will be sent to the finance department, or the risk manager if there is EPLI, while the human resources staff is managing the litigation for the company on a particular case. It is important for all of these parties to work together to fully understand what services are being provided. All too often, the person internally who is handling the litigation never sees the bills. Months later, someone becomes alarmed at the growing expenses. In addition, this very same human resources practitioner, who is working closely with the law firm on the day-to-day defense of the case, may not know the EPLI policy terms and requirements.

How will the in-house legal and human resources staffs divide their responsibilities? Will the in-house staff become the intermediary for conversations with the outside firm? Will the human resources staff work directly with outside counsel on employment matters so as not to involve in-house staff in sensitive employee issues? Many companies do this in order to avoid the prospect of internal employees (attorneys or not) from being exposed to sensitive employee issues.

Based upon the analysis of an organization's internal expertise, what activities can the organization do for itself on its own time, rather than the law firm's time? Once that list has been identified, is it still in the best interest of the organization to take on all of these tasks in light of the other responsibilities with which they may be faced?

DURING LITIGATION

Every organization will, at some point, be faced with litigation of

their employment matters. Determining the roles and responsibilities at the outset, prior to or at the commencement of the case, will make the defense go more smoothly. The first question for internal practitioners is to determine how involved they want to be. Will they attend every deposition? Will they review every fact and detail with the attorney? Some of this involvement may result in more time with the attorney on the case, but may also result in a better defense when skilled practitioners can provide insight and serve as a resource to defense counsel. Determining responsibilities at the outset will also prepare the internal staff for the time, effort and energy that will be required on its part. Attorneys should prepare their clients for the inordinate amount of work that needs to be done to defend a case. This way, the staff can prepare to assimilate that work into its existing busy schedule.

Throughout the defense, the attorney will require a steady stream of documents, facts, and information from the internal staff. The staff is well advised to seek to understand what the outside attorney is asking for and why. What is needed? Why is it needed and how does it help the case? The example of the birthday list above, demonstrates the potential frustration for an attorney who is defending a case with a staff that can do little to help the outcome. Knowing what the attorney is asking for and why will help the internal staff to engage in a thought-provoking discussion with that attorney which may result in bringing out different ideas and facts which can shed light on the case and help in its defense.

How often, and in what way, will the defense counsel communicate with internal staff? During litigation there are often peaks and valleys. Work may be done at a frenzy to meet a deadline and then a great deal of time may go by with little communication between the attorney and the client. The client, concerned about the progress of the case, soon concludes that the attorney has dropped the ball or is not keeping him in the loop. The internal staff should seek to understand the procedural steps in the case so that it can plan for these peaks and valleys and the resulting demands that will be placed upon them. Many times, corporate clients will assume nothing is happening on the case and be critical of an outside attorney claiming that nothing is going on.

CONCLUSION

Retaining outside employment counsel is not merely an isolated decision, but rather a process of serious internal evaluation coupled with a thorough external analysis. The results of this process will enable organizations to more effectively handle their employee relations issues and enable law firms to better serve their clients. The obligation is for both parties to do their homework, establish what they want and need from the relationship and define that for each other. When this is done, the client will experience a productive and long-term relationship with its outside attorneys that will ultimately help the organization perform better in the long run and will promote the possibility of better results for the organization in the resolution of its employee relations matters.

