

message from partner in charge

Some economic pundits say the recession is ending, but unemployment is still rising. So in this issue, Mike Canavan advises on how companies can best treat their employees who remain after reductions in force. In related news, Pepper recently hosted a Closely-Held Business Webinar Series, designed to help businesses save and make money and survive the economic downturn.

In other economic news, merger and acquisition activity is likely to increase this year because of the high level of distressed debt, according to a study commissioned by Carl Marks Advisory Group LLC and Pepper.

Finally, this issue's Spotlight is on Mark A. Solomon and the Princeton office's commercial real estate practice.

As always, we welcome your comments, questions and suggestions.

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Reductions in Force: What About Those Left Behind?

Your business has crunched the numbers, has considered the alternatives, and has come to the conclusion that layoffs are necessary if the business is to remain afloat during these challenging economic times. With that in mind, you've analyzed the company's critical functions and determined which employees must remain to execute those functions; you've examined the demographics of those to be let go to ensure no protected class is disparately impacted; you've given the advance notice to affected employees and government officials that is required by federal and state WARN Acts; and you've come up with a plan for discharging those employees in a manner that maximizes their dignity and minimizes disruption to your business operations.

But how much thought have you given to your remaining employees who are about to watch their friends and colleagues lose their jobs? A critical, but often overlooked, aspect of any downsizing plan is ensuring that your remaining employees maintain their morale and stay motivated in the pressurized atmosphere of a workplace that is trying to maintain its operations with a decreased workforce. This article offers several suggestions for getting the most out of your employees in these difficult circumstances.

1. Make sure downsizing is carried out in a respectful manner. Nothing can poison the morale of employees faster than watching their former colleagues be shown the door in an abrupt and disrespectful manner. The remaining employees will be left to wonder when their turn to suffer such indignities will arrive. When downsizing, ensure the dignity of those who are losing their jobs by notifying them of the decision in private; by allowing them to say goodbye to their colleagues and transfer their responsibilities in an orderly way; and, if possible, by providing them outplacement services that will ease their transition to other employment. Unless absolutely necessary, do not escort discharged employees off the premises as if they are suspected criminals. The remaining employees will take

notice of how you treat those being let go and will quickly determine whether your company truly appreciates the “human” nature of its human capital.

2. Clearly communicate the expectations of the remaining employees. The first question employees may have after a downsizing is how the work of their departed colleagues will be accomplished. The downsizing may be accompanied by a company restructuring, and the remaining employees likely will be receiving new assignments or duties in order to maintain the operation of the business. If the restructuring or reassigning of duties is not communicated clearly and quickly, it likely will lead to uncertainty and anxiety among the remaining employees. Prior to the downsizing, employers should have a plan to proactively communicate the expectations for the remaining employees to facilitate a smooth transition to the new operating model.

3. Recognize that the remaining employees may have ambivalent feelings. It is easy for employers to assume that remaining employees will be grateful to still be working and will be motivated to work hard to remain employed. The reality is not so simple. Although employees will no doubt appreciate their continued employment, they also will likely feel “survivor’s guilt” in being spared layoff while their colleagues were not as fortunate. Employees also may be angry with management for discharging their colleagues and expecting them to take up the slack with no additional compensation. They may feel fear and anxiety that they will be the next to receive a pink slip. They may be unmotivated and dispirited, thinking that even their best efforts may not be enough to ensure continued employment. Employers would do well to recognize that these emotions are normal and inevitable in the aftermath of a downsizing. Employers should acknowledge the challenges the remaining employees face and allow for opportunities for the employees to express these emotions by maintaining an open-door policy, by holding regular meetings to discuss ongoing challenges that allow time for employee “venting,” and, to the extent practicable, by empowering employees by including them in decisions on restructuring and reallocating the workload.

As we all have seen during these recent difficult months, there is practically no industry that is immune to the financial pressures that have forced layoffs throughout the economy. Indeed, the elimination of jobs may be a necessity if some companies are to remain viable. Don’t

Pepper’s Closely-Held Business Webinar Series

Pepper Hamilton’s webinar series is designed to help closely-held businesses save money, make money, and manage profitability through this economic downturn. Learn about the latest need-to-know issues and developments in all facets of your business.

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forget, however, that the viability of your company also depends on having employees who recognize their role in the downsized business, who are motivated to contribute to the company’s ongoing success, and who understand that they remain employees of a business that values them not only for their work product, but for who they are as people.

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Market Conditions to Produce Significant Distressed M&A Opportunities in Second Half of 2009

The current economic downturn will offer greater discounts on distressed assets than previous downturns have offered, drawing both financial and strategic buyers to the market in the coming months, according to 92 percent of respondents to a new **Distressed M&A Outlook** survey conducted by mergermarket, Carl Marks Advisory Group LLP and Pepper Hamilton LLP.

In the second quarter of 2009, Carl Marks Advisory Group LLP and Pepper Hamilton LLP commissioned mergermarket to survey 75 investment bankers, private equity practitioners, hedge fund investors and lawyers regarding their outlook for distressed M&A activity in the upcoming year. Respondents provided invaluable insight into current market conditions, as well as a forecast for the year ahead.

“With a variety of factors contributing to an increased volume of distressed opportunities, both buyers and sellers are expected to eagerly pursue deals, as each side stands to gain unique benefits,” said Jim Rosener, managing partner of the New York office and head of the International Practice Group at Pepper Hamilton LLP.

Aside from attractive discounts, debt related issues will likely be the most prominent drivers of distressed M&A activity in the upcoming year, according to respondents. An increase in covenant defaults is identified as a major catalyst to distressed deal flow, as is companies’ inability to meet debt obligations or refinance upcoming maturities.

Distressed investors are likely to find the greatest opportunity in the following two sectors:

- Real Estate, where 63 percent of respondents expect to see the highest volume of distressed deals in the year ahead, and
- Financial Services, which 38 percent of respondents believe will experience the highest volume of distressed M&A this year.

63 percent of respondents expect most distressed deals to be handled outside of court; however Chapter 11 reorganizations may be an exception as these are expected to be extremely common over the next 12 months.

The predominance of out of court deals is likely related to time constraints, as many respondents cite time as a major drawback to handling deals in court. 59 percent of respondents say the distressed M&A process can exceed four months when handled in court. Meanwhile, on cases handled outside of court, only 25 percent of respondents say the process can take this long. “If implementable, out of court solutions are generally less expensive and disruptive. However, it is not clear whether companies with complex capital structures will ultimately be able to obtain all of the consents necessary to use these solutions,” explains Duff Meyercord, partner at Carl Marks.

Time constraints also are expected to put pressure on management teams within distressed companies, which in turn may influence the dynamics of distressed transactions going forward. According to Jim Rosener, “Not only is the market characterized by people having to do something and forced to do it on a tight timetable, but there also is an increased opportunity as management loses focus and interest over these orphaned businesses.”

Additional findings:

Exit outlook: 65 percent of respondents plan to delay their exits from distressed investments in the upcoming year.

Valuations: 54 percent of respondents say asset based valuations tend to be the primary determinant of price.

Alternative strategies: 79 percent of respondents expect debt buy-backs to increase in the year ahead.

If you would like a copy of this report, please contact Brian Dolan at 215.981.4568 or dolanb@pepperlaw.com.

Spotlight: Mark A. Solomon

Pepper's Real Estate practice group has a strong presence in the firm's Princeton office, with six Pepper attorneys actively assisting clients with commercial real estate and zoning matters, supplementing the group's strong presence in Pepper's nearby Philadelphia headquarters.

In Princeton, Pepper partner **Mark A. Solomon** has been representing clients in complex real estate and land use and zoning matters for almost 25 years. He is experienced in all aspects of the land use regulatory process, including local, county and state permitting and approvals, affordable housing, environmental regulation and land use litigation. He has been counsel to numerous redevelopment projects. His clients include educational institutions, pharmaceutical companies, a regional hospital, shopping centers, a regional mall, residential and commercial developers, and builders of affordable and senior housing, assisted living and nursing homes. His practice also includes real property tax appeals and condemnation.

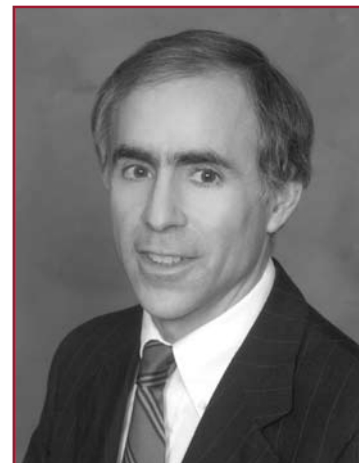
Mr. Solomon is a member of the Real Estate and Land Use Law Sections of the Mercer County and New Jersey State bar associations respectively. He is a past member of the Supreme Court of New Jersey District VII Ethics Committee. He serves on the board of directors of PlanSmart NJ, a nonprofit, nonpartisan civic action group dedicated to sound land use planning and regional cooperation in the Central Jersey area. He also is a member of the board of the D&R Greenway Land Trust, a nonprofit organization dedicated to the preservation of open space in New Jersey. Mr. Solomon is a graduate of Dartmouth College, holds a Master of Arts degree from Yale University, and received his J.D. from the University of Virginia School of Law. He has run many marathons, including Boston, and is outside, preferably with his wife and two children, as often as he can arrange.

Mr. Solomon is joined by several real estate law practitioners in the Princeton office including partners **Thomas M. Letizia** and **Michael J. Mann**, and associates **Andrea M. David**, **Delia C. Donahue** and **Gregory S. Ricciardi**.

The group helps property owners and developers obtain necessary planning and zoning approvals, changes and permits, including representing clients in appeals before municipal zoning hearing boards and trial and appellate courts. In addition to land use and zoning approvals, we

assist clients in obtaining environmental permits from federal and state authorities.

Pepper's Real Estate Group handles the development, acquisition, disposition, leasing, financing, construction and syndication of industrial, commercial and residential real estate; real estate loan and partnership workouts, foreclosures and bankruptcies; zoning and land use; housing, community and urban development; and real estate litigation. The group's experience includes development to LEED® and green building standards; economic development incentives; public/private, infrastructure and multiuse projects; tax exemptions and credits; tax-exempt financing; grants; loans; and brown-fields redevelopment. The group assists clients including national and international businesses, local institutions, developers, real estate investment trusts (REITs), commercial and consumer lending institutions, *Fortune* 500 and closely held corporations, major nonprofit institutions, investment banking firms, commercial real estate companies, retail and hospitality businesses, small business investment companies (SBICs), syndicated partnerships, and state and local governmental agencies.



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