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Motivating Employees in a Downturn

By Robert Washington

The end of one year and the approach of a new one is a good time to reflect on past achievements and prospects for the future, but in the current economic climate a 'Happy New Year' may not mean profits, pay rises and promotions.

Although the UK economy has emerged from a second recession during the first two quarters of 2012, many businesses have not yet returned to pre-2008 levels of activity and turnover. As a result, the past few years have been tough for employees, with many experiencing year-on-year pay freezes or below-inflation pay rises, equivalent to real-term pay cuts. This article looks at other ways to keep employees happy during these difficult times.

Managing Communication

Managing employee motivation through communication is essential. As times worsen, employers can, understandably, become less inclined to share potentially damaging financial information with their own staff, for fear of leaks and a resulting loss of consumer confidence. However, disclosing some information to employees can actually improve morale, by contributing to an inclusive team spirit and motivating employees to pull together for the greater good.

There are a number of ways such information can be shared, depending on the size and structure of the organisation. Some employers use 'town hall' or similar 'all-hands' meetings to share news with employees orally. Such meetings have the advantage of personal contact with leaders, and by disseminating information in oral rather than written form, town halls also have the advantage of making bad news more difficult to pass on than an email or a memo (and, if we are being cynical, infinitely more deniable in the event of a leak).

Larger employers may not be able to hold meetings with their employees as easily. In those cases, a staff forum or works council can assist both as a sounding board and as a means of conveying information to employees.

When sharing information with employees, however, employers should do their homework and avoid painting a picture of doom and gloom where contradictory information or embarrassing facts are available by other means. Nothing is less likely to motivate an employee than learning of all-time-high executive bonuses whilst redundancies are threatened in the ranks.

Pay Rises and Bonuses

Pay rises have been relatively rare throughout the recession, for obvious reasons; once an employee has had a pay rise, they can expect to receive the same salary year-on-year, even if the business does not perform well. As a result, in times of austerity, employers are understandably reluctant to make pay rises.

As an alternative, bonuses are a way to share some of the employer's good fortune without committing the employer to future payments, provided the award and payment process is properly managed.

In some companies, formal bonus schemes are in place with targets and key performance indicators which must be triggered before bonuses will be paid out. Even if this is the case, a spot bonus or other one-off payment can often still be made. To do so, the employer should make it clear that

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the payment is made without reference to any contractual or quasi-contractual scheme which might also be in place. Christmas or end of year bonuses may be an obvious tool for motivating employees, leveraging off the spirit of the season and the clean slate represented by the New Year.

Holiday and Benefits

Additional holiday is another benefit which can potentially be provided relatively cheaply, especially if work levels are low, as allowing quiet employees a day off can be achieved with little or no actual cost to the business. However, employers should avoid locking extra holiday into employees' terms and conditions, as increased holiday levels could hamper productivity in future, when work levels return to normal. A Christmas close-down or a birthday-day-off, could be considered as one-off bonus holidays.

Employers could also consider what other benefits could be manipulated to provide greater benefit to the employee without incurring further costs. Increasingly, employers are offering 'total reward' pay statements showing the employee the full value of their pay and benefits. Some employers now also offer flexible benefits, allowing employees to pick and choose from a list of benefits up to the value of their total compensation, offering more customised cover for the employee, at no additional cost to the employer.

Non-Financial Incentives

If no cash is available at all, other ways to motivate staff should be considered. Many studies show that in fact, non-financial incentives can work as well, if not better than, cash in motivating employees in the workplace. In the modern workplace, employees, especially younger employees, now expect employers to provide more than just financial benefits to their staff. Concepts such as engagement in work, collegiality and career progression all play an active part in the makeup of the modern workplace, and playing on some of these more modern motivation factors can keep staff on board without excessive cost to the employer.

Recognition

Lack of recognition is one way in which morale can slip among staff, especially when work is low and output may not be what it once was. In some cases, employers with a staff recognition scheme based on boom-time sales may find that their motivation tool is now lacking, and may wish to rethink this to provide for a more appropriate means of rewarding effort (for example, a scheme which rewards sales only could be modified to recognise pitches and tenders rather than pure sales).

For employers without an extant programme, ways of recognising achievement could include a regular award (say an annual performance award) or on-the-spot prizes for particular achievements. Prizes as simple as a bottle of wine or a small cash sum can be used to recognise achievement at low cost. At a simpler level, simply encouraging managers to acknowledge hard work by staff can make a difference to employees who feel under-appreciated.

Career Development

As the idea of a job for life seems increasingly outdated, employees are viewing their roles as stepping stones in their overall career progression. As such, a good motivator is to allow employees to develop their skills in their current role, which will allow them to progress in the future (hopefully within the organisation); even if current prospects for progression are slim.

Employers with in-house training facilities could consider deploying these resources to allow staff with capacity to do so to develop a new skill. If resources are scarce, another option may be simply to ask employees with certain skills to spend some time with colleagues for whom those skills would be beneficial, as part of a shadowing or mentoring scheme.

Social Activities

Finally, an effective method of promoting collegiality, and thus motivating employees, is to hold social events. Staff parties are something many businesses have reduced or even cancelled during the downturn, but social events can contribute to staff morale, providing the expense of the event is proportionate to the employer's financial position. If funds do not allow for a masked ball, making a small sum available as a contribution to a team lunch or drinks event can make a real difference to team morale.

Conclusion

Historically, many employers have relied on pay rises and financial incentive schemes to motivate staff to perform, which, however effective such schemes may be when there is more than enough work to go around, may not be effective during a downturn. In the current circumstances, employers without the financial means to make such incentive payments (or to make them at previous levels) should consider what other methods could be employed to motivate staff, and prepare a strategic plan to develop, and in some cases, rescue, their relationships with their staff. ■

Pensions Auto-Enrolment – An overview for HR Professionals

By Doug Styles

Before the new auto-enrolment duties came into effect, there was no requirement in law for a UK employer to contribute to a pension scheme in respect of its employees. However, an employer with five or more employees was, until 1 October 2012, generally obliged to designate and facilitate access to a stakeholder pension. From 1 October 2012, the statutory duty on an employer to designate a stakeholder pension scheme was repealed. The effect is that UK employers are not obliged to provide access to any pension scheme until they have reached their staging date (see below).

Once an employer has reached its staging date, it must ensure that all its eligible jobholders are auto-enrolled into a qualifying scheme from their automatic enrolment date ("AED"), unless they are already active members of the employer's qualifying schemes. The duty to automatically enrol arises under statute and there is no change to a jobholder's terms of employment requiring any consultation with jobholders.

An employer will be obliged to auto-enrol eligible jobholders in an automatic enrolment scheme, unless they are already active members of the employers qualifying scheme. Employers may also use 'NEST', a central scheme set up by the UK government. Several private pension providers have also established competitive schemes.

An employer's obligations under the auto-enrolment regime will apply in respect of "workers who work, or ordinarily work in the UK". The definition of worker in section 88 of the Pensions Act 2008 is broadly the same as under section 230(3)(b) of the Employments Rights Act 1996, which provides that, a "worker" means "an individual who has entered into or works under...(a) a contract of employment or (b) any other contract, whether express or implied...oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose statue is not by virtue of the contract that of a client or customer of any profession of business undertaking carried on by the individual and any reference to a worker's contract shall be construed accordingly."

It will often be easy to identify whether someone is a worker, as they will satisfy the above criteria. However, employers should not rely solely on a person's tax status as to whether they are a worker. An individual who is considered by HMRC to be self-employed for tax purposes may still be classed as a worker for the purposes of the Pensions Act if they work under a worker's contract.

There are three types of 'workers' under the auto-enrolment regimes:

1. "eligible" jobholders, who must be automatically enrolled in an automatic enrolment scheme and are entitled to minimum employer contribution. An eligible jobholder can opt out of a pension scheme in which they had not been enrolled;
2. "non-eligible" jobholders, who have the right of joining a scheme and are entitled to minimum employer contributions; and
3. "entitled" workers who have the right of joining an employee qualifying scheme but are not entitled to receive employer contributions.

Employers are expressly restricted from "prohibitive recruitment conduct" and offers of inducements to opt out of an auto-enrolment scheme. Employers are also under a duty to provide certain written information relating to the auto-enrolment regime. The Pensions Regulator which governs compliance with the new employer duties, has published online guidance with respect to these reforms. This includes guidance notes aimed at pension professionals, which may also be useful for HR professionals. For more information go to www.thepensionsregulator.co.uk.

As a general rule, an employer is required to auto-enrol an eligible jobholder in an automatic enrolment scheme and provide the prescribed information about the scheme within one month from the job holder's AED. The jobholder's AED may simply be the date on which they start employment or, it could be the employer's staging date if the jobholder is employed on that date. However, there will likely be cases where a jobholder's AED will be later than this, for example, where a jobholder is a low-earner and does not receive earnings that exceed the earnings trigger in the first pay reference period. An employer can defer auto-enrolling an eligible jobholder by up to three months from the AED, known as a "postponement".

Once auto-enrolment has occurred, an employer has a duty to make a minimum contribution to an automatic enrolment scheme. An employer using a defined contribution ("DC") pension scheme for auto-enrolment will be required to pay a minimum of 3% of a jobholder's qualifying earnings into the scheme each year. The overall contributions to a DC scheme must be no less than 8% of the jobholder's qualifying earnings and this means that jobholders will be required to contribute 5% of the qualifying earnings. There are transitional periods which allow the full rates of employer and jobholder contributions to be phased in over six years.

To ease the compliance burden, staging dates for small businesses have been delayed and, broadly speaking, employers with between 50 and 249 workers have been assigned revised staging days, running from 1 April 2014 to 1 April 2015. Employers with fewer than 50 workers have been given staging dates between 1 April 2015 and 1 April 2017. New businesses have staging dates at the end of the overall timetable. ■

Government consultation on the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") – does it go far enough?

By Dan Peyton

Our US clients find a great deal of UK employment law frustrating because it seems so heavily weighted in favour of employees. We share a rich common law tradition with the US, but this most enduring of our legal exports is ever diminishing in the face of the relentless march of statutory regulation of the employment relationship. TUPE, along with its European parent, the Acquired Rights Directive, is often ranked amongst the worst offenders. TUPE also adds cost and complexity to business transfers and a need for advice from employment lawyers.

The complexity of TUPE prompted the government's call for evidence on the effectiveness of TUPE between November 2011 and January 2012. Its response was published in September last year, covering the following main areas of concern:

1. Extend the deadline for the provision of employee liability information beyond the current deadline of 14 days prior to the transfer;
2. Review the prohibition on effective post-transfer harmonisation of terms and conditions of employment;
3. Consider excluding service provision changes from the scope of TUPE;
4. Consider further clarification on treatment of pensions and related benefits under TUPE;
5. Provide greater clarity regarding when and how TUPE applies in insolvency situations; and
6. Consider clarification and broadening of the concept of "economic, technical or organisational reason... entailing changes in the workforce".

We await with interest the government's publication of its proposals for changes to TUPE. What we can predict is that although there may be some changes to the way TUPE operates, given TUPE's origins under EU law, the fundamental question of whether we should retain TUPE at all will not be the subject of consultation. Doing away with TUPE sounds like a radical thought, but many jurisdictions outside Europe do not have a TUPE equivalent. For example, in the US, there is very little employment law regulation of business. To the extent that there is regulation, it is mainly limited to obligations to give employees, unions and local and state authorities notice of the transaction and its effects.

The key difference between the UK and US is that in asset purchases in the US it is for the purchaser to choose whether it wishes to take any employees from the seller. If not, the employees are terminated and do not transfer. Share purchases operate largely as they do under English law; the employing entity does not change and subject to the purchase agreement providing otherwise, liabilities pass to the purchaser with ownership of the shares in the target company.

There are some obligations arising in limited circumstances in the US to give notice and engage in collective bargaining in connection with the transfer of a business. A seller or purchaser may be obliged to give written notice to employees, trade unions and local and state government under the Worker Adjustment and Retraining Notification Act ("WARN Act") in the event of large numbers of lay-offs or business closure. The Consolidated Omnibus Budget Reconciliation Act ("COBRA"), requires notice to be given to employees to be terminated, providing them with an opportunity to obtain a temporary continuation of their

group healthcare benefits following termination of employment. In practice, these obligations affect asset purchases rather than share purchases, because in the latter it is less common to terminate large numbers of the target's employees. Further, in asset sales, the purchaser inherits collective bargaining agreements from the seller only if it agrees to employ sufficient numbers of the seller's employees. Further, the National Labor Relations Act ("NLRA") requires the seller to negotiate in good faith with a recognised trade union over the effects of the sale, although there is no obligation to reach agreement. Additional obligations may be imposed under various state laws.

What these US provisions show, beyond raising policy questions about the need for TUPE at all, is whether the emphasis of TUPE should be much more on issues of process (its information and consultation provisions, perhaps emphasising more the substance of this exercise, rather than form) and less on TUPE's interference with the substance of the employment relationship (i.e. change of terms and dismissal). This seems a particularly pertinent question given the full range of employment protections available to UK employees under other legislation. ■