

# a/e RISK REVIEW

A P U B L I C A T I O N O F T H E P R O F E S S I O N A L L I A B I L I T Y A G E N T S N E T W O R K

## Staffing issues front and center with A/E and environmental firms

The headlines appear nationwide: “ABC Firm Lays Off 25% of Staff.” The economic downturn has led to project delays and cancellations, the evaporation of project backlogs and scaled down plans for the future. In January of 2009, the Architectural Billings Index (ABI) plummeted to 33.3, the lowest level in its 13-year history. (A score below 50 indicates a decrease in billings.)

Looking for ways to significantly cut overhead costs in such dire times, A/E and environmental firms both large and small are targeting payroll expenses. Less work means a reduced need for staff. Oftentimes, attrition is not enough and firms must make painful decisions, including laying off long-term qualified staff. These decisions can have a dramatic impact on a firm’s future revenues and liabilities and therefore require a careful consideration of factors beyond the dollars and cents of payroll reductions.

### Making layoff decisions

When budget cuts become imperative during economic downturns, consulting and design firms are often tempted to look at employees with the largest payroll expenses as obvious

layoff candidates. After all, the reasoning goes, it is less painful to cut one \$100,000 employee than two \$50,000 employees.

When faced with such decisions, it is vital to consider all ramifications of a layoff, including liability concerns. It is often the case that the most expensive employees on your payroll are also the most talented and experienced. Your primary concern when making layoff decisions should be the skill set of the remaining employees and how they match up to your current and projected clients and projects. Your worst-case scenario is to come out of a staff reduction with a team that lacks the skills you need to complete current projects and be able to attract new work.

Assigning under-qualified staff to important work, or stretching your qualified people too thin is a recipe for increased errors and omissions and the resulting professional liability claims. The costs of these claims and lawsuits can easily outstrip any savings you achieved from cutting staff. Therefore, think long and hard before cutting loose those highly skilled employees simply because they are among your highest-paid employees.

### Correction:

*In the last edition of a/e Risk Review, Volume 17, Number 1, page 2, under the heading “Collections”, the use of the double negative (“not”) seems to imply that prevailing party fees are covered by professional liability carriers. The correct statement is: A prevailing party attorney fees clause is typically interpreted by the courts to be a reciprocal one and your contractually assumed obligation to pay the client’s costs would not be something professional liability insurance will cover.*

### Employment Practice Liability Insurance

In good times as well as bad, you must make sure your recruiting, hiring, training, management and firing procedures are in full compliance with state and federal laws and are evenly and consistently applied by all members of management. When terminating an employee, one false move that could be perceived as discriminatory could lead to a long and expensive lawsuit.

We can assist you in finding proper coverage with an Employment Practice Liability Insurance (EPLI) policy. These insurance companies often

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provide newsletters, websites and other resources that will help you steer clear of hostile and expensive situations.

**Be ready for opportunities that arise**

Even though the economic pressure to reduce costs may be intense, try to keep a long-term perspective with your staffing decisions that will enable you to respond quickly as new opportunities arise. The current economic stimulus package, for example, could lead to new and exciting projects over the next few years. Try to determine what types of projects and job skills will be in greatest demand based upon your area of expertise and locale. It may be wise to retain or develop skills, for example, associated with public works projects such as roads, highways, wastewater, energy plants and so on.

It seems counterintuitive, but tough economic times are an excellent

opportunity to broaden your firm’s skill set. Chances are, there will be some very talented people looking for employment opportunities. We are not advocating running help-wanted ads in local newspapers and professional trade journals for jobs that don’t exist. Rather, you should simply keep your eyes and ears open to available talent that may add to the quality of your staff.

**W**hen local professionals contact your firm looking for work, be willing to invite them in for an interview. Build a file of qualified people in your area who may be just the ones you are looking for when you land that next big project that would severely stretch your downsized staff.

**Consider alternatives to traditional staffing**

Firms that repeatedly grow and shrink often suffer decreased morale and lowered performance as employees become distracted by the instability. Should you land a new project your current downsized staff can’t adequately handle, but you aren’t convinced that the economy has turned the corner, consider looking to alternative staffing methods.

- **Contract professionals** or **contingent employees** are becoming increasingly commonplace in the design and consulting industries, and the quality of this job pool is particularly high during times of high unemployment.

Qualified architects, engineers, environmental consultants and other professionals can be hired through national agencies and specialized staffing companies. Then, should a full-time position become available within your firm, a contract professional may accept your offer to stay on as an employee.

The benefits contract workers provide are many. They allow flexibility with staffing as job skill requirements and project load fluctuate. Contract workers are typically paid hourly and the employment agency often handles administration, payroll taxes and benefits. Plus, you enjoy lower recruiting costs compared to hiring employees.

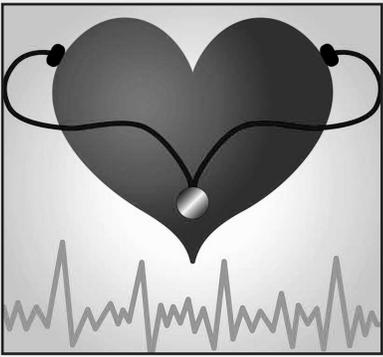
Disadvantages include potential higher turnover and reduced job loyalty—although this is not always the case. In addition, you usually have to pay overtime.

- **Independent contractors** are another alternative to permanent staff. Professionals who are laid off often prefer to offer their services directly rather than go through an agency. The advantage is that the per-hour or per-project cost is generally lower since you don’t pay a fee to an agency. The disadvantage is that you may lose the administrative services often provided by agencies.

- **Loaned employees** are a less common source of contract workers. With this approach, a consulting firm “borrows” an employee from another consulting firm to work on a short-term basis in exchange for a fee. This practice is proving effective between design firms with good working relationships. However, there are substantial gray areas here regarding professional liability. For example, if there is a claim arising from a loaned employee’s services on a project for the borrowing firm, the lending firm can easily be brought into the suit. Be cautious with this approach.

- **Subconsultants** are certainly not new to design firms and consulting firms. Perhaps you have experience hiring specialized subconsultants from a variety of disciplines. However, it is becoming more common to find architects subconsulting with other

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## Employment Practices Liability Insurance

Could this happen in your firm:

- Wrongful termination?
- Retaliation?
- Harassment?
- Discrimination?



If you have employees, the answer is **YES**. We see more claims filed each year by disgruntled employees. Employment Practices Liability Insurance (**EPLI**) can provide surprisingly affordable protection.

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architects, civil engineers subconsulting with other civils, etc. Rather than hiring subs to perform functions where a firm lacks expertise, companies are subcontracting work they would typically perform themselves if they had adequate staff.

When considering alternative staffing, develop a short list of key qualifications. Look for designers with track records of delivering high-quality work and who demonstrate client-service and work-ethic philosophies similar to those of your company. Look for professionals experienced in providing the specific type of services you need performed, preferably for the same type of projects.

### Avoiding legal issues with alternative staff

When considering any alternative staffing method, be sure to check state labor laws regarding what

qualifies a worker as an “employee.” Sometimes, the number of hours worked, duration of hire, or scope of work requirements may inadvertently cause an alternative staffer to be qualified as an employee.

Put your alternative staffing agreements in writing. You can start with one of the professional association forms. (Both EJCDC and the AIA have sub-consultant agreements you and your attorney can adapt to your situation.) Or, develop a form of your own. Your goal is to arrive at an agreement with your sub-consultant or independent contractor that is reasonable and fair and allows each party to reach its objectives.

**H**ere are four critical points you need to address in the work agreement:

1. Incorporate your prime contract with your client into the sub-contract and flow the obligation you assume to the client down to your sub.
2. Draft a clear scope of services that spells out the functions to be performed and the working relationship to be established.
3. Include a fair and insurable indemnity. We suggest a mutual indemnity that gives both parties protection. By providing for mutual indemnity based on comparative fault, the party found most responsible for the error or omission will bear the bulk of the liability. This comparative fault clause only comes into play legally if the claim ultimately is decided in court.

However, it can also serve as a valuable guide should a dispute be resolved prior to a lawsuit through mediation or some other dispute resolution technique.

4. Have each party maintain and furnish proof of insurance. Your

agreement should require each of you to provide to the other certificates of insurance showing all coverages.

Other issues you will need to address include:

- Who will retain ownership of documents?
- How will you handle payment?
- Will the subconsultant/independent contractor perform construction observation?

If you are the prime consultant, we recommend that you also pass through to your subconsultant or independent contractor any liability protections (such as indemnities and limitations of liability) that you are able to obtain from your client. If you

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loan your employees to (or borrow employees from) other consulting firms, you should have a contract that sets forth who will take responsibility for claims that arise from the employee's services. Probably the best solution is to have the "borrowing" firm assume the responsibility and indemnify the other firm.

When contracting with individuals as temporary or contract employees be sure to address issues such as:

1. Termination provision: clarify that it is indeed a temporary arrangement and that you can terminate the temporary employee at will
2. What benefits are provided or a clear statement that no benefits will be provided
3. Other standard employment related agreements similar to what you have with your regular employees such as non-compete

agreements, limits on the use of your confidential trade secret information etc.

### Conclusion

Today's design and environmental consulting firms are facing economic uncertainties unknown since the Great Depression. Layoffs are often unavoidable in order to keep the firm financially viable.

It is critical to look beyond simple payroll dollars and cents when making your layoff decisions in order to avoid claims and lawsuits from both unsatisfied clients and the laid-off workers. It is also wise to keep a long-term vision that includes a game plan for re-staffing once the economy turns around. In the meantime, consider alternative staffing arrangements that will enable you to take on new projects beyond the capacity of your slimmed-

down staff without committing to a full-time employee that may have to be let go once the new project ends.

### Can we be of assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures.

Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN).

**We're here to help.  
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