

Employment & Immigration Law

Managing Reductions In Force in Difficult Times

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Consider this not-so-uncommon scenario in these recessionary times. As general counsel, you have been instructed by your chief executive officer to take significant cost saving measures designed to increase operational efficiency. Employers often first look to reduce their workforce as a means of cutting costs. The significant impact of the financial crisis and the unpredictability of the market have required employers to make very hasty decisions with respect to reducing their workforce. Oftentimes, hasty decisions subject employers to various legal consequences, draining them of the very same financial resources they sought to preserve with the implementation of a reduction in force (“RIF”). Employers should first consider all of the various options at their disposal and, if a RIF is necessary, engage outside counsel to navigate them through the myriad of employment laws that may be implicated.

Alternatives To Layoffs May Reduce The Risk of Claims

Although employers are capable of

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realizing short-term savings through RIFs, large layoffs can cause companies to incur hidden costs. For example, economically-driven RIFs may require the involuntary termination of good workers. Such adverse employment actions impact negatively on morale, affecting both the employees who leave the company and those who remain. In addition, large scale terminations can eliminate a disproportionate number of older, female and minority employees, which may create the potential for class action and individual wrongful discharge lawsuits.

Therefore, before planning a reduction in force, employers should consider whether other options are available, including: (1) hiring freezes; (2) wage and bonus freezes; (3) postponement of wage increases; (4) reducing fringe benefits; (5) work furloughs of limited duration; (6) reducing work hours with proportionate pay cuts; (7) assessing expected job attrition; (8) allowing affected employees to transfer to other vacant positions within the organization; (9) job sharing; (10) terminating recent hires within their introductory periods; and (11) discontinuing the use of temporary and part-time employees and redistributing their work.

Voluntary or Involuntary Layoffs

One alternative to an involuntary layoff is a voluntary separation or incentive

program. A voluntary layoff will minimize a company’s exposure to termination-related lawsuits, in part because employees who leave voluntarily are much less likely to pursue or maintain legal challenges related to their departures. To the extent that employees elect to participate in a voluntary RIF, such employees should be required to sign a release of claims in exchange for participation in the plan. Voluntary plans also have less potential to damage employee morale and productivity.

However, there are several potential pitfalls to consider regarding a voluntary layoff. First, the employer may have little control over the number of employees who will actually choose to participate. If too few employees take the early incentive package, a subsequent involuntary layoff may be necessary. Second, depending on how the voluntary program is structured, good employees may choose to leave while poor performing employees may choose to stay, realizing that they will have difficulty finding new employment. Third, the “voluntariness” of a program may be challenged, with employees alleging that they were effectively coerced into accepting the package.

Proper Planning May Reduce The Risk Of Employment Claims

In contrast to a voluntary program, an involuntary program gives the employer complete control over the selection process and, if implemented correctly, can enable the employer to retain its best employees to help it meet its challenges going forward.

Making key policy decisions —

How to select among employees: In any layoff decision, the most significant factor may be the criteria by which employees will be selected for termination. In the easiest cases, an employer may make a decision based on seniority or by the nature and necessity of the work performed. Where the decision is not so easily made, employers may utilize other criteria in making selection decisions, including: (1) identifying and eliminating unnecessary job classifications, (2) eliminating classes of employees, e.g., all temporary, part-time or contract workers, and (3) use of pre-existing job appraisal data. Initially select employees who have been disciplined for severe or persistent performance problems. Thereafter, select from remaining employees by evaluating and comparing their ability to perform the essential job duties that will remain after the RIF is completed.

Strive for an objective comparison of employees where job qualifications and skills are considered in making reductions: (1) prior to implementation, selection decisions should be evaluated to see whether individuals in protected classes are disproportionately affected by the RIF, (2) if a disparate impact exists, and cannot be justified by business necessity, alternate selections should be considered, and (3) in analyzing the comparative performance of employees, emphasis should be placed on comparing the job functions and skills that will remain to be performed after the RIF is completed.

Statutory Compliance And Legal Considerations

Worker Adjustment and Retraining Notification Act — WARN: Companies with 100 or more employees must consider whether the Worker Adjustment and Retraining Notification Act (“WARN”) will be implicated. In short, the WARN Act requires employers to provide affected employees, or if the employees are represented by a labor organization, the international body of the union, with 60 days advance notice of plant closings and mass

layoffs. WARN also requires that employers provide notice of a plant closing or mass layoff to the state dislocated workers unit and the chief elected official of the local governmental unit where the affected facility is located.

Employers that fail to provide the requisite 60 days notice to covered employees are liable to remit to the employee up to 60 days of back pay and benefits for each day the employer violates the act.

The Millville Davis Airmotive Plant Job Loss Notification Act: Similar to the federal WARN Act, New Jersey WARN requires New Jersey employers with 100 or more full-time employees to provide 60 days notice to employees impacted by a mass layoff, transfer of operations or termination of operations, and also sets penalties for violations at a greater level than those found in its federal counterpart.

Generally, notice is required if 50 or more full-time employees are affected by: (1) a “termination of employment;” (2) a “termination of operations;” (3) a “transfer of operations;” or (4) a “mass layoff.” Written notice must be provided to: (1) the employee; (2) the Commissioner of Labor and Workforce Development; (3) the chief elected official of the municipality where the establishment is located; and (4) any collective bargaining units of employees at the establishment.

If an employer fails to provide the required notification, the employer must pay each employee “severance pay equal to one week of pay for each full year” the employee worked for the employer.

Title VII and the New Jersey Law Against Discrimination: Employers performing RIFs must also be aware of potential disparate treatment lawsuits under Title VII of the Civil Rights Act (“Title VII”) and the New Jersey Law Against Discrimination (“LAD”) where an employee alleges that he or she was selected for the RIF due to a protected class. Federal law prohibits discrimination in employment on the basis of an employee’s color, race, age, religion, sex and national origin. New Jersey extends protection to prohibit

discrimination based on creed, nationality, ancestry, pregnancy, familial status, marital status, domestic partnership status, affectional or sexual orientation, atypical hereditary cellular or blood trait, genetic information, liability for military service, mental or physical disability, perceived disability, AIDS and HIV status.

Additionally, if an employer’s reduction in force disproportionately affects any one of the above referenced protected classes, an aggrieved employee may file a claim alleging discrimination based on disparate impact. Under a disparate impact theory, an employee may be able to maintain a valid discrimination claim by showing a facially neutral reduction in force policy had an adverse impact on a certain group of employees.

Severance Packages: Severance packages often are used to soften the blow on employees included in a RIF and to reduce the legal risk to employers. Receipt of a severance package is usually conditioned upon the signing of a release of claims against the company. If a release is being sought, the employer is required to ensure the waiver complies with the portion of the ADEA known as the Older Worker’s Benefits Protection Act (“OWBPA”) to waive a federal age discrimination claim.

Wage Hour Considerations: Finally, employers should be mindful of wage hour considerations when conducting a RIF. New Jersey law requires employers pay employees all wages earned within 10 business days following the close of the pay period. Thus, any final wages owed to employees affected by the RIF must be made within this timeframe. In addition, employers also should consider whether employees are eligible for other payments upon termination pursuant to company policy, such as accrued but unused vacation

As this article suggests, careful planning is critical to executing a RIF in an appropriate and lawful manner. Failure to address these considerations can increase costs and legal exposure to an unprepared employer. ■