Tips for a Layoff or Reduction in Force in Troubled Times

By Scott T. Baken

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When laid-off workers have a difficult time finding a new job, they are more inclined to sue their former employers. Such suits may be more prevalent in the current economic downturn than in more prosperous times. Meanwhile, according to a recent Society for Human Resource Management (SHRM) poll of public and private company human resources executives, about 60% of employers are likely to institute layoffs in the next year, and 48% have done so in the past year.

“"The current global financial crisis has sent shockwaves throughout virtually every sector of the economy. Employers across the country have responded to this unprecedented climate of economic uncertainty by implementing cost-saving measures designed to increase operational efficiency,” notes Jackson Lewis LLP’s Scott Baken, a Partner who counsels employers on the legal and practical issues involved with reducing labor costs through workforce reductions. The situation is not an easy one for employers seeking to cut costs while minimizing their legal risks. “If not carefully planned in advance, a workforce reduction can result in considerable liability offsetting any initial savings the employer achieves,” Mr. Baken adds.

Employers considering workforce reductions should keep the following suggestions in mind:

Planning for a Reduction in Force (RIF)
A successful workforce reduction process requires careful and early planning. It may take several months from start to finish. However, challenging economic conditions have made extended time for planning a luxury many employers can no longer afford. To cope with the increased pressures created by the present environment, employers should develop policies for periodically evaluating their staffing levels.

- **Consider the feasibility of voluntary attrition programs** – Determine whether a voluntary resignation program is a viable alternative to implementing involuntary layoffs. Factors influencing the success of voluntary attrition programs include time constraints, business conditions and the availability of sufficient incentives for program participation. You can retain discretion to deny resignation requests from mission-critical employees under certain circumstances.

- **Plan for continuous operations and sustained morale** – Early in the reduction planning process, evaluate job functions and skills. Decide whether they are essential or may be eliminated or consolidated. Conduct the process as quickly as business conditions permit to maintain acceptable productivity levels and employee morale. Human resource administration should continue as normally as possible, administering performance reviews and counseling notices. Do not use selection for layoff as a substitute for incomplete performance management.

- **Ensure compliance with obligations under state laws** – Recognize a workforce reduction may trigger compliance obligations under various state laws governing payment of wages, insurance and severance benefits continuation, personnel record access, plant closings, layoffs, and involuntary termination. Plot these obligations on a timeline as they often involve notice requirements.

- **Determine impact on pension and benefit plans** – Before taking action, investigate whether a layoff will trigger the vesting of pension or benefit plans for some employees. Conversely, it may be prudent to avoid selecting employees for layoff shortly before they are scheduled to become vested in substantial employee benefits. Realize that a partial termination of a pension or benefit plan may be a reportable event under ERISA. Understand that terminations may constitute withdrawal from a multi-employer pension plan and cause employers to incur substantial liability.
• **Assess eligibility criteria and plan requirements** – Assure the clarity of eligibility criteria for receiving severance benefits and the variables for calculating such benefits. Also, make plain in policies that employees’ receipt of severance benefits beyond those to which they already may be entitled is conditioned on the signing of a general release of claims.

• **Consider “WARN” and contract obligations** – Realize that, if triggered, the federal Worker Adjustment and Retraining Notification Act (WARN) and comparable state laws provide specific time limits and notice requirements for certain group termination programs. Assess existing limitations, liabilities and/or bargaining obligations related to layoffs created by collective bargaining agreements and other types of contractual employment obligations.

Selecting Employees for Layoff
A critical aspect of any layoff is identifying the criteria by which employees will be selected for termination. In the easiest cases, the decision is guided by the nature of and necessity for the work performed (e.g., where a particular position or product line is being eliminated). In other cases, management must determine job-related selection criteria that can pass muster if the reduction program is subject to legal challenge.

• **Prioritize selection factors** – Base selection on quantifiable and objective factors, such as: 1) length of service or seniority; 2) elimination of unnecessary job classifications; 3) elimination of certain categories of employees, e.g., temporary, part-time, or contract workers; 4) pre-existing job appraisal data related to successful performance of critical post-reduction functions; and 5) disciplinary actions taken for severe or persistent performance problems.

• **Strive for objectivity** – Identify the individual abilities of similarly-situated employees in necessary positions to perform essential job duties. Analyze the comparative performance and skills of employees with emphasis on fulfilling the post-reduction job functions and requirements. Whenever possible, base performance comparisons on current or prior performance appraisals.

• **Review for possible disparate impact** – Evaluate initial selection decisions prior to implementing layoffs. See if there will be any disproportionate effect on minorities, women, or workers 40 years of age or older. If so, evaluate whether the selection of these individuals can be justified by business necessity, or in the case of older workers, by reasonable factors other than age. If not, consider alternative selections of individuals who are outside the protected classifications.

• **Craft releases to comply with statutory requirements** – Employers can reduce their exposure to individual and class-wide claims of discrimination dramatically by obtaining releases of such claims from employees who participate in voluntary and involuntary workforce reduction programs. Strict compliance with legal requirements is critical to the effectiveness of any release. For example, to be enforceable, waivers of federal Age Discrimination in Employment Act (ADEA) claims must comply with various procedural requirements established by the Older Workers Benefit Protection Act (OWBPA). These provisions require employers to give employees sufficient time and information to evaluate the potential claims they are releasing under the ADEA on a knowing and voluntary basis.

There are many other issues that employers should consider in undertaking workforce reduction programs. After completing a voluntary resignation program or an involuntary reduction in force, management should take affirmative measures to optimize the company’s stronger and leaner position and re-energize remaining employees to meet new challenges. Jackson Lewis attorneys are available to answer your questions about workplace reductions and workplace law in light of the significant legal and practical challenges posed by the current and foreseeable economy.

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