

Labor and Employment Alert

Akin Gump
STRAUSS HAUER & FELD LLP

Effectively Managing Workforce Contraction in Turbulent Times

March 25, 2020

Key Points:

- The unprecedented economic conditions caused by the COVID-19 global pandemic and the Russia-Saudi Arabia oil price war have prompted companies of all types and sizes to explore operational cost-savings measures, including workforce reductions.
- Employers should engage in diligent planning when implementing a workforce reorganization.
- Companies must carefully navigate numerous federal and state regulations as well as accompanying strict timelines.

The grinding halt of the U.S. economy due to the COVID-19 pandemic, as well as the Russia-Saudi Arabia oil price war, have forced companies in every industry to evaluate workforce reorganizations and reductions.

In making plans for adjustments to company staffing levels, employers must tread cautiously. There are numerous federal and state employment law issues that employers should consider before implementing a reduction in force (RIF) or terminating individual employees. Failure to comply with the applicable statutes, which may require as much as two to three months' advance notice of any covered layoffs, can negate some of the anticipated savings and lead to litigation. Although employers can limit exposure to lawsuits through the use of releases obtained in exchange for benefits or severance packages, strict requirements must be met for such releases to be valid.

Focusing on RIFs, this alert provides an updated outline of the key considerations when dealing with workforce reduction issues.

This alert covers a complicated topic. It is intended to provide a general overview of the issues to aid in a basic understanding of the range of challenges and potential options. It is not intended to provide legal advice or serve as a substitute for consultation with qualified counsel.

Contact Information

If you have any questions concerning this alert, please contact:

Brian Glenn Patterson

Partner

bpatterson@akingump.com

Houston

+1 713.250.2214

Robert G. Lian Jr.

Partner

blian@akingump.com

Washington, D.C.

+1 202.887.4358

Esther G. Lander

Partner

elande@akingump.com

Washington, D.C.

+1 202.887.4535

Gregory W. Knopp

Partner

gknopp@akingump.com

Los Angeles

+1 310.552.6436

Richard J. Rabin

Partner

rrabin@akingump.com

New York

+1 212.872.1086

Donna M. Mezias

Partner

dmezias@akingump.com

San Francisco

+1 415.765.9575

Scott L. Friedman

Associate

sfriedman@akingump.com

Houston

+1 713.220.8118

Laying off employees is a delicate matter fraught with legal and emotional implications. However, advance planning can help minimize a company's legal exposure for RIFs. Such planning should include the following steps.

Select a Restructuring Team

The first step in implementing an RIF involves establishing a restructuring team to determine whether layoffs are needed or whether other cost-cutting measures will suffice. A restructuring team should include a senior member of the human resources department, other high-level managers, operational representatives and counsel. Ideally, the team also should consist of personnel who have experience with layoffs.

Consider the Alternatives to an RIF

Before proceeding with an RIF, the restructuring team should consider alternatives. While an RIF can help a company quickly trim expenses, it can result in the loss of talent needed for when demand resumes. Companies should consider alternatives to forced layoffs, including early retirements, voluntary RIFs, schedule or wage reductions, furloughs, in-sourcing of functions and related measures to reduce the company's cost structure without putting its talent pool at risk or otherwise having to face the difficulties associated with employee job loss.

Establish the Business Objectives and Rationale for the RIF

Ideally, the next step in an RIF should involve identifying and documenting the employer's business objectives for the RIF. Once it determines that layoffs are necessary, the employer should work with counsel to document the linkage between the proposed layoffs and the stated business objectives.

Thereafter, the employer must determine which employees to layoff—whether the RIF will focus on certain job titles or functions, entire locations, facilities or departments. The answers should be consistent with the stated goals of the RIF and can help focus and shape the layoff plan. The employer also should consider whether there will be a single round of layoffs or multiple ones. Various factors might influence that decision, including the predictability of the business climate, product demand, employee morale, the ability to retain essential employees and operational requirements.

Develop Selection Criteria

Next, the employer should develop the criteria it will use to select employees for the layoff. Objective reasons are often easier to defend than subjective ones if they are later called into question in litigation.

Most layoff selections, however, will involve a subjective component, such as employee performance or assessment of future capabilities. Nevertheless, the employer should consider ways to maximize the objective components of the decision. For example, rather than relying solely on a supervisor's evaluation, the employer might give some weight to employee seniority.

In situations where the employer will use employees' performance as a selection criterion, the employer may need to rely on prior performance evaluations, a ranking system developed specifically for the layoff or some combination of the two. If rankings

prepared as part of the layoff process are inconsistent with prior evaluations, the employer must be prepared to explain the discrepancy.

Company counsel can aid the employer in developing the appropriate documentation of the criteria the employer will use, the reasons for such criteria and their link to the rationale for the layoff. Clearly documenting the criteria to be used also will defuse potential arguments that the employer manipulated the criteria to target certain employees for layoff.

Select the Decision-Makers

After the employer decides which criteria to use, it should focus on selecting the appropriate decision-makers. In general, senior management and human resources personnel may be in the best position to make the general overarching decisions, such as those concerning the scope of the layoff, the locations or facilities to close, the product lines to discontinue and/or the services to outsource.

Decisions concerning which employees to retain may be best left to managers who have personal knowledge of the employees' performance, unless the selections are based on purely objective criteria. Leaving all decision making to a single individual carries potential risks: that individual may be a poor witness, may later be terminated or laid off, or may harbor or be perceived as harboring personal animus toward certain employees.

Identify Any Contractual Requirements

While workers are "at will," meaning they can be laid off or otherwise terminated at any time, with or without cause or notice, subject only to statutory restrictions, many employees have employment contracts, offer letters or other arrangements that place limits on how the employer may end their employment. The restructuring team should consider all such agreements and arrangements in evaluating job reductions.

Contractual restrictions on layoffs may also be found in other sources, such as employee handbooks, options or equity agreements, general employee policies or, in rare cases, verbal promises by management.

In unionized workforces, contractual restrictions in collective bargaining agreements or those established through past practice are also likely to place limits on an employer's ability to reduce its workforce or implement other cost-containment measures. In the case of an RIF, these restrictions may impose certain criteria, obligations or procedures on the RIF. In addition, the decision to implement the RIF, along with its effects on the employer's workforce, may be subject to mandatory bargaining.

Analyze Layoff Selections for Discriminatory Treatment or Effect

RIF selection criteria can sometimes lead to unexpected or unintended effects on individuals in statutorily protected classifications. To ensure a fuller understanding of a proposed RIF's impact, under guidance of counsel, employers should conduct a review of any RIF plan to identify possible issues of disparate treatment or impact potentially caused by the plan.

"Disparate treatment" occurs when an employer intentionally selects certain employees for layoff based on a protected characteristic, such as race, color, national

origin, sex and pregnancy, age, disability or religion. Unlawful disparate treatment also can occur under Section 510 of the Employee Retirement Income Security Act (ERISA) if the employer selects employees for layoff to avoid or reduce the costs associated with providing ERISA-covered benefits or to prevent employees from attaining any ERISA-covered benefit, such as pensions. Employers must also consider other protected characteristics under state and local laws.

“Disparate impact” occurs when the selection criteria unintentionally causes the layoff to fall most heavily on a protected group. For example, disparate impact against older workers may occur if an employer uses employee salaries as a criterion. Because older workers tend to earn higher salaries, a layoff may disproportionately impact older workers. Where disparate impact exists and cannot be eliminated, employment counsel should be consulted to evaluate whether the company has a defensible business justification for its selection criteria.

Employers may use outside experts or consultants to assist in conducting disparate treatment and disparate impact statistical analyses. Such outside analyses can be particularly helpful in understanding issues of disparate treatment or impact and in defending against a claim if litigation does result.

Consider Other Potential Legal Issues

After the employer has identified the employees selected for layoff, it should consider the status of each one to ensure that there are no potential claims lurking. For example, employees who are on protected maternity, family, medical or military leave may have certain reinstatement rights under the Family and Medical Leave Act (FMLA) or the Uniformed Services Employment and Reemployment Rights Act (USERRA). Unless the employer can invoke certain defenses, discharging such employees while they are on leave can expose an employer to liability.

Terminating employees on these or other types of protected leaves of absence, such as disability or workers’ compensation leave, may also create the appearance of retaliation. Similarly, terminating an employee who is considered a protected “whistleblower” under federal, state or local law or an employee who is known to have engaged in protected, concerted union activity could subject an employer to retaliation claims. Individuals who participated in internal investigations or as witnesses for other employees may also have a basis for a retaliation claim.

Review Restrictive Covenant Obligations

Another relevant consideration is whether the employees are under any restrictive covenant obligations that the employer may wish to enforce after implementing an RIF. Such obligations include not soliciting clients or employees and not joining a competitor. State law may impact the employer’s ability to enforce such obligations because some courts may be reluctant to enforce restrictive covenants when an employee is terminated through no fault of their own.

Document Carefully

It is imperative that the employer carefully document the reasons for the RIF, the criteria used and the reasons that the employer selected or did not select each employee in the affected area(s). Such documentation assists in refuting any claim

that the employer manipulated the layoff criteria for unlawful reasons or had any illicit motive for the layoffs. In that comprehensive documentation, the employer should use consistent explanations as to why it selected certain employees for layoff or retention. It also may be appropriate to maintain notes and minutes from any RIF restructuring team meetings.

Identify When Notice Should Be Given

Failure to provide adequate notice to employees of an RIF is a significant potential pitfall for employers implementing RIFs. Thus, employers should carefully review applicable federal, state and local law pertaining to this issue, including whether any exception to the notice requirements applies due to the COVID-19 pandemic and/or Russia-Saudi Arabia oil price war and the unprecedented impacts that have ensued.

The federal Worker Adjustment and Retraining Notification (WARN) Act and various state equivalents known as “mini-WARN” Acts require that covered employers give up to 60 to 90 days’ advance notice before implementing a “plant closing” or “mass layoff.” These statutes compel back pay and benefits, civil penalties and attorneys’ fees in litigation where the employer did not give proper notice to affected employees or their union representatives and/or certain government officials. Such penalties are designed to inflict a steep price and can significantly reduce any savings produced by an RIF.

The federal WARN Act is technical and complex. In general, it applies to private employers with a total of 100 or more full-time employees and mandates 60 days’ advance written notice of (1) a temporary or permanent “plant closing,” or discontinuance of an operating unit, that affects 50 or more full-time employees¹; (2) a “mass layoff” of more than 500 full-time workers at a single site of employment during a 30-day period that is expected to exceed six months; (3) an RIF of between 50 and 499 full-time workers at a single site of employment during a 30-day period, if the RIF affects at least 33 percent of the employer’s total active full-time work force and is expected to exceed six months; or (4) extension of a temporary layoff affecting the number of employees in (2) or (3) at a single site of employment that was originally expected to last six months or less.² The WARN Act generally does not apply to temporary layoffs of less than six months.

In determining whether the employer satisfies these threshold requirements, it is important to check applicable state and local laws. Many jurisdictions have enacted mini-WARNs that dramatically lower the initial threshold numbers and increase the amount of advance notice that employers must give. For example, New York’s mini-WARN Act requires employers with 50 or more employees to give at least 90 days’ advance notice of any mass layoffs, plant closings or “relocation” of operations.

There may be exceptions that excuse the employer from providing the full amount of notice required under applicable law. Most notably, under the unforeseeable business circumstances exception of the WARN Act, employers are relieved from the obligation to provide a full 60 days’ notice if the RIF is caused by a “sudden, dramatic, and unexpected action or condition outside of the employer’s control” such as a “dramatic major economic downturn” or “[a] government ordered closing of an employment site that occurs without prior notice.” This exception likely applies to many RIFs necessitated by the COVID-19 crisis. However, employers relying on this exception

should proceed with caution and refer to [Akin Gump's recent COVID-19 WARN Act client alert](#) detailing the potential application of the “unforeseen business circumstances” and “faltering company” exceptions.

Implementing the RIF

Once the employer has completed the steps outlined above and compiled its final list of employees selected for layoff, it should make final preparations for implementing the RIF. These preparations include:

1. Identifying the corporate representatives who will advise the employees individually of the decisions, coaching them in advance on the employer’s consistent explanation for the RIF, preparing a “script” to be followed with prepared responses to anticipated questions and familiarizing them with information on benefits and any outplacement services for terminated employees.
2. Ensuring that the employer pays all accrued but unpaid wages, bonuses, vacation, pre-negotiated severance and other compensation in a timely manner, with appropriate withholdings and in accordance with state and local law.
3. Compiling information packets for terminated employees regarding final compensation payments, outplacement assistance, insurance continuation and procedures for reapplying for other positions within the company.
4. Preparing a handout outlining answers to frequently asked questions about the RIF for distribution to all employees, regardless of whether or not they were included in the RIF; this will help control the spread of rumors and gossip and ensure dissemination of consistent explanations for the RIF.

Finally, employers should consider offering additional benefits or severance packages to selected employees in exchange for a release of all potential claims against the employer. With respect to age-related discrimination claims, there are several strict legal requirements requiring specific language that must be contained in the release, mandatory consideration and revocation periods, and disclosure obligations identifying the ages and positions of other employees in the decisional group that employers must follow to obtain a valid release, particularly with workers age 40 or older. However, obtaining a valid release is the best method of limiting potential liability against the employer.

A release also provides an opportunity for the employer to require binding arbitration to resolve any disputes that may arise between the employer and the discharged employees, limit the risks of class claims and to bind the employees to covenants of confidentiality, cooperation in future legal proceedings and the like. Employment counsel can advise employers on how to craft releases that will best withstand legal challenges and keep them abreast of any potential changes in the law.

¹ By “full-time employees,” we mean employees who are not “part-time” as defined by WARN. Employees who work an average of fewer than 20 hours per week, or who have been employed for fewer than six of the 12 months preceding notice (even if full-time), are “part-time” employees under WARN. See 20 C.F.R. § 639.3(h).

² See *id.* at §§ 639.3(b), (c), (f); 639.4(b). Note that, under WARN, full-time employees whose hours are reduced by more than 50 percent for each month in a six-month period are “affected employees” entitled to notice. *Id.* at § 639.3(e), (f)(1).