

## LABOR & EMPLOYMENT ALERT

### HANDLING EMPLOYEE TERMINATIONS IN TURBULENT TIMES

As the current economic crisis continues to escalate, many companies are being forced to reevaluate their operations and are considering drastic and immediate workforce reorganizations, including layoffs.

In making plans for the future, however, 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. The failure to comply with the applicable statutes, which may require as much as two to three months' advance notice of any covered layoffs, can eliminate any anticipated savings and result in costly and protracted litigation. Moreover, 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 in order for such releases to be valid.

In this two-part series, we outline the key considerations when dealing with RIFs and individual employee terminations. Today, we focus on RIFs.

#### REDUCTIONS IN FORCE

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

##### *Select a Restructuring Team*

The first step involves establishing a confidential restructuring team to determine whether layoffs are needed or whether other cost-cutting measures, such as wage, hiring, or overtime freezes, or reduction through normal attrition or early retirement, will suffice. A restructuring team should include a senior member of the human resources department, other high-level managers, operational representatives and counsel. The team also should consist of representatives who are familiar with the employer's

layoff history and have experience with layoffs. In step five, these and/or other decision makers will make final decisions on how to implement the RIF.

***Establish the Business Objectives and Rationale for the RIF***

The second step involves identifying and documenting the employer's business objectives for the RIF. Only then will the employer be able to assess properly whether it needs to implement a layoff. Once it is determined that layoffs are necessary, the employer should work with counsel to document the linkage between the proposed layoffs and the stated business objectives. Get the Numbers Right

The third step requires determining which employees to lay off. Will it be certain job titles or entire locations, facilities, or departments? These are questions for the restructuring team. 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 RIFs and the influence of various options on: client, market, and public perceptions; employee morale; the ability to retain essential employees; and operational requirements.

***Develop Selection Criteria***

As a fourth step, the employer should develop selection criteria for the layoff. Ideally, the employer should be able to give objective reasons for selecting each employee. Objective reasons are easier to prove to a judge or jury than subjective reasons, and they give rise to fewer claims of unlawful disparate treatment (i.e., intentional discrimination).

In most cases, however, it is necessary for layoff selections to have a subjective component. 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 will need to rely on prior performance evaluations, a ranking system developed specifically for the layoff, or some combination of the two. Unfortunately, evaluations written prior to the time that layoffs were contemplated may "flatter" employees. However, they still represent the most persuasive evidence of how the employer regarded a given employee's performance; as such, they cannot be ignored. If rankings prepared in conjunction with the layoff are facially inconsistent with prior evaluations, the employer must be prepared to explain the discrepancy. This can be done, for example, if certain supervisors can be shown to have "inflated" their assessments.

During this stage of the layoff process, it is important to work with counsel to document the criteria the employer will use, the reasons why each criterion was selected, and its link to the rationale for the layoff. 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 Decisionmakers***

At step five, after the employer decides which criteria to use, it should focus on selecting the appropriate decisionmakers. In general, senior management and human resources personnel should 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 the services to outsource.

On the other hand, decisions concerning which employees to retain should be based on the input of persons who have personal knowledge of the employees' performance, unless the selections are based on purely objective criteria. Under no circumstances should a single individual make the decision. The 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. If possible, we recommend that the employer form a diverse RIF committee. Doing so creates the appearance of a more equitable selection process.

### ***Identify any Contractual Requirements***

In general, individuals work for companies "at-will," which means they can be laid off or otherwise terminated at any time, with or without cause or notice, subject only to statutory restrictions. However, because an employee's at-will status may be contractually altered, it is important to identify any such constraints when planning for a RIF. For example, an employee with an offer letter or employment agreement may have contractual protection from layoff. These letters and agreements are frequently found at the executive level and may specify, among other things, procedures that the employer must follow before terminating the employee and/or require the payment of severance compensation. Contractual restrictions on layoffs may also be found in other sources, such as employee handbooks, general employee policies, or, in rare cases, verbal promises by management.

In unionized workforces, contractual restrictions are almost always contained in collective bargaining agreements. These restrictions may impose certain criteria, obligations or procedures on a RIF. In addition, the decision to implement the RIF and/or its effects on the employer's workforce may be subject to mandatory bargaining.

### ***Analyze for Disparate Treatment and Disparate Impact***

RIFs often result in litigation. That is why employers should conduct a privileged review of any RIF plan to identify possible disparate treatment or disparate impact issues. The review should focus on whether there is statistical evidence of unequal treatment.

“Disparate treatment” occurs when employers intentionally select 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 cause the layoff to fall most heavily on a protected group. For example, disparate impact against older workers is likely when employers use employee salaries as a criterion. Because older workers tend to earn higher salaries, a layoff may disproportionately impact older workers, giving rise to an age discrimination claim based on disparate impact. 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.

Frequently, employers use outside experts or consultants to conduct disparate treatment and disparate impact statistical analyses. Such outside analyses can be particularly helpful in preventing disparate treatment or impact and in defending against a claim if litigation does result. However, regardless of who conducts the actual analysis, it is important to remember that the plaintiffs will certainly request the analysis in any ensuing litigation. Thus, bringing in outside employment counsel from the outset may help shield such statistical evaluations from disclosure under the attorney-client privilege.

Where evidence of disparate impact or disparate treatment exists and cannot be eliminated, the appropriate decisionmakers should be notified, and the matter should be revisited before the employer finalizes any decisions.

### ***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 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.

Retaliation claims can be quite difficult to defend when the protected activity occurs in close temporal proximity to the RIF. In situations where the employer is eliminating entire jobs or departments, it should not be difficult to demonstrate a legitimate non-discriminatory reason for the decision. In other cases, however, the timing of the RIF decision can create a genuine issue of material fact that will preclude early disposal of a lawsuit. Employers should consult with employment counsel in dealing with such potentially thorny issues.

### ***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 a 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 many courts will not enforce restrictive covenants when an employee is terminated through no fault of his or her own. In such cases, the employer may wish to include the restrictive covenants in any separation agreement that includes the appropriate consideration.

### ***Document Carefully***

It is imperative that the employer carefully document the reasons for the RIF, the criteria used, and the reasons 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 committee meetings. Again, including employment counsel in this stage can help put the employer's best foot forward and shield drafts from disclosure in litigation.

### ***Identify When Notice Should Be Given***

Failure to provide adequate notice is a significant potential pitfall for employers implementing RIFs. Thus, employers should carefully review applicable federal, state, and local law pertaining to this question before proceeding.

The federal Worker Adjustment and Retraining Notification Act (WARN Act) and various state equivalents known as “baby WARNs” or “mini-WARNs” 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 a RIF.

The federal WARN Act is highly technical and complex, and a detailed analysis of its provisions is beyond the scope of this client alert. In general, however, the WARN Act applies to private employers with a total of 100 or more full-time employees and mandates 60 days’ advance notice of any plant closings or mass layoffs. A “plant closing” occurs if 50 or more employees suffer an “employment loss” within a 30-day period if an employer temporarily or permanently closes down an entire site or certain facilities or operating units within a “single employment site.” A “mass layoff” is any other RIF where either: (1) 500 or more employees at a single site suffer an employment loss within a 30-day period; or (2) one-third or more of an employment site’s active employees (but at least 50 or more employees) suffer an employment loss within a 30-day period.

In determining whether the employer satisfies these threshold requirements, it is important to check applicable state and local laws. Many jurisdictions have enacted baby WARNs that dramatically lower the initial threshold numbers and increase the amount of advance notice that employers must give. For example, New York’s baby WARN Act, which becomes effective on February 1, 2009, 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. For more information on this topic, go to: <http://www.akingump.com/communicationcenter/newsalertdetail.aspx?pub=2037>.

There may be exceptions that excuse the employer from providing the full amount of notice required under applicable law. For example, under the federal WARN Act, the “faltering company exception” may excuse notice in situations where the employer is closing an entire employment site. The “unforeseeable business circumstances exception,” which generally applies to unexpected events beyond the employer’s control, may also relieve some or all of the employer’s obligation to give notice. There is an argument that the recent precipitous drop in the economy is enough to trigger this exception.

### ***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, among other things:

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 pre-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; and
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. As we describe in Part II of this client alert, there are several strict legal requirements 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 mandate binding arbitration to resolve any disputes that may arise between the employer and the discharged employees and to bind the employees to covenants of confidentiality, cooperation in future proceedings, and the like. Employment counsel can advise employers on how to craft releases that will best withstand legal challenge and keep them abreast of any potential changes in the law, including the possible passage of the Arbitration Fairness Act (for an overview of this proposed



legislation, go to: <http://washlaborwire.com/2007/12/07/arbitration-fairness-act-of-2007-hr3010-s1782/>) that could alter the validity of certain provisions or the entire release.

**NEXT: In our next installment, we will discuss ways to minimize corporate liability for individual terminations.**

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