Akin Gump
STRAUSS HAUER & FELD LLP

Labor and Employment Alert

March 1, 2016

If you read one thing...

- Given the precarious economic conditions caused by the decrease in oil prices, affected companies are considering operational cost-savings measures, including employee reductions.
- Employers should engage in diligent planning when both contemplating and implementing a potential workforce reorganization.
- Companies must carefully navigate numerous federal and state regulations as well as accompanying strict timelines attendant to the process.

Effectively Managing Workforce Contraction in Turbulent Times

The dramatic drop in the price of oil is forcing many energy-related companies to reevaluate their operations and consider steps to trim their costs. With recent developments in the industry and predictions that low oil prices will extend well into 2016, Akin Gump is reissuing this previously published alert regarding 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.

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

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Select a Restructuring Team

The first step in implementing a 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.

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Consider the Alternatives to a RIF

Before proceeding with a RIF, the team should consider alternatives. While a 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 a 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 lay-off—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 its 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 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 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 a 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 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 cause 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 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 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 committee meetings.

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 (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 a 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 notice of any plant closings or mass layoffs. A “plant closing” occurs if (1) 50 or more employees suffer an “employment loss” within a 30-day period or (2) 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. An “employment loss” is considered to be (1) an employment termination, other than a discharge for cause, voluntary departure, or retirement; (2) a layoff exceeding six months; or (3) a reduction in an employee’s hours of work of more than 50 percent in each month of any six-month period.

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. 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. However, it is unlikely that the recent drop in the price of oil, on its own, qualifies for 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:

I. 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

II. ensuring that the employer pays all accrued but unpaid wages, bonuses, vacation, prenegotiated severance and other compensation in a timely manner, with appropriate withholdings and in accordance with state and local law

III. compiling information packets for terminated employees regarding final compensation payments, outplacement assistance, insurance continuation and procedures for reapplying for other positions within the company

IV. 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 will 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 require 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 challenges and keep them abreast of any potential changes in the law.

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