

DOWNSIZING IN THE NEW ECONOMY: CONDUCTING REDUCTIONS IN FORCE WHILE MINIMIZING THE RISK OF LITIGATION

I. INTRODUCTION

The current global financial crisis has sent shockwaves throughout virtually every sector of the economy. Employers across the country are responding to this unprecedented economic uncertainty by reducing expenses, primarily employment expenses. Many companies are reorganizing business units and reducing staff through voluntary and involuntary group termination programs. These initiatives present challenges for managing a broad range of employment law risks.

Perhaps the most widely utilized method of reducing labor costs is the reduction in force, or “RIF.” If not carefully planned in advance, RIFs can result in substantial liability which may offset any initial savings the employer achieves through the reduction itself. 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. In addition, employers should assess their options for reducing employment expenses and increasing operational efficiency through adjustments to their employment practices designed to preserve jobs and minimize involuntary terminations whenever possible. If preventive measures are insufficient to realize requisite savings, proper planning and advice on the design and implementation of voluntary and involuntary group staffing programs is essential for reducing workforce levels responsibly and lawfully.

A. Recent Increase In Number Of Layoffs.

According to the Bureau of Labor Statistics, U.S. employment fell sharply in January 2009 (down 598,000) and the unemployment rate rose from 7.2 to 7.6 percent. Over the past 12 months, the number of unemployed people across the country has increased by 4.1 million and the unemployment rate has risen by 2.7 percentage points. This downward trend in employment apparently will continue at least over the next year. According to a recent Society for Human Resource Management (SHRM) poll of public and private company human resources executives, about 48% of employers have instituted layoffs in 2008 and approximately 60% of employers are likely to do so in 2009.

B. Alternatives To Layoffs May Reduce The Risk Of Claims.

Although employers are capable of 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 disproportionate numbers of older, female and minority employees. This result creates the potential for class actions and individual wrongful discharge lawsuits. In the absence of proper documentation, an employer may find it difficult to convince a court, administrative agency or other third party of the true reasons for its actions.

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 bonuses and fringe benefits, including employee sharing of insurance premiums, increased insurance deductibles and limited benefit eligibility for newer employees; (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 employees with substantial performance problems; (11) terminating recent hires within their introductory periods; and (12) discontinuing the use of temporary and part-time employees and redistributing their work.

Some employers look to early retirement programs, while others ask for volunteers by offering enhanced severance benefits. While less severe than involuntary layoffs, these measures still require sensitivity to the manner in which they are communicated and the effect on employee morale. Moreover, explaining the company's financial position may enlist employee support rather than resentment. Management should seek a team approach to problem solving and increasing productivity, without making unrealistic promises of job security.

C. When Layoffs Are Unavoidable, Proper Planning May Reduce The Risk Of Employment Disputes.

Once a determination is made that a reduction in force is necessary, the task generally falls to operations, human resources and legal counsel to devise a plan which minimizes the risks of litigation. To be effective, a reduction in force requires advance planning. The following outline summarizes some of the steps that should be considered before any adverse employment actions are taken.

1. Planning the RIF.

- a. Document the financial or other conditions necessitating the RIF.
- b. Identify the goals of the staff reduction, in terms of labor costs to be eliminated and/or the number of employees by which the organization is overstaffed.
- c. Identify the job functions and/or skills that will be essential to successful operations after the RIF.

- d. Eliminate and/or consolidate unnecessary jobs.
- e. Set a timetable for carrying out the RIF. (Unless business conditions require a series of reductions, attempt to act quickly and decisively in an effort to minimize morale problems.)
- f. Be aware of situations where an employee can argue that he or she was laid off close to the time he or she would have qualified for a benefit (e.g., pension vesting rights, retirement eligibility). Even if technically lawful, these situations may appear so unfair that a judge or other trier of fact might stretch the law.
- g. Try not to use a layoff as a substitute for terminating an employee who exhibits poor performance.
- h. Check state laws regarding: payment of wages, insurance benefits continuation, severance benefits, letters of recommendation, personnel record access, plant closings, layoffs, and the like. Many states have specific requirements applicable to involuntary terminations.
- i. Investigate whether the layoff will trigger vesting in pension or benefit plans for employees laid off. Also determine whether the layoff is a partial termination of a pension or benefit plan, requiring a reportable event under ERISA.
- j. Check to be sure that the terminations do not constitute withdrawal from a multi-employer pension plan, which can result in substantial liability.
- k. Check to determine if the termination has any impact on stock options.
- l. Avoid the use of form letters when denying benefits to benefit plan participants.
- m. Take steps to deliver news of layoff decision to the affected and non-affected employees. Inappropriate or poorly communicated notification can result in claims of emotional distress or other litigation.
- n. Be prepared when notifying employees about a layoff. Have answers ready for potential inquiries and avoid the appearance that the decision was poorly or hastily made.

- o. Consider the timing of the layoffs under the federal plant closing law (“WARN”) or under applicable state laws (see below).
- p. Determine what notices are required under ERISA (e.g., Summary Annual Reports, Summary Plan Descriptions) and ensure that employees receive all notices required.
- q. Assess limitations and/or liabilities created by collective bargaining agreements, employment contracts, and the like.
- r. Establish clear eligibility criteria for severance benefits. Be wary of giving extra credits for employees age 40 or older, since such treatment can violate state discrimination laws. Do not preclude retiring employees from severance pay eligibility.
- s. Determine whether a de facto severance pay plan already exists for employees involuntarily terminated. Such plans may require compliance with ERISA reporting requirements and may already bind the employer to provide certain benefits to all affected employees.
- t. Avoid discriminatory transfer policies. Workers should have the same transfer opportunities regardless of age, sex or other protected categories.
- u. Do not make layoff decisions solely on the basis of payroll dollars saved. Such decisions may be evidence of unintended age discrimination.

2. Making key policy decisions - How to select among employees – Some possible scenarios.

In any layoff, the most significant decision may be the criteria by which employees will be selected for termination. In the easiest cases, an employer may make a decision by the nature and necessity of the work performed (e.g., where a particular position or product line is being eliminated). Where the decision is not so easily made, employers may utilize other criteria in making selection decisions. Examples of such criteria include:

- a. By length of service/seniority.
 - b. By identifying and eliminating unnecessary job classifications.
 - c. By classes of employees, e.g., eliminating all temporary, part-time or contract workers initially.
 - d. By strict use of pre-existing job appraisal data.
 - i. Initially select employees who have been disciplined for severe or persistent performance problems.
 - ii. 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.
3. **Strive for an objective comparison of employees where job qualifications and skills are considered in making reductions.**
- a. Consider the use of a RIF Committee and outside legal review.
 - b. 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.
 - i. When possible, performance comparisons should be made on the basis of ratings given on current or prior performance appraisals.
 - ii. New performance appraisals should be conducted for any employee who has not been evaluated within a reasonable period of time preceding the RIF.
4. **Prior to implementing a RIF, factors militating against the selection of certain employees should be considered.**
- a. Can employees be transferred into or post for existing vacancies?
 - b. Is special high-level management review warranted for certain highly-paid or long-term employees?
 - c. Are older, minority or female employees disproportionately affected by the company's initial selection procedures?

- d. Prior to implementation, initial selection decisions should be evaluated to see whether individuals in protected classes are disproportionately affected by the proposed RIF.
- e. If a disparate impact exists on the basis of membership in protected classes such as gender, race or age, alternate selections should be considered.
 - i. If minority or female employees are disproportionately affected by the company's initial selection procedures, can the selection of these individuals be justified by business necessity?
 - ii. If not, alternative selections of individuals outside such protected classifications should be considered.
 - iii. If older employees are disproportionately affected by the company's initial selection procedures, can the selection of these individuals be justified by reasonable factors other than age?
 - iv. If not, alternative selections of younger individuals should be considered.

5. Employers can attempt to limit their potential liability by obtaining general releases from employees affected by a RIF, in return for enhanced severance benefits or other valuable consideration.

- a. Under the Older Workers Benefit Protection Act ("OWBPA"), many procedural requirements must be satisfied before an employee's release or waiver of age discrimination claims under federal law will be considered enforceable.
- b. Like all releases of employment claims, releases waiving claims or rights inuring to individuals age 40 and older under the federal Age Discrimination in Employment Act ("ADEA") must be knowingly and voluntarily executed.
 - i. The waiver must be written in easily understandable terms.
 - ii. The waiver must specifically refer to rights and claims existing under the ADEA.

- iii. The waiver cannot extend to rights or claims that may arise after the date the release is executed.
 - iv. The consideration offered in return for the waiver must be unrelated and in addition to whatever the individual is entitled to receive upon termination under existing company policies. (E.g., If company policy provides for the payment of accrued but unused vacation days upon termination, such sums are not additional consideration capable of supporting a waiver of ADEA rights and claims.)
 - v. The individual must be advised in writing of his or her right to consult with legal counsel prior to executing the release.
- c. If the individual considering the waiver has not filed any administrative charges of age discrimination with the EEOC, or a lawsuit alleging a violation of the ADEA, the following notice requirements must be observed:
- i. In a group situation, each employee age 40 and older must be given at least 45 days to consider the release and afforded an additional 7 days after execution to revoke the agreement if desired. (Note: In individual termination situations where no EEOC charge or ADEA lawsuit has been filed, the employee must be allowed to consider the release for at least 21 days.)
 - ii. The company must notify the individual, in easily understandable written terms, of any eligibility requirements for being selected to participate in the employment termination program and all time limits applicable to the program.
 - iii. The individual must also be informed, in easily understandable written terms, of the job titles and ages of all individuals who are eligible or being selected for the termination program, and the ages of all individuals in the same job classification or organizational unit (“decisional unit”) who are ineligible or not being selected for the program.
- d. If the individual has filed an age discrimination charge with the EEOC, or a lawsuit alleging a violation of the ADEA, the company

must provide him or her with a “reasonable” period of time to consider the execution of a waiver of ADEA rights and claims.

- e. An individual cannot waive his or her right to file a discrimination charge with the EEOC, or to participate in an EEOC investigation.

6. Wherever possible, outplacement services should be offered to assist displaced individuals in obtaining subsequent employment.

7. Employees affected by a staff reduction should be advised of the RIF in as professional and supportive a manner as possible.

- a. If possible, two members of management and/or human resources should meet with affected employees individually.
- b. The communicators should be brief, direct and firm as to the company’s decision.
- c. The communicators should be able to briefly explain the basis for the decision, if asked.
- d. The communicators should also explain:
 - i. Recall/rehire rights, if any;
 - ii. Severance benefits (if any), health insurance conversion rights and other monetary issues; and
 - iii. Outplacement or other transitional services being offered, if any.
- e. The communicators should be prepared to cope with employee shock, surprise and inability to absorb the information being imparted.

8. After the implementation of a RIF, remaining employees must be enlisted as partners committed to future growth.

- a. Often, RIFs are not isolated events. Business conditions may require a series of RIFs before budgetary or manpower goals are satisfied.
- b. To the extent possible, consecutive RIFs should be scheduled in close proximity to each other.

- c. Remaining employees should be provided with prompt and accurate information about the desired goals and anticipated timetables associated with the RIF(s).
- d. If possible, remaining employees can be provided with modest economic or non-economic incentives for increased productivity.

9. Workforce reductions provide unique opportunities for reorganizing and streamlining operations.

- a. To maximize the cost savings effected through staff reductions, existing workflows and/or operating procedures should be redesigned to improve efficiency and to eliminate the duplication of effort and expense.
 - i. Cross-training allows fewer individuals to perform a greater number of job functions.
 - ii. Reporting relationships can be restructured to avoid unnecessary layers of supervision or management.
- b. Existing business practices should also be re-evaluated with an eye toward reducing hidden costs.
 - i. Travel and entertainment expenses and/or budgets can be scaled back.
 - ii. Recruitment efforts and expenses can be curtailed if not eliminated. Wherever possible, post-RIF job vacancies which occur should be filled by transferring or promoting qualified individuals from within the company.

D. Notice Requirements Under The Worker Adjustment And Retraining Notification Act.

The number of employees to be laid off also may trigger the notice requirements under the Worker Adjustment and Retraining Notification Act (“WARN”), or possibly a state plant closing statute. The following outline summarizes the general requirements of the WARN Act.

1. **WARN applies to employers that have, nationwide:**
 - a. 100 or more employees (excluding part-timers); or
 - b. 100 or more employees (including part-timers) whose total weekly work hours (excluding overtime) are at least 4,000 hours per week.

2. **WARN requires an employer to give 60 days advance written notice, as described by the Act and U.S. Department of Labor's regulations, of a "plant closing" or "mass layoff" to:**
 - a. All affected employees (including supervisors and part-time employees), OR if the employees are represented by a labor organization, the international body of the union; AND
 - b. The State dislocated workers unit and the chief elected official of the local governmental unit where the affected facility is located.

3. **A "plant closing" is defined as:**
 - a. A permanent or temporary shutdown of a single site of employment, or of one or more facilities or operating units within a single site of employment; IF
 - b. The shutdown results in an employment loss at the single site of employment during any 30-day period (this period is extended by WARN and Department of Labor Regulations to 90 days) for 50 or more employees (excluding any part-timers and employees who have not suffered an employment loss);
 - c. An "employment loss" is defined as:
 - i. An employment termination, other than a discharge for cause, voluntary departure, or retirement;
 - ii. A layoff exceeding 6 months; OR
 - iii. A reduction in an individual's working hours of more than 50% during each month of any 6-month period.

4. **A “mass layoff” is defined as a reduction in workforce which is not the result of a plant closing; AND**
 - a. Which results in an employment loss at a single site of employment during any 30-day period (this period is extended by WARN and Department of Labor Regulations to 90 days), for at least 50 employees (excluding part-timers and employees who have not suffered an employment loss), if they comprise at least 33% of the workforce at the single site of employment;
OR
 - b. Which results in an employment loss at a single site of employment during any 30-day period (this period is extended by WARN and Department of Labor Regulations to 90 days), for at least 500 employees (excluding part-timers and employees who have not suffered an employment loss).

5. **The Act provides limited exceptions which may permit employers to provide less than 60 days notice of a plant closing or mass layoff if the failure to provide the requisite 60 days notice is due to:**
 - a. Unforeseeable business circumstances.
 - i. Caused by sudden, dramatic, unexpected action or condition beyond the employer’s control; or
 - ii. Termination of major contract, major economic downturn, government-ordered closing.
 - b. A faltering company (in plant closing situations only).
 - i. The employer is actively seeking capital or business when the WARN notice is due;
 - ii. A realistic opportunity exists to obtain financing;
 - iii. If obtained, the financing will enable business to avoid or reasonably postpone shutdown; and
 - iv. The employer possesses a good faith belief that notice would preclude the employer from obtaining the financing.

- c. A natural disaster.
 - i. Floods, earthquakes, storms, droughts, tidal waves;
 - ii. The plant closing or mass layoff is a direct result of the natural disaster; and
 - iii. Notice must be provided in advance or after the employment loss.

6. State and local notice requirements.

The requirements of WARN supplement those contained in personnel policies, employment contracts, collective bargaining agreements or any other statute. Some states and territories have enacted statutes which may impact plant closings or relocations. These locales include, but are not limited to: California, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Oregon, Puerto Rico, South Carolina, Tennessee, Wisconsin and the U.S. Virgin Islands. In addition, some cities and municipalities have enacted plant closing ordinances.

II. CONCLUSION

Unfortunately, it appears that the business community's recent wave of workforce reductions will continue into the foreseeable future. However, a wide range of options exist for employers who wish to reduce labor costs without sacrificing operational efficiency. If the option selected is a reduction in force, significant litigation costs can be avoided with proper advance planning and legal advice.

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