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Fears Of A Double-Dip Recession And Managing Workforce Reductions

**James R. Hays and
Jonathan Stoler**

**SHEPPARD MULLIN RICHTER &
HAMPTON LLP**

Maranda W. Rosenthal

**TULLETT PREBON (AMERICAS)
HOLDINGS INC.**



**James R.
Hays**



**Maranda W.
Rosenthal**



**Jonathan
Stoler**

As the risk of a double-dip recession looms and companies continue to adjust their workforces to adapt to the more challenging economic times, employers are being faced with making the tough decision regarding the possibility of layoffs. Workforce reductions are one of the most unpleasant events for employers to deal with and often involve both economic and emotional considerations. Layoffs can expose employers to unexpected pitfalls and disastrous legal consequences as the company tries to navigate the myriad complex laws involved. In recognition of the current economic climate and the enormous amount of work required to properly plan and execute a large-scale layoff, this article is intended to assist in identifying key issues and to suggest several “best practices” when implementing a reduction-in-force.

Although every company’s reasons may differ, nearly all workforce reductions require that the company consider all possi-

James R. Hays is a Partner in the Labor & Employment Practice Group in the firm’s New York office and cochairs the firm’s Traditional Labor Law Team. Maranda W. Rosenthal is Vice President and Associate General Counsel of Tullett Prebon (Americas) Holdings Inc. Jonathan Stoler is a Partner in the firm’s Labor and Employment practice group in the firm’s New York office and cochairs the firm’s global Labor and Employment practice and the National Non-Competition and Trade Secrets team.

ble scenarios and consequences, develop a comprehensive strategy for identifying affected employees and engage in a thorough legal analysis.

The best way to ensure that the company is in full compliance with all applicable federal, state and local laws, and to ease the negative emotional impact, is to engage in thoughtful planning. More often than not, when an employee understands the need and justification for the reduction-in-force, that employee can be made to feel like he or she has been treated with respect rather than as a disposable commodity. The employee is then much less likely to assert a legal claim regarding his or her separation of employment.

Of course, workforce reductions are one of the most extreme measures of cost-cutting. As a result, before proceeding with any size layoff, companies should always consider alternative means of achieving budgetary goals. Among the many alternative methods, such measures include

- Adjusting compensation levels;
- Adjusting hours of work;
- Eliminating overtime or implementing mandatory caps;
- Implementing a hiring freeze which allows for natural attrition; and/or
- Implementing or offering temporary furloughs.

If none of the above measures is a viable solution, and the company is left in the unenviable position of having to involuntarily reduce headcount, the next question is often:

“Now what?” When faced with this decision, the critical issues to address include:

- The extent and size of the reduction-in-force;
- How to determine which employees will be affected;
- The criteria the company will use for selecting affected employees;
- What documentation is necessary for proceeding;
- How to minimize legal exposure; and
- The best method of communicating the workforce reduction and the underlying rationale.

The Numbers Game

First and foremost, a company must determine the number of employees who must be involuntarily terminated in order to meet its economic objectives. Often, a company will try to unrealistically limit the number of affected employees. This is usually a mistake and can many times lead to a company being forced to engage in multiple rounds of layoffs. Such repeated reductions will significantly damage employee morale and can lead to greater than anticipated rates of attrition and widespread apathy from the employees who remain. As a result, it is a best practice to be realistic about the numbers needed to achieve the necessary budgetary decrease in the first round.

Duck, Duck, Goose

One of the most critical issues in the initial stages is the selection criteria for determining those employees who will be affected by the workforce reduction. Prior to taking any steps to implement the reduction-in-force, a company should have a clear set of criteria for making such determination. Having clearly documented criteria is often a key piece of evidence when defending against employee claims regarding discriminatory

Please email the authors at jhays@sheppardmullin.com or jstoler@sheppardmullin.com with questions about this article.

terminations, including the frequent claim that the company manipulated the layoff selection during the process to ensure that particular employees were included.

Another best practice is to set as many objective criteria as possible. Such objective measures can include seniority, educational requirements or overall costs to the company. Subjective criteria often lead to disagreements and leaves the company exposed to second-guessing by judges and juries. The decision will often, however, necessarily include a subjective component. With this in mind, the company's primary goal must be to implement and abide by set criteria and procedures designed to maximize the objective aspect of the selection decision. Above all, a company should minimize the appearance of arbitrary selection and ensure the criteria are not adversely impacting any protected category of employee.

The Paper Chase

Once the selection procedures are in place, it is critical that the company properly document the reason(s) for including a particular employee in the workforce reduction. No company wants to be in the undesirable position of defending a lawsuit and having no documentation to rely on to support its justifications for specific terminations. Keep in mind, the statute of limitations for a discrimination claim often far exceeds the memories of those involved in the decision-making process.

The greatest protection against claims of discriminatory inclusion is a thorough and detailed memorandum made contemporaneously with the decision for selection which includes

- The reason(s) for inclusion, with references to the pre-set criteria;
- Explanations for the specific criteria relied upon within the affected area(s); and
- A comprehensive chart listing all employees working in the affected areas with references to why the employee was or was not included in the layoff.

When preparing this memorandum, the company should keep in mind that this document is primarily intended to be viewed by the average juror.

Avoiding Pitfalls

One of the most often overlooked litigation pitfalls is a company's failure to conduct a proper impact analysis of the workforce reduction. Companies will often know how to avoid the claim that a particular individual was intentionally selected for inclusion based upon an impermissible factor. What companies frequently fail to do is to ensure that the reduction-in-force is not inadvertently affecting a disproportionate number of employees in legally protected categories.

The best way to avoid these types of claims and reduce the risk of future liability is to conduct a proper "adverse impact study"

that consists of a statistical analysis that can show whether the composition of employees designated for layoff might create a numerical "appearance" of discrimination. The study should be conducted to ensure that there is not a disproportionate number of employees in any of the protected categories being included in the workforce reduction. In cases where disparities may or do exist, employers should consult with employment counsel or a human resources professional trained in this type of statistical evaluation.

Another common pitfall is a company's failure to assess potential for retaliatory inclusion in the reduction-in-force. Prior to implementing any layoffs, employers should review the personnel files for each affected employee to assess the potential for retaliation. Sadly, it is all too often the case that a lower-level supervisor manipulates the selection criteria to ensure a particular employee is included based upon retaliatory motivations.

Breaking The News

How to Announce the Reduction Companywide

As a best practice, it is wise to make at least one general announcement on the same day that the affected employees are scheduled to be told. There are differing opinions, however, as to whether to make the general announcement before or after the individual employees have been informed. There are benefits and downsides to both approaches, and a company should consider them both before deciding which approach is most suitable for the specific situation.

Regardless of when the general announcement is made, it is best to hold a general meeting with all of the remaining employees once the workforce reduction has been communicated to the affected employees. This is a good time to answer any questions, to reassure the remaining employees and to discuss the company's plans for the future.

When to Communicate the Decision to Affected Employees

There is wide-ranging debate governing the timing of communication of the reduction-in-force to the affected employees. Many companies choose to provide advance notice to the employees and then continue to employ the affected employees through the notice period. Other companies choose to pay the affected employees their aggregate compensation and benefits in lieu of any such notice. This is generally advisable in the situation where the company fears that the affected employee may be disruptive following notification. Whatever option the company chooses, it is best to consult with employment counsel to ensure that any release obtained will be ultimately enforceable.

How to Communicate the Decision to Affected Employees

Given the emotional and economic impact on the affected employees, it is a best practice to have the information communicated to the employees from someone with whom they are familiar, in a face-to-face meeting. It is also a best practice to ensure that there are always at least two individuals present in addition to the affected employee and that the conversation is well documented to avoid any future he-said-she-said claims.

This meeting will often be the focus of any future litigation, and so it is best to be considerate and professional. The meeting should be centered around the following: (1) the company's need for conducting the layoffs; (2) why the particular employee was selected for inclusion; (3) any severance pay offered in exchange for a release; and (4) the standard termination issues covered during a normal termination, such as the employee's final paycheck, return of company property, final expense reimbursements, COBRA, general employee benefit elections, etc. It is advisable that a human resources manager or employee familiar with the procedure handle this portion of the meeting.

The individual conducting the meeting must at all times remain professional and consistent. Managers are often tempted to ease the blow by implying that the company is acting unfairly or by suggesting (inaccurately) that the employee may be rehired at a future date. Accordingly, managers must be properly trained not to give in to this temptation and to know what to expect and how to best respond to questions and other reactions from the employee.

Show Me The Money

More often than not, companies choose to provide affected employees with some form of severance or termination benefits, such as a salary continuation for a set number of weeks, lump sum payments based on seniority, acceleration of stock options, temporary payment of health insurance premiums, and/or outplacement assistance. This is generally done to soften the economic impact of the termination and can also serve as a key negotiating point in seeking a general release of claims.

Conclusion

Reductions-in-force invariably present employers with a wide range of complicated legal and employee-relations challenges that above-all require significant forethought and analysis. The number one best practice for all workforce reductions is proper planning and consideration of relevant factors. Indeed, sufficient planning and effective partnering with experienced employment counsel will produce important benefits, placing companies in better positions to anticipate and favorably resolve potential litigations that call into question the appropriateness of otherwise lawful employment actions.