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Work Force Reductions

Thoughtful planning helps take the sting out of the process—and reduce the risk of lawsuits.

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WORK FORCE reductions are among the more unpleasant events employers and their counsel may endure. Such employment actions typically have an emotional and economic impact on employees, require the observance of a myriad of complex laws, and usually require an enormous amount of work in order to properly plan and execute. In recognition of these realities, this article is intended to assist in identifying key issues to consider when planning a work force reduction and to suggest several “best practices” that can help your company plan for, communicate and implement such an action in a humane fashion that will reduce the risk of lawsuits.

In most cases, the reasons an organization is placed in the unenviable position of having to engage in a work force reduction are external—the unexpected loss of a key client or customer, an unanticipated drop in demand for the company’s products or services or a sudden domestic or overseas event affecting industries in general. Although the reasons may differ, virtually every work force reduction requires that companies consider various alternatives, develop a strategy for identifying affected employees and undertake preventive legal analysis.

Thoughtful planning of a work force reduction can help to ensure that a company is in compliance with applicable laws and may take some of the “sting” out of this employment action. Indeed, when the affected employees understand the reasons for the work force reduction and believe that they were treated with dignity (as opposed to a fungible commodity), they may exit their employment with a heightened degree of respect for how the company handled this unpleasant event. This, in turn, may reduce the risk of lawsuits.

Work force reductions are primarily driven by the need to cut company costs, and the termination of employees is among the most drastic of cost-cutting measures. However, before proceeding with a work force reduction, a company should at least



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consider whether it can accomplish some or all of its economic objectives through less radical means. Such alternatives include:

- Reducing or freezing compensation;
- Reducing work hours and/or prohibiting overtime work;
- Freezing hiring and allowing for natural attrition;
- Exit incentive programs;
- Temporary furloughs.

Assuming you have considered and/or exhausted all of the above measures and realize that you have no alternative but to involuntarily reduce headcount and implement a work force reduction, the question you may ask yourself is: Now what? More specifically, the critical questions you will be faced with as in-house counsel include:

- How many employees should be laid off?
- What criteria will be used to identify affected employees?
- How should the company document the process?
- How does the company identify and minimize legal exposure?
- How will the company communicate the reduction and the reasons for it?

Getting the Number Right

One issue all companies face when planning a work force reduction is to determine how many employees should be laid off. The company will be tempted to terminate the fewest number of employees possible to meet its economic objectives. However, one potential problem with this approach is that it may result in the company having to do another round of layoffs

in the near future. Having multiple rounds of layoffs can be very damaging to employee morale because employees are often led to believe that the first layoff will put the company in a position to succeed (and avoid further layoffs).

Selection Criteria

A company should identify and document the criteria it will use to select employees for layoff before it actually decides whom to lay off. Documented proof that the company established its layoff criteria before deciding whom to layoff can help dispel a claim that it manipulated the criteria to ensure that particular employees would be laid off.

Ideally, a company should be able to give an objective reason why each employee was selected for layoff. In discrimination cases, judges and juries tend to find objective reasons for terminations much more credible than subjective ones. However, in most cases the layoff decisions necessarily include a subjective component. For example, in a reorganization where a company can only afford to keep the best performing employees and/or employees with the highest degree of expertise in a certain area, the decision will necessarily be influenced by subjective judgments. In these situations, the company’s goal should be to establish and follow procedures designed to increase the objectivity of the decisions as much as possible.

Careful Documentation

Just as a company should keep pertinent documentation relating to the reason(s) it terminates an individual employee, it must also carefully document the reason(s) for terminating employees in a work force reduction. A company finding itself in the position of trying to defend lawsuits that challenge why particular employees were selected for layoffs will not want to be without documentation that supports these decisions. Memories fade over the years, and members of management who participated in the work force reduction process may be working elsewhere by the time a lawsuit is filed.

The best proof that a company lawfully selected employees for layoffs is a detailed memorandum made at the time of the work force reduction that:

- Explains the reason(s) for the work force reduction;

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- Explains the criteria the company used to select employees for layoff within the affected area(s) of the company; and
- Contains a detailed table listing every employee in the affected areas of the company that indicates: (1) whether or not the employee is being laid off; and (2) why the employee was, or was not, selected for layoff.

When preparing this documentation, you should keep in mind the ultimate potential audience: the average juror. The documentation should not use any legalese but, rather, plain and simple language that someone with no experience in employment law or human resources could understand easily and quickly. The documentation should contain an objective and fair description of the planned work force reduction.

Potential Legal Exposure

When terminating employees as part of a work force reduction, a company must analyze its decisions for a disparate impact and a disparate treatment. You must concern yourself with potential claims that an individual was intentionally selected for termination based upon an impermissible factor, but also against claims that the selection criteria/process inadvertently resulted in an "adverse impact" against a protected class, such as the termination of a disproportionate number of minority employees.

To reduce the risk of discrimination liability, a company should clearly document the reasons that particular employees were selected for layoff. Companies contemplating a large-scale layoff should also perform an "adverse impact study"—a statistical analysis to determine whether the composition of employees designated for layoff might create a numerical "appearance" of discrimination.

It is particularly important to compare the effects of the layoff on employees in legally protected classes, including those over the age of 40, minorities, females, and those who are on leaves of absence. For example, a company should calculate the percentage of women in its work force and then compare that figure to the percentage of employees designated for layoff who are women. One would typically expect the percentage of female employees in the work force to approximate the percentage of women in the population of employees selected for layoff. Similarly, if the average age of the layoff population is significantly higher than the average age of the total work force, there could be an appearance of age discrimination. In cases where disparities may exist, employers should consult with employment counsel or a human resources professional trained in this type of statistical evaluation.

Before implementing layoffs, companies should also analyze the personnel file of each person designated for layoff for any appearance of unlawful retaliation. Likewise, employers should confirm the accuracy of the information on which the termination decisions are based to ensure that a supervisor does not harbor an unknown discriminatory motive or personal conflict.

Moreover, companies should take into account a variety of other factors when assessing potential liability. For example, if the decision-maker with respect to the work force reduction is the same person who decided to initially hire an affected employee, such fact may reduce the likelihood that a plaintiff could successfully establish a discrimination claim.

Similarly, if the job duties of an affected employee are going to be given to an individual in the same protected class, such a fact might also reduce an employer's potential liability.

Announcing the Reduction

Company-Wide Announcement. In general, it is best to have at least one company-wide announcement about the work force reduction on the same day when the individual employees will be told that they are being laid off. However, managers and attorneys involved in planning work force reductions usually debate about whether to have a company-wide announcement of the fact of a work force reduction prior to informing individual employees they will be laid off, or whether to delay the company-wide announcement until the layoffs have been communicated to the laid-off employees.

After the work force reduction has been implemented, many companies hold a group meeting with the employees who were not laid off. The purpose of this meeting is to let the employees know that management has communicated all of the layoff decisions, to answer any questions and to discuss the company's future plans. Management might specifically want to use this meeting to communicate information about the company's future plans that would have been too confidential to communicate in the company-wide announcement at the beginning of the day (i.e., because it would have been communicated to employees who were about to leave the company).

Although nothing requires a company to put these company-wide communications in writing, it is advisable to do so.

When to Communicate the Decision to Affected Employees. Some companies provide employees with advance notice and then continue to employ such individuals throughout the notice period. Such employers may also elect to provide certain individuals with a retention bonus in order to further encourage them to work throughout the notice period. In the alternative, many companies elect to provide laid-off employees pay and benefits in lieu of notice. In some situations, a company may provide pay in lieu of notice because of fears that employees who know they will be terminated might do more harm than good during their final days of employment.

Some companies have provided laid-off employees with notice, and then immediately put the employees on paid administrative leave for their final days of employment. This serves to prevent the soon-to-be former employees from sabotaging the operations and to prevent the employees from continuing to receive confidential information. However, if you are considering this approach, be sure to consult with your employment counsel to ensure any release you ultimately obtain will be enforceable.

How to Communicate the Decision to Affected Employees. Although there are several practical considerations that influence how a company communicates layoff decisions to individual employees, it is usually best to select managers to meet in person with employees who are being laid off. An in-person meeting is simply the most humane way to announce the layoff. Because the discussion that takes place at this meeting may be at "center stage" of any lawsuit that is filed, another witness (generally a member of the human resources staff) should attend the meeting and take notes.

The in-person meeting should focus on explaining: (1) the reasons for the work force reduction; (2) why the employee was selected for layoff; (3) any severance pay including all information required by the Older Workers Benefits Protection Act (for employees over 40 years old who are offered any form of severance pay or benefit in exchange for a release) and (4) all other issues the company normally covers in termination meetings, such as presentment of the employee's final paycheck, return of company property, final expense reimbursements, COBRA, general employee benefit elections, etc. (a human resources manager may wish to handle at least this portion of the meeting).

The manager selected to deliver the message to affected employees should be trained on what to expect and how to deliver a consistent message. The manager should be instructed to refrain from arguing with the employee about the merits of the decision. Rather, the manager should simply tell the employee that the decision has been made and that it was not the purpose of the meeting to argue about it. The managers should also be very careful to avoid the temptation to appease the employee by suggesting that the layoff was somehow unfair, suggesting that the company has acted unfairly by reducing its work force, or by suggesting (inaccurately) that the company will re-hire the employee.

Post-Employment Benefits

In most work force reductions, companies will generally offer some form of severance benefits (e.g., continuation of salary for a number of weeks, acceleration of stock options and/or temporary payment of health insurance) to terminated employees to soften the impact of the termination and also to negotiate a "waiver" of claims in exchange for such consideration. The amount of severance offered often depends upon the size of the work force reduction, the company's financial standing and any policies the company may have in place regarding severance.

A host of other issues, including outplacement assistance, transfer opportunities, group termination programs, severance eligibility factors, and federal and state requirements regarding specific release language and potential contractual obligations, should also be considered when dealing with work force reductions. While such issues are outside the scope of this article, they are no less important and should be carefully considered with employment counsel.

Conclusion

Work force reductions invariably present an array of legal and employee-relations challenges that require detailed thought and analysis. The keys to making a work force reduction as painless as possible are to allow sufficient time to plan the work force reduction and then implement it according to the plan. Companies should involve individuals who have experience in developing work force reduction strategies and practices. 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.