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NEWSLETTER ARTICLE

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Employment Law

PINK SLIP BLUES: GUIDELINES FOR CONDUCTING LAYOFFS

Tough times can call for tough measures, but tough measures can lead to even tougher times if not implemented carefully.

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Economic survival during a business downturn may require a hard look at what is usually a business's major item of overhead, the payroll. Elimination or consolidation of positions can reduce costs quickly, and cutting inessential positions protects employees in essential jobs.

If conducted without regard to legally sound standards and procedures, however, a reduction in force ("RIF") may also create a wave of litigation that can leave an employer longing for a mere recession. The key to obtaining a streamlined workforce while minimizing the risks is planning and the development of clear standards and procedures.

Terminations of individual employees as part of a layoff are subject to challenge on the basis of federal and state employment discrimination laws, and, for public employers, on the basis of claims of First Amendment retaliation, and Due Process and Equal Protection violations. The employer must be prepared to identify and document the legitimate, non-discriminatory reasons for the terminations and the procedural adequacy of the means by which they were carried out.

A. Preliminary Issues

Although the principal legal risks raised by a RIF come from potential claims under the various federal and state employment discrimination laws, some other threshold issues should be noted.

First, if an employer is unionized, it may already be bound to particular criteria, standards, and procedures for layoffs pursuant to a collective bargaining agreement ("CBA"). A CBA will usually require that layoffs of employees proceed from those with the least seniority to those with more seniority. Of course, that standard may be counterproductive from the employer's standpoint -- for example, when newer employees have come to the organization with more current education and training. A seniority based RIF may also reverse gains the employer has made in recruitment and advancement of minorities and women.

Second, the federal Worker Adjustment and Retraining Notification Act (WARN Act) requires employers with 100 or more employees to provide at least 60 days advance notice of certain covered plant closings and covered mass layoffs, regardless of other procedures and considerations. As a WARN-covered employer and layoff must be planned further in advance due to the notice requirements, the employer will have less discretion in choosing the optimal timing for the RIF.

Third, the employer must be aware of any specific contractual obligations it is under with respect to specific employees or groups of employees. Although employees under term contracts may be subject to layoffs along with at-will employees, the term contracts may provide specific standards for what will constitute good cause for termination.

B. Preliminary Assessment

Before undertaking a RIF, exhaust other measures first. A company defending an employment claim in the wake of a RIF should be able to show that the RIF was a last resort. Identify, pursue, and document other cost-reduction measures prior to the RIF, or be prepared to show that such measures were considered, but would have been ineffective.

If a RIF is necessary, the scope of the RIF may affect the approach to be adopted. Termination of a small number of individuals, including those within the protection of the Age Discrimination in Employment Act (ADEA), can sometimes be accomplished through negotiation of individual severance/settlement agreements and waivers of claims in compliance with the Older Workers' Retirement Benefits Protection Act. Under the circumstances of a wider RIF, however, it is usually impossible to negotiate individual cases.

C. Planning

Careful planning is essential to successful layoffs. Although small and medium sized employers may not have a regular RIF policy, the development of a written plan specific to the RIF will help document the employers purposes and methods for a jury in the event of litigation. The RIF plan should include the following elements:

1. Be clear in advance *why* the RIF is necessary.

Every plaintiff who sues following termination under a RIF will claim that the entire RIF was a pretext for getting rid of him or her personally--even though 500 other employees were also laid off. The RIF plan should thus articulate the factors that make the RIF necessary. In addition to business-cycle downturns, issues such as a loss of market share or of key customers or clients, a more competitive industry environment, a merger or acquisition, outsourcing, technological innovations, or a shift in mission, direction, products, or services provide sound bases for layoffs.

2. Document the business and financial reasons for the RIF in advance.

In conjunction with the identification of the reasons for the RIF, the RIF plan should reference or incorporate data that both illustrates and supports such reasons, and identifies the cost savings, operational improvements, increased efficiencies, and other advantages that will allow the employer to overcome the problems that led to the RIF.

3. Identify RIF criteria.

In all instances, the key is to identify and apply neutral and legitimate business-related criteria in the process of identifying positions for the RIF, and to document the process of doing so. How elaborate the process need be will vary depending on the size of the organization, the size of the projected RIF, and the extent to which the employer foresees legal claims arising from the action.

In instances in which a particular sector or operation of the organization is to be eliminated, the RIF criterion is simply one that encompasses the positions in or supporting that sector or operation. If the goal is to downsize or streamline the organization generally, however, specification of the RIF criteria will warrant more detail and effort. Seniority as the RIF criterion offers the benefit of neutrality and legitimacy, but, as noted, it is often a blunt instrument that can leave the employer, with a workforce the training and skills of which are dated. Moreover, seniority selects for layoff on the basis of employees, rather than positions, which is usually a mistake.

When a RIF is warranted for economic, financial, or competitive purposes, RIF criteria should focus upon eliminating positions rather than upon terminating particular employees. That focus may be counterintuitive in light of the desirability of retaining better-performing employees. But, by starting with an analysis of what positions can be eliminated, the employer will be better able to maintain a functionally sound organization while increasing efficiency and reducing costs.

Accordingly, a primary criterion should be whether a position's functions can be redistributed among, and performed by, incumbents in other positions in the particular work unit, department, division, etc., such that the unit will be able to continue to perform its functions. Notably, that approach also reduces the significance of direct employee-to-employee comparisons in the first instance, which can contribute to claims of discrimination. Considerations of performance and even seniority can be incorporated into the selection process through the use of a point system for employees, which can also be particularly useful for comparing a large number of potential RIF candidates.

Although the details of the process will vary from firm to firm, sequentially, the first step is to have line supervisors make initial recommendations concerning how positions and functions can be consolidated, redistributed, or eliminated, subject to review by management. Upon the completion of that process, the employees to be laid off may be obvious on the basis of the skills and performance history of the incumbents. If not, that restructuring of functions can be succeeded by a separate but overlapping process of assigning points to employees on the basis of what management considers important criteria for retention, such as skill/training level, adaptability to different functions, performance history, and seniority. A rating sheet for each employee can be filled out by work group supervisors, who assign points in each category for each employee. A simple "3" (high), "2" (medium), "1" (low) system will suffice.

It is important that the point scores for each employee be based upon verifiable data. The performance rating for each employee, for example, should be based upon the written, annual performance evaluations in each employee's personnel file rather than upon an *ad hoc* rating for purposes of the RIF. That, of course, requires that such evaluations are regularly completed and are current. Likewise, skill/training levels should be clear from application, training, and performance records. When the multi-year performance and training histories of two different employees show clear differences, it is much harder for an employee to claim that he or she was downgraded in anticipation of the RIF.

The foregoing is one illustration of a process that maintains the focus upon objective circumstances and criteria, and that limits subjective comparisons of employees, which can engender discrimination claims.

4. Identify and train the supervisors and managers who will be responsible for identifying RIF candidates in the use and application of the RIF criteria.

It is important to the purposes of the RIF as well as to the avoidance of legal claims, that RIF criteria be applied on a consistent and uniform basis throughout the organization. Accordingly, the supervisors and managers who will be recommending and reviewing RIF candidates be trained to do so. Ensure that the RIF criteria are uniformly understood and interpreted. Make clear that any deviations require approval of specific managers.

5. Create a RIF plan in the form of a management directive for limited distribution to those members of management who will be responsible for carrying out the RIF.

The management directive should outline the plan for the RIF, and should:

- Identify those managers who will be responsible for initial recommendations of employees for RIF;
- Specify the criteria for identification of surplus functions and the system for identifying employee candidates for RIF recommendations, such as a point-based system;
- Create specific documentation requirements for the managers at each level who will be identifying employees for possible RIF, or reviewing or approving such recommendations (development of a form for use at each level is a good way of ensuring uniformity in application of criteria);
- Describe the levels of review of the initial identifications of employees for RIF, *e.g.*, the department head's initial recommendations will be reviewed by the division director, the group vice president, and legal counsel;
- Require, in its documentation requirements, that recommending, reviewing, and approving managers articulate the specific bases for their recommendations or approvals;
- Note that employees on family and medical leave or military leave might require special consideration; and
- Provide for the maintenance of confidentiality regarding the RIF process.

The RIF plan should *not* be published to employees generally, but limited to those management employees at and above the management level that will be making RIF recommendations, conducting reviews, and making final decisions. Publication of the RIF plan to employees generally could give rise to the claim that such publication created a contractual entitlement on the part of such employees. If such contractual entitlement were recognized by a court, minor deviations from the plan, oversights or variations in carrying it out, and other glitches could create "breach of contract" problems.

6. To the extent possible, avoid final identification of employees for RIF on the basis of performance rankings.

Rankings will be based on evaluations, and evaluations--even if they are done well, which is not usually the case--will invariably include some subjective elements. Plaintiffs will concentrate their attack on such elements to show that they were unfairly "targeted" or "set up" for selection for RIF. It is not usually possible to completely avoid performance comparisons, particularly when numbers of employees will be RIFed. But by avoiding final decision-making on the basis of performance-based comparisons, you may avoid such issues.

As noted, one solution is to include performance as one element in the RIF criteria, particularly in selection criteria that employ point systems. The performance factor will thereby be rendered non-dispositive, leaving expendability of functions as the effectively determinative criterion. If performance evaluations as a criterion must be used, make sure that those of employees who may be considered for RIF are up-to-date and complete.

7. Conduct a RIF impact assessment before finalizing RIF selections.

Particularly if the employer is a government contractor, it should determine whether older (over age 40) employees, women, minorities, or disabled employees would be disproportionately impacted by the RIF selections as preliminarily posed. If such disproportions appear, the bases for selection should be reviewed carefully or, if the employer has an approved affirmative action plan, adjusted based upon the goals of such plan.

8. Provide transfer opportunities and outside placement services for employees selected for RIF.

In a litigation context, these types of services can help show the employer's good faith and good will in the eyes of a jury. The closer question is whether to permit "bumping" -- displacement of a less senior employee by a more senior one. If the principal litigation threat is in regard to age discrimination claims, bumping can relieve the impact of the RIF on older employees. As noted, however, if an employer has made efforts to diversify during the years leading up to the RIF, bumping on the basis of seniority may reverse gains made in that regard.

9. Consider obtaining waivers of claims in appropriate cases.

As noted above, waivers can frequently be negotiated when a relatively small number of employees will be laid off. Even in wider RIF situations, however, consideration should be given to whether a waiver/severance pay arrangement would be feasible and cost effective in certain high risk cases.

Note that, regardless of the context in which the waiver is sought, the specific requirements of the waiver under the Older Workers' Retirement Benefit Protection Act may very well alert the employee to the possibility of making a claim, when he or she may not otherwise have thought to do so. Therefore, before seeking such a waiver, make sure the employee in question is either very likely to make such a claim, or very unlikely to be able to establish a valid claim. If it appears the employee would be able to establish a valid claim, reconsider the termination.

10. Consult before you act.

Involvement of employment counsel *before* any final decisions can help avoid costly mistakes, and can also provide risk assessments in the strategic planning of the termination or RIF that will allow the employer to balance disparate factors, recognize and weigh risks, and make better-informed decisions.