

Managing your Workforce in a Slumping Economy

When the economy slows down, employers are often faced with implementing a variety of cost-cutting measures. One measure frequently considered is reducing payroll. Whether it is called a reduction in force ("RIF"), lay-off, restructuring, or right-sizing, this alternative involves loss of jobs and potential litigation. Accordingly, it is important that the process is handled correctly. The following suggestions should be considered by every employer prior to implementing a workforce reduction:

1. Have alternatives to a lay-off been implemented or at least considered?

Many jurors seem to believe that a reduction in force should be the very last cost-cutting measure taken. While the law does not require a lay-off to be the last option, it is advisable for an employer to at least consider other alternatives before implementing a RIF. It might be difficult to explain the purchase of a new corporate jet while simultaneously laying off employees. Common examples of other cost-cutting measures include hiring freezes, compensation adjustments, travel restrictions, bonus adjustments, budget adjustments, etc.

2. Make sure you comply with the WARN Act or similar state or municipal statutes.

The Worker Adjustment and Retraining Notification Act requires employers to give sixty (60) calendar days advance notice when at least fifty (50) full-time employees and one-third (1/3) of the workforce at a single location, or five hundred (500) employees at a single location, regardless of percentage, lose their job due to a lay-off; or fifty (50) employees lose their jobs as a result of a plant closure. Certain states and municipalities have their own statutes, which may be even more protective of employees. These statutory requirements must be observed and obviously require some advanced planning.

3. Are there any contractual restrictions?

On occasion, an employer may be subject to certain contractual restrictions or obligations relating to RIFs. Union contracts generally require that employees be selected for lay-off in reverse order of seniority. Individual contracts, employee handbooks, and offer letters may require severance payments to employees, if they are terminated for reasons other than cause. An employer should be familiar with such limitations and obligations before deciding on this course of action.

4. Avoiding discrimination claims.

Depending upon the factors used to determine which employees are laid off and which are retained, discrimination claims may result from a RIF. Clearly, objective factors such as length of service, productivity numbers, attendance, etc. are easier to defend, although they are not without risk. (Example: Does use of attendance figures discriminate on the basis of pregnancy, disability, FMLA, etc.?) Subjective figures, on the other hand, such as attitude, work ethic, etc., can be very difficult to defend, especially if a disproportionate percentage of a protected group of employees is selected for lay-off. It is important to designate an oversight committee whose composition is ethnically, gender, and age diverse to review individual

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selections and overall numbers to attempt to ensure legitimate, non-discriminatory reasons were used to select employees for lay-off.

5. Is early retirement an option?

Some companies have attempted to avoid lay-offs by offering early retirement packages to qualifying employees. Under these plans, employers generally relax the requirements for retirement (i.e. length of service and/or age), or enhance early retirement benefits for those that do qualify, in order to reduce employee head count by voluntary retirement. This option must make clear that election is absolutely voluntary, and that the employee has not already been selected for lay-off if s/he does not take the package. Other requirements under the Older Workers Benefit Protection Act ("OWBPA") also apply.

6. Severances and releases.

Many companies offer employees selected for lay-off some severance or separation pay to assist them when looking for another job. Oftentimes, these severance amounts are offered in exchange for a release of all claims, or an increased amount of severance is offered in return for a release. Since age discrimination claims tend to be the most common claim arising out of a RIF, it is important that the releases satisfy the OWBPA so that age discrimination claims are effectively released. In a lay-off scenario, releases must specifically state the following in order to effectively release claims of age discrimination:

- (1) The employee is releasing age discrimination claims under the ADEA;
- (2) The employee has forty-five (45) days to review the release terms;
- (3) The employee has the right to have the release reviewed by an attorney;
- (4) The employee can rescind the release within seven (7) days of signing;
- (5) The list of positions and ages of all employees selected for the lay-off and the ages of all individuals in the same job classification or organizational unit who were not selected must be attached to the release document.

The foregoing discussion includes a few of the issues employers should consider before implementing a reduction in force. Several other issues must also be considered. Careful planning prior to implementing a RIF can help avoid potential liability.

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