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June 1997: Tips for Employers Who Want to Avoid Legal Claims For Downsizing

Welcome David Fogarty ▼

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Call it what you will□"reduction in force," "downsizing," "reengineering," or "rightsizing"□in the last several years large and small employers alike have been reducing the size of their workforces. The more recent reductions in force, "RIFs," are different from the earlier ones: white-collar middle managers, not blue-collar workers, are bearing the brunt of the cuts. And many companies that are not fiscally threatened are nevertheless electing to downsize in order to prepare for what they think may be difficult economic times ahead. Companies that are choosing to downsize rather than being forced to by economic difficulties have the luxury of time in which to plan and structure a RIF to minimize exposure to legal liability.

As many have learned the hard way, downsizing is a process packed with potential litigation. Statutes provide employees with numerous avenues for legal challenges. Add to that the emotions created in the process, and the probability of litigation becomes that much greater. The responsible employer will undertake a RIF carefully and advisedly, firmly focused on the legal and economic implications. In all cases, the responsible employer will be aware of the potential for litigation as a result of the RIF and will take steps to minimize it.

Before undertaking a reduction in force, legal advice is essential. The responsible employer will obtain legal advice from an attorney, preferably one who practices in the rapidly-changing area of employment law.

Provided here are some issues for employers contemplating a RIF to consider before undertaking such action.

1. Identify the reasons the RIF is necessary and document the business purposes for it. Are alternatives available? Reasons for a RIF might include the merger or consolidation of business units, the closure of a plant, an elimination of jobs, or bankruptcy. The business purposes for the RIF might include a decrease in sales, technological changes, a poor financial forecast, overstaffing, or changes in the organization or the marketplace. Before undertaking a RIF, an employer should ask, "Could the goals of the RIF be achieved through a hiring freeze, reduced hours, or placement of employees in affiliated businesses?" If not, document the business purposes of the RIF. If the employer has proof it considered alternatives to the RIF, it may be easier to convince a jury that such action was necessary for purely business reasons.

2. Know your workforce's profile before undertaking a RIF. As a practical matter, discrimination claims resulting from RIFs are usually based on age, sex or race discrimination. In order to know whether a planned RIF will have an adverse impact on a protected class, the employer should maintain data representing a profile of the age, sex and race of its workforce. If, for example, the employer's statistics indicate that the average age of the workforce increased after the RIF, this obviously weakens the claimant's case.

3. Consider the number of employees who will have to be displaced to meet the documented business goals of the RIF. Specify in writing the grounds for determining the number of positions to be eliminated in each business unit.

4. Weigh the potential costs of the RIF. These include the cost of expert advice (including attorneys' fees), unemployment claims, severance pay, diminished employee productivity due to poor morale, and possible litigation costs.

5. Determine whether there are any contractual commitments or employee benefit plans that limit the employer's options. These might include individual employment contracts, collective bargaining agreements, written severance plans, or employee handbooks that may arguably commit the employer to following a particular procedure when undertaking RIFs or terminations. Also determine whether there are other employee benefit plans that provide special benefits to terminated employees.

6. Undertake a voluntary RIF first. Early retirement incentive plans ("ERIPs") typically offer enhanced severance or retirement benefits to a group of employees in exchange for a release of all claims against the employer. Be aware also that such a plan may raise issues under the Employee Retirement Income Security Act (ERISA) and the tax laws. For example, an ERIP may be an employee benefit plan subject to ERISA; if so, the employer administering such a plan owes a fiduciary duty to participant-employees. ERISA and tax issues are beyond the scope of this article, but should be considered when planning such a program.

Such a voluntary program is the ideal first phase for a workforce reduction. The risk of legal liability is small because employees elect to leave voluntarily; when they do, each is also required to sign a release in return for additional benefits that he or she will receive. Special rules apply to ERIPs under the Older Workers Benefit Protection Act, discussed in the following section.

7. If the employer must undertake an involuntary RIF, consider offering a severance package in exchange for a release that complies with the waiver provisions of the Older Workers Benefit Protection Act ("OWBPA"). If the employer cannot undertake a voluntary ERIP first, it should elect to terminate individual employees over a period of time, paying severance pay and/or early retirement benefits in return for individual releases to avoid litigation. The OWBPA imposes requirements on any release that purports to waive any age discrimination claim. These requirements are:

The release must be part of an agreement between an employer and employee, must be written in simple English and must specifically make reference to the employee's rights under the Age Discrimination in Employment Act ("ADEA") which are being waived.

The release must be limited to claims or rights which arose before the employee executed the release.

The release must be in exchange for something of value (usually money or benefits) which is more than that to which the employee is already entitled.

The employee must be advised in writing to consult with an attorney before signing the agreement.

The release must allow the employee a 7-day period in which to revoke the agreement after it is signed.

When the release is requested in connection with an ERIP offered to a group or class of employees, each employee must be given at least 45 days in which to consider the agreement; for a release outside a ERIP group termination program, each employee must be afforded 21 days to consider the agreement.

When a release is requested in connection with an ERIP offered to a group of employees, the employer must provide at least 45 days for deliberation by affected employees. Furthermore, the employer is required to disclose in writing in ordinary English the class, unit, or group of individuals covered by the

program, the eligibility factors and time limits applicable to the program, and the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals of the same job classification or organizational unit who are not eligible or selected for the program.

Even if a release does not meet all requirements of the OWBPA, some courts have held that it may still be effective to release all claims, including age discrimination claims, if the employee ratifies it by continuing to accept the money or benefits paid under the release with the knowledge that the release does not meet the requirements of the OWBPA. Other courts, however, have required strict compliance with OWBPA by the employer before an employee is deemed to have waived an age discrimination claim.

In a notice issued this spring by the Equal Employment Opportunity Commission (EEOC), that agency noted that an employee's promises not to file a charge of discrimination or to participate in an EEOC proceeding are null and void. The EEOC also observed that "[a]greements extracting such promises from employees may also amount to separate and discrete violations of the anti-retaliation provisions of the civil rights statutes." EEOC Notice No. 915.002 (April 10, 1997). While it is clear that a private agreement can eliminate an individual's right to personal recovery, it cannot interfere with EEOC's right to enforce the ADEA or other statutes prohibiting employment discrimination.

8. First consider purely objective methods of selecting employees for termination; if these are rejected, then consider more subjective methods. Once an employer has decided to undertake an involuntary RIF, it must determine the basis or bases on which employees will be chosen for termination.

The safest course to avoid age discrimination claims is to utilize a strictly objective method, such as seniority. Such an approach, however, may expose an employer to claims from minorities, women or other protected groups who are often more recent hires. Other objective methods to consider are a lottery, measured quantity of production, pension eligibility or job elimination based on a thorough analysis of positions needed.

There are more subjective methods, too. With these, however, there is a need to document the decision-makers' focus on the business purposes of the RIF. For example, the employer may want to select employees for elimination based upon their relative performance, thereby keeping the most valued employees. This method is almost purely subjective, and thus is more open to challenge on legal grounds. If older plaintiffs can show that the RIF had a statistically significant impact on older workers, the employer's justification based on performance appraisals or rankings may be considered inadequate. It is thus important that the decision-making process be conducted with well-defined, written criteria that avoid, minimize, or at least channel subjectivity. The evaluation process should be thorough, well-documented, and based on focused, job-related criteria. With the use of such methods, it is more likely that any apparent discrepancy or perceived unfairness can be logically analyzed and justified.

If merit is to be the criterion, it is best if the selections for termination are supported by pre-existing performance reviews that have been prepared with objective criteria.

> "Deciding to lay off someone based on a company-wide performance rating system, which has been in place for many years and which has not been shown to be discriminatory, and choosing to lay off all those who were among the lowest rated, must count as 'an articulation of a legitimate non-discriminatory reason' [and thus not discriminatory as a matter of law]." Conkwright v. Westinghouse Elec. Corp., 933 F. 2d 231, 234 (4th Cir. 1991).

9. Know that a properly-performed RIF, even for sound business reasons where the worst performers are terminated across-the-board, still does not insulate an employer from liability in some circumstances. Even when a RIF is conducted for sound business reasons and the employer has taken precautions to insure no disparate impact on protected classes of employees, a terminated employee's discrimination claim may still reach a jury if the employee can provide direct evidence of a discriminatory motive in the form of comments or actions by a decision-maker that bear some relationship to one or more of the terminated employees. In one case, for example, a decision-maker's comments about a female employee's legs and breasts raised a factual question for the jury concerning sex discrimination in the selection of the plaintiff for inclusion in the RIF. Moreover, if an employer fails to follow its own RIF procedures, liability may result. It is therefore crucial that those who are making the decisions and who are communicating directly with the employees to be terminated are conscientious, legally knowledgeable, and properly trained.

10. Terminated employees may also make a claim under ERISA ' 510. Employers must also guard against claims that a termination was made to prevent vesting of an employee's benefits under an employee benefit plan. ERISA ' 510 (29 U.S.C. ' 1140) forbids an employer from interfering with a plan participant's or beneficiary's attainment of any right to which the participant or beneficiary may become entitled. In a 1993 decision, the United States Supreme Court held that an employer does not necessarily violate the ADEA by interfering with an older employee's pension benefits where vesting rights were determined not by age but by the employee's years of service. The Court reasoned that ADEA liability rests on proof that an employer was motivated by consideration of the employee's age, and that a decision based upon years of service is analytically distinct from one based on age. The Court, however, left open the possibility of liability where an employer uses pension status as a proxy for age or where vesting is based on age rather than years of service.

11. The federal WARN Act may apply. The Worker Adjustment and Retraining Notification Act ("WARN") requires employers, among other things, to give employees advance notice if the RIF constitutes a "mass layoff" or a "plant closure." The notice must be given to all affected employees, the state government and the local government. WARN applies to business enterprises, including public entities and nonprofit corporations, which employ 100+ full-time employees or 100+ full- or part-time employees who, in the aggregate, work at least 4,000 hours per week, exclusive of overtime.

Notice is required for "plant closings" which are defined as "the permanent or temporary shut down of a single site of employment, or one or more facilities or operating units within a single site of employment," where the shutdown results in "employment loss" for 50 or more full-time workers during any 30-day period. Notice of a temporary shutdown is required if 50 or more employees at a single site of employment are terminated or laid off for more than 6 months or have their hours reduced by more than 50% per month for any six-month period. Notice is also required for "mass layoffs," defined as a RIF at a single site of employment which, during any 30-day period, causes an "employment loss" for 33% or an employer's work force where 33% constitutes 50 or more employees. If 500 or more employees are affected, notice is required regardless of what percentage of the workers are laid off. Notice is also required where, within any 90-day period, two or more employment losses occur which would not trigger the Act's notice requirements alone, but would if counted together. The notice requirements apply in this situation unless the employer can show that the actions resulted from separate and distinct causes, and it was not acting to evade the Act's notice requirements.

An employer who fails to give notice as required by WARN may be liable to affected employees for back pay and benefits for each day of violation up to 60 days. As a practical matter, some employers choose to pay 60 days' compensation instead of giving the required notice. It is unclear whether this approach technically complies with the Act, but it would seem to eliminate any damages for a potential claimant. It is important that such pay be made in addition to any other separation or severance pay to which the employee is otherwise entitled.

Conclusion

Having employees sign an effective release of all claims in return for severance pay to which they would not otherwise be entitled is the most prudent way for an employer to avoid legal claims for downsizing.

Before an employer agrees to pay such severance pay, however, it needs to make it clear to employees: the prerequisite for an employee's receiving severance pay is the signing of a release that will effectively release all employment-related claims (including all of the claims mentioned above). On balance, this is the most reliable and least risky way for an employer to avoid legal problems in downsizing. Remember, too, that it is always the employer's burden to prove that a release was voluntarily given; the only assurance that an age discrimination claim has been effectively waived is through strict compliance with the provisions of the OWBPA.

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