

Manufacturers' Legal Considerations for Staffing Reductions

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In these uncertain economic times, many manufacturers and other employers are deliberating over measures to shore up their financial positions and reassessing their workforce needs. Employers may be considering organizational restructuring, including voluntary attrition programs and staff reductions (e.g., layoffs), to manage costs, eliminate redundancies, and ensure operational efficiencies, all of which are critical to any organization's long-term health.

Even while many manufacturing companies continue to seek ways to hire more employees (e.g., skilled labor and trades people), many others face recessions or adjustments in demand or supply chain disruptions and may have to lay off employees, temporarily or permanently.

Increased legal liability can be among the unintended consequences of layoff decisions. Therefore, once any workforce reduction is determined to be necessary, rather than being fast and reactive, a company should take a comprehensive and strategic approach to minimize the potential for or impact of subsequent litigation. Manufacturers should use objective criteria when selecting employees for layoff, as the company may have to defend the basis for its decisions later.

A successful workforce reduction process requires careful and early planning. Before proceeding with restructuring that includes layoffs, determine the justification for the job eliminations or consolidation of positions, whether driven by financial considerations or other internal or external forces.

Staff-reduction alternatives. Manufacturers should look for opportunities to consolidate positions, reassign duties, and utilize attrition in implementing organizational changes. Importantly, they should work with their legal counsel to assess the legal risks in determining which departments and positions will be affected by changes. Attrition can sometimes limit the need for layoffs and sometimes people can be offered alternative positions, which may reduce risk.

Legitimate, non-discriminatory, non-retaliatory. If layoffs are required nevertheless and these termination decisions are later challenged in court, the company should be able to respond with its legitimate, non-discriminatory and non-retaliatory bases for these decisions.

In particular, manufacturers must consider the potential adverse impact of those layoffs on any protected categories under federal or state law. It is good practice to analyze and compare the relative ages, races, disability and leave status, and gender of the affected employees to the overall group under consideration for layoff to determine any disparate impact on any of these protected

groups. Under applicable federal laws, an employer cannot discriminate based on race, color, religion, sex (including pregnancy, gender identity and expression, and sexual orientation), national origin, physical or mental disability, age (40 and over), military service, genetic information, and citizenship status. Applicable state human rights laws also may cover other categories, including ancestry, creed, ethnicity, order of protection status, marital status, arrest record, veteran status, and military discharge.

Therefore, within the departments or job positions affected, the potential impact on any of these — and other — protected categories under applicable law could be a possible source of liability for manufacturers. Additionally, layoffs may also raise the possibility of retaliation claims, in the context of employees who recently made an internal or external complaint about alleged unlawful conduct or practices, employees who recently took Family and Medical Leave Act leave, and employees who recently filed a workers' compensation claim. It creates extra work — and no layoff will impact all groups in the same manner, but disparate effects should be minimized and, if some remain, there needs to be an objective and logical explanation.

Objective information as to job performance and effectiveness (e.g., scrap created, operational capability of the worker, skills mastered, machine downtime, and so on) is plentiful in manufacturing. These criteria, combined with performance reviews and disciplinary records, often tend to be more objective in manufacturing compared to other businesses and thus, can be critical in defending decision-making.

Contractual obligations. Any applicable provisions of a collective bargaining agreement, including as to seniority and layoffs, and any recall rights, must be factored into how the organizational restructuring is implemented. Another source of potential liability are individual employment contracts.

Communication. Once the staffing reductions have been determined, manufacturers must decide how to communicate those layoffs. In addition to the affected employees and to those employees who remain a vital part of the operations, union representatives and certain government officials may need to be notified in some cases.

Layoffs can cause anxiety among the remaining workers, and an internal and external communication strategy needs to be considered to sustain morale.

Separation agreements. While often these organizational changes are driven by financial constraints, one way to mitigate risk is for manufacturers to offer the departing employees severance pay or benefits extension in exchange for the employee signing an agreement releasing and waiving any and all claims against the company.

Under the Age Discrimination in Employment Act and Older Workers Benefit Protection Act, in order to have an effective release of age-related claims, employees age 40 and over must be given 45 days to consider such agreement (in a layoff involving at least two employees), advised to consult with counsel, allowed seven days to revoke the agreement with respect to those claims, and provided information regarding the decisional unit, including the ages of individuals considered for the layoff (and whether selected or not selected).

State requirements also may exist for an effective release and waiver for any employee, regardless of age, such as consideration periods before signing and confidentiality issues.

Even where these separation agreements are offered, affected employees might elect not to sign the

agreement, leaving the potential for a claim against the company. It remains important to plan and ensure these layoff and compensation decisions are made without regard to any inappropriate factors and with minimal impact on legally protected categories.

WARN Act. Separately from considerations regarding the impact on employees, there are federal Worker Adjustment and Retraining Notification Act (WARN Act) and state mini-WARN Act requirements for manufacturers to consider. Under the federal WARN Act, employers with at least 100 employees must provide 60 days' advance written notice of a plant closing or a mass layoff at a single site.

Some states place additional restrictions on employers and notices of closing, which are sometimes substantial. Manufacturers are impacted more than many other employers with WARN Act considerations.

Pension, benefit plans. Additional factors that could create the potential for legal liability when implementing layoffs include whether the discharge may trigger vesting in pension or benefit plans, whether a reportable event under ERISA exists, and whether the layoffs could constitute withdrawal from a multi-employer pension plan.

The impact can be massive in some instances and pension liability must be considered. In some situations, the cost in withdrawal liability can exceed the costs of savings, at least in the short run.

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