Five Things Every Employer Must Know Before Engaging in a Reduction in Force

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For obvious reasons, reductions in force (“**RIFs**”) are never a happy topic. A company’s decision to lay off a substantial number of workers is a somber one. That being said, RIFs are most often undertaken to secure the long-term health of a business. Appropriate restructuring can help turn a struggling business into a growing one, thereby creating more jobs and opportunity in the long run. Employers faced with a RIF should plan carefully, to reduce the risk of litigation brought by former employees affected by the RIF. Litigation may arise when employees affected by layoffs allege that the company’s RIF was actually a pretext for discrimination. Although there is no ‘magic bullet’ to ensure a litigation-free RIF, employers who consider the below points will be at a significant advantage.

Create a Business Justification Memorandum. Any employer engaging in a RIF should, in advance, create a ‘business justification memorandum.’ The purpose of this document is to establish—in writing—the business related and objective reasons for implementing the RIF. This document should provide contemporaneous (as opposed to after the fact) proof that the company considered alternatives and demonstrate the RIF was undertaken for **purely** business (as opposed to discriminatory) reasons. The document should, at minimum, contain answers to the following questions:

- Why is the RIF happening?
- What are the company’s future goals?
- How will a RIF help achieve these goals?
- What alternatives to a RIF were considered?
- Why were those alternatives unworkable?
- How will the RIF be implemented?

Consider a Voluntary Reduction Program (“VRP”). Employers should first consider a VRP as an alternative to mandatory layoffs. In doing so, businesses should discuss the structure of such a plan with benefits counsel, as any such plan may be subject to ERISA. A VRP can be a helpful tool to limit litigation via employee releases containing waivers of claims. Businesses should also be cautious of the risks that come with a VRP, however. These include (i) less employer control over who stays and who leaves, (ii) the risk that, if too few employees participate, the business may have to engage in layoffs anyway, and (iii) litigation exposure from ill-considered choices when offering the VRP to employees.

Get Workforce Statistics. Employers should involve counsel and experts early in any RIF process. This is crucial because—before any RIF is undertaken—an employer must know how its workforce looks now, and how it will look post-RIF, to ensure employees who are members of a protected class are not disproportionately affected (and, if they are, why). Data points should include age brackets of employees, as well as the gender and racial makeup of the workforce. Ideally, these reports should be prepared by and with counsel to maintain privilege over the results of any analysis.

Develop Appropriate Selection Criteria. Deciding which employees will be let go is the most important—and most dangerous—part of any RIF. Errors here can and will result in expanded litigation and exposure to significant liability. Consequently, employers must use permissible selection criteria when deciding how the RIF will be implemented. Such criteria include:

- Seniority
- Skill sets
- Performance level
- Geographic location
- Positions that are no longer needed

Notably, employers should be careful when basing any RIF-related decisions on purely subjective performance criteria. This is particularly crucial because the subjective judgment of individual supervisors—whose performance reviews of employees may be the determining factor in layoff decisions—may be called into question if evidence emerges that a particular supervisor is biased against employees of certain protected classes. Consequently, employer performance metrics that underlie any RIF should be clearly identified, uniformly applied, measurable, and written. Ideally, these metrics should be generated by multiple evaluators in order to bolster the credibility of the process and protect against the single "bad apple" manager, whose could embroil the company in litigation by former employees.

Provide Advance Notice of Layoff. The federal Worker Adjustment and Retraining Notification Act ("**WARN Act**") requires many employers with 100 or more employees to provide 60 days advance notice of plant closings and mass layoffs of employees. There are many qualifications and exceptions to WARN notice requirement. Employers should confer with legal counsel to understand any WARN notice obligations under a contemplated layoff in advance of the 60 day notice window. Employers that violate WARN may be liable to each affected employee for back pay and benefits for the period of the violation, up to 60 days. In addition, several states (including California, Illinois, New York, and Tennessee) have laws that require advance layoff notices in situations not covered by the federal WARN Act.

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