

Labor & Employment Inner Workings





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RIF: Reducing Risk When You Are Reducing Your Workforce

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Overview

- Cost saving options other than RIF
- Developing RIF plan and RIF documentation
- Releasing Age Discrimination Claims
- WARN Act and Labor Law Considerations
- New COBRA Rules
- Communicating RIF decisions

Can You Avoid A RIF?

- A. Shortened work week with corresponding salary decrease
- B. Furloughs/temporary layoffs
- C. Salary Reduction
- D. Voluntary exits

Reduced Workweek

- An employer may prospectively adjust salary with a like adjustment in scheduled workweek.
- Guidelines:
 - A. Needs to be prospective
 - B. Announcement should indicate that this is a change in the standard workweek, along with salary change.
 - C. 5th Day should be treated like a Sat. or Sun.
 - D. Explain that this is to avoid more layoffs.
 - E. Cannot switch workweek schedules and pay often.
 - F. Benefits issues.

Furlough

- An alternative approach is requiring exempt employees to take a full week off, because Company not required to pay exempt employees for any week in which no work was performed.
- Department of Labor has recently stated that employees can be required to use vacation during furlough.
- Must have procedure for who will be laid-off/furloughed, how long, and process for bringing employees back to work.
- DOL has suggested that frequent furloughs could jeopardize exempt status.
- WARN Act implications

Pay Cuts

- Options
 - Reduce or eliminate 401k match
 - Reduce or eliminate other bonuses
 - Reduce compensation on go-forward basis
- Notice Requirements
- Morale implications
 - Consider time limitation so the “pain” will be finite.
 - Explain that this is yet another way that layoffs are being avoided or reduced.

Voluntary RIF

- Offered to select employees
- Employees do not have to accept the RIF
- Advantages and disadvantages
- Which employees will receive the offer?
 - Those in specific job roles?
 - Those in specific locations?
 - Every employee?
 - Be prepared to deal with more volunteers than expected
 - Do you want/need to reserve the right to reject a volunteer based on business needs?

Involuntary RIF

GOALS

1. Retain the best employees
2. Ensure terminations are based on permissible, non-discriminatory factors
3. Ensure terminations are consistent, substantively and procedurally, and are consistent with CBA and contractual obligations
4. Fairness

Risk Inevitable

- If a single termination carries legal risk, a group of many terminations usually carries more risk.
- Issue is not whether RIF was necessary, but how the company decided which employees will be selected for RIF.

Liability from RIFs

- It is no excuse for a manager to say “I was required to reduce my headcount.” If an employee was selected based on a protected category (or protected activity), then the company could incur liability.
- It is no excuse for a manager to say “I eliminated the position altogether.” If the position was eliminated based on a discriminatory bias, then the company could incur liability.

HR Deposition

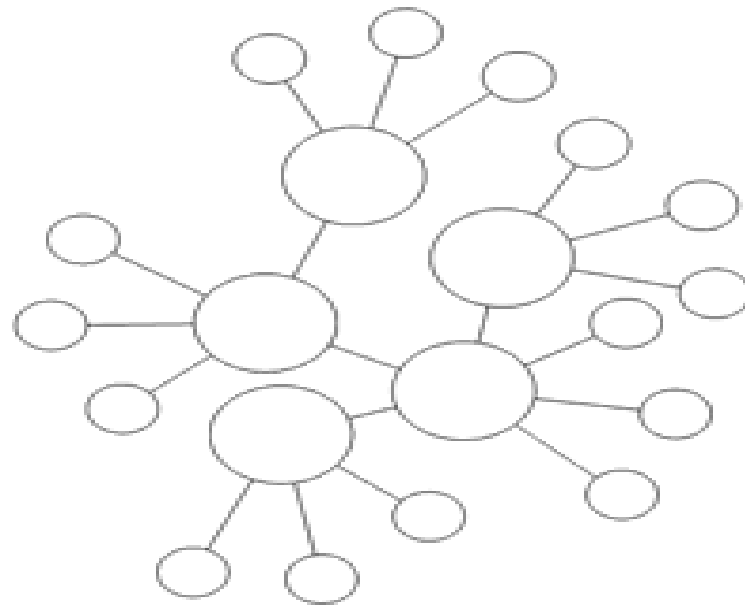
- Who was considered for RIF?
- Who made the decision to select my client for termination?
- What criteria did you use?
- What facts show that my client rated lowest?
- Did you train decision maker regarding EEO?
- What documents were used in decision making?
- Why wasn't his younger co-worker selected instead?
- Who is doing his job now?

Prudent Steps

- Pre-RIF planning (criteria/documents)
- Train business managers
- Make selections and document them
- HR review of selection decisions
- Attorney review with HR
- Disparate impact analysis
- Prepare disclosure
- Preparation for termination meetings
- Document collection/retention

Decentralize

- Decision making should be decentralized, as much as possible.



Decentralize: Avoid Class Action

- Individualized decision-making is important
- Class actions stemming from RIFs are based on the existence of a common policy or practice that makes the class members similarly situated
- If the employer can establish that the decisions were decentralized and made by different decision-makers based on individualized factors, it will be more difficult to establish that the proposed class members are similarly situated

Planning Selection Criteria

- The best way to reduce exposure is to devise non-discriminatory criteria for the selections. For example:
 - First cut – disciplined within the last year.
 - Second cut – poor performance evaluations.
 - Third cut – single incumbent jobs that can be eliminated.
 - Fourth cut – Safest approach for choosing between employees is using objective criteria such as service time.

Selection Criteria

- Need to decide on selection criteria at the outset and stick to it
- Some methods include:
 - Seniority
 - Past Performance, including individuals on Performance Improvement Plans
 - Program, project, and related work elimination due to loss of business
 - Function elimination with a single incumbent
 - Position elimination comparing multiple incumbents (Forced ranking)
 - A combination of the above

Planning Selection Criteria

- For example, if there are five incumbents, rank them 1 (high) through 5 (low) in each category, then total their points. The individuals with the most points will be reduced.
- Break ties based on seniority.

Train Supervisors

- Managers must not be permitted to consider age (or other protected categories) for purposes of selecting the employees to be riffed.
- Short slideshow on company's commitment to non-discrimination.
- Counsel them about this, and then document that you did.

Decisions By Supervisors

- Usually the supervisor (who has the most personal knowledge of the employee's value to the company) will be the decision maker, and the best witness to testify about why the decision was appropriate.
- HR should work with the decision maker and help document nondiscriminatory process.

HR and Legal Review

- After the RIF-list is completed and employees are selected for termination, the list should be reviewed by HR and legal – not by the initial decision makers – for possible demographic problems.
 - What are the ages of the employees being terminated vs. the employees not terminated?
 - What are the ages of the other employees selected by the same decision maker?

HR and Legal Review

- Pay special attention to long-service employees, esp. when they are being selected over short-service employees.

HR and Legal Review

- Utilize Attorney Client Privilege, which can protect discussions between you and your attorney.
- Use this review to analyze protected categories and test legal issues that you want to protect from discovery later.

Two Sets of Documents

- SET ONE – Documents that show how the selection decision was made.
 - We need these to be discoverable.
- SET TWO – Documents that analyze what legal risks and vulnerabilities the company may have.
 - We need to protect these under Attorney Client Privilege so they don't become discoverable.
- Keep a separate file for “set two” (privileged docs).

Decision Maker's Age

- The older age of the decision maker is not usually a good defense in defending claims of age discrimination.
- There can be age discrimination whether a 45-year-old employee gets terminated by 65-year-old supervisor, or whether a 65-year-old employee gets terminated by 45-year-old supervisor.
- Older employees can theoretically discriminate based on age; women can theoretically discriminate against women; etc.

Be Careful When You Discuss “Retirement”

- “He was going to retire soon anyway” is not a good defense to an age discrimination lawsuit.
- If an employee has announced an intent to retire, it is fine to ask the employee about this subject (which the employee already broached).
- However, the employee must not be forced out early based on the fact that retirement is available to him.

Disparate Impact

- Bad statistics are deadly – if you disproportionately terminated older employees, minority employees, women, it is very tough evidence to overcome.
- Prudent to do a disparate impact analysis for RIFs with 8 or more terminations.
- Your attorney can help with this analysis.

Releases

- ADEA amended effective 1998.
- The amending law was called “The Older Workers Benefit Protection Act” or OWBPA.
- One of the most significant effects of the OWBPA relates to the enforceability of age releases.

Older Workers Benefit Protection Act

- Congress found that too many employers were coercing their older employees to sign a release of claims “on the spot.”
- In order to guarantee that waivers of age claims were “knowing and voluntary,” Congress now requires “magic words.”

Release for One Employee

- If only one employee is being terminated, main magic words are:
 - 21 days to consider this agreement;
 - 7 days to revoke this agreement after signing;
 - Encouraged to speak with an attorney;
 - Agreement must specifically refer to the Age Discrimination in Employment Act as a released claim.

Group Termination Program

- If there is a group termination program (group means more than one), then the magic words are different:
 - 45 day consideration period;
 - 7 day revocation period;
 - Encouraged to consult attorney;
 - Specific reference to Age Discrimination in Employment Act;
 - Age and job title disclosure form.

Group Termination Program

- A group termination plan may be offered in conjunction with voluntary or involuntary terminations.
 - Involuntary terminations, where severance program benefits are offered in exchange for release; or
 - Voluntary exit incentive programs where buyout is offered in exchange for a release.

Disclosures

- Four required elements
 - Define the decisional unit – the pool of employees considered for the package.
 - Define the selection criteria.
 - Define the time limits that apply to the package.
 - Provide a table of ages and job classifications for those selected and those not selected.

Disclosure Form

Group Termination Program

The following is a listing of the ages and job titles of persons in the mechanics department who were and were not selected for termination and the offer of consideration for signing a waiver.

Job Title	Age	No. Selected	No. Not Selected
Mechanic B	65	1	0
Mechanic B	53	1	0
Mechanic B	42	1	0
Mechanic B	35	0	1
Mechanic A	27	0	1

Consideration

- Consideration is the notion that each party gets something new out of the deal, i.e., each party gets “the benefit of the bargain.”
- Contract is not enforceable without consideration.
- Promising something the employee is already entitled to?

Damages

- No compensatory or punitive damages available for ADEA claims.

WARN Act

- WARN generally requires employers of 100 or more employees to give at least 60 days advance written notice of a plant closing or mass layoff to
 - Union;
 - Other affected employees who are not in Union;
 - State dislocated worker unit;
 - Unit of local government where the site is located.

WARN Act Notices

- Be aware of the 90-day look-back/look-forward provision that aggregates employment losses that do not themselves amount to a plant closing or mass layoff.
- Termination by the seller and immediate rehire by the buyer is not an employment loss under the WARN Act.

WARN Act Notices

- Failure to provide the required notice can result in substantial exposure – up to 60 days of back pay (per person, per day) for every day that notice should have been – but was not – provided.
- Thus, even late notice is better than no notice under the WARN Act. For example, providing fifteen days of notice (as opposed to sixty) results in total exposure of 45 days of backpay (per employee) rather than 60.

WARN Act

- WARN Act notice must include the “date” on which the recipient can expect to be terminated.
- Under the WARN Act, this “date” is defined as being a fourteen-day window.
- Providing employees with the timing of the termination enables employees to plan their finances (mortgages, car payments, etc...) accordingly.



States with “Baby WARN” Laws

- California
- Connecticut
- Hawaii
- Illinois
- Kansas
- Maine
- Maryland
- Massachusetts
- Minnesota
- New Hampshire
- New Jersey
- New York
- Oregon
- Rhode Island
- South Carolina
- Tennessee
- Wisconsin

Labor Law Considerations

- Decision to Close Plant or Relocate Work or Conduct Mass Layoff

Labor Law Considerations

- Does decision turn on labor costs or other factors that are amenable to collective bargaining? OR
- Does the decision lie “at the core of entrepreneurial control”?
- Management decisions having indirect impact on employment (e.g., mass layoffs in order to regain profitability) involves balancing between the benefit to labor-management relations versus burden on the conduct of the business.

Labor Law Considerations

- Decisional Bargaining
 - Work Relocation (*Dubuque Packing*, 303 NLRB 386 (1991))
 - Three Part Test
 - NLRB must first show relocation not a basic change in the nature of the employer’s operation
 - Employer must show either show “labor costs” not a factor or, if so, concessions needed are well beyond Union’s ability; OR
 - Show that work performed at new location
 - » “varies significantly” from former plant; or
 - » work is being discontinued entirely; or
 - » Move represents a change in the “scope and direction” of the enterprise

Labor Law Considerations

- Bargaining Over Effects and to Impasse
 - Duty May Apply in Absence of Decisional Bargaining
 - Most Often Includes Request for Voluminous Confidential Information Regarding the RIF and Cost – Benefit Analyses
 - Agreement Need Not Be Reached
 - Meaningful notice and opportunity to discuss is required.
 - Post-implementation offer to bargain is generally viewed as “fait accompli” and unlawful failure to bargain in good faith
 - Union may be found to have waived right to demand effects bargaining

New COBRA Premium Subsidy

- The federal government will subsidize 65% of the COBRA premium actually charged to an “assistance eligible individual” (AEI) for up to 9 months.
- The subsidy applies for all types of group health plans (medical, dental, vision) other than health flexible spending accounts.

Who Are AEIs?

- A COBRA qualified beneficiary who:
 - is a COBRA qualified beneficiary because of an *involuntary* termination of a covered employee's employment (other than for gross misconduct) that occurs from September 1, 2008 through December 31, 2009; and
 - elects COBRA coverage either during the original COBRA election period or during the special election period (discussed below).
- Includes a covered employee **OR** a covered employee's covered spouse or dependent child who became a qualified beneficiary because of the involuntary termination of the covered employee's employment.

How Is the Subsidy Provided?

- An employer can only require an AEI to pay 35% of the COBRA premium that the AEI would otherwise be required to pay.
- The federal government will reimburse an employer for the remaining 65% of the COBRA premium by allowing the employer to take a credit against its payroll tax and federal income withholding tax deposits.



Communicating the Termination

- How you treat the people who leave your organization speaks volumes to the people who stay.

Communicating the Termination

- Before
 - Communicate early and often
 - Manage expectations
- During
 - Explain reasoning
 - Acknowledge loss
 - What matters most is employee's dignity and your integrity
- After
 - Communicate early successes to “survivors.”



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