A Sign of the Times: Employers Confront Reductions in Force

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In these challenging economic times, employers are increasingly faced with the difficult, but necessary, task of downsizing their operations. When structured and implemented effectively, a reduction in force (RIF) should be viewed as a corporate opportunity; it not only helps a company to weather difficult times, it also assists the organization so that it is well-positioned going forward. However, an ill-planned RIF can cost an employer more than it is seeking to save – both in litigation costs and in reputational damage. Following the steps outlined below will help minimize the risks inherent in a RIF.

Establish and Document the Rationale for the Reduction in Force

A company contemplating a reduction in force should first assess, and then document the business objective sought to be achieved by the RIF. This will help to provide an overall conceptual backdrop for the RIF, and will help frame the decision-making process when actual personnel decisions are made. Companies contemplating RIFs should consider present and future markets, corporate resources, profitability and the workforce skills needed to meet future corporate goals in order to determine the shape of the resulting organization. This assessment should be supported by a business plan that identifies how the company will meet its objectives. In short, the employer needs to articulate, in concrete terms, the objectives that the RIF seeks to accomplish.

Once the business plan is completed, the company should conduct a review of its entire organization in light of the goals identified in the business plan. This entails identifying jobs or units to be eliminated or consolidated, duplication of functions, and redundant layers of management. Moreover, this process should be done before any personnel decisions are made, in order to create a conceptual framework or blueprint for the company.

Once the company has developed a preliminary estimate of the total number of positions to be affected, it should next consider the potential impact of the federal Worker Adjustment Retraining and Notification (WARN) Act and any similar state law requirements. The WARN Act requires covered employers (those with more than 100 full-time employees) to provide 60 days of advance notice to employees, and other specified entities, of any "mass layoff" (defined as a layoff of 50 full-time employees, comprising 33% of the workforce or a layoff of 500 full-time employees) or "plant closing" (defined as a permanent or temporary shutdown of a single site of employment that results in the termination of 50 or more full-time employees). The WARN Act requires employers to consider personnel actions that have been taken both prior to and following a particular RIF, such that several distinct RIFs, if conducted closely together, could trigger the WARN Act requirements even if each of the RIFs, considered individually, would not.

After the organizational review is complete, the company should conduct an audit of its pre-RIF workforce. Given the importance that statistical information often plays in employment discrimination cases, the employer should create a matrix identifying the race, sex, ethnic and age distribution of the workforce, both on a company-wide basis and within the units or departments to be affected by the RIF. The age analysis should be broken down into five-year ranges (rather than simply having two groups, one under 40 and one 40 and over) to provide a more complete view of potential age implications.

Identify Affected Persons

As the company moves on to the personnel decision-making phase, it should establish, to the maximum extent possible, objective criteria for evaluating employees. From a litigation perspective, this may be the most crucial aspect of the RIF. It may be helpful to:

- Document specific, job-related guidelines for evaluating employees;
- Use a structured appraisal method;
- Use proven skill, performance, knowledge and experience qualifications for the retained positions as criteria.

The company should begin to evaluate specific employees only after it establishes the criteria to be used. To decrease the likelihood that subjective (and thus more easily challenged) criteria are employed, the company can structure the employee evaluations as a two-tiered process, with the in-line manager conducting the initial review and then a member of upper management or human resources reviewing the managers' evaluations along with the affected employee's past performance evaluations and any other objective, documented evidence of the employee's performance and skills that might be available. The second reviewer should ensure that the documents support the in-line manager's evaluation. In other words, have an internal check and balance mechanism in place to keep internal decision-makers honest.

In addition, at this stage the company should take great care to ensure the confidentiality of the RIF decision-making process. If information about a RIF leaks out to the workforce, it will be difficult, if not impossible, for the company to combat the rumor mill that surely will develop, as employees share whatever information (which is usually incomplete and inaccurate) they have gleaned about the company's plans.
Once the employees affected are identified, the company should then conduct a second internal audit to determine whether there may be a disparate impact on a particular protected class. In general, the EEOC and many human resource professionals use the so-called "80 percent" rule to determine if an adverse impact exists; that is, if a selection rate for any protected class is less than 80% of the rate of the group with the highest selection rate, the EEOC will consider this to be evidence of adverse impact. If the second audit reveals a potential adverse impact on a particular protected class, the company should not necessarily "swap in" employees from a different protected class to "correct the numbers," as such an action could, in turn, lead to a claim of unlawful discrimination. Rather, the employer should re-assess its criteria, and how the affected employees measured up to those criteria, to ensure that the criteria are business-related and consistent with the current, and anticipated future, needs of the company.

Finally, if the company is going to offer separation benefits, such as severance pay and extended health insurance, to the employees subject to the RIF, it should prepare the appropriate documents, including a release of claims from the affected employees. At this point, the company must consider the impact of another federal statute, the Older Workers Benefits Protection Act (OWBPA), which contains several specific requirements in order to have an effective release of age discrimination claims (and thus applies only to employees who are 40 or older). Care must be taken to ensure that a separation agreement complies with OWBPA, including certain informational disclosures that must be made to employees, as the consequences of non-compliance are severe. If a release does not comply with the OWBPA, the employee may still sue the company for age discrimination, but would not be required to return any severance pay or other benefits otherwise received under the agreement.

Implementing the RIF
After all of the decisions have been made, the company must communicate its decisions to the workforce - a step fraught with nearly as much peril as the decision-making process itself. However, once the company announces to the workforce-at-large that it will be conducting a RIF, it should carry out the RIF as quickly as possible; indeed, it is most beneficial to have all employees subject to the RIF depart on the same day, rather than having employees leave in separate waves. A RIF occurring in several stages, most likely, will create employee morale issues, even for those employees not selected for the RIF, as they see their co-workers slowly departing over time.

The company should draft a script to be followed by the persons who will be informing the employees about the RIF decisions. The message conveyed to each employee will be attributed to the company in any future litigation, and the script will prevent managers from offering their own, unauthorized explanations for RIF decisions. Also, the text will keep the company's explanation for its decisions consistent across different business units, and thus will eliminate the appearance of

a varying or shifting rationale for the RIF. Indeed, the script may help avoid litigation in the first place – employees often sue when they perceive that decisions have been made on the basis of arbitrary, unfair or illegal factors. A message that communicates that the company has reached difficult decisions based on carefully-considered, objective standards may allow the affected employees to better understand the decisions (even though they still may not agree with them), and move on without suing the company.

In the individual employee meetings, the following should be explained clearly:

- Why their job functions were eliminated;
- How the selection process worked;
- The separation benefits offered (including any special benefits, such as outplacement assistance); and
- Who to contact with any questions about the separation benefits.

Following the steps described above, of course, does not guarantee that every employee will accept the ultimate decisions made in the RIF. It will, however, help to insulate the company from potential claims and strengthen the company's position in any future litigation.