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Being Careful With Reductions in Force

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In difficult economic times, employers frequently look to cut costs by cutting jobs. Employers doing so need to be careful not to increase costs by inviting lawsuits from terminated employees. Myriad laws apply when making decisions about "reductions in force" (RIFs), whether in a large layoff or just when eliminating a couple of marginal positions. This article provides an up-to-date overview of some of the laws and regulations employers today need to keep in mind.

Generally, preparation and planning provide the best protection against lawsuits arising from RIFs. Employers need to be able to identify why people are being let go in plain English and without jargon. The identified reasons need to be nondiscriminatory. Criteria for who will be selected for termination—and who will keep their employment—need to be thought out clearly, explained accurately, and communicated consistently. Determining those criteria and implementing them during a RIF should be done with the following legal requirements in mind.

Larger employers—typically defined as those with 100 employees—need to be warned about WARN, the Workers Adjustment and Retraining Notification Act. WARN's protections kick in if an employer makes a "mass layoff"—eliminating 50 or more full-time jobs if those total more than 33% of the jobs at a site, or eliminating at least 500 jobs within a 30-day period at a site. WARN's protections typically require 60 days' notice to affected employees, local government bodies, and others before any layoff can take effect. Failing to provide adequate notice subjects employers to claims for back pay, lost benefits, civil penalties (up to $500 a day), and attorneys' fees.

Most employers need to be very careful to make sure that a RIF does not discriminate against older workers. The Age Discrimination in Employment Act (ADEA) prohibits adverse employment actions being taken against workers on the basis of age, specifically those workers over the age of 40. Consequently, an employer cannot implement a RIF simply by laying off its oldest workers. ADEA's reach, however, extends to far more than just intentionally discriminatory acts. ADEA also protects older workers against "disparate impact." For example, even if an employer implemented a RIF by laying off its most expensive or least productive workers, that RIF still could violate the ADEA if it turns out that all—or even just a lot—of the workers affected are over the age of 40.

To provide older workers with additional protection, the Older Workers Benefit Protection Act (OWBPA) limits an employer's ability to rely on releases of age discrimination claims from terminated employees. In the case of an individual release from a single employee, the employer must allow the employee 21 days to consider the written specifics of the release and notify the employee of his or her right to seek the advice of legal counsel about the release. The employee can shorten this 21-day period, but the employer cannot. Moreover, the employee has the right to rescind any executed release agreement within seven days of signing it. Failure to meet the OWBPA's requirements means that the employee—even if paid a settlement amount—has not released the employer from ADEA claims and the employer still can be sued.

Additional OWBPA protections apply when more than one employee is affected by a termination or layoff, as is typically the case in a RIF. In this situation, OWBPA's notice period increases from 21 to 45 days, although the seven-day rescission period still applies. Additionally—and often most troubling for employers—employers must provide each employee included in a RIF with a list of those workers in the "decisional unit" (such as a division, plant or department from which positions are being eliminated) who are being retained after the RIF and those who have been selected for termination. This identification has to include the job title and the ages of all individuals selected for the RIF, as well as the ages of all individuals in the same job classification or "decisional unit" who were considered—or could have been considered—for selection and inclusion in the termination program. In short, the employee gets a complete listing of the ages and jo b titles of the people who get to keep their jobs and those who get laid off. The information is designed to reveal to the terminated employee whether he or she (and his or her laid-off colleagues) has suffered disparate impact on the basis of age. Employers want to be able to provide information which shows that older workers have not received such disparate impact.

Although age discrimination tends to be the type of discrimination most argued about in RIFs, employers also need to protect themselves against other kinds of discrimination claims. Employees are legally protected from discrimination on the basis of race, sex, disability, national origin, and religion. Employers need to plan for and implement RIFs so that no specific group is targeted, intentionally or unintentionally, for termination.

Employers must consider how a RIF affects employees who are on leave status. For example, employers need to analyze how RIF decisions impact workers on leave under the Family Medical Leave Act, or the Pregnancy Discrimination Amendments to Title VII of the Civil Rights Act of 1964, or the Uniform Services Employment and Reemployment Rights Act. If the RIF disproportionately affects workers on leave because of family health problems, pregnancy, or military service, an employer may want to reconsider the RIF's criteria.

When making RIF decisions, employers should be mindful of their obligations under the Employee Retirement Income Security Act of 1974. At a minimum, in setting RIF criteria, employers should try to avoid terminations that could interfere with an employee's vesting rights in an ERISA-qualified plan.

All of the statutes discussed above are federal laws. Employers also may need to consider state law issues in planning for and carrying out a RIF. State law, for example, typically governs covenants not to compete and other post-termination obligations of employees. Most covenants not to compete are triggered by the end of an employee's employment, regardless of cause. Accordingly, employers typically still will be able to enforce the terms of the employment covenants even against workers who are laid off in a RIF. In determining which employees to let go, employers may do well to consider which employees can hurt the employer the most—or be prohibited from hurting the employer at all—by going to work for a competitor.

RIF decisions are not easy, but in challenging economic times, the termination of employees can be a harsh reality. Employers may consider various approaches and actions to mitigate a RIF's effects: offering exit incentive programs; providing severance payments; or arranging outplacement services for laid-off employees. If properly planned and implemented, RIFs can be a way to both save expenses in the short-term and better position an employer for a more efficient recovery in the mid- to long-term. RIFs, however, also can cause unintended legal consequences that cost more money than they save and further erode employee morale. Advance planning and awareness of the legal opportunities and pitfalls (only some of which are discussed here) will help to maximize the potential benefits and hopefully minimize the downside of this process for employers.