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# Avoiding Legal Risks in Workforce Reductions

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Despite signs that the economy is recovering, many employers still find it necessary to trim their workforces. Doing so in the right way is important if the employer wishes to avoid the risk of costly legal challenges. This article addresses some of the legal compliance strategies that downsizing employers can follow.

## *Have a Plan*

Though the need for planning may seem obvious, too many employers go about a reduction in force with only a general understanding of the goals of the RIF and how to achieve them. However, having an established and well-documented process can be invaluable in showing that the employer acted for legitimate and fair reasons. A good starting point is a centralized planning document that describes the reasons for and goals of the RIF. The planning document also can describe the criteria that will be used to select particular employees for separation. Selection criteria may vary and can be objective (*i.e.*, seniority, performance ratings, titles, job functions, education and certifications, attendance and disciplinary records) or subjective (*i.e.*, performance potential, leadership, and communication skills). Whether objective or subjective, the criteria should be logical and fair and consistent with the actual business reasons for the RIF.

## *Don't Discriminate*

All decision making in a reduction in force must be free from unlawful discrimination. Improper considerations include an affected employee's race, gender, religion, national origin, age, pregnancy, disability and (in many states) sexual orientation, marital status, and familial status. Employers need to ensure that their RIFs can withstand the various ways that employees (and their attorneys) may seek to prove discrimination.

### *Direct Evidence*

Direct, or "smoking gun," evidence proves discrimination directly—that is, without inference or interpretation. Examples of direct evidence may include statements by an affected employee's manager suggesting a discriminatory animus relating to the selection (*e.g.*, "we wanted to retain younger employees") or notations found on RIF

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documents reflecting an unlawful motive. Effective training of managers who will be involved in selection decisions is critical to ensuring that a RIF is not tainted with such direct evidence.

*"Pretext" Method*

Where direct evidence is unavailable, an affected employee may seek to prove discrimination indirectly using the "pretext" method. Under this method, the plaintiff must demonstrate a *prima facie* case of discrimination by showing, for example, that he or she was separated while a lesser qualified person outside of the protected class was retained. The employer then must articulate a legitimate, non-discriminatory reason for its decision (*e.g.*, business reorganization, cost-cutting, performance, sales, productivity). Thereafter, the question becomes whether the separated employee can offer enough evidence to prove that the employer's stated reason for its decision was a mere pretext for unlawful discrimination. Weaknesses, implausibilities, and inconsistencies in the employer's stated reasons for the RIF are all ways that the downsized employee can seek to prove his or her claim under a pretext theory. Therefore, employers must be consistent—and accurate—in articulating the reasons for the RIF and for particular selection decisions. An employer should not, for example, tell a downsized employee that his or her position is being eliminated as part of the RIF, only to post a vacancy announcement for that position a short while later. Even small discrepancies in an employer's explanations can lead to large claims by separated employees under a pretext theory.

*Statistical Evidence*

Where there is no direct or indirect evidence that a layoff decision was motivated for a discriminatory reason, downsized employees still have another available avenue to try to prove their discrimination case—statistical evidence. Under a so-called "disparate impact theory," a plaintiff may seek to prove discrimination by showing that an employer's facially neutral RIF policies, procedures, or selection criteria had a statistically disparate impact on a protected class.

To measure statistical impact, the U.S. Equal Employment Opportunity Commission and other federal enforcement agencies have adopted a rule that generally considers a selection rate for any race, sex, or ethnic group that is less than 80 percent of the selection rate for the group with the highest selection rate as evidence of disparate impact.[1] A more sophisticated and judicially-accepted statistical method is "standard deviation" analysis. This analysis measures the difference between the number of members of the protected class selected and the number that would be anticipated in a random selection system. Courts usually find a difference of two or three standard deviations sufficient to prove disparate impact.[2] If the plaintiff can prove disparate impact, the employer then must justify the practice on the grounds that it is job-related and consistent with business necessity or, in the case of federal age discrimination claims, based on reasonable factors other than age.[3]

Employers should conduct statistical analyses in their pre-RIF planning, considering both the four-fifths rule and standard deviation analysis. If the statistical analysis reveals that the impact of the RIF falls more heavily on one protected class than another, employers must carefully scrutinize the selection criteria to ensure that they

are supported by business necessity. If not, or if an alternative approach would yield the same business justification with a lesser impact, the employer may need to revise its approach.

*Use Multiple Levels of Decision Making*

It is often advisable to have multiple levels of decision making in their RIFs, with higher-level decision makers overseeing (and perhaps revising) initial decisions. This helps ensure that the employer is consistently and correctly applying the selection criteria. The employer should retain legal counsel to facilitate this review process. Experienced counsel not only can help guide the review—including assisting in the formulation of the proper statistical analysis—but can also help ensure that the pre-RIF deliberations retain some level of confidentiality under the attorney-client privilege.

*Remember the Unions*

In general, unionized employers must bargain with their unions over the decision to layoff employees for economic reasons and the effects of those decisions.[4] Employers also need to consult the collective bargaining agreements of affected unions before implementing a RIF. In many cases, the collective bargaining agreement may govern the procedures that employers must follow when implementing a layoff, including seniority and bumping provisions.

Employers cannot make layoff decisions based on the union activities of affected employees. In a case decided earlier this year, *Keift Bros. Inc.*,[5] the National Labor Relations Board (NLRB) found that the employer violated the National Labor Relations Act when it conducted a mass layoff of a group of drivers who had recently voted in favor of union representation at their facility. The employer argued that the layoffs were necessary because of the recent economic downturn. The NLRB rejected this argument, noting that the employer had never before conducted a mass layoff at the facility. The NLRB found that the timing of the layoffs soon after the employees had chosen union representation, combined with the employer's stated opposition to unionization and the unprecedented nature of the layoffs, warranted a finding of anti-union animus. The NLRB ordered the reinstatement, with back pay, of all drivers who had been laid off. The *Keift Bros.* case is a cautionary tale for employers and reveals that not even the worldwide recession was enough to insulate the layoff from legal challenges. As the economy improves, economically-motivated RIFs will likely experience even greater scrutiny.

*WARN Your Workforce*

Employers with at least 100 full-time employees also must comply with the federal Worker Adjustment and Retraining Notification Act (WARN Act).[6] This law generally requires covered employers to provide at least 60 days advance notice in the event of a plant closing or mass layoff resulting in the terminations of 500 or more employees in a 30-day period, or at least 50 employees if they comprise one-third of the workforce. An exception is available to a "faltering company" that is actively seeking capital or business to avert a plant closing, and reasonably believes that advance notice would prevent the employer from obtaining the capital or business.

Other exceptions apply in cases of unforeseen business circumstances and for natural disasters. An employer that fails to provide the required notice under the WARN Act is liable to each affected employee for an amount including back pay and benefits for the period of the violation, up to 60 days, less any voluntary and unconditional payments made by the employer.

A number of states impose notice requirements in addition to those under the federal WARN Act.[7] These laws vary widely. For example, New York's act requires 90-days notice and applies to layoffs of as few as 25 employees comprising at least 33 percent of the workforce, or 250 full-time employees in total. California's law applies to layoffs involving 50 employees in facilities with 75 or more employees, but does not require that one-third of the workforce be affected and does not recognize the "unforeseen business circumstances" exception available under the federal WARN act. Iowa's law takes effect on July 1, 2010 and will require employers with at least 25 or more employees to provide at least 30 days written notice of a business closing or layoff of 25 or more employees at a single site of employment. Employers must ensure compliance with the WARN rules of each state where they will be laying off employees.

*Handle Employees on Leave with Care*

The Family and Medical Leave Act (FMLA)[8] provides certain covered employees with up to 12 weeks of job-protected leave in a 12-month period for a qualifying family or medical reason, and up to 26 weeks of job-protected leave to care for a seriously injured military service member. The Uniformed Service Employment and Reemployment Rights Act (USERRA)[9] requires employers to reinstate employees returning from military service to the jobs they would have attained had they not been serving in the military. Many states have similar job-protected leave laws that apply to family, medical, or military leave.

Employees in a job-protected leave status present special challenges for the downsizing employer. An employer may not consider an employee's status on such leave as a factor in deciding whether to lay off that employee. On the other hand, an employee on FMLA or USERRA leave is not protected from discharge if the employer can show that employee would have been laid off if he or she had remained at work.[10] An employer whose reduction in force will reach employees who have recently taken, or are currently taking, FMLA, USERRA, or similar job-protected leave must carefully consider whether it would have separated the employee had he or she not taken the leave.

*Consider Offering Releases*

One way for employers to minimize litigation risks in a RIF is to provide severance pay to terminated employees in exchange for their signing release agreements not to sue. All releases must be knowing and voluntary and provide pay and/or benefits to which the employee would not otherwise be entitled absent a release. Employees generally cannot waive statutory discrimination claims arising after the date they sign the release. Nor can employees promise non-cooperation or non-participation in government enforcement proceedings in release agreements.

Special requirements apply to releases of claims under the federal Age Discrimination in Employment Act (ADEA).[11] For an ADEA release to be valid, the employee must receive at least 45 days in which to consider the release agreement, and another seven days after signing the release in which to revoke it. The employee also must receive written notice that describes: (i) any class, unit, or group of individuals covered by the program and any applicable eligibility factors and time limits; and (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.[12] An employer that fails to comply with these requirements risks having a court later declare the release invalid, leaving the separated employee free to sue the employer under the ADEA—even if the employer has already paid the severance benefits provided in the release agreement.

### *Inform the Affected Employees*

At some point, it will be necessary to communicate the decision to employees. Managers should meet with each affected employee separately. It is usually advisable for the employer to have another manager or a human resources representative in the room. The main purpose of the meeting is simply to inform the employee that he or she has been affected by the RIF. The meeting is also a good opportunity to deliver important information to the employee, such as the proposed release agreement (if applicable), benefits information, and any outplacement assistance offered by the employer. However, the meeting is not the occasion to tell the employee what a great (or bad) employee he or she was. Managers should resist the temptation to say more than necessary to convey the essential information about the RIF.

### *Conclusion*

Reductions in force are never pleasant occurrences for employers, and the challenging legal landscape makes them all the more difficult. Federal and state employment discrimination laws, bargaining obligations with unions of affected employees, and pre-notification requirements are just some of the many legal compliance issues that downsizing employers face. Careful and effective planning, documentation, review, and communication are essential if the employer wishes to navigate these legal issues successfully.

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1 *See* 29 C.F.R. § 1607.4(D).
2 *See Castaneda v. Partida*, 430 U.S. 482, 497 n.17 (1977).
3 42 U.S.C. § 2000e-2(k)(1)(A); 29 U.S.C. § 623(f)(1).

[4] *In re Tri-Tech Servs., Inc.*, 340 N.L.R.B. 894, 894 (2003); *Lapeer Foundry & Machine*, 289 N.L.R.B. 952 (1988).

[5] 355 NLRB No. 19 (Mar. 15, 2010).

[6] 29 U.S.C. §§ 2101–09.

[7] Some states with so-called "mini-WARN" laws include California (Cal. Labor Code § 1400 *et seq.*); Connecticut (Conn. Gen. Stat. §§ 31-51n and 31-51o); Hawaii (Haw. Rev. Stat. § 394B-2); Illinois (820 Ill. Comp. Stat. § 65/1 *et seq.*); Iowa (Iowa Code Ch. 84C (eff. 7/1/10)); Kansas (Kan. Stat. Ann. § 44-616); Maine (Me. Rev. Stat. Ann. Tit. 26, § 625-B-1); Massachusetts (Mass. Gen. Laws Ann. Ch. 151A); New York (N.Y. Lab. L. §§ 860-a to –i); New Jersey (N.J.S.A. §§ 34:21-1 to -7); Tennes*see* (Tenn. Code Ann. § 50-1-601, 602); and Wisconsin (Wis. Stat. Ann. § 109.07).

[8] 29 U.S.C. § 2601 *et seq.*

[9] 38 U.S.C. § 4301 *et seq.*

[10] 38 U.S.C. § 4312(d); 29 C.F.R. § 825.216.

[11] 29 U.S.C. § 626(f).

[12] 29 C.F.R. § 1625.22.