

Layoffs and Reductions in Force

Preventing Lawsuits and Avoiding Legal Liability

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INTRODUCTION

- 2020 and the pandemic forced more businesses than ever to contemplate and/or institute layoffs and reductions in force.
- What are we seeing in the courts as a result?

OVERVIEW

- Sources of Liability – quick review
- Theories of Liability – quick review
- Planning Reductions in Force (RIF)
- Execution of RIFs
- Resuming Operations

MAJOR SOURCES OF EMPLOYER LIABILITY

- Americans with Disabilities Act (ADA)
- Civil Rights Act of 1964 (Title VII)
- Age Discrimination in Employment Act (ADEA)
- Fair Labor Standards Act (FLSA)
- Family Medical Leave Act (FMLA)
- Worker Adjustment and Retraining Notification Act (WARN)
- Collective Bargaining Agreements
- State Laws

SOURCES OF LIABILITY

- Each employment law defines some protected activity
- Liability accrues where employer takes an adverse action
- Adverse actions include:
 - Termination
 - Demotion
 - Failure to promote
 - Reduced pay and benefits
 - Transfer to less desirable position
- Layoffs/RIF unquestionably are adverse actions!

LIABILITY THEORIES

- Burden shifting
 - Prima Facie case
 - Legitimate non-discriminatory purpose
 - Employee rebuttal by showing pretext
- Individual Disparate Treatment
 - Direct vs. Circumstantially proven
- Group Disparate Treatment
 - Policy & Practice vs. Impact
- Harassment
- Retaliation

MAKING THE DECISION

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CONSIDERING OTHER OPTIONS

- Considering Costs of RIFs
 - Compliance with relevant legal frameworks
 - PR and Shutdown Costs
 - Back-end costs associated with restarting operations
 - Loss of goodwill and moral costs
 - Lost institutional knowledge
- Hiring & Promotion Freeze
 - Lower likelihood of employee lawsuits
 - Less capital intensive
 - Lower restart costs
 - Retention of institutional knowledge

OTHER OPTIONS (CONT.)

- Furloughs and Temporary Pay & Benefit Cuts
 - Risk of Exemption loss under FLSA
 - Advanced Notice Rules
 - Furlough Structure
 - CBA Issues

OTHER OPTIONS (CONT.)

- Voluntary Separation
 - Incentivizes amicable separation, but with risk of losing best employees most equipped to compete in job market
 - Identification of Limitations
 - Claims Release
 - ERISA & Tax Implications
 - Communication

WHEN INVOLUNTARY RIFS ARE UNAVOIDABLE

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INVOLUNTARY RIFS

- Determine desired outcome and timeline
- Determining local laws and securing legal counsel
- Identifying Decisionmakers
 - Selection Committee
 - Review Committee
- Identifying Objective Selection Criteria

INVOLUNTARY RIFS

- Even Application of Objective Criteria
- Independent Review of Selections by Review Committee
- Adjustments where needed

DESIGNING SEVERANCE PACKAGES

- ERISA Concerns
- Release of Claims & Waivers
- Older Workers Benefits Protection Act (OWBPA)
- NDAs & Restrictive Covenants

TAX CONSIDERATIONS & BENEFITS

- COBRA
 - Continued healthcare coverage for laid off or furloughed employees
- 401(k)
- 409(A)

EXECUTION OF RIF

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NOTIFICATION

- WARN
 - 60 Days Notice when applicable
- Mini WARNS
- Union Notice

WAGE AND HOUR ISSUES

- Employees entitled to all earned wages
 - Exempt: when work performed in the workweek
 - Non-exempt: for all time worked

CONDUCTING MEETING

- Carefully select representatives
- Be Informed
- Take Minutes

TACT CONSIDERATIONS

- Preventing Notice by Media
- Transparency & Clarity
- Compassion
- Avenues for Communications
- Training for Handling Emotional Responses

RESTARTING OPERATIONS

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MEETING WITH REMAINING EMPLOYEES

- Meet with remaining employees
 - Outline Future of Worksite
 - Highlight resources available

RECALLING WORKERS

- Avoid providing notice until recall is certain
- Inverse of RIF, use objective recall criteria & review
- FLSA exemption issues
- PPP loan forgiveness

QUESTIONS?



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THANK YOU

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