

EMPLOYMENT LAW BULLETIN

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IMPLEMENTING REDUCTIONS-IN-FORCE: A PRIMER

Reductions in force (RIFs) are a fact of corporate life, even in a thriving economy. For example, the Department of Labor's Bureau of Labor Statistics reports that in the third quarter of 1999 and the first quarter of 2000, amid a robust economy, there were 1,099 and 1,268 mass lay-offs, respectively, involving the collective loss of nearly 500,000 jobs.

Not surprisingly, RIFs are fertile ground for employment claims. Managed poorly, RIFs can magnify the very cost concerns they were intended to ameliorate. The employer ends up spending more on attorneys' fees, settlements or judgments than it hoped to save on salaries and benefits.

The legal landscape can be successfully navigated. Doing so, however, requires careful planning, a familiarity with applicable law, and a close eye on several specific issues. In this edition of the Employment Law Bulletin, we provide a checklist of certain key issues employers should consider in connection with a RIF.

1. Recognize Likely Claims.

While claims based on any protected category (national origin, race, gender, etc.) can arise out of a RIF, age discrimination appears to be the most common, a trend likely to continue given that older workers comprise a growing percentage of the workforce. Age discrimination claims currently may be brought under two theories: disparate treatment (where an individual employee is allegedly intentionally treated differently due to age, race, gender, etc.) and disparate impact (where, regardless of intent, facially neutral practices may be unlawful if their practical effect is to disproportionately harm a protected group of employees). Each has different implications for RIF planners.

2. Conduct A Statistical Analysis.

Employers should conduct their own pre-RIF statistical analyses. If statistically significant patterns emerge, employers may readily address them at the planning stage through adjustments to the individuals selected, modification of the selection criteria, or further analysis showing that the patterns are attributable to factors other than age, race, gender, etc.

3. Consider Alternatives.

The documented consideration of less drastic alternatives, such as wage and hiring freezes, early retirement programs, salary reductions, and part-time work, addresses both the legal and visceral perspectives of a potential judge or jury. It shows that the employer approached its business concerns with compassion for its employees. And it may have direct evidentiary value in the context of a disparate impact claim, given that the plaintiff may ultimately prevail by showing the employer's practice was not the least discriminatory, yet effective, alternative available.

4. Document The Basis For The RIF.

Some lawsuits challenge the legitimacy of the RIF itself; they force the employer to show the RIF was undertaken for legitimate business reasons, such as cost savings, organizational efficiency, or elimination of duplicative operations. These broad challenges rarely succeed. The evidence must be strong, because the courts' role is to enforce the civil rights laws, not second-guess the employer's business judgment. Nevertheless, employers are well-advised to create a record of both the reasons for, and anticipated benefits of, the RIF to meet a broad challenge to its legitimacy.

5. Control The RIF Selection Process.

Consider giving decision-making responsibility to a RIF committee that includes representatives of different protected groups, departments, and even levels,

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in the organization. This will broaden the committee's perspective and disburse responsibility, thereby undermining a claim that any particular participant is biased and reducing the likelihood of seemingly conflicting decisions by independent decision-makers in a more decentralized approach.

6. Determine The Selection Criteria.

Where possible, RIF decisions should rest on objective, quantifiable criteria, such as productivity, wage rates, test scores, education requirements, elimination of duplicative job functions, or seniority. The United States Supreme Court has held that these types of criteria, though some are empirically correlated with age, are lawful. They are unlawful only where there is additional evidence they are being used as a proxy for age. Of course, subjective criteria also are lawful, and in some instances, they may be the only alternative. For obvious reasons, however, subjective criteria generally are much more difficult to defend.

7. Follow Internal Policies.

Many employers implement RIFs in violation of their own written policies, which may inadvertently create a breach of contract claim or evidence of pretext in support of a discrimination claim. Collective bargaining agreements, employment contracts, employee manuals and even oral statements, if sufficiently specific, are potential sources of contractual obligations. The typical claim is that the RIF was not implemented in accordance with an allegedly prescribed process (e.g., seniority was not considered when it allegedly should have been).

8. Determine The Most Appropriate Date, Time, And Location For Communicating The Discharge Decision.

Much, probably too much, is made of the timing issue. The myriad recommendations are all over the map. Nevertheless, it is important, where possible, to: (i) notify as many of the affected employees as possible in the shortest period of time so as to prevent the "dribbling effect" of serial meetings over an extended period; (ii) notify affected employees individually and personally; and (iii) meet in a private area removed from general work areas.

9. Determine Benefits And Compensation Due.

State, not federal, law generally governs the payment of wages and accrued benefits upon termination of employment. The rules vary from one jurisdiction to another. For example, Washington law simply requires that

the final paycheck be provided within the next regular pay period following discharge. By contrast, Oregon law requires that at the time of discharge all wages be immediately paid in full. State laws also sometimes define "compensation" differently and more broadly than expected. For example, California law defines it to include accrued vacation, while Washington law does not. Employers must also be careful in unilaterally offsetting amounts owed by employees from final paychecks. This, too, is typically governed by state law. While these laws vary, the common theme is that unilateral offsets are discouraged if not prohibited.

10. Consider Transitional Assistance.

Employers have no obligation to provide discharged employees with severance pay, outplacement counseling, letters of recommendation or other transition assistance. In most instances, however, it makes sense to consider doing so. This type of assistance typically can be provided at modest expense and generates considerable goodwill. The sooner the employee transitions to new employment, the sooner the attendant economic motivation for legal action dissipates.

11. Determine How And Who Will Communicate The Discharge Decisions.

Where possible, discharge decisions are best communicated in person. In fact, employers should have two representatives present, one serving the role of witness. Employers also should be prepared to provide departing employees with a document that clearly addresses anticipated separation issues. Finally, the persons who communicate the discharges must be prepared for a wide range of reactions, including silence, anger, hostility, etc. If transitional career counseling is offered, it may be wise to have counselors on-site at the time of discharge so that employees can immediately focus on constructive steps toward new employment.

12. Protect Assets.

Though rare, some discharged employees may attempt to leave with company assets or sensitive competitive information. Arrangements must be made for the return and inventory of equipment, keys, key cards, company cars, laptop computers, credit cards, etc. Consideration must also be given to changing locks and passwords.

13. Consider Requiring Release Agreements.

If transition assistance is offered, determine whether to condition, or sweeten, it on the execution of a release. While the benefits are obvious, there are potential drawbacks which are too often ignored. For example, releases may be later introduced into evidence if the employee does not sign. The argument is that the request for a release shows the employer had something to hide. Further, the release request may eliminate goodwill otherwise created by the offer of severance or other assistance. Relatedly, the release may actually cause exactly what it was intended to prevent — a lawsuit — because it may encourage or even require the employee to seek legal counsel.

14. Consider The WARN Act.

The Worker Adjustment and Retraining Notification Act (WARN) requires covered employers to provide 60 calendar days notice to workers who are expected to lose their jobs as a result of plant closings and mass layoffs. The notice period is intended to provide displaced workers with the time necessary to smooth their transition to new employment. The employer must also notify the chief elected officer of any union representing affected employees, the state dislocated worker unit and the chief elected official of the local government within which the closing or layoff will occur. The WARN Act applies to employers with (a) 100 or more full-time employees or (b) 100 or more full-time and part-time employees who collectively work an aggregate of 9,000 hours per week, exclusive of overtime.

The WARN Act only applies to plant closings and mass layoffs. A “plant closing” is “the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site during any 30-day period for 50 or more employees excluding any part-time employees.” A “mass layoff” is a reduction in the workforce at a single site of employment during any 30-day period that results in job loss for (a) 33 percent of the full-time employees (so long as that percentage translates into a minimum of 50 full-time employees), or (b) 500 full-time employees. Separate instances of lesser employment loss may be combined over a “rolling” 90-day period to meet the minimum number necessary to trigger the notice requirement.

15. Consider The NLRA.

The National Labor Relations Act (NLRA) may require an employee to bargain over the decision to undergo a RIF and will require bargaining over the effects

of such a decision. Absent a relevant provision in the collective bargaining agreement, the reasons for, and purposes of, a RIF generally determine whether it is a mandatory subject over which the employer must bargain. If the RIF is part of a fundamental restructuring of the business, there typically is no duty to bargain over it. This may be the case, for example, where the employer implements a RIF as part of the shut down of a plant or line of business. However, if the RIF rests on other reasons, there may be a duty to bargain to determine whether there are less drastic alternatives that do not involve loss of employment.

16. Consider COBRA.

The Consolidated Omnibus Budget Reconciliation Act of 1974 (COBRA) requires employers with 20 or more employees who provide group health insurance to provide terminated employees with the option of continuing their group coverage at their expense for 18 months after termination. Specific statutory notices must be given within 14 days of the job loss.

17. Consider ERISA.

Early retirement plans are welfare benefit plans subject to the Employee Retirement Income Security Act (ERISA) and sometimes severance plans are as well. If an ERISA plan is involved, the employer may be required to prepare a written plan document and annually file a Form 5500 with the Department of Labor. The employer also may be subject to claims based on plan amendments, plan information and plan termination. For example, RIFs may cause “partial plan terminations,” which require that all affected participants immediately vest under the plan. There is no hard and fast test for when partial plan terminations occur. The rule of thumb is that if one or more RIFs over the course of a year or less result in the termination of 20% or more of the plan participants, the plan may have been partially terminated.

18. Consider The Aftermath.

Employers must not undermine the stated reason for discharge through pre-RIF transfers and post-RIF hires. As for the former, courts (and juries) are particularly suspicious of employers that transfer, or retain through an ostensibly competitive application process, one or more younger workers while eliminating the employment of their similarly situated older counterparts. Considerable skepticism also surrounds the concept of “overqualification,” the assumption that older workers would perceive certain positions to be demotions which will cause future attitude problems best avoided by not

offering the job to them in the first place. Some courts view this logic as inherently pretextual.

19. Consider The Concerns Of Retained Workers.

Finally, do not forget the people being retained. They doubtlessly have mixed emotions and many questions: Is the RIF over? Is my job secure? Do I want to continue working with a company that has had to go through this process? Why should I remain loyal to this company?

How could they let Joe go after 10 years? Will there be a second RIF soon? Employers should anticipate these concerns and address them.

CONCLUSION

RIFs need not create legal quagmires. Through careful planning and a recognition of certain fundamental legal principles, employers can lawfully and efficiently reduce their workforces when necessary.

Upcoming Speaking Engagements

On December 5, Steve Winterbauer will make two employment-related presentations at the 16th Annual TRENDS Education Conference And Trade Show sponsored by BOMA in Seattle. On January 17, Ken Diamond and Lisa Vanderford-Anderson will present an "ADA and FMLA Update" at the Valley Educational Institute in Tacoma. On February 15, Ken will provide "A Defense Lawyer's Perspective on Employment Claims" at the Lorman Educational Services Seminar in Seattle. On March 2, Steve will co-chair, and he and Ken will speak at, the Washington State Bar Association's Ninth Annual Employment Law Institute in Seattle.

Did You Know?

Supreme Court To Hear Employment Cases. During the 2000-2001 term, the United States Supreme Court will address the following cases which raise employment claims or otherwise may have employment-related consequences.

- *PGA Tour v. Martin*, 2000 WL 948978. The Court will decide whether PGA Tour Inc.'s requirement that competitors walk courses during professional golf tournaments violates the Americans With Disabilities Act (ADA).
- *Circuit City Stores Inc. v. Adams*, 120 S.Ct. 2004 (2000). The Court will decide whether the Federal Arbitration Act (FAA), which requires enforcement of valid arbitration agreements, applies to employment contracts. The FAA requires enforcement of arbitration provisions in "any . . . contract evidencing a transaction involving commerce" but excludes from coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The Ninth Circuit has interpreted the exclusionary language to encompass all employment contracts. By contrast, other federal circuit courts have held more narrowly that the exclusion is limited to employment contracts for employees directly involved in the movement of goods in interstate commerce.
- *Egelhoff v. Egelhoff*, 120 S.Ct. 2687 (2000). The Court will address whether ERISA preempts a Washington state law automatically revoking beneficiary designations to the former spouse of a divorced plan participant.

New EEOC Compliance Manual Section One Benefits Discrimination. The Equal Employment Opportunity Commission (EEOC) recently issued a new section to its Compliance Manual analyzing application of Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act and Title I of the ADA to employer-provided benefits, including health, life, and long and short-term disability insurance, severance pay, and pension and other retirement benefits. The new section may be obtained from the EEOC's website at www.eeoc.gov.

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