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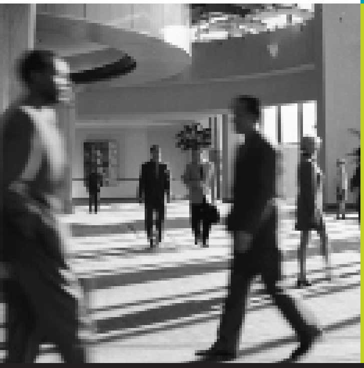
Tips for Planning Reductions in Force

FOLEY HOAG LLP

Driving Business Advantage

by Michael L. Rosen



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Tips For Planning Reductions in Force

by Michael L. Rosen

We know that the recent financial crisis and related economic downturn unfortunately are causing many employers to consider ways to reduce operational expenses, including through workforce restructuring and layoffs. Mike Rosen, a partner in Foley Hoag's Labor & Employment Law Department recently prepared this eBook offering tips for administering a reduction-in-force. We offer a few preliminary considerations: any such reduction-in-force (RIF) must be carefully planned and executed both to minimize exposure to liability under various employment laws and to mitigate negative effects on employee morale and operations. The following are some issues for employers to consider as they grapple with whether and how to implement a layoff.

1. Is a Layoff Necessary?

An important threshold question is whether a layoff is even necessary or appropriate. The typical objective in a layoff is to reduce expenses through the paring down of payroll and benefits-related costs. Such cost savings may make a RIF attractive, but large-scale reductions also entail substantial costs, both in upfront severance-related compensation, and in longer-term, often hidden costs, such as legal expenses associated with claims by terminated employees, attrition of valued employees, and downstream costs of hiring again when economic circumstances improve.

Alternative methods to achieving expense reductions should be considered before a RIF is implemented. Are there other reductions in expenses that can accomplish the same goal without hampering the company's future ability to compete? Such alternatives can include hiring freezes, wage freezes, postponement of wage increases, reduction or elimination of annual bonuses, reduction in fringe benefits, reduced work hours, transferring potentially affected employees to open or vacant positions, and engaging in more selective performance-based terminations.

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2. Voluntary or Involuntary Program?

One alternative to an involuntary layoff is a voluntary separation or incentive program. This approach can minimize a company's exposure to termination-related lawsuits, in part because employees who leave voluntarily are less likely to contemplate legal challenges to their departures. In addition, such employees typically are required to sign a release of claims in exchange for participation in the plan. Voluntary plans also have less potential to damage employee morale and productivity. But there are several potential pitfalls. The employer may have no control over the number of employees who will actually choose to participate. If not enough employees take the package, a subsequent layoff may be necessary. Moreover, a voluntary program is a very blunt instrument for paring a company's workforce; good employees may choose to leave while poor performing employees may choose to stay, realizing that they will have difficulty finding new employment. In contrast, an involuntary program gives the employer complete control over the selection process and if implemented correctly, can enable the employer to retain its best employees to help it meet its challenges going forward.

3. Develop Uniforn Selection Criteria.

Perhaps the most critical factor in avoiding legal complications with a layoff is the development and application of a uniform approach for selecting employees for termination. Employers must choose among objective criteria (for example, seniority or comparative sales revenue), subjective criteria (for example, management ranking by performance) or some combination of both in determining whom to lay off. From the perspective of reducing the potential of discrimination claims, using objective methods is generally preferable to using subjective methods. However, such an approach may not be the ideal method for an employer seeking to retain the best employees going forward. What is most important is that the employer utilizes a method for selection and then applies that method fairly and consistently across its workforce. Employers should create and maintain documentation to support the decisions made in the layoff process. Such records will be critical in the event of litigation challenging some aspect of the decision-making process.

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4. Conduct a Layoffs Analysis.

Once an employer has compiled a list of positions (or employees) to eliminate, care should be taken to analyze whether the RIF has a disproportionate effect on any one group of protected employees, such as racial minorities, women, older workers (age 40 or over), or the disabled. An outside statistical consultant or legal counsel can assist in assessing susceptibility to a claim of discrimination based on adverse impact. With respect to older workers, the stakes are higher in the wake of several recent Supreme Court decisions making clear that the "disparate impact" theory of liability is available in the context of age discrimination claims. In *Smith v. City of Jackson*, a 2005 decision, the Court held that a plaintiff could bring an age discrimination claim based on a theory that, although there was no evidence that he was treated differently based on his age, the challenged employment action had a disproportionate impact on older workers. In *Meacham v. Knolls Atomic Power Laboratory*, a decision issued only a few months ago, the Court held that employers defending such disparate impact claims bear the burden of introducing evidence that a reasonable factor other than age was utilized in the challenged layoff determination. The *Meacham* case makes clear that while a layoff that has a disproportionate impact on older workers is not by definition illegal, employers must be able to show that such impact was the result of legitimate nondiscriminatory factors.

5. Is Advance Notice Required?

Advance layoff planning is particularly important because of the potential applicability of federal and/or state laws requiring a particular period of notice before a layoff can take effect. The relevant federal law is the Workers Adjustment Retraining and Notification Act (WARN), which requires employers with 100 or more employees to provide employees, bargaining representatives and local government officials with 60 days advanced written notice of a mass layoff or a plant closing. A mass layoff involves an employment loss of at least 33% of full time employees and a minimum of 50 employees at a single site. A plant closing involves shut down of a single site if the shut down results in an employment loss of at least 50 full time employees. In addition to the federal WARN law, several states have different and/or more expansive plant closing laws.

6. Severance and ERISA.

Typically, employers will provide some amount of severance—often based on a formula such as years of service—to employees who are laid off. Severance may or may not be conditioned upon the employees signing of a release of claims against the employer. Employers should think about whether the provision of severance will be subject to an ERISA-governed severance plan. ERISA is the federal statute imposing reporting, disclosure and fiduciary requirements on employee benefit plans, including some types of severance plans. It may be beneficial for an employer to create an ERISA plan which spells out the eligibility requirements for severance and the process by which the plan will be administered.

"...create an ERISA plan which spells out the eligibility requirements for severance..."

7. Asking for a Release.

Many employers are generally familiar with the provision of releases to employees in the context of individual terminations. But many employers are unaware of the specific, heightened requirements for obtaining a valid release from employees over the age of 40 in the context of a layoff. These heightened requirements are the result of the Older Workers Benefit Protection Act (OWBPA). Among other requirements, in the context of a group termination program such as a layoff, employees over 40 must be provided with information about eligibility factors to participate and time limits of the program, (2) job titles and ages of all employees eligible or selected for the program, and (3) ages of all employees in the same job classification or organizational unit not eligible or selected for the program.

8. Don't Forget Immigration Implications.

For companies that employ foreign nationals, a layoff will raise a host of immigration issues. Nonimmigrant workers on the various categories of temporary work visas (H-1B, L, E and TN) are legally authorized to remain in the US only as long as they are employed with the particular employer noted in their visa application. For example, an H-1B is considered to be out of status upon termination and normally is expected to depart the United States, unless he or is eligible to apply for a change to a different type of visa. An employer that terminates an H-1B employee before the end of the validity period on the approved H-1B petition must pay "the reasonable costs of return transportation" for the foreign national to return abroad. Additionally, an employer <u>must</u> notify the US Citizenship and Immigration Services of the H-1B foreign national's termination. Only when that notification is filed is the employee's employment considered "terminated" according to U.S. Department of Labor (DOL) regulations. Where an H-1B's employment is not considered to be "terminated," the employer is liable to pay the employee the required wage, as attested to in the H-1B petition until termination is established. These are a few of the requirements employers must consider in the event that a layoff affects foreign workers.

9. Don't Lose Sight of Termination Basics.

A layoff can be an administratively complicated event, causing some employers to lose sight of basic requirements that come into play in any termination situation. These include ensuring that affected employees are paid all accrued salary and unused vacation time in the final paycheck (which in many states must be provided on the last day of employment); administering COBRA notices; reminding employees of the continued applicability of non-disclosure obligations and other restrictive covenants; ensuring that employees return all company property on a timely basis; and providing state unemployment rights notices to employees, as many states require. Ensuring that all of these matters are addressed appropriately requires significant planning and organization.

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About the Author

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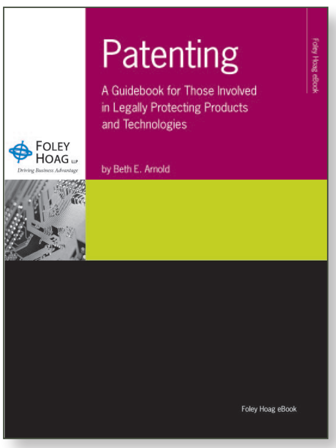

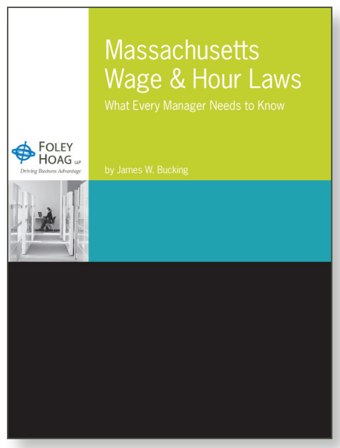

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