Employment Dos and Don’ts When Implementing Workforce Reductions

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As economists and news outlets inform us daily, a recession is coming – with some asserting it is already here. For many companies this signals a major change to what has been a very tight labor market.

Employers are well aware that during the economy’s recovery from the COVID-19 pandemic, the ability to hire and retain talent has been a challenge. Compensation increases, signing bonuses, and retention bonuses became commonplace in an effort to attract talent where there were more open positions than applicants to fill them. However, as the threat of recession looms, forward looking employers should prepare for a change in course regarding labor challenges. Contracting markets will force many organizations – who just recently could not find enough employees – to downsize their workforces. Taking steps now to prepare for the possibility of future reductions will help lower risk for companies.

There are a few key steps that employers can take now to prepare for the shift from not being able to fill open roles to facing the potential downsizing of workforces. Understanding the nuances of the WARN Act, proper documentation of performance issues, and other reduction in force (RIF) planning measures will ease the transition and reduce risk.

Avoiding WARN Act Liability Takes Advanced Preparation

The Worker Adjustment and Retraining Notification Act (WARN Act) is a federal law which requires employers to provide 60 days’ notice of an impending mass layoffs and plant closures. Failure to adhere to the requirements of the WARN Act can be very costly and lead to class action litigation, with the penalty for non-compliance including payments to employees for all wages and benefits between 60 days and the actual notification time. For instance, if the employees only receive one day notice of their layoff, that penalty would include 59 days of wages and benefits for each employee that was entitled to notice under the WARN Act. Compliance with the WARN Act itself – sending notice to affected employees, their representative union if applicable, and certain governmental contacts – is very low cost. In terms of the WARN Act, all risk comes with failure to comply with its highly technical requirements.

Typically with a plant closure (or operating unit closure), an employer will know well before 60 days prior to shut down that the plant or operating unit will cease operations. In that case, compliance with the WARN Act is fairly straightforward as long as the employer complies with the required contents of the notice. More often, employers are faced with the prospect of rolling layoffs. Under the WARN Act a mass layoff (and triggering of the WARN Act) takes place when an employer either (1) lays off 500 or more employees at a single site of employment in a 30 day period or (2) lays off over 50 employees in a 90 day period and the layoffs constitute 33% of the employers total active workforce (not including part time workers) at a single site of employment. Without careful planning and tracking of layoff numbers and dates, an employer may not be aware 60 days before a layoff that it will be part of a 90 day period that triggers the WARN Act.

In order to mitigate potential liability in this area, careful planning is needed. Employers should designate a person who is highly involved and up to date in the layoff consideration process to track reduction plans and flag possible actions that could trigger the WARN Act. Ongoing consulting with legal counsel is crucial for proper analysis of when and whether the WARN Act has been triggered. If an employer thinks it may have layoffs in the next six months, it is not too early to start the planning process to determine the number of layoffs and when they will take place in order to ensure the company has sufficient time to issue WARN notices where required.

The WARN Act includes three exceptions for compliance with the 60-day notice period: natural disaster, unforeseeable business circumstances, and the “faltering company” exception. However, even under these exceptions an employer is not relieved from giving notice altogether, but must still provide as much notice as possible and the required content of the notices is unchanged. At first glance it may appear that the natural disaster exception could be helpful with respect to layoffs required as a result of COVID-19, but a recent federal court decision dampens this prospect by holding that COVID-19 is not a natural disaster. More likely to assist employers who experience unexpected layoffs due to COVID-19 is the unforeseeable business circumstances exception. In fact, the Department of Labor has suggested that it may be available in certain COVID-19 related circumstances. If an employer believes that the unforeseeable business circumstances exception may apply, it should consult with legal counsel as soon as possible in order to ensure it is appropriately complying with the statute given the circumstances in question.

A key to WARN Act compliance and avoiding costly liability is planning, preparation, and tracking. Understanding the nuances of the WARN Act now, before facing a possible notification requirement, is essential to avoiding costly missteps once your RIF planning begins in earnest.

Reductions in Force and Disparate Impact

The WARN Act is not the only legal issue to consider when facing a reduction in force. Employers must also ensure that their reduction in force is conducted in a non-discriminatory manner.

When conducting a reduction in force, employers should be sure to also analyze the final decisions through a disparate impact analysis. Under Title VII and many state equivalents discrimination means not only intentional discrimination but also any action caused by a facially neutral policy that has a disparate impact on a group based on their protected status. Disparate impact cases relating to RIFs typically involve a large number of plaintiffs and can result in costly class action lawsuits. As a result, RIF decisions should be carefully analyzed to confirm that no group (based on race, national original, age, gender, etc.) is disproportionately chosen for termination. Employers should specifically keep in mind that sexual orientation and/or gender identity is now a protected category based on Supreme Court precedent. With that in mind, disparate impact analysis should also include protected status categories such as sexual orientation and gender identity in order to ensure that all protected statuses are considered.

The method of analysis will depend on the circumstances, including size of the reduction. In addition to a statistical analysis, if feasible depending on the size of the RIF, an employer should review each termination decision. If a position is being eliminated, employers should ensure that documentation supports the decision and that there are no plans to reinstate the position in the near future. If the decision is based on reduction of a certain number of people in a specific department or role and is based on performance of the individual as compared to others in the group, employers should be sure to confirm the basis for the decision and request support for such decisions. This process will help to ensure that no decisions are made for impermissible reasons and that all are supported by documentation where possible.

There are steps that employers can take now to ensure a smooth process later if RIFs are necessary. For starters, it is imperative for not only RIF decisions, but also a best practice for employee relations generally, for employers to train supervisors regarding proper performance counseling and documentation. It is all too common that supervisors and/or managers are reluctant to document performance issues until the time comes that it is clear an employee is not performing and should be terminated. Instead, a best practice is to train managers on giving and documenting candid performance feedback (including issues) on a regular basis. All too often a manager will have been frustrated by an employee's performance, but done nothing to document the issue or communicate it to the employee.

Proper performance management is key not only to driving performance of employees, but also to have a defensible and documented basis for employment decisions based on performance, including RIF decisions.

Considerations for Severance Programs

If an employer reaches the point where a reduction in the workforce is required, it has a couple of options to effectuate that change:

- Reduction via attrition. As employees leave the company for other positons, the employer can take the opportunity to restructure and eliminate positions where necessary. Depending on the reduction needs and attrition rate, it may be possible to avoid an involuntary layoff altogether.
- Voluntary separation programs. If not all of the necessary changes can be covered by natural attrition, employers can also consider voluntary separation programs (VSP), in which employees have the option of resigning, typically with a predetermined severance amount that incentivizes employees to resign. If enough employees choose the voluntary separation package, an involuntary RIF may not be necessary. The risk of such a program is that the employer does not have the

opportunity to determine which employees will self-select and highly valued employees may choose to resign. The key to implementing such a program is that it must be truly voluntary - it cannot be voluntary only in name, without risk of constructive discharge claims. Depending on the parameters, voluntary severance programs can be vulnerable to claims of disparate impact as well if only certain groups or positions can participate, and circumstances lend toward a view that it was not actually voluntary in practice.

- Involuntary reduction in force. If the headcount reduction needs cannot be met with either natural attrition or a voluntary separation program, an involuntary RIF may be necessary.

OWBPA Considerations

In addition to the disparate impact issues discussed above, employers should also be aware of the Older Workers Benefits Protection Act (OWBPA) which imposes requirements on agreements that release age claims for workers 40 years old or older. As part of the OWBPA, for a group termination employers must provide 45 days' notice and a 7 day revocation period in any agreement that releases claims under the Age Discrimination in Employment Act – rather than the typical 21 day consideration period and 7 day revocation period for single terminations. In addition, an "Attachment A" must be prepared for all separation agreements for employees 40 years old or older which requires specific information regarding the employees selected for the severance program, those not selected, and the selection criteria among other issues. Employers should ensure that the severance agreement forms and their required attachments are in order now, prior to any reduction in force, in order to avoid wasted time and uncertainly later when the reductions themselves will take a large amount of time for the human resources management team making these decisions.

As noted, there are many actions that employers can take to prepare themselves for possible future reductions in force which are made more likely with the coming recession. Proper performance management and attention to the details of possible reductions now will save time and risk later when a recession occurs and requires reductions in your workforce.

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