

The Troubled Economy Survival Kit for Employers—Solutions for Difficult Times

October 30, 2008

Our current troubled economy presents a two-fold dilemma for many employers: new challenges must now be faced, and old challenges appear more difficult to manage. This LawFlash summarizes several of the most important lessons that have already been learned by employers attempting to cope with difficult times. Even employers not confronting imminent workforce changes will find these lessons useful.

Coping with a Troubled Economy—The Challenge

Difficult times present a triple threat of challenges for most employers: (1) *legal liability*: poorly planned or executed changes can result in significant legal claims and liability, which may defeat the business goals underlying workforce reductions, wage or benefit changes, or other initiatives; (2) *limited resources*: a troubled economy causes significant financial and resource constraints within companies—workarounds cannot be easily or quickly implemented; (3) *who should leave and who should stay*: there are good reasons to devote attention to individuals whom you may have to let go, but it is equally important to focus on those whom you want to remain—the people who will be responsible for addressing present challenges and future business needs.

Reductions in Force—“Short List” Action Items

Many employers confronting difficult times must reduce the size of their workforce. In every case, the goals to be accomplished by a reduction in force (RIF) must be clearly understood, and employers must determine which employees and resources are needed to accomplish the company’s business needs in the future. This requires a concrete assessment of the existing employee population, required cost reductions (if any), and what post-RIF structure best serves the company’s prospective business objectives. There is enormous variation among the types of RIFs, their underlying causes, and their business objectives. However, most RIFs will be effective only if employers pay particular attention to important issues, including:

1. **Have a Realistic Strategy.**¹ While most workforce reductions may be unavoidable, they are not a quick fix. The underlying strategy has overriding importance. Is the reduction solely for cost elimination? Is the company being restructured at the same time? By what criteria are positions being chosen for elimination?

¹ These suggestions are derived in part from Philip A. Miscimarra, “Your Next Reduction in Force: The Dirty Little Secret,” *EmploymentLaw360* (Aug. 11, 2008).

2. **Speed Versus Planning.** Workforce reductions may need to be made rapidly. But excessive speed is almost always a factor in problem-ridden RIFs that inflict strategic damage to affected organizations. Delay is also hardwired into many RIF situations under certain federal or state laws, such as those requiring companies to give employees advance notice prior to layoffs or shutdowns and for the consideration of waiver/release agreements.
3. **Make It Count.** The only thing more debilitating than one RIF is the subsequent need for additional RIFs. Whenever possible, it makes sense to consider alternatives to a RIF. But once a RIF is deemed necessary, strong leadership is required to overcome organizational resistance and to implement a reduction that effectively and appropriately reduces total headcount.
4. **Let Lawyers into the Room—Evaluating Potential Adverse Impact.** All RIFs require an underlying business strategy, but they also typically involve a high risk of litigation and potential legal liability. This calls for coordination between business and legal professionals from the outset of RIF planning. Most important is the need to evaluate RIF selections for potential adverse legal impact (often conducted by counsel in the context of a privileged legal review).
5. **Talent Rush—In the Wrong Direction.** The hidden cost underlying every workforce reduction includes the embedded training and development investment made in those who will no longer be employed. This cost will increase if ineffective handling of a reduction prompts the best people to leave or, worse, to go to work for your competitors. Significant attention should always go to those whom your company does not want to lose, and who will contribute to overcoming your business challenges post-RIF.
6. **Severance Pay, Releases, and Notice Requirements.** Most large or midsize employers make severance benefits available to separating employees in some form. Severance benefits contribute to the significant short-term costs associated with most workforce reductions, but also provide an incentive for departing employees to sign a release, allow for an orderly transition, and play a critical role in employee retention. Compliance with laws such as the Employee Retirement Income Security Act (ERISA), the Older Workers Benefit Protection Act (OWBPA), and the Worker Adjustment and Retraining Notification Act (WARN), among others, affects severance benefit plans, release agreements, and potential notice obligations. These issues again underscore the importance of attorney involvement in RIF planning.
7. **Union Issues.** Special care is required for RIFs involving unionized operations. In some cases, employers cannot make final restructuring decisions unless unions have first been given notice and bargaining opportunities, which may take weeks or months to complete. Antiunion discrimination claims and grievances can take years to resolve. If these issues are mishandled, the consequences are often severe, potentially including significant financial liability, the potential reinstatement of affected employees, and discontinued business operations. Although union presence in the private sector has dropped in recent years, there are formidable RIF-related risks for companies that disregard union obligations.
8. **Process Counts.** An effective RIF requires more than sound strategy. It also requires effective implementation, with careful coordination among business leaders, human resources and benefits professionals, the media, potential outplacement services, and in-house and outside legal counsel. No single process or procedure is appropriate for all RIFs or all employers. There must be a meaningful assessment of what type of process, realistically, can be adopted for the best business outcome.

Other RIF issues warranting attention and planning include document assembly and review, the creation of a RIF management team, supervisor training, employee communications, media releases, and the appropriate treatment of contractors and other contingent employees—to name a few.

Reduction-in-Force Alternatives

Even when a RIF appears expedient, many employers will benefit by implementing alternatives to involuntary employment terminations. These alternatives can be less costly and avoid lowered employee morale and the risk of legal claims and potential liability. Potential alternatives include hour reductions and work sharing, overtime restrictions, hiring freezes, the elimination of contract employees, and exit incentive and voluntary separation programs, among others.

Voluntary separation and exit incentive programs involve yet additional decisions, including (among many others) what benefits will be offered as an exit incentive (e.g., severance pay, pension enhancements), whether everybody can participate in the program, and whether eligible employees will participate in the program completely at their own election.

Employee Benefits Issues

A significant consideration in most RIFs will be the benefits available to employees who are selected (or volunteer) for separation, which gives rise to the following important considerations. For example, employers should assess (i) the impact the RIF will have on employees' rights to benefits under existing plans and arrangements (e.g., pension plans, health and welfare plans, accrued leave arrangements, bonus or incentive compensation arrangements), (ii) whether any RIF benefits or incentives can be structured in an advantageous manner (e.g., through an early retirement incentive "window" that accesses over-funding in a pension plan or through a supplemental unemployment benefit plan) to minimize the cost of the benefits and/or to make the benefits more tax efficient, (iii) existing severance and other benefit plans can be amended (or, if none exist, established) before any RIF is implemented, (iv) if unionized, the potential withdrawal liability arising from participation in multiemployer pension plans, and (v) the need for timely employee notices (e.g., COBRA notices describing employees' rights to health insurance continuation).

Times Are (Still) Good—What Do You Do?

The best time to address RIF issues is when there is no imminent need for a workforce reduction. As many companies have experienced, implementing RIFs without effective preparation can limit the resulting cost savings, give rise to RIF-related liabilities, and increase the RIF's negative impact on the business, or worse.

Companies experiencing favorable business conditions should address a number of important issues that are more difficult to deal with in the context of a downturn:

- 1. Performance Management.** Although RIFs may involve the separation of employees who are strong contributors, they frequently highlight a failure to effectively manage performance, absenteeism, and productivity problems. Performance evaluations can pose particular problems in subsequent RIF-related litigation, where the evaluations may appear to contradict the reasons why certain employees have been selected for inclusion in the RIF.
- 2. Benefit Plans.** Good times provide the opportunity to ensure that all aspects of corporate benefit plans are up to date, including retirement plans, severance pay plans, potential early retirement incentives, ERISA filings, and other requirements.

3. **Waivers/Releases and Restrictive Covenants.** In recent years the validity of waiver and release agreements based on the standards and requirements set forth in OWBPA has been among the most highly litigated issues resulting from workforce reductions. Especially challenging is the need, in situations involving group exit incentive or employment termination programs, to provide accurate position and age data for all employees (selected and not selected) in the relevant “decisional unit.” Employers should review waiver and release agreements under OWBPA when business conditions are favorable and not when there is an urgent need for a broad-based workforce reduction. Intellectual property should be protected by confidentiality, no-solicitation, or noncompete agreements when employees are hired or when there are no immediate RIF plans, especially in states that have found severance pay to be insufficient consideration for such restrictive covenants.

4. **Be Prepared.** Recent events have demonstrated the speed with which business fortunes can change. This makes it all the more important for employers to carefully preserve their discretion and flexibility to make employment changes that could essential during a business downturn. This is especially relevant in unionized work settings where collective bargaining agreements can impose restrictions on subcontracting, relocations, and RIFs. Effective RIF planning should take place long before the need for workforce change becomes urgent.

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