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## EMPLOYMENT & IMMIGRATION LAW

### Navigating Workforce Reductions in Uncertain Economic Times

The importance of the *Meacham* case and New Jersey WARN Act

By **Rene M. Johnson, Thomas A. Linthorst** and **Diane L. Lisowski**

With uncertainty in the economy, the headlines are filled with companies announcing reductions and restructurings in the workplace. Numerous industries with significant operations in New Jersey such as pharmaceuticals, financial services, construction and manufacturing are impacted. These announcements come at a time when the law is, in many respects, becoming more protective of displaced workers. This article looks at two significant developments in the law of workplace change, and identifies significant issues that employers should consider when implementing a reduction in force.

The United States Supreme Court recently agreed to hear a case examining the application of the federal Age Discrimination in Employment Act (ADEA) to an employer's downsizing program. On Jan. 18, the Supreme Court granted certiorari in *Meacham v. Knolls*

*Atomic Power Laboratory*, 461 F.3d 134 (2d Cir. 2006) (*Meacham II*). The Court will examine whether an employee alleging disparate impact under the ADEA bears the burden of persuasion to show that the employer's business justification for the layoff the "reasonable factors other than age" (RFOA) defense is unreasonable. In *Meacham II*, the Second Circuit ruled that it is the employee's burden. Other circuits have reached differing conclusions on this issue.

*Meacham II* originated in 1996 when Knolls Atomic Power Lab instituted an involuntary reduction in force (IRIF). As part of the selection process, supervisors were instructed to rank employees based on three factors: performance, "flexibility" and the "criticality" of their skills. Thirty-one employees were selected for the IRIF. Twenty-six of the laid off employees sued under a disparate impact theory, contending that the company's policies or practices, while facially neutral, affected older workers disproportionately. At trial, a jury found in favor of the plaintiff employees, and the employer appealed. The Second Circuit affirmed in *Meacham v. Knolls Atomic Power Laboratory*, 381 F.3d 56 (2d Cir. 2004) (*Meacham I*), finding that although

the employer had demonstrated a legitimate business justification for the IRIF, the employees had successfully demonstrated that the justification failed the "business necessity" test because at least one suitable alternative existed. More specifically, the employer "could have designed an IRIF with more safeguards against subjectivity, in particular, tests for criticality and flexibility that are less subject to managerial bias." The judgment, however, was vacated and remanded by the U.S. Supreme Court following its decision in *Smith v. City of Jackson*, 544 U.S. 228 (2005).

In *Smith v. City of Jackson*, the Supreme Court held that the ADEA permits disparate impact suits by employees, but ruled that the "business necessity" standard is not applicable under the ADEA. The appropriate test of an employer's action under the ADEA is one of "reasonableness." In light of the ruling in *Smith v. City of Jackson*, the Second Circuit reconsidered its ruling in *Meacham I*. On remand, the Second Circuit vacated the judgment of the district court by a 2-1 vote and remanded the case with instructions to enter judgment for the employer.

The *Meacham II* majority held that it is the employee's burden to show that the employer's justification for the challenged business action is unreasonable. Applying that standard to the case, the court ruled that the plaintiffs had failed to carry their burden. Refusing to act as a "super-personnel department," the court found that the employer's allegedly subjective decision-making process passed the reasonableness test:

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*Johnson and Linthorst are partners and Lisowski is an associate with the labor and employment practice of Morgan, Lewis & Bockius in Princeton.*

Any system that makes employment decisions in part on such subjective grounds as flexibility and criticality may result in outcomes that disproportionately impact older workers; but at least to the extent that the decisions are made by managers who are in day-to-day supervisory relationships with their employees, such a system advances business objectives that will usually be reasonable.

The decision in *Meacham II* provided employers with helpful guidance on implementing a lawful reduction in force, such as the importance of involving the day-to-day supervisors of eligible employees in the selection process. The Supreme Court may provide further guidance for employers about reasonable decision-making processes in reductions in force. A decision from the Supreme Court is expected by the end of the term in June.

Of additional significance to employers is New Jersey's institution of its own "baby" WARN Act. The Millville Dallas Airmotive Plant Job Loss Notification Act, New Jersey's "baby" WARN Act became effective on Dec. 20, 2007. New Jersey has joined a growing number of states that have enacted notification laws to supplement the plant closure and mass layoff notification requirements in the federal Worker Adjustment and Retraining Notification (WARN) Act.

The New Jersey act generally tracks the federal WARN act in requiring that employers provide 60-day notice before a plant closing (or transfer) or mass layoff. However, the New Jersey act contains several important differences from the federal WARN Act.

Perhaps the most significant distinction is the severance obligation that companies owe to departing employees if the company does not issue a timely 60-day notice announcing a termination or transfer of operations, or a mass layoff of employees. An employer that is not in compliance with the notice requirement under the act shall pay severance equal to one week of pay for each full year of employment to

each full-time employee who is dismissed. This potentially is a much steeper penalty than provided for under the federal WARN Act.

The New Jersey act also has some unique notice requirements. Employers are required to provide notice on a form to be developed by the Commissioner of Labor and Workforce Development that is to be available by March 19. The notice must include, among other things, a statement describing: (1) the number of employees whose employment will be terminated, the expected date on which the transfer or termination of operations or mass layoff will occur, and the date on which each termination of employment will occur; (2) the reasons for the transfer or termination of operations or the mass layoff; and (3) the amount of severance pay that is due as a penalty for failure to provide the required 60-day notice.

The New Jersey act is also much less detailed than that of the federal WARN Act and leaves many issues to be resolved by the courts. For example, the New Jersey Act does not expressly contain many of the exemptions, exclusions, and notice-reduction provisions in the federal WARN Act, including the sale-of-a-business exclusion, or the faltering business and unforeseeable business circumstances notice-reduction provisions.

The *Meacham* case now pending before the Supreme Court and the recently enacted New Jersey WARN Act serve to remind employers that in connection with any reduction in force, a company may be required to answer for its business decisions in court. Careful planning and execution of a reduction in force are critical to ensure that the process is fair and reasonable, and that the employer's actions will hold up to scrutiny if challenged.

Employers should consider the following issues, among others, before implementing an IRIF:

- (1) Use of a voluntary reduction in force to reduce or eliminate the need for an IRIF;
- (2) Business justification for the IRIF;
- (3) Selection criteria and the underlying business rationale;
- (4) Identification of the employees

who will be eligible for the IRIF;

(5) Who the decision makers will be and what type of training they may need on the selection process and criteria;

(6) Who will communicate the decisions to the selected employees and what communication training they may need; and

(7) Any federal or state WARN notification requirements that may be triggered.

Employers should also have human resources and legal counsel review individual and collective decisions, including conducting adverse impact analyses. Employers should be mindful to review: severance, retirement, and other relevant policies and plans in order to understand the impact of the IRIF on those plans, and to make any necessary changes to the plans in advance of the reduction in force and in compliance with federal and state laws. Employers should also review any individual employment agreements (particularly with executives) to determine what obligations exist under those agreements in the event of termination of employment.

If any part of the impacted workforce is unionized, the employer should consider whether there are any obligations under federal labor law and review collective bargaining agreements to ensure compliance with applicable layoff, notice and severance requirements. Employers also should consider offering separated employees a severance package tied to a general release of claims. There are special requirements for releases offered in a group termination or exit incentive program under the Older Workers Benefits Protection Act (OWBPA), and employers should review the latest case law interpreting those provisions to ensure their releases are valid and enforceable.

Finally, employers should develop a post-IRIF "recommitment campaign" designed to proactively encourage remaining employees to recommit to the future success of the company. While reductions in force are difficult decisions for all involved, proper planning and execution can help ensure that the selection process is fair and defensible. ■