Checklist for a Reduction in Force in Troubled Times

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A successful workforce reduction process requires careful and early planning. It may take several months from start to finish. However, challenging economic conditions have made extended planning time a luxury many employers can no longer afford. The situation is not an easy one for employers seeking to cut costs while minimizing their legal risks. If not carefully planned in advance, a workforce reduction can result in considerable liability offsetting any initial savings the employer achieves. Thus, employers considering workforce reductions should keep the following suggestions in mind.

General Consideration

- **Consider voluntary attrition programs** – Determine whether a voluntary resignation program is a viable alternative to implementing involuntary layoffs. Factors influencing the success of voluntary attrition programs include time constraints, business conditions and the availability of sufficient incentives for program participation.

- **Plan for continuous operations and sustained morale** – Evaluate job functions and skills early in the reduction planning process. Decide what is essential (including staffing levels required by law or contractual obligations) or may be eliminated or consolidated. Human resource activities should continue as normally as possible, such as administering performance reviews and counseling notices. Do not use selection for layoff as a substitute for incomplete performance management.

- **Ensure compliance with obligations under state laws** – A workforce reduction may trigger compliance obligations under applicable laws governing payment of wages, insurance and severance benefits continuation, personnel record access, plant closings, layoffs, and involuntary termination. Plot these obligations on a timeline as they often involve notice requirements (such as applicable WARN laws-see below).

- **Determine impact on pension and benefit plans** – Before taking action, investigate whether a layoff will trigger the vesting of pension or benefit plans for some employees. Conversely, it may be prudent to avoid selecting employees for layoff shortly before they are scheduled to become vested in substantial employee benefits.
• **Assess eligibility criteria and plan requirements** – Assure the clarity of eligibility criteria for receiving severance benefits and the variables for calculating such benefits. Also, make plain in policies that employees’ receipt of severance benefits beyond those to which they already may be entitled is conditioned on the signing of a general release of claims.

• **Consider “WARN”** – Be mindful that, if triggered, the federal Worker Adjustment and Retraining Notification Act (WARN) and comparable state laws in New Jersey and New York which may provide specific time limits and notice requirements for certain termination programs.

• **Contract Obligations** – Assess existing limitations, liabilities and/or bargaining obligations related to layoffs created by collective bargaining agreements and other types of contractual employment obligations.

**Selecting Employees for Layoff**

A critical aspect of any layoff is identifying the criteria by which employees will be selected for termination. In the easiest cases, the decision is guided by the nature of and necessity for the work performed (e.g., where a particular position or product line is being eliminated). In other cases, management must determine job-related selection criteria that can pass muster if the reduction program is subject to legal challenge.

• **Prioritize selection factors** – Base selection on quantifiable and objective factors, such as:

  1) length of service or seniority;

  2) elimination of unnecessary job classifications;

  3) elimination of certain categories of employees, e.g., temporary, part-time, or contract workers;

  4) pre-existing job appraisal data related to successful performance of critical post-reduction functions; and

  5) disciplinary actions taken for severe or persistent performance problems.

• **Strive for objectivity** – Identify the individual abilities of similarly-situated employees in necessary positions to perform essential job duties. Analyze the comparative performance and skills of employees with emphasis on fulfilling the post-reduction job functions and requirements.
• **Review for possible disparate impact** – Evaluate initial selection decisions prior to implementing layoffs. Determine if there will be any disproportionate effect on minorities, women, workers 40 years of age or older, or employees in other protected categories. If so, evaluate whether the selection of these individuals can be justified by business necessity.

• **Craft releases to comply with statutory requirements** – Employers can dramatically reduce their exposure to individual and class-wide claims of discrimination by obtaining releases of such claims from employees who participate in voluntary and involuntary workforce reduction programs. Make sure the releases comply with applicable legal requirements such as procedural requirements established by the Older Workers Benefit Protection Act (OWBPA) for waiver of age discrimination claims.

After completing a voluntary resignation program or an involuntary reduction in force, management should take affirmative measures to re-energize remaining employees to meet new challenges.

For more information, please feel free to contact a Pro Bono Partnership staff attorney. Click here for contact information.

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