

**Avoiding Liability in Work Force Reductions and Layoffs
– Walking the Minefield –**

With the increasing number of reductions in force (“RIF’s”), or layoffs, comes more potential for “wrongful termination” liability and related claims. Before terminating a group of employees or an individual, the company must consider a number of worker protection laws. This checklist highlights the critical issues of:

- ? WARN Act
- ? Discrimination Claims
- ? Retaliatory Firing
- ? Severance Pay
- ? Releases of Liability
- ? Older Worker Protections
- ? The Ultimate Question

The WARN Act

In a RIF, or layoff, the first legal issue is whether or not WARN applies. WARN, short for the “Worker Adjustment and Retraining Notification Act,” is a federal notice statute designed to prevent surprise in the case of mass layoffs. WARN only applies if the company has more than 100 full-time employees or full-time equivalent employees and the RIF involves a plant closure or mass layoff, both of which are defined terms under the statute.

If WARN applies, the company must give a 60-day advance notice of the plant closure or mass layoff. The form of notice is specified by statute. There are certain exceptions, for example, if the company actively seeks funding to stay open, then the notice can be deferred for a limited time. Penalties for failure to comply with WARN

include damages based on the period in which notice should have been given, including the lost wages for those involved.

Discrimination Claims

The next consideration in all layoffs is whether the selection of particular employees is discriminatory. This typically involves the issue of age discrimination, but can also involve discrimination in other protected categories, namely race, religion, color, national origin, ancestry, disability, medical condition, marital status, sex, sexual orientation, and pregnancy. The discharged worker may seek to prove discrimination under one of two theories, either disparate treatment or disparate impact.

Disparate Treatment

“Disparate treatment” means the protected category was actually a motivating factor in the decision. For example, “We chose Arnie and Jack because they were the oldest and making the most money.” If the employee heard this rationale, it would almost certainly give rise to an age discrimination case. Usually, the reason is subtler, such as; “We needed a fresher look around here,” from which a jury might infer age bias. If age, gender, race, or other protected category can be shown to factor into the decision, then the company may be subject to a claim for disparate treatment discrimination. Sometimes the case is one of “mixed motive,” where the employer admits the decision was partly based on age, but that even if Arnie or Jack were not the oldest, he would have been fired anyway. This becomes a very difficult case for the employer, who has the burden of proof in a “mixed motive” case.

Disparate Impact

“Disparate impact” discrimination occurs when there is an apparent nondiscriminatory reason but there is a discriminatory effect on a protected group. In these cases, the employee typically relies on statistical analysis to support the claim, such as, when counting all the laid off workers, ninety percent are over age forty, but the entire company had only fifty percent workers over forty. This is a typical method of proving an age bias case when more highly compensated employees are laid off. Again, the burden of proof may shift to the employer to prove nondiscriminatory intent.

[Tips to Avoid Discrimination Claims](#)

So what can be done to avoid discrimination claims? It is important that layoff criteria be as objective and classification-neutral as possible. For example, the company might choose length of service, sales volumes, other performance criteria or other neutral factors unrelated to the protected classifications. The objective, neutral criteria should be described in writing. Once the group of workers is chosen for layoff, it should be tested statistically to confirm that a disproportionate number of older workers, one sex, one nationality, etc. is not overly represented in the group of terminated employees. Finally, the decision and criteria should be announced to the worker in the presence of at least two company witnesses – e.g., a manager and HR representative.

[Retaliatory Firing](#)

A related issue is whether any terminated employee might claim he or she was selected based on retaliation for some legally protected conduct. These “retaliatory firing” or “whistle blower” claims have become very popular. Typical of these cases are retaliation claims brought by workers who have reported sexual harassment, or some other legal or safety violation, such as the company’s failure to comply with overtime laws. Thus, if a terminated employee had previously lodged such a complaint with the company, that person might then have a potential claim for retaliatory termination. In effect, by lodging the complaint, the employee gains some form of protected status – similar to those in the protected categories listed above - in the event of termination.

[Severance Pay](#)

In any termination, whether a layoff or individual firing, the company must carefully consider whether to offer severance pay. This would be additional pay that is not otherwise owed or promised. In contrast to wages earned and accrued vacation, which are already owed, there is no legal obligation for the employer to offer any severance payment. (This is not always understood by departing employees - in fact I believe many jurors would assume that longer-term employees are owed severance pay.) In addition, some companies have already promised severance pay – or “notice pay” – in the employment agreement or employee handbook, but under the law, there is

no duty to pay severance in the absence of an obligation or promise. It is optional and should usually be done in connection with a broad, written release of claims.

Releases of Liability

If the company decides to pay severance, it should require a written release of the employee's known and unknown claims. This is the consideration or quid pro quo for the extra payment. The company will be "buying its peace." Of course, once a written release is presented to an employee, which discusses releasing all legal claims of any kind, under various federal and state laws, it may appear to the employee that there are valid claims to bring. And, since a written release is a "legalistic" document, the employee will often want to review it with a lawyer and/or negotiate further. These are several reasons to consider not offering severance in the individual termination case, unless the employer is fairly certain that the employee will accept. Be ready to negotiate!

But there are other benefits to using a written release, e.g., to confirm confidentiality obligations, return of company property, non-solicitation clauses and invention assignments. Each case, therefore, needs to be considered carefully before simply putting a severance offer and release in front of the terminated employee. The offer can be explored first with the employee, to glean whether it would be accepted, and should also be discussed with the company's counsel.

Older Worker Protections

To give full protection, any release offered to an employee age forty or over must include certain warnings under the Older Workers Benefit Protection Act ("OWBPA"). Among the more important warnings are that the employee has been given twenty-one (21) days to consider the offer (45 days in the case of a RIF) and seven (7) days after signing to revoke the agreement. Therefore, the severance payment should never be made before the eighth (8th) day after the employee signs the agreement. Also, in a RIF, the company must notify the affected employees of the ages and positions (but not the names) of all those terminated.

The Ultimate Question

Finally, before any termination decision is communicated to an employee, the company should ask itself: will the person be surprised? If the answer is yes, then, at minimum, the message should be delivered very carefully (by at least two company representatives), and followed by written confirmation. Perhaps more homework or rehearsal should be done beforehand. For many, termination is one of those major life events that stirs the psyche and ego in ways that will tend to cause reactive and unpredictable conduct. So, beware the minefield in terminations!

Recent Case Note:

In a related development, the California Supreme Court has ruled that employers may discriminate by providing different job benefits to younger employees. In June 2002, the court decided the case of *Esberg v. Union Oil Company of California* ("UnoCal"). Mr. Esberg had sued UnoCal for refusing to let him pursue a master's degree through a company-sponsored education plan that paid tuition. Esberg, 56, had already received a bachelor's degree, but was told that he was too old to "invest in" further. Meanwhile, other, younger employees qualified for the benefit. The court applied the California Fair Employment and Housing Act ("FEHA"), to hold that employers may discriminate based on the "compensation, terms, conditions or privileges of employment."

Since the Court's decision was unanimous, the case could prove to have broad applicability. For example, future courts could find this ruling applicable to other benefits, such as stock options, vacation time, sabbaticals, and other conditions or privileges of employment unrelated to hiring, firing and promotions.

However, California employers remain subject to federal law, which specifically prevents age discrimination when it comes to health and insurance benefits and related programs. And, of course, no matter the law, it may still amount to bad company policy to openly discriminate against older employees in connection with benefits offered to the work force as a whole.

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