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[Podcast]: Reduction in Force (RIFs) Trends in the Financial Services Industry

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In this episode of the Proskauer Brief, partners Steven Hurd and Patrick Lamparello discuss recent trends in reductions in force (RIFs) in financial services and some of the main reasons employers are engaging in them. These include automation of jobs or other technological developments, cost reductions, investor preferences, employee redistributions, and even Brexit has been a reason for downsizing. So be sure to tune in as we discuss best practices an employer can engage in to carry out a RIF as well as practical alternatives an employer can consider to a reduction in force.

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Steven Hurd: Hello and welcome to the Proskauer Brief, Hot Topics in Labor and Employment Law. I'm Steve Hurd and on today's episode I'm joined by Pat Lamparello. Today we're going to discuss reductions in force. So let's get started. Pat, what have been the recent trends in reductions in force and what are the main reasons employers are engaging in reductions in force?

Patrick Lamparello: So, there has been a trend recently of employers in certain industries downsizing their work force and there are a number of reasons employers have cited to us as reasons for going through these reductions in force, including automation of jobs or other technological developments, cost reductions such as meeting projection goals, investor preferences, employee redistributions such as making room for new talent and some of our international clients have mentioned to us Brexit as a reason for downsizing. Regarding trends in what we see, we see employers offering severance and outplacement services, as you probably would expect and there's also the required notice period which we'll touch on in a little bit. Now, Steve, what factors should be identified when contemplating a potential reduction in force?

Steven Hurd: Well certainly how many employees are being separated and what the demographics and ages of those individuals are. You should evaluate whether there's going to be any disparate impact being created by the selections. We'll discuss in a little bit the decisional unit and what federal and local warrant implications may arise from a reduction in force. Employers should also consider their existing policies, whether it be severance or notice or other policies that may come into play, and certain sensitive issues such as employees on leave or employees who have made prior complaints in the past. And then finally employers should determine whether they want to have a group termination program. Pat why don't you explain what a group termination program is?

Patrick Lamparello: Of course, Steve. A program exists when an employer offers additional consideration for the signing of a waiver pursuant to an employment termination to two or more employees.

Steven Hurd: Now I mentioned earlier the decisional unit and its significance. What is a decisional unit?

Patrick Lamparello: Yeah, so you're right Steve. This is pretty significant, because this probably is the area where most questions come up when conducting a RIF. A decisional unit is that portion of the employer's organizational structure from which the employer selected the impacted employees for the employment termination program. When considering the appropriate decisional unit employers should consider organizational structure and the decision making process. In other words, who is making the actual decision? What is the pool of employees being considered? Now, Steve, what are some of the best practices an employer should engage in when deciding on whether to carry out a RIF?

Steven Hurd: Well once the selection criteria are created as to what factors will go into selecting individuals for the RIF there should be a contemporaneous document as to the reasons for those criteria. In the future the employer will want to be able to show why certain individuals were selected. Additionally, the selection criteria should be reviewed to make sure there are legitimate reasons for laying people off and that they're being applied consistently, and then finally employers should perform a statistical analysis of the decisional units and the other subgroups to determine if any disparate impact on a particular group is being created. Now we also mentioned WARN Acts, both federal and local. Pat, what are the WARN Acts and how can an employer insure compliance with them?

Patrick Lamparello: Yeah, of course, Steve. So, the WARN Act is the Work Adjustment and Retraining Notification Act and this requires advance notice to employees and to certain government officials in the event of a plant closing or a mass layoff affecting the requisite number of employees. And there are differences between federal and state WARN Acts with respect to items such as the number of employees that have to be affected or with respect to the number of days of notice that an employee has to give to the affected work force.

Steven Hurd: And what are the penalties for violating the WARN Acts?

Patrick Lamparello: Sure, Steve, so, employers could be liable for back pay, benefits or a fine for each day that they fail to notify the appropriate government agency. Steve, now how about ERISA? When a program is an ERISA plan, for the purpose of a RIF analysis, are there any significant differences that an employer should be aware of?

Steven Hurd: So, a severance pay arrangement is covered by ERISA only if it constitutes a plan, fund or program established or maintained by an employer. If a written severance plan is operated in compliance with ERISA it is usually strong evidence of ERISA coverage.

Patrick Lamparello: If a program qualifies as an ERISA plan, what are the corresponding procedural and substantive requirements?

Steven Hurd: Well, there are a lot of them. There certainly needs to be a formal plan document, there are also annual reporting requirements, if there's at least a hundred participants, and there's many other reporting and disclosure requirements. A Summary Plan Description needs to be distributed to the participants and any time there are any changes made to the plan a Summary of Material Modification must be issued to the participants. You also must have a claims and appeal procedure. I suggest employers consult with an ERISA lawyer in creating, evaluating and operating these plans as they are very complicated and detailed and can present many pitfalls.

Now moving on, Pat, are there any practical alternatives an employer can consider to a reduction in force?

Patrick Lamparello: Actually, Steve, yes, there are. The one that is most common that we see is a voluntary resignation incentive program but there are others that an employer might want to consider. Now, Steve, with respect to the RIF documents, what are some of the key considerations when an employer drafts the documents for a reduction in force?

Steven Hurd: Well any release of claims must be supported by additional consideration and also must have specific references to the statutes that are being released. There should an explicit carve out to allow for participation in agency proceedings like the EEOC or a local agency and depending on the circumstances you may want to include other obligations like confidentiality, or non-disparagement. Employers should also note the specific requirements for an enforceable release for individuals who are over age 40 and may want different forms for employees over and under 40 and then of course state law requirements should be addressed. For example, California has specific waiver language that must be used and New Jersey has a 21 day consideration period even outside of the age context. Again, consulting an employment lawyer is your safest bet.

Well that is all of our time. That you for joining us today on The Proskauer Brief. Stay tuned for more hot topics in labor and employment law and be sure to follow us on iTunes, Spotify and Google Play.

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