

10 Ways To Combat Risks When Cos. Reduce Their Workforce

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Varying industries saw rapid recovery and growth as society emerged from the pandemic in 2021 and 2022.

High consumer demand led to a spike in the job market and a hiring frenzy in many industries. Despite the strong job market, recession is predicted, and the media already regularly covers massive layoffs in the technology, transportation, retail, crypto and other industries^[1]. If layoffs are on the horizon, employers should consider how to prepare now for a possible reduction in force.

From the employer perspective, a reduction in force, or RIF, sets in motion several legal hurdles that require planning and strategy.

When making RIF decisions, employers need to be mindful of the Age Discrimination in Employment Act and the Older Workers Benefit Protection Act, both of which prohibit age discrimination in employment, and which also set forth additional considerations if a RIF encompasses protected employees.

Employers may also be required to provide Worker Adjustment and Retraining Notification Act notices if applicable, and may want to consider offering severance in exchange for employee releases.

Employers will also need to consider the potential for either disparate impact or disparate treatment class and individual claims, as well as claims brought by the [U.S. Equal Employment Opportunity Commission](#) or analogous state agencies.

Legal consequences are a possible outcome, of course, in addition to the necessity of navigating the practical effects of a RIF on an employer's operation and structure. Employers therefore should take steps far in advance to mitigate the risks imposed by a RIF.

Employers should keep these 10 items top of mind now to best protect themselves from recession-associated risks later:

1. Assemble evidence of the legitimate business reason for the RIF.

As soon as an employer becomes aware that a RIF may be necessary, it should begin compiling, documenting and preserving evidence demonstrating the employer's legitimate business reasons for the reduction, whether it's economically driven cost-cutting, structural reorganization or other factors.

It is a best practice to consider conducting some of this work subject to attorney-client privilege. Such evidence may include emails; charts; graphics; spreadsheets; analysis; memorandums and communications among executives and managers, human resources and legal counsel; meeting minutes; and other documents setting forth or supporting the rationale for the RIF.

Employers should also document the objective process for how the RIF selections will be made.

Employers who are able to show that the RIF resulted from a legitimate business need are better able to defend against claims of discriminatory treatment, especially when the documentation of the need for the RIF and the application of objective selection factors predates the alleged discriminatory action.

2. Ensure performance reviews are current.

Aside from justifying the overall need for the RIF, another risk mitigation strategy involves the ability to justify the reasons the employer selected any particular individual for the RIF.

Often, termination selection criteria includes historically poor performance. In order to have a compelling argument that the worker was selected wholly or in part because of poor performance, the employer will need to be able to produce written documentation of the employee's performance.

To that end, employers will want to ensure that performance reviews are robust, account for performance deficiencies in a clear and honest manner, and are up to date before and throughout the RIF process.

3. Ensure disciplinary action reports are updated in a timely manner.

Objective RIF selection factors often take disciplinary action into account.

While performance reviews can be a useful tool in rationalizing the termination decision, since performance reviews are generally conducted once or twice a year they may not be sufficient to counter a discriminatory treatment claim on their own.

Documentation of disciplinary actions, including verbal and written warnings or performance improvement plans, can be used to supplement poor performance reviews.

Thus, it is crucial that employers ensure that all disciplinary action reports are updated and current, and instruct their managerial and supervisory staff to be diligent in timely documenting disciplinary actions as they occur.

4. Close out ongoing investigations.

Active investigations into employee complaints of discrimination, harassment or improper workplace conduct can frustrate the RIF selection process.

Employees involved in investigations — whether they have raised the complaint or have participated in the investigation as witnesses — can raise the potential for claims of discriminatory treatment or retaliation if an employee is terminated while the process is ongoing or has only recently been completed.

Thus, if feasible, employers should promptly conduct and close out any pending or active investigations prior to making and documenting RIF decisions.

5. Make a list and check it at least twice.

When implementing the objective process for RIF selections referenced above, employers will need to make decisions concerning which departments, divisions and individual employees will be encompassed by the RIF.

In particular, employers should consider whether certain classes of employees, such as C-suite or executive employees, will be included or excluded from future reductions.

In making such decisions, employers will need to decide who the decision makers are in each department or division and who will ultimately collaborate and approve the decisions. Employers will also need to determine how best to fill leadership gaps that may arise — this determination may warrant a company reorganization or shifting of job duties and responsibilities.

Moreover, employers will want to take steps to mitigate financial risk — this mitigation can be accomplished through well-drafted separation and release agreements with a focus on severance, as well as strong cooperation and transition clauses.

6. Navigate issues surrounding employees on protected leave.

Federal and state laws often require employees who are on leave for medical or other state or federally protected reasons be returned to their original job or a substantially similar job upon termination of their leave.

Thus, employers will need to be cautious when deciding to designate such employees for layoff or termination and should determine whether it is possible to justify the employee's exclusion from or inclusion in the RIF by relating the decision back to the legitimate business reason.

Employers may benefit from the protection of the attorney-client privilege when determining how best to mitigate the risk where the employee selection process creates vulnerabilities.

7. Review employment contracts, policies and past practices.

Once an employer has a preliminary idea of which employees are likely to be implicated by the RIF, they will want to review any applicable employment contracts for provisions regarding termination and severance to determine what contractually required costs, if any, will be associated with terminating the agreement.

They will also want to review what steps, if any, the employer will be obligated to take to effectuate termination under the agreement.

Here, it may be useful to document the relevant terms, costs and obligations for each reviewed contract in a spreadsheet that can serve as a reference guide.

8. Make decisions on severance and release agreements.

Beyond the contractual arrangements with the employees —which often contain their own severance and release provisions — if an employer has enacted policies or has established a pattern and practice pertaining to termination rights, layoffs or severance, it is likewise recommended that the employer review these policies or past practices to ensure future termination decisions and severance offers are, to the extent possible, consistent with the employer's internal policies and past practices.

Consistency, especially with respect to severance offers, may help combat claims of discriminatory treatment.

One of the most common risk reduction methods is offering severance in exchange for a general release of claims. Employers will need to consider the level of potential legal and financial risk being assumed, and the financial capabilities of the company in determining whether to provide severance and release agreements to terminated employees.

If employers decide to offer severance and releases, they will need to ensure they are meeting the legal requirements for group terminations.

This step may entail Age Discrimination in Employment Act and Older Workers Benefit Protection Act disclosures, and if applicable, Worker Adjustment and Retraining Notification Act notice. Employers should also be aware that a formal severance plan may trigger certain obligations under the Employee Retirement Income Security Act if the severance plan is considered a welfare plan under ERISA.

When drafting severance agreements, employers should also keep in mind new and emerging federal and state fair pay acts. Severance amounts are often based on job title or responsibilities, tenure with the company, and the degree of risk of the termination, not gender.

Pay transparency and internal audits of severance offers are useful tools for justifying and confirming that employee compensation, including severance, is in line with federal and state fair pay acts and is based on bona fide factors other than sex.

9. Conduct an adverse impact analysis.

Conducting an attorney-client privileged adverse impact analysis, either internally or externally, can provide useful information to employers.

An adverse impact analysis provides a statistical review of whether and how much intentional discrimination may be implicated in the RIF selections.

Results from the adverse impact analysis may inform and may require a review of who should be included or excluded from the final RIF list to reduce the mere appearance of discrimination, whether on a disparate treatment or disparate impact theory.

10. Develop internal and external messaging.

Finally, throughout the RIF preparation process, the employer should consider how to message the RIF decisions, both internally and externally.

Internal messaging should be aimed at preserving company morale and culture in the remaining workforce, and at mitigating risk among the terminated employees.

External messaging should be aimed at preserving the company's image and stature with consumers, investors and the press, while also retaining or increasing the company's strength in the employer's market or industry.

Conclusion

Not surprisingly, following these 10 recommended preparation steps cannot be done overnight and often requires a significant commitment of company resources.

With forethought, planning and execution, employers will be better situated to reduce the legal risks and operational hurdles that arise from a RIF, and to defend against the inevitable claims that may arise out of a large-scale RIF.

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[1] [Mass Layoffs in 2022: What's Next for Employees? \(mondo.com\)](#)

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