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Managing Legal and Reputational Risks When Right-Sizing Your Workforce

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Reductions in force can help lower your company's operating expenses, but if not undertaken with empathy, they might have the opposite effect.

The "Great Resignation" has left a general scarcity of employees in the labor market just as the economic climate is shifting toward a downturn. In response, many employers are trying to streamline their operations and right-size their workforces by conducting reductions in force (RIFs).

RIFs are complex and technical in any climate, but in the post-pandemic world of remote work, many employers face the added challenge of having employees spread throughout the country. As a result, employers conducting RIFs not only have to deal with messaging to employees not present in their offices but might also be subject to the laws of multiple jurisdictions.

Besides challenges with technical compliance, layoffs in a remote or hybrid environment also present employee relations issues. A poorly conducted RIF can leave employees frustrated and angry, increasing the likelihood of negative press coverage, social media attention or litigation. But a thoughtful, well-executed RIF rarely makes the news.

For these reasons, planning and preparing for a RIF is just as important as its execution.

Litigation risks

Because RIFs impact groups of employees, they are ripe for class actions, which can result in significant liability — or, at a minimum, significant expense — for an employer.

Federal and state Worker Adjustment and Retraining Notification Act (WARN) laws, for example, have strict requirements with respect to notice for RIFs of certain magnitudes. Failure to follow these requirements can result in class-wide litigation, and in such cases, attorneys' fees can be sizable even if the damages are not.

Poorly conducted RIFs can also lead to class-wide or individual discrimination claims when employees doubt the company's motives. For these reasons, it is particularly important to assess both the optics and the analytics of the potential group of affected employees before making final decisions. A disparate impact analysis can be a particularly useful tool in assessing and mitigating this risk early on in the process.

And employers with large virtual or hybrid workforces might face claims unique to the jurisdictions in which their employees live. As a result, employers should consider the laws not only of the jurisdictions in which the employer operates, but also those of each state and local jurisdiction in which an affected, remote or hybrid employee lives and works.

For employers with a large remote workforce, navigating these laws can be an undertaking.

Mitigating litigation risks

Messaging employees is just as crucial in reducing litigation risks as meeting the technical obligations and executing on the logistics.

Being thoughtful in your employee communications is essential to protecting brand reputation, especially given how easy it is for disgruntled employees to take to social media to decry a company's poor handling of its terminations.

On the other hand, the best executed RIFs are considerate and thoughtful in both their process and messaging — and, as a result, receive little negative press coverage. In other words, it's important for employers undertaking a RIF to put its workers first, considering how they will be affected and thinking through what steps the company can take to soften the blow.

Here are a few ways you can manage a RIF to minimize litigation risk.

Communicating empathetically

Transparent communications are key so that employees understand why a RIF is necessary and have a reason to believe the selection criteria were fair and based on business needs.

Many employers make town halls, early in the process, part of their communications, because they give leaders a chance to explain the rationale of the RIF, and then assure employees that the company will do its best to help them through the process.

Of course, this messaging must be truthful and consistent. Accordingly, it is essential to create a comprehensive communications plan setting forth the rationale for the RIF early on, and then be consistent with that messaging across all communications — to the public, employees, shareholders or clients

Crafting non-discriminatory criteria

In addition to understanding the legitimacy and necessity of the RIF, employees want to know the RIF was fair.

To create a RIF that is perceived as fair by both affected and remaining employees, it is essential to devise clear, non-discriminatory objectives at the beginning of the process, and apply them consistently throughout. For example, concentrating layoffs in business areas that are clearly struggling would likely be viewed by employees as a sensible business decision.

Crafting sensible criteria is particularly important with respect to decisions about the decisional unit (the group from which the cuts will be made), and the selection criteria for employees from that group that will be cut.

A defensible selection process will be rational, consistent, non-discriminatory and supported by a business objective.

Person-to-person meetings

Even the best-worded messaging falls flat if delivered impersonally. In the virtual environment, it may be tempting to notify affected employees that they have been selected for termination by email rather than through individual meetings, but doing so might be a costly mistake.

Individual conversations allow the employer to answer questions and address employee concerns at the outset. Each employee deserves to hear this news in an individual conversation, preferably from a manager or HR representative they know. Where possible, these conversations should be conducted in person, with a one-on-one video conference as an alternative.

Preparing agreements

Separation packages with properly crafted releases can soften the blow to employees and protect the employer against future litigation. It's particularly important to ensure that the separation agreements provided to each employee contain comprehensive releases that waive an employee's claims under all relevant laws.

For remote employees, this could include releases that take into account where the company is located, where the employee's assigned office is located or where the employee actually works. In addition, some employers will offer employees job placement services or other tools to provide a soft landing for employees as they transition to their next role.

Conclusion

As economic uncertainty continues, many employers will need to undertake cost-saving measures such as RIFs. While RIFs can help lower operating expenses, if not undertaken with empathy, they may ultimately have the opposite effect.

Careful and thoughtful planning, execution and communication strategies at every stage in the process, in consultation with experienced counsel, can mitigate these risks.

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