Reductions In Force: Considerations, Checklists and Best Practices

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Overview

- Checklist / issue spotting
- OWBPA requirements
- Adverse impact analysis and rationale review
- WARN issues
- ERISA issues
- Voluntary programs
- Typical documents
- Agreement / release "best practices"

Recent News…

- Economy slowing
- Increased interest rates
- Increased borrowing costs
- Trade war and uncertainty about tariffs
- Mass layoffs
  - Ex: GM announced a major restructuring of its global business and will reduce its salaried workforce by 15%

RIF Rationales

- Cost reduction/meeting projection goals
- Automation and other technological development
- Internal employee redistribution
- Making way for new talent

RIF Checklist and Issue Spotting

- Initial planning: purpose and scope of program
- Determine selection process and criteria
- What benefits will be offered?
  - Assess pre-existing plans, policies, agreements

Getting Started: What You Need to Know

- How many employees are being separated?
    - Is it a group termination under the ADEA/OWBPA?
        - Need to obtain demographic data of employees in “decisional unit”
        - Need to determine location of selected employees
    - Need to assess WARN implications – recent terminations at any affected sites may be aggregated
- Are employees 40 years of age or older?
    - Requirements of ADEA/OWBPA (29 U.S.C. 626(f))
    - Treatment of under-40 employees is context-driven
- Voluntary vs. involuntary?

Voluntary Programs: Practical Considerations

- Consider voluntary resignation incentive programs as a means of avoiding or reducing the need for involuntary layoffs
- Need to discuss timing and communications vis-à-vis potential involuntary program
- Early discussion of needs and scope of program can mitigate placing “voluntary” nature of program in jeopardy
  - Determine the eligibility requirements for participation
  - Employers can reserve discretion to accept/reject participants, but must understand risks

Voluntary Programs: Practical Considerations (cont'd)

- Age-related considerations
  - Use of age plus service as eligibility criterion
  - Interplay with preexisting retirement programs

- Benefits must provide an incentive

Getting Started: What You Need to Know (cont'd)

- Is there a standing severance policy/practice/handbook?
- Is there an applicable severance plan?
- Do any employees have an individual employment contract or offer letter?
  - Severance provision?
  - Notice provision?
  - Other provisions to incorporate/survive termination?

Getting Started: What You Need to Know (cont'd)

- What consideration is being offered, and what is already owed to employees?
  - Agreement must be clear about what is subject to release and that to which employee is already entitled
- Are there any special concerns about any employees or the circumstances?
  - Contentious vs. amicable separations
  - Simple vs. complex agreements
  - "Sensitive" issues (e.g., employee on leave, employee who has made complaints, etc.)
- Be mindful of new laws affecting release agreements – e.g., New York, New Jersey

What is a Group Termination “Program”?

- 29 C.F.R. § 1625.22 (F)(1)(iii)(B)
  - A “program” exists when an employer offers additional consideration for the signing of a waiver pursuant to an employment termination (e.g., a reduction in force) to **<u>two or more employees</u>**
- 29 C.F.R. § 1625.22 (F)(3)(i)(B)
  - A group termination program involves a selection process that will include, as well as exclude, employees within a “decisional unit” from the “program”

NOTE: A “program” must meet the requirements of the OWBPA only if one or more employee is age 40 or older

What is a Decisional Unit?

- 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 identifying the scope of the "class, unit, or group," and "job classification or organizational unit," an employer should consider its organizational structure and decision-making process
  - Need to understand the underlying business decision for this action
- Identifying the decisional unit is a case-by-case exercise

Decisional Unit Examples:

- *Facility-wide:* Ten percent of the employees in the Springfield facility;
- *Division-wide:* Fifteen of the employees in the Computer Division;
- *Department-wide:* One-half of the workers in the Key Department of the Computer Division;
- *Reporting:* Ten percent of the employees who report to the Vice President for Sales, wherever the employees are located;
- *Job Category:* Ten percent of all accountants, wherever the employees are located, will be terminated next week.

Group Terminations: Rationale Review and Adverse Impact Analysis

- Rationale review
  - Must first understand purpose and scope of program
  - Best practice for decision makers to document reasons for selection criteria and selections made thereunder
    - "Reasonable Factors Other Than Age" rule highlights importance of contemporaneous documentation and guidance to decision makers
  - Review selection criteria and selections for legitimacy and consistency
- Adverse impact analysis
  - Gather demographic data – e.g., age, race and gender
  - Statistical analysis of relevant decisional units and other subgroups
  - Consider potential modifications and/or risks of selections

RIF Checklist and Issue Spotting (cont'd)

- Evaluate WARN issues and plan for compliance
- Develop communications plan and train managers
- Special considerations (e.g., employees on leave)
- Timing of terminations relative to program announcement and relationship to severance documentation, WARN compliance
- Preparation of documentation – whether to "ERISA-fy"
- Outplacement services

WARN Act Compliance

- Requires advance notice to employees and various government officials in the event of a plant closing or mass layoff affecting requisite number of employees
- Federal and state requirements differ with respect to employer coverage, affected employee thresholds, required notice, and other aspects
- Some limited “exceptions” that allow for untimely notice, such as the “unforeseeable business circumstances” and “faltering company” provisions
- Early issue spotting and evaluation are key

Summary Comparison of New York, California and Federal WARN Acts

	NY WARN	California WARN	Federal WARN
Applicable Employers	50 or more employees	75 or more employees at a "covered establishment"	100 or more employees
Notice	90 days written	60 days written	60 days written
Minimum Affected Employees	• 25 over 30/90 day period (AND at least 33% of workforce for mass layoff or *relocation*) OR • 250	50 over 30 day period	• 50 over 30/90 day period (AND at least 33% of workforce for mass layoff) OR • 500
Action Rights	▪ Administrative Enforcement ▪ Private Right of Action	▪ Administrative Enforcement ▪ Private Right of Action	Private Right of Action Only

Penalties for Violating Federal WARN Act

- Violating employers are liable to each aggrieved employee who suffered an employment loss for:
  - Back pay at the average regular rate of pay received by the employee during the last three years of employment, or the employee's final rate of compensation, whichever is <u>higher</u>; and
  - Benefits under an employee benefits plan – including medical expenses during the employment loss that would have otherwise been covered
- Liability is capped at a maximum of 60 days
- An employer who fails to properly notify local government officials is subject to a civil penalty of not more than $500 for each day of such violation
- Similar penalties exist for employers under the NY WARN Act

Does ERISA Apply?

- Depends on the circumstances…
- There might be advantages to having an ERISA plan
  - Preemption: federal jurisdiction; no state claims (wage, reverse discrimination), jury trials or punitives
  - Discretionary standard of review: only if in the plan document
  - Written plan document encourages consistency and clarifies criteria, exclusions and formulas (claims of oral promises, patterns of past behavior, etc. harder to make)
  - Claims and appeals procedure is a pre-litigation burden
  - Contractual statute of limitations

Does ERISA Apply? (cont'd)

- If ERISA applies, you need to ensure compliance with the following requirements:
  - Formal plan document
  - Form 5500 requirement (annual report if at least 100 participants)
  - Reporting and disclosure requirements
    - SPDs (we structure to be the same as the formal plan document) and SMM
  - Less flexibility to ignore terms
  - Claims and appeal requirements

Typical Documents We Draft (or Review)

- ERISA Severance Plan (sometimes severance policy or guidelines)
- Separation Agreement and General Release
- Cover letter or memorandum
- OWBPA Disclosure Statement
- For voluntary program – election form and acceptance/rejection notices
- Communications pieces
  - For executives, managers, and/or human resources personnel
    - May also advise on corporate communications outside company
  - For group/individual meetings with selected employees and remaining employees
  - May take form of scripts, talking points, or frequently asked questions (FAQs)

What to Include in the Agreement

- Release of claims must be supported by additional consideration
- Specific references to statutes released (including state laws)
- Cannot release “future” claims or certain substantive claims (e.g., workers’ comp.)
- Need explicit carve-outs to allow for participation in agency proceedings (e.g., confidentiality, non-disparagement provisions)

What to Include in the Agreement (cont'd)

- Tailor other obligations based on circumstances, prior practice, existing agreements, and goals, e.g.:
  - Confidentiality of agreement
  - Non-disparagement
  - Confidential information
  - SEC enforcement language
    - OSHA has also issued policy guidelines regarding approval of settlement agreements in whistleblower cases
  - Trade Secret language pursuant to Defend Trade Secrets Act
  - Cooperation
  - Return of property

What to Include in the Agreement (cont'd)

- Releases must be "knowing and voluntary" -- for employees age 40+, ADEA/OWBPA set forth specific requirements:
  - At least 45 days from date of receipt for consideration period
  - 7-day revocation period
  - Cannot include covenant not to sue under ADEA
  - Cannot include "tender back" of consideration prior to filing ADEA suit
  - Advise to consult with attorney, in writing
  - Must include OWBPA disclosure statement
    - Sets forth eligibility requirements and time limitations for participating in group termination program
    - Identifies all employees in decisional unit (job titles and ages) and whether each was "selected" or "not selected" for participation in the program
    - Differences for involuntary and voluntary programs

What to Include in the Agreement (cont'd)

- Decide whether to use different forms for over/under age 40
- Agreement should acknowledge receipt of OWBPA disclosure statement (if applicable) and any other explanatory severance documentation (e.g., severance plan)
- State law requirements
  - California – specific waiver language (Civil Code § 1542)
  - New Jersey – 21- day consideration period for all, regardless of age
  - Specific references to statutes recommended and in some cases required

RIF Checklist and Issue Spotting (cont'd)

- Security and communications
  - Return of property
  - Managing employee exits
  - Scripts and FAQs
  - Safeguarding confidential information and employer property
- Final wage payments, including vacation and other accrued benefits
- State law requirements with respect to terminations

Key Takeaways

Plan, Plan, Plan…

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