May 2008

Understanding Reduction in Force Issues for the Employer

By Sally Rogers Culley and Matthew Carson
sculley@rumberger.com mcarson@rumberger.com

Though it seems that nobody can agree as to whether we are in a recession, moving into a recession, or avoiding a recession altogether, there can be no doubt that the economy has seen better days. Rising costs, uncertain investments and decreasing sales all have a significant impact on a company's bottom line. The most common and effective defense strategy employed by businesses to address this problem is to reduce costs. Sometimes minor adjustments will be sufficient to ride out the storm. However, sometimes it becomes necessary for a company to eliminate a portion of its workforce. If your company is faced with just such a situation, here are a few things you need to keep in mind:

WARN Act

In 1998, Congress passed the Worker Adjustment and Retraining Notification (WARN) Act, in an effort to ensure that workers have sufficient time to prepare for the transition between jobs. The WARN Act applies to businesses that employ 100 or more full-time employees. Under this Act, affected employers are required to provide 60-days' advance notice of "plant closings" and "mass layoffs" to covered employees. A "plant closing" is the permanent or temporary shutdown of an employment site, or the shutdown of a facility or unit within an employment site that employs 50 or more full-time employees. A "mass layoff" is a reduction in workforce of between 50 and 499 employees if those employees represent at least 33% of the total full-time workforce, or any reduction in workforce of 500 or more employees.

The WARN Act is not triggered if the above conditions are not met, if the reduction is for 6 months or less, or if the reduction in work hours is not 50% or more in each month for a 6-month period.

If the WARN Act is triggered but an employer fails to give the required notice to affected employees, the employer could be liable to the employee for up to 60 days of back pay and benefits for each day the employer is in violation.

Exceptions to the 60-day notice requirement include unforeseen business circumstances, natural disasters, and situations where the company is seeking capital or business to avoid an employment site shutdown (but only where providing advance notice would negatively affect its ability to obtain the capital or business). However, even in

situations where these exceptions may apply, employers are still required to provide notice as soon as possible, and must include their reason for reducing the notice requirement.

Under the WARN Act, notice of a covered reduction in workforce must be provided to affected employees, as well as the union representative (if applicable), the State Rapid Response Dislocated Worker Unit,[1] and the chief elected official of the local government where the reduction is to take place. Failure to provide notice to the local government could result in a $500 civil penalty for each day of violation.

The WARN Act contains additional factors and requirements that must be considered on a case-by-case basis to determine how the employer is to proceed if faced with a potentially covered reduction in workforce.

Discrimination Issues

State and federal laws (e.g., the Florida Civil Rights Act, Title VII, and the Age Discrimination in Employment Act) prohibit discrimination in the workplace on the basis of various factors including sex, gender, age, national origin, and religion. When a reduction in force has a disproportionate impact on one of these protected classes, it can lead to claims of discrimination from the terminated employees. In particular, reductions in force often lead to age discrimination claims, because older workers sometimes feel as though they were eliminated because they are more expensive to employ, especially where younger, less experienced (and less expensive) employees are allowed to retain their jobs.

It is clear that employers must not intend to discriminate against older workers when reducing their workforce. It is also important that any reduction in workforce not have an unintended negative impact on older workers.

In *Smith v. City of Jackson, Miss.*, 544 U.S. 22 (2005), the United States Supreme Court ruled that practices that adversely impact older workers more than younger workers may violate federal law irrespective of the intent of the employer. However, the Court also ruled that employers can justify their practices by showing that they were based on reasonable factors other than age.

The U.S. Supreme Court heard oral arguments on April 23, 2008, in the *Meacham v. Knolls Atomic Power Laboratory* case (Case No. 06-1505). In this case, the Court will decide who has the burden of persuasion – the employer or the employee – on this "reasonable factors other than age" defense. In the underlying decision, the Second Circuit held that the employee bears the burden of persuasion that the employer's

[1] In Florida, the Rapid Response Dislocated Worker Unit is administered through the Agency for Workforce Innovation. More information can be found at http://www.floridajobs.org/React. For information about Rapid Response Dislocated Worker Units in other states, please visit http://www.doleta.gov/layoff/rapid_coord.cfm.

justification is unreasonable. It will be interesting to see how the United States Supreme Court resolves this issue.

Regardless of how the U.S. Supreme Court rules in the *Meacham* case, it is important for employers to closely examine the impact a reduction in workforce will have on protected groups, including older workers. If a reduction in workforce will adversely impact older workers, an employer needs to be sure that it can defend such a reduction by showing that it was based on reasonable factors other than age, such as salary level (especially if salary is based on experience), years of service, criticality, flexibility, or ability to accept reassignment and consolidation of responsibilities. When utilizing these factors, employers should compare reduction decisions with the most recent performance evaluations. If employers intend to rely on performance as one of the "reasonable factors", there should be some correlation between objective performance data and who is retained.

In planning for workforce reductions, employers should analyze their workforce to determine what the workforce looks like before making the reduction decisions. For example, if the employer's average age before the reduction is 54 and is 38 after the reduction, older employees may be able to use statistical information to shore up discrimination claims. This is likewise true with race and gender claims: if a reduction in force will leave an employer with a statistically significant lower percentage of females and minorities, the employer should have a legitimate reason for this change.

Older Workers Benefit Protection Act

The Older Workers Benefit Protection Act (OWBPA) ensures that older workers are not compelled or pressured into waiving their rights under the Age Discrimination in Employment Act (ADEA). If the requirements of the OWBPA are met, employees may legally sign waivers of their rights to sue for age discrimination under the ADEA.

If a severance package is to be provided to eliminated employees, the severance agreement should comply with the OWBPA, as follows:

1. the agreement must be written in a manner that can be understood by the employees;
2. the waiver of rights under the ADEA must be clear and specific;
3. the agreement should not attempt to waive rights that arise after the execution of the agreement;
4. consideration over and above what the employees are already entitled to receive must be paid;
5. the employees must be advised in writing to consult with an attorney before executing the agreement;

6. the employees must be given at least 45 days to consider the agreement (this is reduced to 21 days if the employee is not part of an employment termination program offered to a group or class of employees);

7. the agreement must provide that the employees may revoke the agreement within no less than 7 days; and

8. if the agreement is part of an employment termination program offered to a group or class of employees, the employer must identify (1) the class, unit or group of employees covered by the program, (2) any eligibility factors for the program, (3) any time limits applicable to the program, (4) the job titles and ages of all individuals eligible or selected for the program, and (5) the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

ERISA

Employers should also be aware that some severance and voluntary incentive pay plans may be plans covered by the Employee Retirement Income Security Act (ERISA). In *Adams v. Thiokol Corp.*, 231 F.3d 837, 840 n.4 (11th Cir. 2000), the court determined that severance plans meeting certain requirements were "employee welfare benefit" plans covered by ERISA. Therefore, employers should consult with counsel before implementing a severance program.

Union contracts

Employees represented by a union probably have rights under the collective bargaining agreement. Employers should take a moment to review such agreements to determine employee rights and or the need to renegotiate certain aspects of the agreement**.**

Conclusion

Reductions in force can be unsettling, both to the employees and the employer, but they do not have to result in increased litigation. The bottom line is that employees want to be treated fairly: they want notice of a layoff so that they can start looking for a new job, they want to know that their experience and loyalty to the company are recognized as important, and they want to feel as if their employers are not taking advantage of them. Closely following the dictates of the WARN Act, Florida Civil Rights Act, Title VII, ADEA, OWBPA, and ERISA will help you to communicate to your employees that you share their concerns and that, even if a reduction in force is necessary, you are committed to doing it as fairly as possible. This may prevent many employees from ever considering litigation in the first place. Of course, there will be those that will be bitter, distrustful and litigious no matter what you do, but making sure that you are in

compliance with these laws will help you there, too, because you will have strong defenses to any lawsuits filed against you.

If you are contemplating a reduction in force and would like assistance in ensuring that your reduction in force complies with state and federal employment laws, please call one of the labor and employment lawyers at Rumberger, Kirk & Caldwell, P.A. We would be happy to assist you.

Rumberger, Kirk & Caldwell provides litigation and counseling services in a wide range of civil practice areas including products liability, commercial litigation, construction, intellectual property litigation, environmental, labor and employment, insurance coverage and bad faith, professional liability, health care and administrative law. Offices are located in Orlando, Tampa, Miami, Tallahassee and Birmingham, Alabama. For more information, please visit our website at www.rumberger.com.