AS TALK OF THE ECONOMY COOLING PERSISTS, EMPLOYERS ARE REDUCING THEIR WORKFORCES

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As talk of an economic slowdown persists, so have the number of layoff announcements hitting the news. While the last quarter of 2022 saw the technology and financial sectors lay off thousands of workers, in 2023, this trend is expanding into other sectors of the economy. Before employers make any reduction-related decisions, they need to develop a strategy to mitigate their risk of litigation. The strategy should not only ensure that the selection plans are based on valid, nondiscriminatory business criteria, but that the organization is complying with federal and state Worker Adjustment and Retraining Notification ("WARN") requirements, ERISA, and wage and hour laws. On top of all of the legal requirements, employers should also develop strategies to lessen the impact of the reduction on the affected employees. Together, it is enough to cause anyone heartburn. This article will address these issues and give both a legal and practical analysis of steps to take to try and ease the heartburn and reduce the potential for litigation.

Employees terminated as part of a layoff or reduction in force enjoy many of the same rights and protections under the law as if they were being terminated individually. As such, even before we analyze WARN or any other wage and hour requirement, it is critical for employers to develop neutral criteria for determining the composition of the affected group. Developing neutral criteria and reviewing the selected individuals/groups prior to implementation will prevent an inadvertent disparate impact on protected categories (i.e., the selection of only female-identified employees) and ensure that the selection supports the goals of the reduction.

The selection criteria utilized will change for each organization and each reduction in force. If a business line is eliminated, the reduction may just be limited to that line of employees versus that of a companywide loss. Consequently, the criteria utilized needs to be reevaluated for each reduction and then consistently applied. Examples of lawful non-discriminatory criteria include:

a. Seniority (last hired, first fired);
b. Employee status (i.e., contingent, part time, contract etc.);
c. Business needs related to service area, region, unit or geography;
d. Skills-based assessments (i.e., crossover potential); or
e. Union obligations.

The above criteria can be used individually or in conjunction with other bases. Once the number and group of affected individuals are identified, employers need to ensure that they are compliant with the numerous federal and state requirements before effectuating the reduction in force.

Depending upon the size of the affected group and the employer, WARN may be applicable. The federal WARN Act requires employers to provide sixty (60) days advance written notice to affected employees before plant closures or mass layoff occurs. The advance notice is designed to allow workers and their families transition time to seek alternative jobs or enter skills training programs. The federal WARN Act is applicable to both private for-profit businesses and private non-profit organizations and has a number of nuances that can be challenging to follow. Federal WARN notices are required when a business with 100 or more full-time workers (not counting workers who have less than 6 months on the job and workers who work fewer than 20 hours per week) lays off at least 50 people at a single site of employment or employs 100 or more workers who work at least a combined 4,000 hours per week. WARN notices are also required when an employer closes a facility or discontinues an operating unit permanently or temporarily in a manner that affects at least 50 employees, not counting part-time workers, at a single site of employment. A plant closing also triggers WARN when the employer closes

an operating unit that has fewer than 50 workers, but that closing also involves the layoff of enough other workers to make the total number of layoffs 50 or more. In addition to federal WARN requirements, a number of states (including Illinois, California, Georgia, Iowa and Maine) have separate WARN obligations that can include different thresholds for compliance and notifications to state and local entities.

An employer's failure to comply with federal and state WARN laws can be costly. Employers who violate the federal WARN Act can be required to pay each affected employee backpay, as well as any employee benefits they would have been eligible for prior to any loss of coverage, including medical expenses. To avoid any potential legal violations, employers should consult with an attorney experienced in dealing with state-specific and federal WARN laws, preferably an experienced labor and employment attorney or law firm that specializes in labor and employment law.

In addition to WARN, a number of other federal and state laws affect layoffs, with each law having its own requirements and enforcement rules. Of significant note are the Older Workers Benefit Protection Act ("OWBPA") and the Employee Retirement Income Security Act ("ERISA"). The OWBPA regulates certain rights related to group terminations for employees 40 years of age and older and controls how and what you include in group releases to ensure protection against age discrimination claims. ERISA governs employee benefits, including retirement and health and welfare benefits.

Moreover, because reductions in force typically impact employee benefits considerations, including COBRA, vacation payout, retirement benefits, etc., planning beyond the initial selection process is a critical part of the process. The reduction must be carefully reviewed and orchestrated to ensure that all earned and accrued benefits are not only paid out, but paid out according to the timeframes set forth by state and local laws, union contracts, and employee agreements. This includes ensuring that employees timely receive their final paycheck, commissions, and COBRA notices.

Ensuring compliance alone is only one half of the mitigation equation. The second half of the equation is to develop strategies that help the affected workers become gainfully reemployed as quickly as possible. As a general rule, the more quickly an individual is reemployed, the less likely they are to sue. Mitigation strategies include offering alternative work assignments/transfers when available, job placement assistance, resume writing services, severance benefits (that always include a release of claims), and voluntary buyout packages. Many states and counties have workforce development departments that can be leveraged as a resource to affected employees. Like selection criteria, there is no one fit for assistance mitigation strategies and many employers utilize a number of strategies all at once, depending upon the nature and scope of the reduction.

The most important takeaway when conducting a reduction in force is the importance of planning. Ensuring that neutral criteria are developed, that all wage and hour laws are followed, that appropriate WARN notices are issued, and that workers are given the tools to successfully move on from an organization is no small task. However, developing strategies before the reduction will save you years of future legal headaches.

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