

THE TOP FIVE TIPS TO STRUCTURING AND IMPLEMENTING A REDUCTION IN FORCE

by Elise R. Vasquez



Reductions in Force must be well-thought out and uniformly executed to minimize the threat of litigation. Here are the top five tips to structuring and implementing a Reduction in Force (“RIF”).

1 ESTABLISH AN OBJECTIVE REASON FOR THE RIF

An employer must first establish an objective, business related reason or reasons for deciding to reduce its workforce. For example, economic necessity, loss or downturn of business and reorganization. The reason or reasons given, should be well-supported and documented.

2 CONSIDER ALTERNATIVES TO A WORKFORCE REDUCTION

There is no requirement that an employer consider alternatives to a RIF. An employer, however, who shows that it considered alternatives to a RIF, prior to its decision, can better support that its RIF was done out of necessity.

Alternatives to a RIF may include:

- *Pay freezes or reductions*
- *Shorter work weeks or workdays*
- *Modified vacation and other paid time off benefits*
- *Reductions in authorized overtime*
- *Voluntary leaves of absence*
- *Temporary shutdown*
- *Reduction in the numbers of temporary or contract personnel*

- *Hiring freezes*
- *Voluntary Separation Programs*
- *Early Retirement Programs*

The two most commonly used alternatives to a RIF are Voluntary Separation Programs (“VSP”) and Early Retirement Programs (“ERP”). Each program is governed by specific Federal and State laws.

A. Voluntary Separation Programs (VSP)

If there is no established policy or practice, the amount of severance and eligibility criteria for a VSP can be established by the employer. Important laws affect severance benefit plans, release agreements, and potential notice obligations.

A VSP must not suggest to any employee that her refusal to accept the VSP, will result in a subsequent involuntarily termination. Such a suggestion will expose an employer to liability. The employee who accepts the “voluntary” separation will argue she was actually constructively discharged. Her voluntary release of claims, therefore, was not truly voluntary and as such, not enforceable.

The monetary portion of the VSP can be made in either a lump sum payment or in installments. It can also offer a continuation of benefits. It is recommended that the VSP benefits be conditioned upon her execution of a release of employment related claims. Employees must be given a time period upon which to consider such a release and to terminate their employment. Under the Older Worker Benefits Protection Act (“OWBPA”), employees must be given at least 45 days to review any release agreement upon which VSP benefits may be

conditioned. If less than 45 days are given for the employee to review the VSP and the employee accepts the VSP an employer can expect challenges by the employee to the voluntariness of the released claims.

B. Early Retirement Programs (ERP)

To encourage voluntary retirement, ERPs generally include incentives that are not ordinarily offered to retiring employees. Incentives may include continuation of company-paid medical insurance, continuation of salary, severance payments in excess of those already provided or increased pension benefits.

An ERP must use non-discriminatory criteria in determining eligibility for the plan. An ERP’s offer of early retirement must be presented as a strictly voluntary option available to eligible employees in order to prevent claims under the Age Discrimination in Employment Act. The program must also have an expiration date before which the employee must accept the offer.

3 USE AN OBJECTIVE SELECTION PROCESS

The selection process must be based on objectively determined criteria, consistently executed and well-documented.

The most commonly challenged part of a RIF is the selection process the employer uses to determine which employees will be included in the RIF. Absent a requirement under a collective bargaining agreement, the law does not require employers to give employees selected for layoff an opportunity to transfer or “bump” other employees.

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An employee's wrongful termination claim arising out of a RIF allege that the employer discriminated against them in selecting them for layoff. Another common claim arising from a RIF, is a challenge by the employee that the true reason for the RIF was to get rid of employees in a protected class.

In either case, unless the reductions can be justified as being job-related and consistent with business necessity, discrimination can be established if facially neutral procedures have an adverse impact on a protected class. An employee can establish a prima facie case of discrimination by showing a statistical adverse impact.

An objective selection process must be developed to avoid discrimination claims under equal employment opportunity laws:

- ♦ *The RIF must be based on nondiscriminatory factors,*
- ♦ *The RIF must be based on facially neutral factors do not have a disparate impact; and*
- ♦ *The determined criteria and process to be used must be consistently applied.*

Two commonly used criteria for the selection process is seniority and performance.

Seniority is the most commonly used criteria. The employees with the least length of service with the company are selected for the RIF. It is also better accepted by employees involved and, therefore, less subject to claims of discrimination.

Performance, however, as a selection process is difficult to objectively execute. If written performance

evaluations have not been consistently given and are not well-documented, they cannot provide the necessary objectivity.

4 INSTITUTE A MANAGEMENT COMMITTEE TO OVERSEE THE SELECTION PROCESS

Institute a committee to oversee the selection process and to implement the RIF. This committee should necessarily include management other than direct supervisors of the targeted employees. This facilitates fairness and a greater objectivity.

The committee should receive copies of the written selection criteria. The committee need only receive employee data relevant to the selection process. The committee should include Human Resources professionals. All members should be educated to ensure consistent and uniform application and administration of the RIF.

5 COMPLY WITH ALL THE LEGAL REQUIREMENTS FOR NOTICE, COMPENSATION PAYMENTS AND CONTINUATION OF BENEFITS

RIF affected employees must receive all entitlements required by law and company policy. For example:

A. Advance Notice of Closing/Mass Layoff. The Worker Adjustment and Retraining Notification Act (the "WARN Act") and similar state statutes require employers to provide advance notice in the event employees are terminated due to the closing of a facility or due to a significant reduction in the workforce. Such statutes set minimum thresholds and can have a significant effect on the timing of a layoff.

B. Severance Benefits. If a company policy or practice for the payment of severance to laid off employees exists, this must be followed. Absent any policy that conditions the payment of severance upon the signing of a release, further consideration must be paid to the employee to enforce any release of employment related claims. If, however, a release is sought a waiver of an age discrimination claim will not be valid unless it is in writing and understood by the employee. It must include a specific reference to the rights and claims under the Age Discrimination in Employment Act (ADEA) and the employee must be given at least 21 days to consider the agreement and 7 days to revoke the agreement.

C. Wages and Vacation Pay. All applicable State wage payment laws that govern payment of final wages should be followed upon termination.

D. Insurance Continuation and Conversion Privileges. Employers now face a significant communications and administrative challenge to comply with the COBRA portions under President Obama's economic stimulus bill. Employees are now entitled to more generous benefits.

There is no exact science to the avoidance of RIF related employment actions. A well-structured, well-documented and consistently applied RIF, however, can minimize the exposure to employment related litigation.

Elise Vasquez is a partner in the Labor & Employment counselling and litigation practice in RMKB's Redwood City office. She can be reached at 650.780.1631 or evasquez@rmkb.com