



Layoffs and Reductions in Force

by Thomas J. Gibney and Carrie L. Sponseller

Employers have been experiencing what economists made official last month: the U.S. economy is in recession. Turbulent economic times often force companies to reduce the size and structures of their workforces. Companies contemplating reductions in force must plan carefully to avoid potential liability, clearly articulate the reasons for the layoff or reduction in force and in some instances must provide affected employees with advance notice of mass layoffs or plant closings.

While no reduction in force program can fully guarantee an employer will not be sued, careful planning and implementation greatly reduces the threat of litigation. Employers should be able to demonstrate that the reduction in force was necessitated by a legitimate business reason. Generally, employers experiencing budgetary constraints or decreased revenue are justified in responding to the situation with a reduction in force. Employers should consider preparing a cost analysis to demonstrate that the reduction in force will actually serve the goals it was implemented to achieve.

If the reduction in force requires selection among individuals performing the same job functions, employees must be evaluated to determine who will be retained and who will be terminated or transferred. Employers first should determine what criteria will be utilized to decide which employees will be selected for termination. Consistent application of the selection criteria is key to withstanding judicial scrutiny. Before final decisions are made regarding the positions or employees to eliminate, management should conduct an adverse impact analysis. Retention of legal counsel may bring the analysis within the protections afforded by the work product and attorney client privileges. The purpose of this analysis is to ensure there are no statistically significant differences in the selection rates of older workers, minorities or women. If an adverse impact is identified, the reduction in force program must be closely scrutinized to determine whether systemic bias affected the selection process.

The Worker Adjustment and Retraining Notification Act (WARN) is a federal law governing mass layoffs and plant closings. WARN requires employers with more than 100 employees to provide written notice to employees at least 60 calendar days in advance of covered plant closings and mass layoffs. WARN notices must be specific and should adequately describe the nature of the planned action by including the following information:

1. the name and address of the site of the plant closing or mass layoff;
2. the expected date of the first layoff and the anticipated schedule for subsequent layoffs;
3. the job titles of affected positions, the number of employees in each classification and the names of employees currently holding these positions;
4. a statement as to any applicable “bumping” rights;
5. identification of union representatives of the affected employees; and
6. the name, address and phone numbers of a company official to contact for additional information.

Employers also should be aware of pending legislation that would significantly impact smaller employers involved in layoffs and reductions in force. The Federal Oversight Reform and Enforcement of the WARN Act (Forewarn Act) is a proposed amendment to WARN that significantly reduces the minimum employer size from 100 to 50 employees and lowers the mass layoff threshold from 500 to 100 employees. The Forewarn Act also expands the notice period from 60 to 90 days and increases penalties for noncompliance. President-elect Obama supports the Forewarn Act. He is expected to sign the bill into law if passed by Congress.

In addition to the legal notice requirements discussed above, there are a number of logistical issues employers should consider regarding how and when to notify employees of layoffs or reductions in force. Management should be prepared to answer questions regarding separation benefits being offered (if any), state and federal unemployment benefits, insurance benefits and when employees can expect to receive their final paychecks. Scheduling informational meetings, posting information and responding quickly to employee questions may relieve some of the anxiety associated with impending job loss and, in turn, reduce the risk of litigation.

For more information on the law regarding layoffs and reductions in force, Mr. Gibney and Ms. Sponseller may be reached at our Toledo office (419-241-6000).



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