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Proper Planning and Considerations When RIFs are Unavoidable

Quick Summary. Once it's determined that a Reduction In Force ("RIF") is necessary, the difficult work is customarily undertaken by a team of legal counsel, operations, and human resources professionals to devise and implement a plan that accomplishes the economic objectives with the least amount of workforce disruption, while also minimizing the risks of litigation. Before your team gets started, consider this checklist of 15 practical steps, related considerations and useful links in advance of any RIF.

CHECKLIST FOR A RIF PLAN	
1	Document the company's business reasons for the RIF.
2	Document the tangible savings the RIF will produce.
3	Identify the job functions and/or skills essential to successful operations after the RIF and eliminate and/or consolidate unnecessary jobs.
4	Set a timetable for carrying out the RIF. Unless business conditions require a series of reductions, attempt to act quickly and decisively in an effort to minimize morale problems.
5	Do not use a layoff as a substitute for terminating an employee based on poor performance.
6	Review applicable state laws regarding payment of wages, continuation of insurance benefits, severance benefits, letters of recommendation, access to employee files, etc.
7	Investigate whether the RIF will trigger vesting in pension or benefit plans for affected employees or whether the RIF will be considered a partial termination of a pension or benefit plan, a reportable event under the Employee Retirement Income Security Act (ERISA).

CHECKLIST FOR A RIF PLAN

8	Confirm that the RIF does not constitute a withdrawal from a multi-employer pension plan, which can result in substantial liability.
9	Communicate the RIF to the affected employees very carefully and be prepared to answer questions to avoid inconsistent statements concerning the reason for the RIF and the appearance that the decision was poorly or hastily made.
10	Analyze whether the RIF triggers the protections of the Worker Adjustment and Retraining Notification Act (WARN) or applicable state mini-WARN laws.
11	Determine what notices are required under ERISA (e.g., Summary Annual Reports, Summary Plan Descriptions) and ensure the employees receive all required notices.
12	Review collective bargaining agreements and employment contracts.
13	Determine whether a <i>de facto</i> severance pay plan already exists for employees involuntarily terminated. Such plans may require compliance with ERISA reporting requirements and may already bind the employer to provide a benefit to all affected employees.
14	Analyze the demographic characteristics of the affected employees to ensure compliance with anti-discrimination laws.
15	Do not determine the affected employees solely by compensation, as it tends to skew the pool of affected employees towards older workers.

MAKING KEY POLICY DECISIONS FOR THE SELECTION PROCESS

A number of lawful criteria may be used to establish policies for selection of employees for layoff:

- by years of service/seniority;
- by identifying and eliminating unnecessary job classifications;
- by classes of employees, *e.g.*, eliminating all temporary, part-time, or contract workers initially; and
- by departments or lines of businesses.

When using preexisting performance reviews, initially select employees who have been disciplined for severe or persistent performance problems; thereafter, select from remaining employees by evaluating and comparing their ability to perform the essential job duties remaining after the RIF is completed.

OUTPLACEMENT SERVICES

It is in the company's interest for its separated employees to find comparable new employment as soon as possible. To achieve that goal, and to ease the stress of a layoff on the affected employees, consider providing outplacement services for separated employees.

COMPARING JOB QUALIFICATIONS & SKILLS

Establishing a RIF Committee to implement the selection policies and standardize the procedures is advisable. The Committee would:

- Evaluate selection decisions to determine whether individuals in protected classes are disproportionately affected. If a disparate impact exists, and cannot be justified by business necessity, alternate selections should be made.
- Analyze the comparative performance of employees with emphasis on comparing the job functions and skills to be performed after the RIF is completed.

Wherever possible, performance comparisons should be made on the basis of evaluations made before the decision to implement a RIF. New performance appraisals should be conducted for any employee who has not been evaluated within a reasonable period of time preceding the RIF.

There are certain factors that may automatically militate against the layoff of certain employees, regardless of the other criteria being used to determine selections. They are:

- Can employees be transferred into existing vacancies?
- Is special high-level management review warranted for certain highly-paid or long-term employees?
- Are employees in protected classes disproportionately affected by the company's initial selection procedures? If so, can the selection of these individuals be justified by business necessity? If not, alternative selections of individuals outside such protected classifications should be considered.

ADVISING EMPLOYEES IN A PROFESSIONAL, SUPPORTIVE MANNER

The RIF can be professionally and sensitively handled by following these guidelines.

- The employee's manager and a member of Human Resources should meet with affected employee individually.
- The communication should be clear, concise and without equivocation as to the company's decision.
- The communicators should be prepared to briefly explain the basis for the decision.
- The communicators should also explain: a) any right to reapply; b) severance benefits, health insurance conversion rights (*i.e.*, COBRA), and other monetary issues, such as payment of unused vacation days if appropriate; and c) any outplacement or other transitional services being offered.
- Security should not be present, but be available to the extent that affected employees do not comport themselves with professional decorum.

POST-RIF CONSIDERATIONS FOR REMAINING EMPLOYEES

The following guidelines can be helpful for addressing the concerns of remaining employees.

- To the extent possible, consecutive RIFs should be scheduled in close proximity to each other.
- Remaining employees should be provided with prompt and accurate information about the desired goals and anticipated timetables associated with the RIF(s).
- If possible, remaining employees can be provided with modest economic or noneconomic incentives for increased productivity.

LINKS TO USEFUL RESOURCES

- [Fact Sheet on the Worker Adjustment and Retraining Notification Act \(DOL\)](#)
- [Employment Law Guide: Plant Closings and Mass Layoffs \(DOL\)](#)
- [Worker Adjustment and Retraining Notification \(WARN\) Act Guide to Advance Notice of Closings and Layoffs, Employers Guide \(DOL\)](#)
- [State Rapid Response Coordinators](#)

- WARN Regulations
- EEOC Directive Number 915.003
- Older Workers Benefit Protection Act of 1990, Public Law 101-433, October 16, 1990, 104 Stat. 978, 29 USC 621 et seq.

CONCLUSION

We have set forth above only a sampling of the issues that affect employers implementing a RIF to address concerns in their businesses. The risk of employee lawsuits, even class action litigation, mandates careful legal review and analysis of all aspects of a RIF, including selection criteria and execution strategy. Company resources should team with experienced counsel to plan and execute this complex event. Among other considerations, separation agreements containing waivers and releases of age discrimination claims must comply with specific statutory provisions, and mass layoffs must be conducted in accordance with federal, state, and local notification laws. As long as the RIF is carefully and lawfully planned, and executed with the steady input of legal counsel, employers can realize the savings while minimizing the potential for liability.

CONTACT

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