REDUCTIONS IN FORCE: PRACTICAL TIPS FOR AVOIDING PITFALLS©

by:

MICHAEL J. GRAY[1]
RYAN M. HUBBARD
JONES DAY

In light of the difficult economic climate, more and more employers have little choice but to consider job eliminations to reduce costs and preserve economic stability. If not executed carefully, however, any reduction in force (RIF) may expose an employer to costly litigation that easily can consume the savings realized by the reductions in personnel. Indeed, with the increased number of court decisions involving RIFs, employers should stay abreast of legal developments to ensure that their RIF procedures will withstand judicial scrutiny and that any release agreement provided to severed employees is binding and valid. This article suggests some practical tips an employer may want to consider when planning and implementing a RIF.[2]

I. ESTABLISH A FIRM TIMETABLE FOR PLANNING AND CONDUCTING THE RIF.

Conducting a RIF properly can be a complicated process, and moving too hastily increases the risk of litigation. One of the first steps an employer should take when planning a RIF is to work with counsel to develop a timeline. This timeline should be used as a guide to ensure that decisions are made with deliberation, that the proper documentation is produced, and that members of management, human resources and counsel work together. The timeline also should ensure that the employer has ample time to review its decisions to ensure that protected groups of employees are not being disproportionately affected by the RIF.

II. CAREFULLY DOCUMENT THE BUSINESS REASONS BEHIND THE RIF.

Although the basis for a RIF may seem obvious in the current economy, documenting the business or budgetary reasons supporting the RIF provides significant advantages. For example, judges and juries often look more favorably on employers who can demonstrate sound reasons for conducting a RIF. The documentation also can account for any alternatives that were considered and rejected or implemented unsuccessfully.

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[1] Michael Gray leads the labor & employment practice in Jones Day's Chicago Office. His practice focuses on representing corporate clients with their complex labor and employment litigation, including class action and multiplaintiff employment discrimination lawsuits, state law overtime class actions, FLSA collective actions, and trade secrets and restrictive covenant matters. Ryan Hubbard is a member of the Firm's New Lawyer Group.

[2] This article, written in conjunction with the ABA Teleconference: Economy in Peril (Part 2): RIF Tips and Pitfalls, Bankruptcy and Transitional Issues, is not designed to provide legal advice and we suggest that you consult with an attorney concerning the particular facts and circumstances before implementing a RIF.

III. CAREFULLY DEVELOP AND DOCUMENT OBJECTIVE CRITERIA FOR SELECTING EMPLOYEES FOR THE RIF.

The less individual discretion is used to determine which employees are subject to the RIF, the easier it will be to defend those decisions. A RIF that eliminates entire job functions, departments, facilities, or business groups may involve few, if any, individualized layoff decisions and therefore becomes easier to defend. Practically speaking, such a high-level approach may not be feasible. In such case, an employer should carefully establish objective criteria under which the selection of employees will proceed. Objective criteria may include years of service, certifications and licenses, attendance, or performance ratings. Still, in some cases, such objective criteria may not achieve the business objectives and more subjective criteria is used. Employers need to be even more cautious when using such subjective criteria, such as skills, flexibility, quality of work, or informal reviews, in determining the affected employees or inconsistent decision-making may result.

In *Meacham v. Knolls Atomic Power Laboratory*, 128 S. Ct. 2395, 2401 (2008), for example, the U.S. Supreme Court recently held that an employer bears the burden in such cases to produce evidence and persuade the court that it used reasonable factors other than age to select employees for a RIF. An employer, therefore, not only must use reasonable, non-discriminatory selection criteria but must be prepared to defend them. This situation occurs even if older employees were not treated differently in the RIF process but the RIF resulted in a "disparate impact" on employees forty years of age or older. Accordingly, the employer also has to see whether the net effect on the workforce resulted in older workers being affected disproportionately.

IV. DEVELOP A CONSISTENT COMMUNICATION PLAN FOR THE RIF.

Open communication between the company's management and the employees can improve morale, smooth the RIF process and eliminate post-RIF litigation. Inadvertent statements, though well-intentioned, may be interpreted as evidence of a discriminatory animus. Accordingly, management should adopt a consistent plan for disseminating information to employees, including the affected and unaffected groups.

Managers giving notice to terminated employees should follow a clear and consistent approach in their communications to the affected employees. Although difficult, managers should avoid consoling employees ("it's not your fault," "this has nothing to do with your performance," or "I would have retained you but it was out of my hands."). Such statements can be particularly dangerous when employees were selected for the RIF based on evaluations or performance. Management should also carefully consider the method of notification. Individual meetings with laid-off employees add integrity to the RIF process that a phone call or email lacks.

Care must be taken not only in communicating with those involved in the RIF, but also across the company. Evidence of disparaging remarks or other discrimination may be considered relevant to litigation, even if they are not directly connected to the RIF's decision-makers. In *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140, 1147 (2008), the U.S. Supreme Court recently found that such "me too" evidence may be relevant, depending on the facts of

each case. Consistent, clear and well-managed communication by the company's representatives, whether directly part of the RIF process or not, alleviates the risk that such evidence will become an issue.

V. REVIEW RIF DECISIONS ON BOTH AN INDIVIDUAL AND AGGREGATE BASIS.

In addition to choosing objective criteria for the RIF, an employer should conduct a high-level review of the decisions before they are finalized. For sizable RIFs, performing a statistical audit allows an employer to catch disparities in the RIF between younger and older employees. The employer then can decide whether a disparity is justified or whether the decisions should be revised. With the help of a statistical expert, an employer can analyze the RIF in detail to minimize disparate impact on legally protected groups. A well-documented review of the RIF decisions will reduce the risk of litigation as well as equip the employer with helpful evidence if an affected employee decides to sue.

Statistical analysis, however, is only as good as the data it relies on. So, even in large RIFs, someone other than the decision-makers should review the individual decisions to terminate, especially for those members of a protected group.

VI. CAREFULLY CRAFT ANY RELEASES TO FULLY COMPLY WITH OWBPA.

A properly written release that complies with the Older Workers Benefit Proction Act (OWBPA) can insulate an employer from liability to older employees. The requirements for a valid release are complicated, however, and even small mistakes may invalidate the release under the OWBPA.

The case of *Syverson v. IBM Corp.*, 472 F.3d 1072 (9th Cir. 2007), provides an illustration of the challenges an employer faces. The release was carefully worded to protect the employer while still accurately describing the employee's rights. However, the waiver was deemed invalid because the court found it to be too technical to be understood by employees. An employer in a later case, *Ricciardi v. Electronic Data Systems Corp.*, 2007 WL 576323 (E.D. Pa. Feb. 20, 2007), managed to avoid this pitfall by differentiating the claims an employee waived or preserved in separate paragraphs.

The requirements of the OWBPA are strict, and partial compliance is not enough. It is imperative that employers consult with counsel, either inside the organization or outside, regarding compliance. More and more courts will invalidate the age release unless each individual requirement is explicitly satisfied.

VII. CAREFULLY CRAFT ANY DISCLOSURES REQUIRED UNDER OWBPA.

In connection with OWBPA releases, employers must disclose certain details about the RIF to employees. Again, strict compliance is required in this disclosure. Two particularly troublesome pitfalls for employers are accurately defining the "decisional unit" of employees considered by the RIF and disclosing the data regarding those employees properly.

The scope of the "decisional unit" varies greatly depending on the process and criteria the employer uses to conduct the particular RIF. If the employer discloses the decisional unit as broader or narrower than it actually was, it may invalidate the release. Properly documenting the RIF goals and process can help avoid confusion when defining the unit. Considerations can include to whom the employee reported, who made the decisions regarding the RIF, or where the employees worked. A decisional unit defined as all the workers at a facility may be too broad, when only employees working for the facility manager were considered. *See Kruchowski v. Weyerhaeuser Co.*, 446 F.3d 1090, 1094-95 (10th Cir. 2006). In a nationwide reorganization, however, the decisional unit may be limited to employees in a certain region or within a certain business unit if that is where the decisions were made. *Burlison v. McDonald's Corp.*, 455 F.3d 1242, 1248-49 (11th Cir. 2006); *Ricciardi*, 2007 WL 576323, at *5.

Even after the decisional unit has been properly defined, the employer must take care to disclose information about the individuals in the unit. An omission of even one or two individuals from the disclosure may invalidate the release. *Peterson v. Seagate*, 2007 WL 4179399 (D. Minn. Nov. 20, 2007). Additionally, in *Pagliolo v. Guidant Corp.*, 483 F. Supp. 2d 847 (D. Minn. 2007), the employer provided the birthdates of terminated employees instead of their ages, which the court found to invalidate the release.

VIII. APPOINT A CONTACT PERSON TO RESPOND TO INQUIRIES REGARDING THE RIF.

Employees selected for a RIF will have questions about their rights and benefits and answering those questions fully and promptly may be the difference between an employer having to defend its decisions in litigation or not. Even if the employer explains benefits to the employee in the termination meeting, an employee may need time to reflect on the details. Appointing a contact person to field those questions from terminated employees can help smooth the RIF process as well as provide the employer with advance warning of an unresolved issue.

As part of the communication plan, the employer should consult with counsel to develop a clear understanding of what the contact person can and cannot discuss with terminated employees. For example, the contact may clarify what benefits the employee is entitled to under the RIF, but may not be the correct person to comment on the reasons the employee was selected.

Pitfalls under the OWBPA and ADEA are only some of the legal difficulties employers face in conducting a successful RIF; Title VII, ADA, ERISA and other state and federal laws often are implicated. Many of these hazards may be avoided, however, with proper diligence and legal advice in the planning and implementation of the RIF.