Getting It Right in Reductions in Force: How to Minimize Legal Risks

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With the downturn in the economy, scores of employers are having to make difficult decisions and lay off hundreds, if not thousands, of employees. Each layoff poses potential legal risks, and plaintiffs' counsel are poised to ride what may become a new wave of employment litigation. A recent *New York Times* headline tells the story: "Job Cuts Causing a Boom in Lawsuits."[1] But layoffs do not need to lead inevitably to litigation. With thoughtful advance planning and careful implementation, employers can minimize their legal risks. This article explores key decision points in a reduction in force (RIF) and identifies some of the precautions employers can take to minimize their potential exposure.

ADVANCE PLANNING FOR A REDUCTION IN FORCE

Economic and business circumstances usually dictate the timetable for a reduction in force and frequently leave managers less time to implement the action than is optimal. Human resource managers and legal counsel need to try to work together with line management to set a manageable timeline or calendar for the RIF and ensure that appropriate preliminary measures have been taken.

Consider and Document Alternative Measures

A first step in the planning process is to consider whether all alternative expense reduction measures that can be implemented have been implemented. In any subsequent litigation, jurors will likely be highly offended if, at the same time that it is terminating employees due to economic conditions, a company continues to sponsor lavish executive retreats or elaborate parties, allows its senior managers to fly around the country on corporate jets unnecessarily, or otherwise displays insensitivity to the economic realities necessitating the RIF. This is particularly true now, given the spate of recent news stories about executive compensation and bonuses. Thus, management needs to think about whether appropriate cost cutting initiatives have been considered, including:

- Curtailing discretionary spending, e.g., office parties, retreats, discretionary travel, corporate jets;
- Implementing a shorter workweek or a short-term furlough;
- Freezing or reducing salaries, bonuses, and other forms of incentive compensation, including those of senior management—but think through any wage and hour, contract, or tax implications of current wage reductions and/or future, deferred compensation promises;
- Limiting use of contractors or temporary employees; and/or
- Imposing a hiring freeze.

As part of the planning process, it is important to document any and all alternative measures that are considered, whether undertaken or not. Where an alternative is considered and rejected, the documentation should include an explanation (it can be brief) as to the business reasons why the particular action is not feasible for the organization. This will provide the necessary record should there be subsequent litigation in which the plaintiff tries to point to an ongoing expense as evidence that the layoff was not really necessary and thus is a pretext for age or other discrimination.

Consider Voluntary Exit Programs

One alternative to an involuntary layoff is a voluntary exit program. Such programs, however, require time and careful planning.

Voluntary programs can take one of two forms: (1) a program that is available to all employees company-wide or within a particular division or unit or (2) a voluntary early retirement program that is offered to employees of a certain age and years of service. A risk with either program is that, because the program is voluntary and the employer cannot choose which individuals within a particular department or job group can and cannot elect to participate, the employer may lose valuable

employees. And a critical component to either type of program is that the election to participate truly be voluntary.

The Age Discrimination in Employment Act[2] (ADEA) contains a safe harbor for early retirement incentive programs that are "consistent with the relevant purpose or purposes of [the ADEA]."[3] Thus, the legal risk of a reduction in force can be minimized through a properly developed retirement incentive program. However, employees who accept such an incentive still frequently challenge their separations on the grounds that the program was not truly voluntary and/or consistent with the purposes of the ADEA. To determine whether a retirement plan was in fact voluntary, courts consider whether, under the circumstances, a reasonable person would have concluded that there was no choice except to accept the offer.[4] Thus, if the company is going to offer a voluntary early retirement program, managers need to be cautioned to refrain from making any comments to employees eligible for the program about the prospects for their future if they do not elect to participate and certainly not in any way urge or incite them to accept the offer.

Identify and Document the Reasons Behind the RIF

Another important step in the RIF planning process involves documenting the business reason or reasons for the actions to be taken. Employees often challenge the business justification for a layoff as part of a discrimination claim. The company's position will be enhanced if it can present contemporaneous business record documents establishing why particular actions were taken in a given unit. Such documentation should include detail about the varying factors that may be driving the RIF in different parts of an organization; for example, in one part of an organization, it may be the loss of a contract that leads to the wholesale elimination of a job group while, in another part, it may simply be cost pressures necessitating the reduction in staff by a certain percentage. Detail as to the industry conditions in which the company finds itself is also useful. Being able to offer this level of varying detail can be of valuable assistance in fending off class or collective action litigation.

Comply with WARN Act Requirements

The establishment of a comprehensive timetable for the planning and implementation of RIFs is not just a prudent litigation strategy; in many circumstances, detailed federal and state laws require advance notice to workers and official entities to allow employees the opportunity to seek retraining or alternative employment and communities to prepare for the economic disruption attendant to a mass layoff.[5]

The federal Worker Adjustment and Retraining Notification (WARN) Act requires most businesses employing 100 or more persons to give 60 days' advance written notice of a plant closing or mass layoff to all affected employees, their collective bargaining representative (if any), the state dislocated worker unit, and certain state and local government officials.[6] The WARN Act defines a "plant closing" as the "loss" of employment for at least 50 full-time employees at a single site of employment during any 30-day period, as a result of the permanent or temporary shutdown of one or more distinct units within a single site of employment. A "mass layoff" is defined as a reduction in force that does not result from a shutdown of a facility or operating unit but includes the "loss" of at least 50 full-time employees at a single site and, for layoffs of fewer than 500 full-time employees, affects at least 33 percent of the active full-time workforce at that site. Aggrieved employees may file a civil suit in federal district court, and any employer who engages in a mass layoff without giving its employees the requisite warning of the impending job terminations is liable for up to 60 days back pay and benefits to those employees who lost their jobs, as well as attorneys' fees.[7]

An increasing number of states have enacted their own WARN laws with requirements that are, in many cases, even more onerous. The New York WARN Act, which became effective on February 1, 2009, for example, applies to private sector employers of 50 or more full-time employees and requires 90 days advance written notice of a mass layoff, plant closing, or relocation, and broadens the definition of events that trigger the notice requirements.

Due to the extremely technical nature of the federal and state WARN laws, employers contemplating layoffs should familiarize themselves with all applicable requirements to, if possible, avoid WARN Act triggers but, in all cases, comply with the laws' myriad obligations. As a practical matter, employers would be well advised to perform a detailed analysis at least two months prior to the implementation of any RIF to determine if it will result in either a "plant closing" or "mass layoff" (or other triggering events per state law) and to prepare the required written notices. Employers who fail to exercise caution in undertaking these analyses risk incurring penalties, including the payment of back pay to aggrieved employees for each day of the violation, that could potentially eviscerate the economic savings of the workforce reduction itself.

Satisfy Any Duty to Bargain Obligations

Implementing a RIF in a unionized environment implicates special concerns. Under the National Labor Relations Act (NLRA), it is unlawful to take unilateral action regarding certain decisions impacting wages, hours, and other terms and conditions of employment without providing adequate notice to, and first bargaining to impasse with, the

certified union.[8] Management actions that require bargaining about the decision itself often concern operational or structural changes that turn in part on labor costs (like a work relocation); where the action, even though it may impact terms and conditions of employment within the bargaining unit, concern the enterprise's core entrepreneurial functions (such as a shutdown, partial closure, or elimination of an operational unit), no duty to bargain exists over the decision because it impacts the basic direction of the business. The National Labor Relations Board takes the position that layoffs of employees "for economic reasons" (i.e., to reduce labor costs in response to a marked decrease in production and sales), rather than due to a change in the fundamental scope of the business' operations, require prior bargaining about both the decision and its implementation.

As a decision to implement a RIF generally rests on a multitude of factors, it is important for unionized employers to seek advice of counsel to determine where the contemplated action falls within this continuum. Building ample time into the RIF timetable for this process is critical because good faith bargaining requires the employer to provide notice to the union before the decision is a *fait accompli* and while the employer is willing to consider alternatives. Moreover, even where a decision to order layoffs may not in and of itself require an employer to engage in advance consultation with the union representing the affected employees, an independent obligation generally will exist to provide express notice to and bargain with the unions as to effects of the layoffs. Thus, upon the union's request, employers generally will have to bargain about employment levels and whether and to what extent it will provide severance to laid-off employees, among other topics, even though it may not have to discuss whether to make the layoffs themselves.

Compliance with the complex and fact-intensive rules relating to notice and bargaining is essential. In this area as in all others, it is important to create necessary documentation relating to the decision, its justification, and its timing, so that the determination of any bargaining obligation is adequately explored and supported. If this does not take place and an employer is found to have failed to engage in required bargaining with a union about layoffs, the traditional remedy includes providing all adversely affected employees with full back pay plus interest until they are recalled or until the employer bargains with the union to agreement or impasse.

Selection Processes

Age discrimination claims are the most common type of discrimination claims brought by employees laid off during a reduction in force. Following the Supreme Court's decision in Smith v. City of Jackson,[9] recognizing a cause of action for disparate impact under the ADEA, former employees age 40 and over can pursue both disparate treatment, intentional discrimination claims, and disparate impact age discrimination claims, in which no showing of intent is required. In either case, the employer needs to be prepared to establish what selection criteria were used and why they were appropriate and job-related. Indeed, last year, in Meacham v. Knolls Atomic Power Laboratory,[10] the Supreme Court held that, in a disparate impact case under the ADEA, once the plaintiff shows that the selection process had an adverse impact against older employers, the employer bears the burden of proof on the issue of whether the criteria used to select employees in the reduction in force constituted reasonable factors other than age.

A first step in implementing a reduction in force is to determine what level of managers will be involved in the RIF decision-making process. Ideally, line managers, those closest to the employees to be impacted, should be involved because they are the ones who know the organization and how it operates and know how the employees in the organization perform day to day. This is not always feasible if managers are also going to be impacted by the RIF, but, to the extent possible, such line managers should be involved as it minimizes the risk of claims that the decision-makers had no knowledge of the impacted employees and thus no basis for the judgments and selections made.

A second step is to identify the employee population that will be impacted. The analysis should focus first on identifying the positions needed going forward. Ideally, only after the future organizational structure is established and the positions defined will consideration be given to the question of who will fill those positions.

The easiest decisions to defend are those that involve work eliminations (i.e., the elimination of an entire department or function), because such decisions are devoid of individual selection decisions and thus not potentially tainted by bias. Courts routinely hold that, where an elimination is done in a neutral manner, an employee whose job function or department was eliminated cannot establish a *prima facie* case of discrimination. Thus, managers should first consider whether there are functions or units that can be eliminated.

If the RIF cannot be managed through work or job eliminations and individual selection decisions need to be made, selection criteria need to be carefully defined and applied uniformly within a group or department. Some organizations use inverse seniority, selecting the employees who have been with the company the least amount of time; union contracts usually require that layoff decisions be based on seniority. Because seniority tends to favor older employees, its use reduces the likelihood of age discrimination claims, but, as women and

employees of color are often among the more junior employees in an organization, seniority can adversely affect a company's efforts to enhance its diversity. Moreover, many companies want to retain the best employees without regard to tenure and thus want to make decisions based on performance and merit.

Some companies elect to use previously administered performance evaluations and ratings as the selection criteria. Plaintiffs may challenge the use of such performance evaluations on the grounds that the evaluations are themselves tainted with discriminatory bias or are outdated. Another issue that arises with the use of performance evaluations is that many companies have fairly wide ratings bands; for example, if the rating scale is 1-3 with a "1" going to the very top performers, in many organizations 70 percent or more of the employees may be rated a "2," thereby making it impossible to distinguish among this broad group on performance ratings alone.

Thus, frequently, it will be necessary to base layoff decisions, at least in part, upon employee assessments performed specifically for the particular reduction in force. Such assessments are frequently challenged on the grounds that they were predetermined to ensure that certain individuals (e.g., older employees), fall to the bottom of any ranking. However, if managers carefully identify the skills, knowledge, and performance levels required for the specific jobs that will be performed going forward, use objective criteria (e.g., sales numbers, productivity measures) to the extent possible, carefully and thoughtfully assess their employees against such criteria, and offer specific examples of what skills, knowledge, or performance attributes the employee is lacking or offers, the employer will be best positioned to defend against such claims. Assessments done in this way should usually correlate with prior performance evaluations, although the new assessments will be more refined and allow managers to draw distinctions that the prior evaluations missed. Consideration should also be given to how ties, if they occur, will be broken. Seniority is an often used tie-breaker.

Decision-Maker Training

Once the general selection process is developed, the company should provide training to the line managers charged with making the decisions on the process. This does not mean that the specific selection criteria to be used should be dictated to the managers because, as noted above, it may make most sense to have the line managers identify and define the skills criteria because they know the jobs. Nonetheless, managers need to be told how to identify such criteria, group employees for comparison and selections, evaluate employees, and then document their decisions. In addition, in any meetings surrounding the RIF managers should be instructed that they are not to consider any demographic characteristics or other impermissible factors in making their layoff decisions. In particular, managers should be cautioned not to take into consideration how close to retirement an employee may be; they cannot assume that someone close to retirement age wants to retire. Nor should they make inquiries of employees as to their interest in or plans for retirement.

Likewise, any RIF training materials should include a discussion of the organization's EEO policy and a reminder that decisions are not to be made on the basis of any protected classifications. Having this written reminder will be good evidence later to refute any allegation that the company had a policy of discrimination.

Documenting Decisions

Documenting selection decisions is another important step in the RIF process. Often during a RIF, managers are pressed for time and do not record the reasons why they selected certain employees over others. Without documentation, more senior management, human resources (HR), and legal counsel cannot effectively monitor and review the decisions made to ensure that they are based on appropriate job-related reasons. Moreover, if a discrimination claim is later filed, or worse, a collective or class action is filed, the company and its counsel are left scrambling to reconstruct, often years after the fact, the reasons for potentially hundreds of decisions.

Thus, a company is well-advised to prepare a form or worksheet, approved by senior management, HR, and legal counsel, for all managers to use. This form would list the employees considered in a particular selection decision, identify the selection criteria used (as the criteria may vary between departments or business units depending upon the specific jobs and skills required), identify the persons selected for layoff, and provide an explanation as to why one person was selected over another. From a subsequent litigation perspective, it is useful to have an explanation both as to why one person was selected and why another employee was retained. These documents will not be privileged but will be a contemporaneous business record that the company can use to justify the selection should litigation ensue. However, as with performance evaluations, these forms are only of value if they are completed properly and thoughtfully and do not contain extraneous or inappropriate remarks.

As part of manager training, managers should be instructed on how to complete these forms and cautioned about not making careless comments on the forms or in e-mails which might come back to haunt them. Managers should also be cautioned not to create lists of employees eligible for retirement or organizational charts with dates of birth or ages; this information is simply not relevant to the selection decisions.

Review of Layoff Decisions

Because reductions in force frequently happen quickly, and managers are pressed for time, the organization may want to develop an oversight committee, which will be charged with reviewing not only the layoff decision-making process but also the myriad issues that will arise about future placements and/or backfilling and the like. This committee could be interdisciplinary, with members from management, human resources, finance, and legal.

Whether or not a formal review committee is established, a process should be implemented to review the RIF decision-making process, including the selection criteria used and the selections made. HR and legal should review the individual selection forms the managers prepare to ensure that they are complete and that the prepared explanations justify the selections made. If a skills or performance assessment is conducted specifically for the RIF, the company should review these assessments to ensure that they are justified.

Beyond the individual review, if the reduction in force is of sufficient size, counsel should consider conducting a statistical analysis to determine whether the selection decisions are disproportionately impacting any particular protected group. The company will want to preserve the attorney/client privilege on any such exercise; thus, it should be done at the direction of legal counsel to enable counsel to provide legal advice as to any legal risks associated with the RIF process. If disparities are identified, the legal department can push back to the managers to confirm that the decisions are appropriate and job-related and that bias has not infiltrated the process. In some instances, it may be appropriate to have selection decisions revisited and changed, but such actions need to be taken carefully so as not to jeopardize the integrity of the overall selection process used.

During the review process, the team should be on the lookout for situations that may be more likely to create litigation. For example, the law is clear that an employer cannot retaliate against employees who have filed charges or presented internal complaints. The fact that an employee selected for layoff has a pending complaint or in the recent past has filed a charge does not mean that the company necessarily needs to revisit or change the decision, but it does require the company to take additional steps to ensure that the selection was properly made and to apply extra sensitivity about how the decision is conveyed and effectuated. Similarly, if a female employee is pregnant or an employee is on FMLA leave, care should be given to how their layoffs are handled. Increasingly, spouses work for the same company and, if both are selected for layoff, the likelihood that they may pursue any claims increases; again, careful handling of such situations can reduce some of the risk.

Finally, there should be some oversight and review to ensure that jobs that are slated for elimination are in fact eliminated and not backfilled and that a business unit that is downsizing due to costs constraints is not the next month hiring new employees who effectively take the place of those laid off. It is generally advisable that a hiring freeze be imposed at the time that a reduction in force is implemented and that it remain in effect for at least several months thereafter. To the extent that exceptions to the freeze are necessary due to unexpected attrition or an unexpected need for new or different skills, managers should be required to seek approval for such exceptions in advance through the review committee or other mechanism.

Communications Surrounding RIFs

A critical component of any RIF-planning strategy should be developing the message and tools to be used in communicating the action internally and to the general public. An effective communication plan is designed to ease the transition for affected employees and support the morale of employees remaining with the organization. Accordingly, taking extra care upfront to address the concerns of both the workforce and the community at large could make an important difference in discouraging disgruntled employees from later seeking redress through litigation.

The first step in the communication plan is to identify the various target audiences and develop the key message for each of them. In crafting any announcement, it is important to strike a balance between truncating the process to avoid unnecessary and possibly harmful disclosures and conveying sufficient information about the action to reflect an appreciation for the often devastating impact that the RIF will have upon individuals within the organization. Equally important is the identification of the proper channels through which to deliver the announcement. The following are the steps that should be considered in this process, but any plan should always be tailored to the size, culture, and circumstances of the organization, the scope of the RIF, and the state of the industry as a whole.

Important Steps

- HR staff meet first with managers to advise them of the RIF and provide them with training on how to make selections and then again to provide notification training. Both meetings should include a script as to what should and should not be said during meetings with affected employees.
- Managers and HR representatives next meet with each affected employee individually to explain their selection and the terms of the separation. Managers should give the employee honest and complete information about the decision and how it will affect him or her

personally. They should address, if applicable, the meaning of any non-competition agreements and any leave or job placement opportunities. They should also discuss the processes in place for appealing the employee's selection but stress the finality of the decision.

- Immediately after affected employees have been notified or as soon thereafter as possible, senior management should discuss the organization going forward with the remaining staff in small group meetings. Allowing the message to trickle out over even a short period of time will likely result in the dissemination of incorrect information through the rumor mill.
- Throughout this process, the company should have Employee Assistance Program representatives on hand to counsel affected employees and to answer any questions regarding severance, outplacement opportunities, and other issues.
- Often, the need for the RIF will raise questions among the non-selected employees about the continuing viability of the enterprise. Management should be prepared to address such concerns as well as any "survivor's guilt" of those remaining in the workforce. Ongoing follow-up by managers is often necessary to identify and resolve any continuing issues.
- Communications teams should issue a press release, make contacts to consumer and other business groups, and respond to community and investor questions.

Once a strategy is in place for addressing these key concepts, final steps will include slotting them into the overall RIF timetable, taking care to address any statutory compliance issues (such as WARN Act notices). To ensure consistency and accuracy of the message, ample time should be allotted for the development of internal talking point memoranda regarding severance, benefits, and termination, as well as scripts for HR and manager notifications and media contacts. Do not forget that, particularly for the remaining workforce, the company's internal network or intranet is often the best tool for sharing information about the action and the resources available to help the organization move forward productively. Finally, because all communications—public or private—may become fodder for future discovery, employers would be well-advised to review their content beforehand with legal counsel.

Job Placement

Many age discrimination lawsuits arising out of reductions in force stem, not from the initial decision to eliminate the employee's position, but, rather, from the decision not to place them into another position for which they have applied. Employees often understand—at least initially—the business conditions necessitating the elimination of their position (e.g., the termination or reduced scope of the contract on which they were working, the elimination of, or reduced demand for, the product they helped manufacture), although they may disagree with the decision to select them rather than a coworker. However, when they apply for 10, 15, or 20 open positions and are not selected for any of them, any understanding evaporates and they become disgruntled and more inclined to pursue a legal challenge. Employers, on the other hand, usually focus intently on the initial layoff decisions and provide extensive training and support to the managers involved in making those decisions, but pay far less attention to the redeployment or placement decisions.

By giving more thought to the redeployment process, if there is to be one, organizations can reduce their legal exposure. The first two issues to consider are: whether displaced employees will in fact be eligible for other positions, and whether their date of notification will be the last day that they need to report to work. These are often intertwined decisions. If the company has few or no openings, it may be best to tell displaced employees that they are to leave work immediately and can devote the remaining time that they are on the payroll to searching for a job elsewhere. This avoids the office chitchat and growing anxiety over who is doing what remaining work that time in the office permits. If there is work to be done for some specified period or if there is a good chance of placement, keeping the employees in the workplace may be a necessary or viable option, but doing so is not without risks. Under either circumstance, clear guidance needs to be provided as to whether the displaced employees will be considered for other positions within the organization and if so how.

If there are openings for which displaced employees may be considered, and the company has a posting system for open positions, displaced employees should be told that they must utilize the posting process in order to be considered. Making an exception to an established posting requirement for employees displaced during a layoff can lead to problems.

Because employees who have been notified of a pending layoff are far more anxious about the outcome of a job posting than the typical incumbent who may be seeking a lateral transfer or a promotion through posting, strict adherence to the posting system processes is critical. Communication is particularly important; displaced employees should not be left hanging about the status of their applications. Ideally, the system or a manager will notify them at each step of the process (e.g., initial screen, interview selections, etc.) as to the status of their application and, if they are not selected at a particular step, they will be so notified. If a posted position is withdrawn and thus not going to be filled, this decision would be reflected in the posting system and, in an automated system, notice would be sent to the applicants.

Releases and Waivers

Another consideration for employers is whether they want to pay consideration, beyond what the impacted employees might otherwise be entitled to, in order to obtain a waiver and release of any claims. There may be legitimate reasons why an employer will not want to seek a waiver and release, but, if the decision is to do so, the employer needs to ensure that the waiver and release comports with the Older Workers Benefit Protection Act (OWBPA) provisions of ADEA.[11] A properly drafted release will insulate the company from claims, but the OWBPA requirements are technical and small mistakes can lead to the invalidation of the entire release. Thus, legal counsel should be consulted to ensure that all elements of the OWBPA requirements are being satisfied.

The statutorily required elements of a knowing and voluntary release are:

- The waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
- The waiver specifically refers to rights or claims arising under the statute;
- The individual does not waive rights or claims that may arise after the date the waiver is executed;
- The individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
- The individual is advised in writing to consult with an attorney prior to executing the agreement;
- The individual is given a period of at least 21 days within which to consider the agreement; or if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees (e.g., a RIF), the individual is given a period of at least 45 days within which to consider the agreement;
- The agreement provides that for a period of at least seven days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective until the revocation period has expired; and
- If a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified above) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to:
  - — Any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and
  - — The job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.[12]

Most companies are aware of these requirements, but issues regarding their implementation continue to arise.

For example, in Syverson v. IBM Corp.,[13] the court reversed the district court's dismissal of an age discrimination collective action on the grounds that the release and waiver was confusing and, thus, not reasonably calculated to be understood by a lay person. The IBM agreement contained a release of all claims including claims arising under the ADEA and a covenant not to sue, which included an agreement to never institute a claim of any kind against IBM. However, the agreement also provided that "[t]his covenant not to sue does not apply to actions based solely under the [ADEA]."[14] Thus, the issue was the interplay between IBM's release of claims and the covenant not to sue. In finding the language of IBM's release to be confusing, the court held that release agreements must be drafted in "plain language geared to the level of understanding of the individual party" and that employers must "take into account such factors as the level of comprehension and education" of the employees signing the waiver.[15]

The informational requirements of OWBPA have also generated considerable litigation and necessitate careful consideration. For example, the EEOC's implementing guidelines instruct that statistical data is to be provided regarding those employees in the same "decisional unit." The scope of the "decisional unit" is defined by how the company chooses employees for the RIF and the population examined. Courts have invalidated releases where the company has drawn the "decisional unit" too broadly.[16] However, in a nationwide reorganization, the decisional unit may properly be limited to employees in a certain region or within a certain business unit, if the decisions were made at that level.[17]

Other Exit Issues

Among other issues an employer should consider is whether to offer outplacement services to displaced employees, if for no other reason than that the likelihood of litigation drops markedly if impacted employees are able to find other comparable jobs quickly. One cautionary note about outplacement. Many outplacement companies handling mass layoffs conduct plenary sessions at which dozens or even hundreds of former, unhappy employees come together. Such sessions can become a breeding ground for litigation. Many plaintiffs in age discrimination collective actions have testified that it first occurred to them that they might have been the victim of age discrimination when they saw all of

the "gray hair at the XYZ outplacement center." The company, therefore, may want to try to work with the outplacement company to find creative approaches to effective outplacement that do not involve such mass meetings.

Attention should also be given to whether any impacted employees are foreign nationals in the United States on company sponsored work visas. Department of Labor regulations impose certain payment and notice obligations on employers who terminate H-1B employees before the end of their validity periods.

Finally, the American Recovery and Reinvestment Act of 2009—the Stimulus Act—signed by President Obama on February 17, 2009, provides for new COBRA premium assistance benefits to certain individuals who lose their jobs between September 1, 2008 and December 31, 2009. The Stimulus Act reduces the maximum COBRA premium that an assistance eligible employee (defined as a qualified beneficiary who becomes eligible for COBRA continuation coverage because of any involuntary termination of employment between September 1, 2008 and December 31, 2009) must pay for COBRA continuation coverage to 35 percent of the regular COBRA premium for a period up to nine months. These benefits apply for a period of COBRA continuation that begins on or after the law's enactment date or continues after the enactment date. In addition, each assistance eligible individual who does not have a COBRA election in effect on the enactment date but who qualified must be given a special opportunity to elect COBRA continuation coverage. As a result, employers will need to revisit prior elections. The Act further provides for a reimbursement to the employer, the plan or the insurer for 65 percent of the COBRA premium. There are technical details to these provisions, and employers will need to coordinate with their COBRA administrators and payroll providers as well as legal counsel to ensure compliance.

NOTES

1. *N.Y. Times,* Jan. 31, 2009, at B1.
2. 29 U.S.C. § 621 et seq.
3. 29 U.S.C. § 623(f)(2)(B)(ii).
4. *See, e.g.,* Morgan v. A.G. Edwards & Sons, Inc., 486 F.3d 1034, 1040–1041 (8th Cir. 2007) (upholding the employer's voluntary early retirement program, the court noted that the company, in offering the program, stressed its voluntary nature although it also noted the possibility of future involuntary reductions).
5. *See* 20 C.F.R. § 639.1(a); *see also* H.R. Conf. Rep. No. 100-576 (1988), reprinted in 1988 U.S.C.C.A.N. 2078, 2079.
6. *See* 29 U.S.C. § 2101, et seq.
7. 29 U.S.C. § 2104(a).
8. *See* 29 U.S.C. § 158(a)(5).
9. 544 U.S. 228 (2005).
10. 128 S. Ct. 2395, 2401 (2008).
11. 29 U.S.C. § 626(f).
12. 29 U.S.C. § 626(f). The EEOC's guidelines regarding these elements can be found at 29 C.F.R. § 1625.22.
13. 472 F.3d 1072 (9th Cir. 2007).
14. *Id.* at 1083.
15. *Id.* at 1077 (citations omitted).
16. *See e.g.,* Kruchowski v. Weyerhaeuser Co., 446 F.3d 1090, 1094–1095 (10th Cir. 2006) (defining the decisional unit as all workers at a facility was too broad when only employees working for the facility manager were considered); Pagliolo v. Guidant Corp., 483 F. Supp. 2d 847, 857–858 (D. Minn. 2007) (holding a release invalid where the decisional unit improperly aggregated parts of separate corporate entities into a single decisional unit).
17. Burlison v. McDonald's Corp., 455 F.3d 1242, 1248–1249 (11th Cir. 2006).

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