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Navigating the rough winds of employee layoffs

Ask anyone in management or human resources and they will tell you that the hardest part of the job is letting people go, especially when it is through no fault of their own.

Fortunately, most companies have not had to worry about layoffs or restructurings lately and focusing instead on finding and retaining workers. Some winds seem to be shifting, however. We are seeing stories about layoffs at once-high-flying tech companies, the word "recession" is on everyone's lips, and calls about potential restructurings and layoffs have even started coming in to my legal practice.

I sincerely hope that none of you reading this column have to go through the pain of conducting or, worse, being impacted by, a reduction in workforce and that the economy turns around quickly. However, given these uncertain times, I thought I'd provide some tips on how to prepare for and conduct restructurings in the most professional, empathetic, and legally compliant way possible.

PLAN AHEAD

Few employers want to conduct layoffs, and most will delay hard decisions as long as possible in order to save jobs. However, procrastination can lead to severe consequences. Under the Worker Adjustment and Retraining Notification Act, commonly referred to as the federal WARN Act, covered employers who conduct a "mass layoff" or "plant closing" — which can include reductions in workforce affecting as few as 50 employees — are required to provide at least 60-days' notice of such action to affected employees, local government entities and others. New York State also has its own version of the WARN Act that reduces this employee threshold to as few as 25 employees and stretches the notice period to 90 days. The WARN acts are complicated and full of employee counting and look-back periods that defy common sense, so don't think that just because you are laying off 20 employees one month and 15 the next that you are safe from the WARN acts.

The WARN acts do have some exceptions for faltering companies, unforeseen business circumstances, and natural disasters, but these exceptions are extremely limited in scope, and hiring a lawyer to argue on your behalf can be expensive. If you have any inkling that you may need let go of 25 or more employees over the next few months, now is the time to review the specifics of the WARN acts and potentially reach out to legal counsel for advice. The damages for non-compliance are severe.

CHOOSE CAREFULLY

Danger lurks around every corner when selecting employees for inclusion in a layoff. While no well-intentioned employer would base their layoff decisions on an employee's race, age, sex, or other protected characteristics, legal liability can still exist if a non-discriminatory decision results in a discriminatory outcome.

For example, impermissible "disparate impact" discrimination may occur when an employer bases a layoff decision on seemingly legitimate business criteria, such as performance reviews or employee sales numbers, but the outcome dispro-

portionally affects a protected group, such as older employees, women, or people of color. To defend against such claims, an employer generally must show that the criteria used to make the decision was supported by a business necessity and that no effective alternatives existed that could have avoided the disparate impact. Thoughtfulness on the front end will go a long way to ensure that your selection criteria and ultimate decision are equitable and legally compliant.

PAY SEVERANCE — BUT CONDITIONED ON A RELEASE

Where financially possible, employers should pay severance to their employees. Although no law requires employers to pay severance, it is generally the right thing to do, and it helps employees as they transition to the next phase of their careers. More importantly — at least in the eyes of some employment lawyers — severance gives employers an opportunity to obtain a release of claims from affected employees and ensure that potentially lingering employment claims are resolved.

To be blunt, no employer should pay severance until a signed separation agreement containing a release of claims has taken full effect. It may sound cold, but I can't tell you how many times I've had employers reach out to tell me that they paid someone months of severance but still got sued for discrimination. Please, be generous and caring when you offer severance benefits, but also be smart about it.

DOUBLE CHECK THAT SEPARATION AGREEMENT

On the topic of separation agreements, be very careful before you search online for "template separation agreement" or dust off the form agreement that you used when you fired your brother-in-law. Under the Age Discrimination in Employment Act, very technical rules apply to separation agreements used in group terminations, including extended consideration and revocation periods and a requirement to provide specific demographic information about affected employees. Failure to comply with these requirements can result in you paying severance for a release that is still unenforceable with respect to age discrimination claims.

Crafting a thoughtful separation agreement can also tie up other loose ends and address issues like the ongoing protection of confidential information, the future solicitation of customers and clients, non-disparagement of the company, and the resolution of any disputes about equity, bonuses, commission, or other compensation-related issues. However, a release cannot waive wage-related claims under the Fair Labor Standards Act, so make sure you also pay your employees all that they are owed right away.

CONSIDER OTHER OPTIONS

If possible, try to think of ways that you can avoid having to conduct layoffs or, at a minimum, how you can limit their impact. Options include, but are not limited to, natural attrition, employee furloughs, pay reductions, reworking commission or incentive plans, and participation in the New York State Shared Work Program, where employees work partial schedules while receiving unemployment benefits. Each has their own legal quirks and risks to think about, but they might help avoid sitting across the table from an employee with a separation agreement in hand.

As I said, I hope that no one reading this column will have to consider any of the issues and that business is booming for all. However, if you sense that your economic winds are becoming rough, think now about necessary course corrections and, if required, how you can conduct layoffs in a manner that limits risk while still showing respect and appreciation to those impacted.

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