

Downsizing with Dignity

Reduction in Force Best Practices



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High level considerations for any termination

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- Legal Requirements
 - Compliance with company policies
 - Consider past practices
 - Decision making
 - Proof
 - Consistency
 - Pretext-free

“But we are an at-will state”



- Why is this an almost useless defense?
- Is there an employment contract?
- Any verbal promises of a term or conditions for termination?
- Does the handbook or policies limit the right to terminate?
- Is termination against public policy?
- Is there evidence of discrimination / retaliation?
- Any recent protected activity?
- Is there a collective bargaining agreement?

Protected Activity

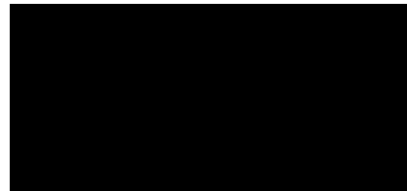
- USERRA
- FMLA
 - Not protected from actions that would have affected the employee if not on FMLA leave, but employer has burden to prove that employee would not have been employed at reinstatement.
- Wage and hour, OSHA, accommodation requests, workers' comp claims, harassment or discrimination investigations

Common Reasons for RIF

- Cost reduction
- Lack of work
- Changing skills needs
- Physical relocation or site closings
- Outsourcing or offshoring

Selection Criteria

- Do not cut corners on this step
- Business case
 - Skills
 - Experience
 - Documented Performance
 - Seniority
 - Bumping
 - Voluntary program considerations
- Legal review



Group Layoff/Reductions In Force

- WARN Act
 - Detailed analysis required to determine whether obligations triggered
 - Covered employer must give at least 60 days' notice of plant closing or mass layoff to affected employees, state dislocated worker unit, and local government (some exceptions apply)

Group Layoff/Reductions In Force

- WARN Act
 - Covered employer - 100 or more employees or 100 or more employees collectively working at least 4,000 hrs./week
 - Affected employee - employee that reasonably may be expected to experience an employment loss as a result of a proposed plant closing or mass layoff

Group Layoff/Reductions In Force

- WARN Act:
 - Plant closing - permanent or temporary shutdown of single site of employment, or one or more facilities or operating units at single site, resulting in employment loss at the single site occurring within any 30-day period, for 50 or more employees (excluding part-time)
 - Mass layoff - RIF, not qualifying as a plant closing, resulting in employment loss at the single site within any 30-day period, for 50-499 employees and that number is at least 33% of active employees or for 500 or more employees

Group Layoff/Reductions In Force

- WARN Act common problems
 - Applying the part-time employee rules
 - Identifying single-site of employment
 - Counting employment losses (which employees, which reasons, over what period)
 - Changes in termination date
 - Calculating notice date
 - Content of notice

Group Layoff/Reductions In Force

- Mini-WARN Acts and other notification laws
 - Applicable in at least 20 states, DC and Puerto Rico (including CA, CT, GA, HI, IL, IA, KS, ME, MD, MA, MI, MN, NH, NJ, NY, OH, OR, PA, RI, SC, TN, VT, WI)
- Disparate impact analysis

Group Layoff/Reductions In Force

- Waivers of age discrimination claims with exit incentive or other employment termination programs offered to a group or class of employees
 - Must provide 45 days for consideration of agreement
 - Must provide disclosures as to the class, unit or group of persons covered by the program, eligibility factors and time limits, as well as job titles and ages of all individuals eligible or selected for the program, and ages of all individuals in the same job classification or organizational unit who are not eligible or selected

Release Considerations

- Age discrimination waivers:
 - Understandable
 - Waiver must refer to rights/claims under ADEA
 - No prospective waiver
 - Consideration must be in excess of anything to which employee already is due
 - Advise employee in writing to consult attorney
 - 21 days for consideration (45 if offered with exit incentive or other termination program to group/class)
 - Seven days for revocation (regardless of whether review period is 21 or 45 days)

Make the Money Right

- Determine when final pay is due under applicable state law
 - May differ from policy/practice
- Consider:
 - Bonuses
 - Commission payments
 - Accrued but unused vacation, sick days, other PTO



Give Notice When Notice is Due

- Does employment agreement/offer letter require a certain type or period of notice?
- COBRA
 - Offer group health plan continuation coverage
- State-required notice of reason for termination
 - Not required, or advisable, in NC
 - Some states require (for example, NY)

Several Ounces of Preparation

- Security considerations
 - Think in advance about potential problem people and situations
- Protect worksite, confidential information, IT systems, choose time, place and participants carefully
- Witness - at least two people in every meeting
- Prepare and rehearse (including responses to anticipated questions)
- Give the real reason
- Do not argue or debate
- Avoid reentry into work areas

The Truth and (Some of) The Truth

- References
 - Provide only dates of employment and position held
- Avoid post-termination statements inconsistent with real reasons for termination
 - References
 - Letters of recommendation
 - Unemployment paperwork/hearings

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