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Avoiding Liability When Downsizing

By Bennett Pine

It's no secret that 2008 is shaping up to be a grim year for layoffs across a broad swath of industries nationwide. New weekly unemployment claims have twice exceeded 375,000 this year (once in January and once in March) — the highest level since immediately following Hurricane Katrina in fall 2005. By contrast, the monthly average for new claims in 2007 was just 130,000. David Rosenberg, a Merrill Lynch economist, has forecast 2.5 million job losses this year. In a survey released this January by the employment consulting firm Career Protection, more than half of the 1,300 senior executives questioned said that they are planning layoffs in 2008. That's up from 13% of those polled in 2007.

The subprime crisis has naturally hit the financial industry particularly hard. Research firm Challenger, Gray & Christmas estimates that 22,000 financial sector jobs were lost in the first two months of 2008, 18,000 of them in the mortgage industry. The Bear Stearns bailout has prompted forecasts of 15,000 to 30,000 more financial sector job losses this year. These estimates may prove modest. In the wake of 9/11, the sector lost nearly 100,000 jobs.

Executives and in-house counsel faced with the unpleasant task of implementing layoff must protect themselves against potential liability by complying with legislative and judicial mandates regarding reductions in force ("RIFs") and familiarize themselves with federal laws governing mass layoffs and plant closings, particularly the notification requirements of the Worker Adjustment and Retraining Notification Act, as well as anti-discrimination laws impacting the issue of which individuals are selected for lay-off.

The Worker Adjustment and Retraining Notification Act (WARN)

In general, WARN requires that all organizations employing a total of 100 or more full time employees (at all locations) must provide advance written notification to employees of a "plant closing" or "mass layoff" affecting 50 or more employees at least 60 days prior to the plant closing or mass layoff. Virtually all employing organizations must be aware that WARN's requirements also relate to office

Legislative Updates

Commissions in New York: Put It In Writing

Employers of commissioned salespersons in New York State now must put in writing the terms of sales-based compensation. The written agreement must contain, at minimum, the following terms of employment:

- Description of how wages, salary, draw on commissions and all other amounts earned and payable are calculated;
- When commission payments would be earned and payable;
- How often recoverable draws against commission will be reconciled;
- Details regarding payment of commissions in the event of the termination of the salesperson's employment relationship; and
- The written agreement must be signed by both the employer and the commission salesperson.

If the employer fails to produce such a written commission agreement when requested in a Department of Labor investigation, the terms alleged by the commissioned salesperson will be presumed to be the accurate terms of employment. The amendment was enacted because

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or facility closings, because a "plant" closing is broadly defined by WARN as a temporary or permanent shut down of any single facility or site of employment.

Employers who fail to follow the advance notice requirements of WARN can be held liable to aggrieved employees for back pay and loss of benefits for the period of violation, up to 60 days. Employers found to have violated notice requirements can also be held liable for attorneys' fees.

Equal Employment Opportunity (EEO) Implications of RIFs

Like any employment action, a reduction in force is also subject to federal, state and local anti-discrimination laws. One of the greatest areas of exposure for employers with respect to RIFs is potential liability under the Age Discrimination in Employment Act (ADEA), which prohibits age discrimination in employment and protects employees age 40 and older. Because employers typically lay off employees to reduce expenses, the layoffs may disproportionately affect workers age 40 and older, as they are likely to earn higher salaries than younger workers. Furthermore, age discrimination concerns can come into play when older employees are "offered" retirement packages in connection with a RIF.

Disparate Impact on Age-Protected Employees

Attention to age discrimination concerns has been particularly salient since the Supreme Court decided, in *Smith v. City of Jackson*, 544 U.S. 228 (2005), that the ADEA allows recovery against employers under the "disparate impact" theory of discrimination. Under disparate impact theory, older employees can recover under the ADEA by proving that, although a particular employment decision may lack a discriminatory motivation and is on its face neutral with respect to age, it has an adverse *disparate* impact on older employees. The availability of disparate impact theory provides a much easier standard under which plaintiffs may attempt to prove their age discrimination claims.

However, in the *Smith* decision the Supreme Court was careful to note that the ADEA may limit recovery under disparate impact theory and expressly provides a defense whereby there can be no recovery where the claimed adverse impact is attributable to a "reasonable factor other than age," such as job performance. In March, 2008, the EEOC proposed changes to its federal ADEA regulations to incorporate and reflect the *Smith* ruling. Under the proposed regulation "an individual challenging an allegedly unlawful practice is responsible for isolating and identifying the specific employment practice that is allegedly responsible for any observed statistical disparity." The employer would then have the burden of proving "a reasonable factor other than age" whenever the exception is raised.

The practical result of the *Smith* decision is that if the employer can establish that reasonable factors other than age account for the disparate impact of an employment action on older employees, the action will likely not be found unlawful. However, an employer must beware that when it takes employment actions, even if the impact on older workers is not deliberate, it potentially could be found unlawful if a disproportionate adverse effect on older workers results. It is therefore essential that the employer document the "legitimate business reasons" for its actions.

Liability Considerations: Release Agreements

Given the threat of RIF related lawsuits, employers should strongly consider requiring employees to sign "releases" in exchange for receiving severance pay in connection with their termination. Although regulations take care to protect employees who agree to waive their rights (i.e., releases must be "knowing" and "voluntary"), when designed and executed carefully, release agreements can still be valuable protection to employers. The cost can be more than offset by the avoidance of litigation.

What You Can Stipulate

A release agreement usually stipulates that employees will not sue their employers for discrimination or any other claim. In addition, employees are typically asked not to disclose confidential information about the employer, not to disparage the employer, or not to disclose the details of the release to anyone other than theiri-spouse, attorney, and financial advisor.

The release agreement should also contain a clause that says the employer, by entering into this agreement, has not conceded liability in any way. In addition, there should also be provisions whereby employees will forfeit the enhancements from the agreements if they breach the agreement.

Consideration/Enhancement

To make the release agreement binding, employees must be offered some type of "consideration." The typical consideration is severance pay over and above what may already be provided for employees. For example, if the employer already pays one week's severance for each year an employee works, then the consideration for the release has to be in addition to that. Severance is typically paid out either as a lump sum or salary continuation. Other types of consideration could include helping the employee pay for Consolidated Omnibus Budget Reconciliation Act (COBRA) health coverage, outplacement counseling, or allowing them to keep the company car.

The Over 40 Crowd

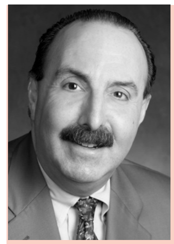
The Older Workers Benefit Protection Act (OWBPA) has added safeguards for workers over 40 when it comes to release agreements. First and foremost, it requires that the release be "knowing and voluntary." In other words, the release has to be in clear language and has to spell out exactly what the employee is receiving. In addition, it must tell employees that they have the right to consult an attorney before they sign the agreement.

Employees over 40 also have a minimum of 21 days to consider the agreement, and even after signing it, they still have a seven-day revocation period.

Finally, if there is a group lay-off — basically, if more than one employee is being terminated as a result of the same decision — the employee gets 45 days to consider the offer, instead of 21 days. Moreover, the employee must also be given information about the other employees in similar positions who are or are not being laid off. That information includes job title and category of age.

Conclusion

Overall, the most important thing employers can do to avoid liability and protect themselves during RIFs is to plan ahead and be aware of the potential legal implications of mass layoffs for legally protected employees. The key point to remember: RIFs are not accidents, but planned events.



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of administrative difficulties the New York DOL experienced in investigating claims for commissions in the absence of written commission agreements. (See N.Y. Labor Law, Sec. 191)

Paid Family Leave in New Jersey

Both houses of the New Jersey state legislature have approved a bill to require employers of all sizes to offer six weeks of paid leave to workers wishing to care for a new child or a sick family member. Governor Jon Corzine has stated he will sign the bill into law shortly.

The plan was backed by organized labor and opposed by employer groups.

The program would be paid for through a payroll deduction which legislative officials would cost workers approximately $33.00 per year. Workers who take leave would receive a benefit equal to two-thirds of their salary up to a maximum of $524 per week, with an average weekly benefit estimated at $415.

Currently, only the states of California and Washington have similar laws requiring companies to offer up to six weeks of paid family leave annually.

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