

Surviving layoffs

How to navigate the legal hazards of a reduction in force **Interviewed by Clare DeCapua**

Reductions in force are fraught with potential legal landmines. Even the most sensitive of employers can find themselves defending discrimination claims after a RIF. And any time that you have a difficult economic environment, you see a dramatic rise in employment-related claims.

“There are a number of issues that arise in different phases of a reduction in force,” says Larry Feheley, chair of the labor and employee relations area at Kegler, Brown, Hill & Ritter. “One of the important things is that employers allow enough time to plan and implement a RIF properly. It’s not something that you want to do like a financial fire drill.”

Smart Business spoke to Feheley about the legal implications surrounding a reduction in force and how to avoid liability.

What are the first steps when considering a RIF?

It’s important to identify what’s driving the reduction. Is it redundancies resulting from a merger? Is it a change in the business model? Or is it that decreasing revenues can’t support current expenses? The answers to those questions impact, first, whether alternatives to layoffs may be available and, secondly, the legal issues that you’re going to have to confront in the context of the RIF.

Part of planning the RIF appropriately involves the consideration of whether or not all the nonpersonnel costs have been eliminated. Owners may think they have to reduce their staff because they have to cut their personnel costs. But sometimes they don’t factor in the cost of the layoff itself. Obviously there’s severance pay, unemployment benefits, etc. But there are costs from employee morale or lawsuits or charges that you have to defend. Sometimes you lose good people and you’re not in a position to immediately pick back up when business turns around.

Some companies have tried mandatory furloughs, reduced salaries or wages, or reduced hour schedules. Each of these alternatives has its own separate, but frankly manageable, legal issues. Taking these steps before jumping into a dramatic layoff keeps the work force intact, but spreads the burden across a number of people in what is hopefully a temporary situation.

What are common mistakes employers make when approaching a RIF?

The most common mistake I see is that supervisors are allowed to select people for



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a layoff viscerally — through a gut feeling about whom the best employees are. The key is to develop defensible criteria on which to uniformly evaluate individuals in the workplace. The reference point of all of that is what the organization is going to look like after you’ve done the RIF. And, concomitantly, what the skills and abilities are that you’re going to need in this new business structure.

It’s important to set up criteria of what skills and capabilities you need, and then to evaluate current employees against those skills in a business-related way. Try to make it as objective as possible and stay away from things like ‘attitude’ and ‘teamwork’ and those kinds of subjective qualities that can often be seen as stereotypical.

All too often, the process isn’t documented. If there’s a challenge to a RIF, an employer is asked: ‘How did you select the people to be laid off and to be retained?’ In my 30 years of practice, I’ve found that judges, juries and civil rights commissions believe that in today’s world, if businesses make important decisions, they are written down and there’s documentation.

How should an employer go about implementing the RIF?

Determine how the news is going to be communicated to people. What will each

employee be told? How will the process of people leaving their office be managed? There ought to be a prepared script or a plan.

A RIF is a traumatic event for the employees who survive. Their friends are gone; everyone is wondering who or what is going to be next. So without making promises that you can’t keep, you have to try to create a sense that the worst is over and you can work together and get through this to allay some of that fear and sadness.

You may also need to communicate either ahead of time or in the course of this with your key customers, investment partners or banks, maybe the media, depending on how prominent you are in the community, and perhaps some governmental unit.

What are some of the legal issues presented by RIFs?

It’s unlawful to select somebody to be laid off because of a legally protected characteristic or activity. The most common is the well-known litany of EEO protected classes: race, color, creed, sex, national origin, age, disability, veteran or military status. But it also includes the person who made a sexual harassment claim, the person who took FMLA leave, the whistleblower or the person who filed a workers’ compensation claim.

Depending on the size of the layoff, you may be required by the federal WARN law to give written notice 60 days in advance to the employees laid off. This often brings its own issues, because giving notice can cause a great deal of attrition, and you still have to somehow manage the business for 60 more days.

An employer offering severance or any other type of benefit to the departing employees may require a release or a waiver of claims in return. Under these circumstances, you want the employees to promise that they won’t sue the company in return for benefits that you’re giving them, but there are a number of hoops that you have to jump through to make sure that you do that validly. For example, there’s a federal law called the Older Workers Benefit Protection Act requiring that you include a number of specific things in the release agreement and that you give the affected employees a special notice that describes the contours of the RIF. <<

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