

REDUCTIONS IN FORCE: PLANNING AND ALTERNATIVES

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The unemployment rate rose in November, 2008 to 6.7% and the number of long-term unemployed rose to 2.2 million according to the Bureau of Labor Statistics. The financial crisis and recession have caused, and will continue to cause, many employers to reduce expenses, including, through employee layoffs. A reduction in force ("RIF") must be carefully planned and executed to assure compliance with the various employment laws and to minimize any adverse affect on employee morale and operations. Short-term cost savings may be outweighed by other costs, particularly if current economic conditions may be short-term.

Reasons to Avoid a RIF

There are several factors that may make a RIF unattractive: a RIF can be costly to implement; severance and other costs, such as the cost of hiring again when economic circumstances improve, should be considered; employee productivity may suffer due to an adverse affect on employee morale; having fewer employees might cause loss of revenues; and litigation and possible legal liability could ensue.

Alternatives to Consider

A RIF should be the last option. Employers should always consider the following before implementing a RIF:

- Leave without pay
- Incentives for early retirement
- Freezing wages
- Eliminating discretionary bonuses
- Reducing employee benefits
- Voluntary layoffs
- Reducing hours for hourly employees and restricting overtime
- Retraining employees for open positions

Solutions for a Successful RIF

There are many reasons why a RIF may be the best or only feasible course of action. A successful RIF, however, requires careful thought and planning. The following considerations and actions are essential:

- **Uniform Selection Criteria.** There may be a need for urgent action but there can be no substitute for careful planning. An employer needs to develop neutral, business related criteria for selecting employees to be laid-off. The importance of the employee's job, availability of other employees to perform the job, the employee's length of service, the potential for shifting the employee to another job, and the employee's job performance

are criteria that should be considered and uniformly applied. Disparate impact on protected classes, such as race, age and sex, might violate anti-discrimination laws.

- **Promote Morale.** RIFs can affect employee morale. It is important to support the employees you keep and be sensitive to job insecurity issues.
- **Severance Pay.** Most employers pay severance benefits. Such payments increase the costs of a RIF but can be conditioned upon the employee signing releases as discussed below.
- **Releases.** Employee releases may eliminate the potential for lawsuits and legal fees as well as avoid discrimination claims, if such releases are legally permitted.
- **Notice Requirements.** The Employee Retirement Income Security Act (ERISA), the Older Workers Benefit Protection Act, the Worker Adjustment and Retraining Notification Act (WARN) and many state laws may impose notice and disclosure requirements.
- **Separation Agreements.** In addition to containing notice requirements and releases, Separation Agreements may include non-disparagement, confidentiality, cooperation, and return of property clauses as well as a non-compete clause in states where it is enforceable.
- **Union Issues.** Unionized companies have unique issues and pose risks for RIFs that require consideration.
- **Counseling.** Assisting the laid-off employee with transition job counseling shows that the employer is concerned for the employees, may help morale of the remaining workforce and may help avoid lawsuits.

RIFs should only be implemented when alternatives are considered and found to be insufficient. If it is determined that a RIF is necessary, it is essential to carefully plan and execute.