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A Reduction-in-Force Refresher

Not since the COVID-19 pandemic have so many organizations been faced with the need to consider reductions in force (RIFs). Government funding cuts, increased costs, inflationary pressures, changes to reimbursement rules, and demographic shifts have come together in a perfect storm, testing organizational resiliency and keeping leaders up at night.

As organizations contend with this reality, today's Monday Minute highlights key considerations, issues, and risks associated with RIFs.

Planning Ahead

Involuntary RIFs are the most challenging for employee morale and create more legal risk than non-RIF options for cost savings. Before instituting a RIF, consider instead hiring freezes, voluntary early retirement incentive programs (*i.e.*, offering severance to employees meeting some combination of years of service and age requirements), voluntary separation incentive programs (*i.e.*, offering severance to employees of any age), termination of poor performers for cause, salary/wage reductions, and temporary furloughs.

When the above-mentioned measures will not be sufficient, and a RIF is necessary, **PLAN AHEAD**. RIFs are complicated and may involve preparing and distributing certain legally required notices. The federal Worker Adjustment and Retraining Notification Act of 1988 (WARN Act), which mandates 60 days' advance notice to impacted employees, must be considered if 50 or more employees will be separated. Additionally, various states have enacted "mini-WARN" statutes that impose greater requirements on employers. For instance, Maryland's mini-WARN statute must be considered if the greater of 15 employees/25% of a workplace will be impacted.

RIFs require that organizations do their homework. A well-structured RIF requires more than asking managers to each name a few employees they could live without.

1. First, an organization should document the business reasons for the RIF, which will help guide the criteria for determining which positions will be eliminated and which will be retained. Criteria may include factors like seniority, job function, skills, job performance, and impacts to business operations.
2. Second, clear instruction should be given to managers about which criteria should be applied and how—this is especially important where multiple incumbents hold the same

position. If an organization has 5 accounts payable specialists but can support only 3 going forward, the organization must determine what legitimate non-discriminatory basis will be used to select the employees who will be separated.

The process of determining “who” will be eliminated and “why” may involve use of a detailed “scorecard,” or may rely on as simple of a determination as “last in, first out.” Regardless, the required homework includes creating contemporaneous documentation explaining the employer’s process for making these decisions.

Disparate Impact Analysis

Once the affected employees are determined, the organization should perform a disparate impact analysis based on sex, race, and age (over 40/under 40). For each of these protected classifications, the organization must perform a statistical analysis of impact on the protected group versus impact on the overall workforce to determine if the impact on the protected group violates legal standards. Once the impact on protected groups is determined, the organization can consider if any changes to the RIF criteria are necessary to reduce the risk.

Disparate impact analysis looks at overall risks, but the risk of including particular employees in the RIF should also be considered. Typically, further risk analysis should be conducted for:

- Employees on or just returning from Family Medical Leave Act (FMLA), military, Americans with Disabilities Act (ADA), and other protected leaves
- Pregnant employees
- Employees with disabilities, especially those who have recently requested an accommodation
- Employees who have filed harassment/discrimination complaints or grievances
- “Whistleblower” employees
- Employees with current or recent workers’ compensation claims
- Employees who have recently relocated to a different city at the employer’s request
- Employees involved in union-related activities

Costs

In addition to the savings associated with a RIF, employers should make sure they understand the costs of a RIF. Employers should review employee handbooks/policies, applicable collective bargaining agreements, employment agreements, and other documentation to determine what employees are already entitled to receive upon separation. Additionally, employers should also consider a separation package for employees including a formula for severance, payment of the employer portion of COBRA for a limited period, and possible outplacement services or referrals.

If severance will be offered, the company should consider whether it will require employees to sign a release of claims in exchange for receiving any compensation or benefits to which they are not entitled. There are pros and cons to requiring a release, and legal rules about advance notice to employees age 40 and older who are asked to sign a release that may impact the timing of the RIF.

Employers should also understand the impact of the RIF on operations and consider whether any employees need to be retained for a certain period after the effective date of the reduction in force. Employers sometimes offer retention bonuses to employees to stay on for a specific period to ensure continuity of operations.

Strategy

Lastly, employers should make sure to consider the practical and logistical ramifications of a RIF. Losing one’s employment is a significant event, and a RIF can be destabilizing. Make sure to develop a communications strategy inside and outside the company (what to say, to whom, when, and in what order), and consider how to conduct the RIF with care and consideration for the employees impacted. Consider issues related to workplace violence, security precautions (both physical and data security), availability of crisis counseling, and/or employee assistance program (EAP) referrals.

While a single RIF is destabilizing, multiple RIFs magnify that impact. Wherever possible, employers should “rip off the band-aid” with a single RIF that addresses all necessary separations at once and allows the company to move forward positively without a cloud of continued uncertainty over its head.

What's Next?

We would be happy to assist you in addressing any questions. Please reach out to:

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