



Financial Markets Crisis Task Force

Bringing Legal Clarity to the Economic Crisis

Employment

Alert I – October 24, 2008

Employment Law Issues and Risks in the Current Financial Crisis

The daily headlines report steady job losses as businesses struggle with the financial crisis. The trend suggests that more layoffs and reductions in force are on the way given the economic forecasts of a recession. Employers faced with the difficult decision to reduce their number of employees must consider several important issues to avoid running afoul of various federal employment laws. This alert highlights some of those issues. To ensure that proper procedures are followed, employers should also review applicable state and local laws, contracts, collective bargaining agreements, and company policies before implementing a reduction in force.

Employee Notice: The WARN Act. The federal Worker Adjustment and Retraining Notification (“WARN”) Act requires covered employers to give 60 days’ advance written notice before implementing a “mass layoff” as defined in the Act. Under WARN, written notice of a mass layoff must be given to each affected employee, the state dislocated-worker unit, and the chief elected official of the local unit of government where the layoff is to occur. WARN imposes back-pay liability upon covered employers who fail to follow the required notice provisions. A number of states have adopted statutes based on WARN.

The WARN Act is complex, and there are two exceptions that may come into play in the current economic crisis: (1) the faltering company exception, and (2) unforeseeable business circumstances. Employers should consult legal counsel to determine what their obligations are under WARN and the different state variations of the Act, given the specific circumstances of the proposed reduction in force.

Legitimate Nondiscriminatory Business Decisions: Federal and State Employment-Discrimination Laws. Reductions in force are fertile ground for litigation under federal and/or state employment discrimination laws. Such lawsuits may involve: (1) disparate treatment claims alleging that an employee was unlawfully singled out for termination because of his or her age, gender, race or other protected class; or (2) disparate impact claims alleging that a protected class of workers, such as older workers, were disproportionately selected.

The two best ways for employers to minimize claims of discrimination are as follows: (1) thoroughly analyze and document the business case prior to implementing a reduction in force, and (2) develop an objective selection process and criteria to determine which jobs to eliminate and/or which employees to lay off. The selection criteria must be applied in a consistent manner, and it may be advisable to perform a disparate impact analysis to determine whether layoff decisions are disproportionately affecting any protected classes of employees.

Contractual Restrictions. In the union setting, collective bargaining agreements typically contain contractual provisions related to downsizing that must be reviewed and may give rise to bargaining obligations. In the nonunion setting, executives, senior management, and other employees may have individual contracts with notice and severance provisions that are triggered in the event of a reduction in force. Some employers may have specific layoff policies that will need to be followed.

Severance Payments and Releases. Employers should consider offering severance pay in exchange for a release of claims from employees who are part of a reduction in force. Releases are subject to various requirements under federal and state laws. To release any claims under the federal Age Discrimination in Employment Act, which covers individuals 40 and older, the release must comply with the requirements of the Older Worker’s Benefit Protection Act (“OWBPA”). OWBPA has specific requirements for individual terminations and additional requirements for group terminations.

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Conclusion

The current financial crisis is forcing employers to deal with difficult decisions. Many of the workforce planning decisions, including layoffs and reductions in force, involve a range of employment laws and issues. Prior to implementing a layoff or reduction in force, employers should

- ▶ Consider alternatives to a reduction in force, such as early retirement and incentives for voluntary separation.
- ▶ Analyze and document the business case in the event of a reduction in force.
- ▶ Develop selection criteria linked to the business need, and apply the criteria consistently.
- ▶ Determine what procedures must be followed under federal, state, and local laws to lawfully carry a layoff or reduction in force given the employer's particular situation.
- ▶ Review applicable collective bargaining agreements, individual contracts, and company policies to determine what restrictions or obligations are imposed or triggered by layoffs or a reduction in force.
- ▶ Consider whether to offer severance pay in exchange for an effective release of claims.

Reductions in force involve navigating complex and difficult employment laws and issues, which should be done in consultation with legal counsel. For more information or assistance with reductions in force, please contact Debra M. McCulloch, a member of the Financial Crisis Team and the Dykema Employment Group, or another member of the Dykema Employment Group.