Workforce Reductions – Avoiding Legal Pitfalls

As the economic impact of a weak economy continues, many companies are taking measures to reduce costs by restructuring operations and reducing the size of their workforces. These decisions are difficult enough for employers without having the extra burden of justifying their actions before a government agency such as the EEOC, or in court. Unfortunately, reductions in force have resulted in a number of different legal actions by employees who feel they were unfairly selected. This article answers commonly asked questions concerning workforce reductions.

1. What kinds of lawsuits get filed as a result of workforce reductions?

Layoffs or employee terminations as part of a workforce reduction often generate employment discrimination claims. These claims typically stem from decisions that appear to disproportionately affect employees who are protected class members (for example, minorities, females, disabled employees, or older workers). In addition, decisions that appear to be retaliatory may result in legal action. These decisions could include the discharge of employees who have engaged in legally protected activities, such as filing a workers' compensation or EEOC claim, complaining of harassment or about working conditions, or requesting an accommodation.

2. Are we required to have a written layoff policy?

No law requires employers to have a layoff or reduction in force policy. Employers who adopt such a policy should retain discretion as to which employees are selected, how much notice must be provided, and whether the employer is obligated to recall laid off workers before it hires new employees.

3. Are there required guidelines we must use in choosing employees for layoff?

No. Employers have wide discretion in determining which employees are to be laid off. To prevent discrimination claims, however, an employer should use business-related and objective criteria, such as length of service, performance, job skills, disciplinary records, attendance (so long as it is not FMLA, ADA or military leave related) and job elimination. Whatever criteria is used, an employer should determine if any protected group is disproportionately affected (e.g., race, sex, age, national origin). If so, the employer should review the basis for selection of all employees in the affected protected group(s) to ensure that the decisions are defensible.

4. Do we have to give advance notice of a layoff?

Employees are not required by statute to give employees advance notice of every layoff or termination. The Worker Adjustment Retaining and Notification Act (WARN), however, requires employers to provide advance notice of certain large-scale layoffs and plant closings. The Act, which applies only to employers with 100 or more employees, generally requires covered employers to provide 60 days' advance written notice when either of the following happen during any 30-day period: (1) layoffs or terminations affecting one-third of the workforce and at least 50 employees; or (2) layoffs or terminations affecting 500 or more employees (regardless of whether this constitutes one-third of the workforce). In the case of a facility closing, covered employers must give notice if it will cause an employment loss for 50 or more employees. The notice must be provided to affected employees or their union representative and to the state's dislocated worker unit.

5. Can employees on a leave of absence be laid off or terminated?

Employees who are on leave protected by law (such as the Family and Medical Leave Act, the Americans with Disabilities Act, or military leave) may be laid off or terminated if their employment would have been terminated had they not been on leave. Since employees who are on leave are obviously exercising a statutory right and might reasonably suspect that this played a part in the employer's decision, employers who terminate employees while they are on leave should take extra care in documenting the reason for selecting these employees.

6. Do we have to pay laid-off employees severance?

The payment of severance is discretionary. If an employer provides severance pay, it should consider doing so in exchange for an employee signing a release of claims. If severance pay (or other benefits) is offered to a group of employees as part of a reduction in force, for the release to cover potential claims of age discrimination under the Age Discrimination in Employment Act (ADEA), an employer must comply with requirements set out in the Older Workers Benefit Protection Act (OWBPA). The OWBPA prohibits the waiver of ADEA rights unless the release specifically refers to rights under the ADEA, advises employees of their right to consult an attorney, and gives employee's 45 days to sign (this period can be after termination of employment) and seven days to change their mind. In addition, at the beginning of the 45 day period, on a department or "decisional unit" basis, the affected employees must be given the job titles and ages of the terminated employees and the job titles and ages of employees who were not terminated.

7. What about vacation pay?

In Michigan, an employer is only obligated to pay an employee for accrued and unused vacation time if it has agreed to do so in its policies or by contract.

8. What are our obligations regarding health insurance?

Under the Consolidated Omnibus Budget Reconciliation Act (COBRA), employers with 20 or more employees that provide a group health plan must offer the employee and qualified beneficiaries the opportunity to continue coverage, at their own expense, when they lose coverage as a result of termination or layoff. Affected employees are entitled to 18 months of coverage. Beneficiaries are entitled to 18 months of coverage and possibly longer if they suffer more than one qualifying event.

9. Do we have to rehire everyone we laid off if work becomes available?

No. In the absence of a collective bargaining agreement or other agreement to the contrary, an employer is not required to rehire or re-call any laid-off employee. However, to many employees, a layoff implies something other than a permanent loss of employment. If an employer does not intend on calling employees back to work, it should consider advising employees that they have been terminated, rather than laid off.

10. What are some alternatives to a permanent workforce reduction?

There are a number of alternatives an employer can implement that will allow it to keep its work force in tact for the long term, while addressing what hopefully is a temporary need to cut costs. These alternatives include reduced pay or benefits, shortened work weeks, temporary individual layoffs, and temporary department or employer-wide shutdowns. An employer must take care in

implementing any of these options to ensure that there are no unintended adverse economic consequences.

Article submitted by Mel Muskovitz, a member of the Employment and Labor Section in the Ann Arbor office of Dykema Gossett PLLC. Other articles written by Mr. Muskovitz can be viewed at www.dykema.com. Mr. Muskovitz can be reached at (734) 214-7633 or via e-mail at mmuskovitz@dykema.com.