Implementing Workforce Reductions

Legal and Strategic Factors to Bear in Mind When Considering Reductions in Workforce Size to Adjust to Economic Conditions

SUMMARY

One of the many negative ramifications of the current economic crisis is the well-publicized wave of layoffs. Employers faced with the need to make reductions in the size of their workforces have an array of options to choose from, as well as a thicket of federal, state and sometimes local statutory obligations through which they must navigate. We provide here (1) a brief outline of steps employers should consider in planning layoffs, as well as (2) summaries of certain particularly pertinent considerations.

PRACTICAL CONSIDERATIONS IN A REDUCTION-IN-FORCE (RIF)

INITIAL STEPS

The initial steps in anticipating and preparing for a RIF include:

- Establishing a management team to make and implement decisions, deciding the appropriate level of board involvement for the ensuing decisions, and lining up in-house and outside counsel ready to advise on legal compliance;
- Analyzing the need for a RIF and considering possible alternatives, such as a hiring freeze;
- Deciding whether to offer a voluntary or involuntary exit program, or both; and
- Determining whether there are any individual employment contracts, union contracts or collective bargaining obligations that will affect the decision process.

ESTABLISHING SELECTION AND SEVERANCE STANDARDS

Issues to be addressed concerning the selection process include the following:

- Will employees be selected based on the elimination of certain departments or positions? Redundancy or overlap of work? Seniority (overall or within departments)? Performance?
Will there be transfers to different positions, relocations, consolidations of facilities? Bumping rights (i.e., contractual rights of employees selected for termination to avoid termination by "bumping" employees with less seniority)?

- Arrangements should be made for the managers’ preliminary selections for layoff to be reviewed by individuals such as senior management, human resources and the legal department.

- If severance is to be offered, criteria should be identified for determining the amounts of any payments, as well as for identifying other benefits that might be offered, such as outplacement assistance, vesting of unvested equity awards, payment of accrued but unused vacation time (for which legal obligations vary from state-to-state—see below), and covering or reimbursing employees for their payment of medical insurance premiums under COBRA for some or all of the applicable 18-month period.

- Employers should consider whether to offer severance in a lump sum, or to offer to maintain employees on a salary continuation status for a period of time, which may also enable the employee to continue to receive medical benefits for the duration of the salary continuation period or to offer a combination of the two.

- In constructing severance offers, an evaluation should be made of whether the new deferred compensation tax rules (Internal Revenue Code § 409A) might apply and if so (and if no exception applies), offered severance benefits must be properly structured to comply. The impact on tax-qualified retirement plan benefits of potential severance arrangements should also be considered.

**STEPS TO MINIMIZE LITIGATION RISKS**

After initial review but before communication of the decisions:

- Conduct a statistical analysis of the demographics of the selection lists. If members of a particular protected class appear to have a significantly lower retention rate than other groups, further inquiry as to the business reasons for the selections may be warranted.

- Review employment contracts of individual employees to determine payments and benefits to which they may already be entitled.

- Consider the potential availability of retiree health coverage and clearly reserve rights to change or terminate such coverage (particularly given that legislation in this area is anticipated).

- Prepare for employee communications: What have employees already been told? Does it make sense to hold “town hall” meetings to announce the RIF prior to individual communications? What is confidential, and what can be shared with employees? Are plant closing notices required (see below)? Must FINRA U5 termination notices be submitted?

- Coordinate communications, internally and with employees, regarding retirement plan benefits.

- Prepare the formal separation documents, including separation agreements and Older Workers Benefit Protection Act (“OWBPA”) disclosures. To obtain an enforceable release of age discrimination claims in the context of a group termination, OWBPA requires that employers disclose to affected employees, and give them 45 days to consider, the job titles and ages of all persons within a decisional unit selected and not selected for participation in a voluntary or involuntary severance program in which general releases of legal claims will be given. In addition, separation agreements should be reviewed by counsel to ensure that they comply with the latest state and federal law requirements. It is important not to rush the documentation part of the process, if at all possible.
PROS AND CONS OF VOLUNTARY SEPARATION PROGRAMS

A voluntary separation program involves offering employees the opportunity to resign and receive a package of severance pay and/or benefits in exchange for the execution of a waiver and general release of legal claims against the employer. The OWBPA disclosures described above apply in the case of a voluntary separation program.

The advantages of a voluntary separation program include:

- The curtailment of potential claims because employees have willingly resigned and signed a release;
- Potentially less negative effect on morale, as compared to involuntary layoffs;
- Increased predictability by controlling the termination date and transition period of employees who may have been thinking of resigning anyway; and
- Avoidance of the need to make difficult termination decisions.

The disadvantages of a voluntary separation program include:

- The loss of flexibility in the ability to pick and choose employees to be laid off (e.g., some above-average performers could opt to resign); and
- The possibility that an insufficient number of employees will accept the buy-out, such that additional, involuntary termination decisions will still have to be made.

PLANT CLOSING NOTIFICATION LAWS

In addition to the 60-day notice requirements of the federal Worker Adjustment and Retraining Notification ("WARN") Act that apply in the context of plant closings or mass layoffs, there are numerous state plant closing laws, some of which were only recently enacted, such as in New Jersey and New York. The various state notification laws often (i) impose more stringent requirements on employers than the federal WARN Act, in terms of the length of required notice, minimum threshold numbers of employees affected to trigger the notice requirement and penalties for non-compliance; and (ii) are inconsistent with one another, creating compliance headaches for multi-state employers who must follow different rules for different offices.

- The New York State Worker Adjustment and Retraining Notification Act ("NY WARN") Act requires private employers to provide notice to their employees before specified plant closings or mass layoffs occur in New York. Although the NY WARN Act closely tracks the language of the federal WARN Act, it also imposes additional requirements on employers by expanding the circumstances in which notice must be given, and increasing the required notice period to 90 days. The NY WARN Act is not effective for layoffs that occur prior to February 1, 2009, but it states that notice must be given at least 90 days in advance of any covered layoffs that occur after that date, which may arguably require that notice be given to employees and specified government agencies prior to the February 1, 2009 effective date of the law.

- New Jersey’s job loss notification act went into effect on December 20, 2007. Although the notice period is the same 60 days as it is under WARN, the penalties for non-compliance are...
more severe: an employer who fails to comply with the notice requirement must provide “severance pay equal to one week of pay for each full year of employment” to every affected employee, arguably regardless of the degree of non-compliance. In addition, the statute requires submission of its own, specific notification form, and establishes a “response team” within the state Department of Labor and Workforce Development who must be given access to the work site by the employer so the response team can “provide appropriate information, referral and counseling,” to displaced workers.

- There are numerous other state plant closing laws with which employers considering a plant closing or RIF must ensure compliance, including, among others, California, Connecticut, Illinois and Ohio.

VARIOUS OTHER REQUIREMENTS

There are various other state laws applicable in the context of plant closings and RIFs that can pose significant compliance challenges to employers. In New Jersey, for example, employers who implement a “mass separation” of 25 or more employees must give 48 hours’ notice prior to the separation to “the unemployment unit of the One-Stop Career Center located nearest the place of employment” (although a federal WARN notice, if applicable, satisfies this requirement). In New York, employees must receive a written notice within five (5) days of their termination of the exact date of their termination and the date on which benefits will cease. In Massachusetts and California, employees have a statutory right to pay for accrued but unused vacation time, and such pay must be included in their final paycheck on the day of their termination, while in New York and other states, such vacation pay entitlement depends on the employer’s written policy and/or an agreement between the employer and employee.

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The attorneys of Sullivan & Cromwell’s Labor and Employment Law and Executive Compensation and Benefits Groups have extensive experience in identifying and dealing with the issues outlined in this publication. We are available to assist clients through this challenging process.
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CONTACTS

<table>
<thead>
<tr>
<th>Labor and Employment Group Contacts</th>
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<tbody>
<tr>
<td>Theodore O. Rogers, Jr.</td>
<td>+1-212-558-3467</td>
<td><a href="mailto:rogersto@sullcrom.com">rogersto@sullcrom.com</a></td>
</tr>
<tr>
<td>Robin D. Fessel</td>
<td>+1-212-558-3832</td>
<td><a href="mailto:fesselr@sullcrom.com">fesselr@sullcrom.com</a></td>
</tr>
<tr>
<td>John F. Fullerton III</td>
<td>+1-212-558-3906</td>
<td><a href="mailto:fullertonj@sullcrom.com">fullertonj@sullcrom.com</a></td>
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<tr>
<th>Executive Compensation and Benefits Group Contacts</th>
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<tbody>
<tr>
<td>Max J. Schwartz</td>
</tr>
<tr>
<td>Marc R. Trevino</td>
</tr>
<tr>
<td>Matthew M. Friestedt</td>
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