

Economic Downturn May Cause Spike in Litigation Arising From Reductions-in-Force

by Aaron Goldstein and Marina Lyons

With economists predicting a recession in the coming year, many employers are considering downsizing their operations. In planning for and implementing such reductions, employers should be aware of the risk of litigation arising from such actions and take preventative steps to avoid such risks. Some of the most salient risks employers face in planning reductions-in-force are claims for discrimination in the selection of workers for termination and claims under federal and state laws requiring advance notice of plant closing.

Reductions in Force

When making layoff decisions, employers should seek to identify objective criteria for selecting employees for the reduction and to apply such criteria consistently. For example, employers may consider factors such as seniority, work performance, and skill set. Once the employer selects employees for layoff based on the selection criteria, employers should analyze the potential adverse or disparate impact of the layoff on certain groups of employees that are statutorily protected from discrimination. Such disparate impact analysis should be conducted under the direction of counsel, in order to potentially preserve the attorney-client privilege.

Generally, to conduct a disparate impact analysis, employers should analyze whether certain protected classes are affected more than others by comparing the percentage of the protected class selected for the layoff with the percentage of the protected class in the employer's entire workforce. To correct any potential disparate impact, employers should work with counsel to identify mitigating measures. For example, employers may reevaluate selection criteria for layoffs and ensure that it has a documented legitimate business purpose for using the criteria at issue.

After finalizing the list of terminated employees, employers should consider whether severance benefits should be offered in exchange for a release of legal claims against the company. Employers should ensure that they draft their proposed severance

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agreements carefully, including especially the proposed release of claims. Having a defective release may result in the employee keeping the severance benefits while also retaining the right to bring claims against the employer. Because of the detailed legal requirements for group separation agreements, employers should engage counsel to review such agreements.

For example, under the Older Workers Benefit Protection Act, group separation agreements that include releases of age discrimination claims under federal law must contain specific provisions, such as a 45-day consideration period and a 7-day revocation period. Moreover, employers must provide employees who are over 40 years of age detailed disclosures about the severance plan, such as the eligibility factors and a listing by job titles and ages of those employees selected for layoffs. Omitting these provisions may mean that the release of federal age discrimination claims is not enforceable, and the employee may be free to bring such claims against employer, even after receiving the severance payment.

When drafting separation agreements, employers should also take advantage of the last opportunity to include restrictive covenants or intellectual property rights protections. If the employees' contracts with the company do not already include such provisions, employers should consider adding these to the separation agreements for additional protections post-termination.

WARN Act

Once the employer decides on the list of employees selected for layoff and the severance packages it will offer in exchange for releases of claims, the employer must communicate the layoff decision to the affected employees. When evaluating how and when to provide notice of termination, the company must consider whether the Worker Adjustment and Retraining Notification Act (the "WARN Act"), or similar state laws, apply.

Generally, the WARN Act requires employers with 100 or more employees to provide workers at least 60 days' advance notice of plant closings or mass layoffs. A "plant closing" is defined as a shutdown of a site of employment during a 30-day period that results in an employment loss for 50 or more employees. A "mass layoff" refers to a reduction in force that results in an employment loss at a single site during a 30-day period of (1) 50 or more employees (if those affected constitute at least 33% of the active workforce at the site) or (2) 500 or more employees. In addition, state law may have more stringent requirements. For example, California employers must also comply with the California WARN Act, which is triggered in the event of a plant closure affecting *any number* of employees, and layoffs of 50 or more employees, *regardless of percent of workforce*.

If the WARN Act is triggered, employers must provide advance notice not only to their employees (or their representatives if unionized), but also the state or entity designated by the state to carry out rapid response activities, the chief elected official of the unit of local government where the closing or layoff will occur, and any other parties as required by applicable state law.

There are exceptions to the notice requirements, such as a natural disaster or unforeseeable business circumstances, but these exceptions are narrowly defined. Moreover, the WARN Act does not provide for any alternative, such as pay in lieu of notice. However, if an employer does choose to pay workers for 60 days instead of giving proper notice, the employer may have technically violated the WARN Act, but the damages for the violation would equal 60 days of pay, so the employer is not responsible for an additional penalty under WARN. Accordingly, some employers prefer to provide pay in lieu of notice to its employees, but those payments must include all forms of compensation, including benefits, for 60 calendar days. If any severance is offered in exchange for a release of claims, that must be made on top of that 60-day payment.

In distress situations, where the employer may be insolvent and unable to pay employees damages for violating the WARN Act, employees have brought actions against officers and directors individually under state law claiming that such individuals breached their fiduciary duties to the corporation. *E.g.*, *Stanziale v. MILK072011 (In re Golden Guernsey Dairy)*, 548 B.R. 410 (Bankr. D. Del. 2015); *LaMonica v. Tilton, et al. (In re TransCare Corporation)*, No. 16-10407, 2020 WL 8021060 (Bankr. S.D.N.Y. 2020). While the law on this issue remains unsettled, employers should nonetheless consider the impact of such potential litigation in the form of claims by officers and directors against the employer for indemnification under corporate governance documents or for coverage under the employer's insurance policies.