

Reductions in Force and the Older Workers Benefit Protection Act

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by Aaron Goldstein

It is generally a good idea for companies not to disclose biographical information about their employees, such as marital status, religion, or age. Good HR professionals counsel managers not to ask for such information during interviews, for example, in order to avoid claims of discrimination in hiring.

Under U.S. law, however, there is an important exception to this well-advised general rule. Under the Older Workers Benefit Protection Act (“OWBPA”), employers terminating two or more employees as part of a layoff and offering severance in exchange for a release must disclose the following information to each employee over 40 who is being terminated and offered severance: 1) a description of the class of employees considered for termination (e.g., all sales people in the state of Washington); 2) the age and title of each employee in the class considered for termination; and 3) whether or not each of the employees in the class considered for termination is in fact being terminated and offered severance. The employer must give these employees 45 days in which to consider the release agreement and must specifically advise the employees in writing to seek legal counsel.

Canadian employers are often shocked to discover that such disclosures are not only allowed, but required under U.S. law. These disclosures allow each employee over 40 who is being offered severance to quickly assess whether the layoff will have a “disparate impact” against employees over 40 and thus to bring a suit for age discrimination. Whether a layoff has such a “disparate impact” involves some moderately complex math. However, it basically boils down to whether employees over 40 (or other protected classes) are disproportionately chosen for termination out of the pool of employees considered for layoff.

When Canadian companies acquire businesses in the United States, they often engage in reductions in force post merger. It is important for these companies to not only comply with the disclosure requirements of the OWBPA, but also to vet the contemplated layoff for possible disparate impacts upon protected classes such as age, gender, religion, race

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and national origin. It is particularly important to assess whether the layoff has a disparate impact upon employees over 40, given the disclosures required by the OWBPA.

Canadian companies laying off U.S. employees should make sure they have knowledgeable counsel regarding the requirements of the OWBPA to avoid setting themselves up for costly litigation.