

Employment Law Corner

Monthly Report



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Employment Law Corner: Layoffs and Reductions in Force

December Updates

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Of RIFs and Recessions:

Given the dire predictions in the news, it's no surprise many businesses are gearing up for a recession as we approach the new year. With recessions comes layoffs, with Twitter, Amazon and Meta among the first to lead the way. Layoffs can be daunting, a morale killer, and riddled with compliance issues. In many cases, even the most well-intentioned reductions in force (RIFs) can cause costly errors. Unless you have the deep pocket of an Elon Musk, you likely want to prepare for any reduction in force the best way possible.

Discrimination and Disparate Impact Analysis:

One of the key questions any Human Resources and Compliance team should ask is: "Do these layoffs look like discrimination?" In the event your selection favors one gender, age, race, sexual orientation, gender identity, or any other protected class over another, there is a potential for exposure. If you cannot rely on solid, objective criteria like performance, tenure, or financial viability of the position to justify the selection, you have exposure.

A best practice when deciding on layoffs is to perform a disparate impact analysis. A disparate impact analysis helps your team compare those who have been selected for layoff against the general group or department. It is best to do a broad look of the company at large and also narrowly by supervisor or department. This helps you to see, compared to the overall demographics of the company or department, if you are disproportionately selecting those over 40 or who are in a protected class like African-American, over 40, etc.

A thorough disparate impact analysis will also tease out the potential for implicit bias in decision making. Implicit bias is found everywhere and it affects every day decisions, including RIFs. Doing a thorough analysis of the demographics of your selection will help to expose some implicit bias decisions, potentially avoiding discrimination claims.

Severance Agreements:

This is definitely worth considering and can be an opportunity to limit your exposure in the event of a mass layoff. Be sure to look at any existing

employment contracts that provide a severance or the “golden parachute” provision. If you do have a non-compete in the severance agreement, **be sure that it complies with state specific guidance**. This area is tricky.

If possible, consider providing a solid severance package to your selected employees. It generates goodwill under these circumstances, mitigates risk, and the money spent now will save you later on.

Age Discrimination:

This one deserves special consideration because is probably one of the most important considerations in the event you choose to offer severance. If you do, be sure to include the necessary ADEA language in the severance agreement. If you only fire one person over 40, then they are entitled to a 21-day consideration period and a 7-day revocation period. If you fire two or more people over 40 that number goes up to 45 days of consideration and you must provide the “Decisional Unit Disclosure” data along with the separation agreement.

The Decisional Unit Disclosure is a notice that provides the position title of everyone in a given decisional unit, their age, and whether or not they were selected for layoff. It is required by the Older Workers Benefit Protection Act and would be an automatic violation to not include in the severance agreement. We are very familiar with these specific requirements and can help.

Be Empathetic:

Most people don’t wake up and decide that they want to terminate hundreds of employees, causing them to lose their income and health insurance. These can be difficult decisions for supervisors who have worked closely with the selected employees. It’s important to be patient and understanding with one another and come up with a good game plan on how and who will do the termination. This is where Human Resources or People and Culture Departments can demonstrate the value of their empathy.

Remember that it’s not about you, meaning the Company, who is doing the layoffs. Social Media has seen quite a few CEOs or business leaders posting themselves crying or complaining about how hard it was for them to make the decision to layoff. Stop that before you start. Losing a job is obviously much harder. What you can do: be as available as possible in the offboarding process, assist them with looking for another job, provide references, ensure they have all the information they need to appropriately apply for benefits, and be as understanding as possible in your communications.

Have a RIF coming up and need help? Need someone to review your severance agreements or do a disparate impact analysis? **We can help!**

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