Reductions in Force

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What to Consider?

- Selection Criteria
- Compliance with OWBPA (Older Workers Benefit Protection Act)
- Compliance with federal WARN and state mini-WARNS
- Dis disparate Impact Analysis
- Severance package/Severance Plans
- Implementation
Avoid Top 10 Pitfalls

- Failure to plan = plan to fail
- Drawn out process – water cooler talk and no one working – morale down
- No statistical analysis
- Insufficient waivers/releases
- Inconsistent and undefined selection criteria
- Inconsistent/ineffective internal communications
- Failure to consider federal and state WARN
- Insufficient knowledge of severance plans/policies and/or contracts
- Lack of sensitivity
- Lack of Consideration of the “after”
Before You Start

- Define and document the need for the restructuring/layoff
- Identify and document the business goal
- Identify facilities/business units impacted
- Timeline for layoffs
Consider Impact of Layoff

- Cost of implementation
- Unions
- Remaining workforce
- Customers
- Vendors
- Investor relations
- Media
- Government
Collect Relevant Documents

- Handbook
- CBAs
- Severance Policies
- Org Charts
- Benefit SPDs and Plans
- Job Descriptions
- Performance Reviews
- Offer Letters
- Employment Agreements
- Restrictive Covenant Agreements
- Commission Agreements
- Equity Grants
Define **Objective Selection Criteria**

- Designate appropriate decision-makers
- Be consistent
- Options
  - Last in, first out
  - Performance evaluations
    - Must be documented
    - Consider weighted scores
  - Other available options
Union Considerations

- Notice obligations?
- Bumping?
- Liability for withdrawal from multi-employer union pension plan?
Voluntary or Involuntary Programs?

- **Voluntary**
  - Limits legal risk
  - Manages expectations
  - Takes time
  - May lose key employees

- **Involuntary**
  - More expedient
Selecting Employees: Do Before and After Org Charts

LIST JOB TITLES
NO NAMES ON FIRST DRAFT

- Merging Duties?
- Cutting Similar Positions?
- Eliminating Departments?
Don’t Do A Layoff….

- In lieu of performance management
- To remove “problem employees”
- If you can’t answer “why” under oath
Consider Legal Issues

- WARN Acts
- The Older Worker Benefit Protection Act
- Discrimination Claims
- Retaliation Claims
- Contract Claims
- Tort Claims
- H-1B Employees?
Scrutinize the Selections

- **Adverse Impact Analysis**
  - Check for disproportionate effect
  - Age, sex, race, national origin and other protected characteristics

- **Retaliation Issues?**
  - Recent FMLA leave
  - Workers Comp claims
  - Internal complaints
  - Lawsuits
Severance Pay and Benefit Issues

- Review existing severance plans, agreements, and other arrangements:
  - Will contemplated action trigger severance pay or other incentive/bonus/retirement obligations?
  - Can amendment eliminate severance pay obligations?

- Determine any discrentional severance:
  - Based on years of service?
  - Paid in regular installments or lumps sum?
  - Impact of reemployment?
  - Any non-cash severance benefits?
  - 409A issues?
Releases

- Limits liability and provides transition resources for impacted employees
- Will require additional payment and/or benefits as “consideration” for release of claims
- Do existing plans reference Releases?
- Should an ERISA plan be adopted?
What Is Consideration?

- Must be in addition to anything of value to which employee is already entitled
- Can not include:
  - Accrued PTO
  - Payments per prior severance policy
  - Guaranteed bonus or commission
Release/Waiver Agreements

- Where does the release agreement come from (and when was the last time it was revised?)
OWBPA - Older Workers Benefit Protection Act

- Governs releases for employees 40 or older
- Review Periods
  - 45 days for group
  - 7 day revocation period
  - Need disclosure of age and title of those selected and those keeping their jobs
OWBPA Requirements

- ADEA waiver must be “knowing and voluntary”:
  - Written and understandable
  - Mention ADEA
  - No future waiver
  - Consideration
  - Consult with a lawyer
  - Review period
  - Revocation period
Must Be “Knowing and Voluntary” Waiver

- Avoid legalease
- No waiver of rights after execution
- Opportunity to consult with counsel
- Supersedes any oral promise
- Be clear waiving important rights, including ADEA claims
Key Communications

- **To Supervisor:**
  - Review RIF Plan (criteria, process, documentation)
  - Summarize organizational objectives
  - Talking points for exit meeting

- **To Public:**
  - Press Release
  - WARN Notice (if applicable)

- **To Impacted Employees:**
  - Employee announcement letter and Separation Agreement
  - FAQ
  - Benefits information

- **To Remaining Employees:**
  - What to expect next
Provide Transition Resources

- Unemployment representatives
- Job training/placement
- EAP (check if available via COBRA)
Mistakes Can Be Costly

- **Zeltwanger v. Webber, et al.** - $18.8M verdict for female sales rep. who sued for sexual harassment and 2 months later discharged as part of a RIF.

- **EEOC v. Allied Signal** - $8M settlement agreement with EEOC on behalf of 350 former employees age 40+. Employees claimed age discrimination because company continued to recruit younger workers at time of RIF.
Insensitivity Can Be Costly

- **Shemonsky v. Witco** - $2.3M verdict awarded in age discrimination claim. Layoff predominantly affected senior workers. Workers were called to manager’s office via PA announcement for termination.

- **Baker v. National State Bank** – over $4M verdict awarded to 2 former employees terminated as part of a RIF due to employer’s failing financial condition. Claims of age and gender discrimination. Employees were abruptly ordered to report to the company’s headquarters and given a form letter advising them that their positions were eliminated.
COBRA Issues

- Be sure to comply with notice obligations
- Group health plans (including medical, dental and vision plans) must offer continuation coverage to “qualified beneficiaries” upon a termination of employment or reduction in hours
- Continuation coverage generally is 18 months
- Spouse or other dependents may be eligible for up to 36 months of continuation coverage in some circumstances
WARN Act

- Applies to employers of 100 or more employees
- Must provide 60 days advance notice of a
  - Plant Closing (when there will be 50 or more employees affected at a site) or
  - A mass layoff (1/3 of employees at a single worksite will be affected, so long as that percentage is more than 50 F/T employees, or when there will be 500 or more affected employees).
- Exceptions including faltering company, unforeseeable business circumstances, natural disaster
What Is An “Employment Loss”? 

- Termination other than “for cause”, voluntary departure or retirement’
- A furlough exceeding 6 months
- Reduction of hours of more than 50% during each month of any 6-month period
Penalties for WARN Act Violations

- Back pay for each day of violation, up to 60 days
- Reasonable attorneys’ fees
- Prejudgment interest
- Lost employee benefits
- Civil penalties for failure to notify local government unit
NJ WARN Act v. Federal WARN

- More stringent notice requirements
- Harsher penalty for non-compliance
- Less room for exceptions to WARN
States with Mini-WARN Laws

- California
- Connecticut
- Hawaii
- Illinois
- Kansas
- Maine
- Maryland
- Massachusetts
- Minnesota
- New Hampshire
- New Jersey
- New York
- Oregon
- Rhode Island
- South Carolina
- Tennessee
- Wisconsin
WARN in NY

- 90 days notice – more than Federal 60 days
- Employers with 50 or more full-time employees or 50 or more employees that work in the aggregate of at least 2,000 hours
- A plant closing occurs if facility or site of employment is shut down and 25 or more employees (other than part-time employees) suffer an employment loss during any 30-day period.
- A mass layoff occurs if the RIF, which is not part of a plant closing, results in employment loss for either (1) 33% of the workforce, which amount to at least 25 employees, or (2) a total of 250 employees (excluding part-time employees).
- Written notice required for a relocation of all or substantially all of the covered employer’s industrial or commercial operations to a different location 50 miles or more away.