

Tips for Executing an Effective Reduction-in-Force*

by Stuart R. Buttrick and John S. Rossero**

The struggling economy and recent financial crisis have presented many employers with the challenge of remaining profitable during a period when there is a significant reduction in demand for products or services. As a result, unfortunately, many employers have begun considering whether a reduction-in-force (RIF) is a necessary response to the ongoing economic downturn. A RIF requires a significant amount of planning and preparation to minimize potential liability and comply with statutory obligations. What follows are several "tips" employers should consider when conducting a RIF:

Consider the potential alternatives to implementing a reduction-in-force. Before deciding on a RIF, consider whether other options will accomplish the organization's objectives. Examples of alternatives to RIFs include voluntary layoffs or separation programs, early retirement programs, reassignment of employees and temporary shutdowns.

Identify and document the reason for the RIF. A non-discriminatory, business reason should be identified and articulated in writing as the basis for the RIF. Examples include cost reductions, loss of business, restructuring of operations or abandoning lines of business. Employers should then identify the documentation that exists supporting the reason for the RIF, and such documentation should be kept in a separate file.

Determine the size of the reduction necessary. Employers should determine the number of employees that will be affected by the RIF, consistent with the non-discriminatory business rationale underlying the RIF.

Determine how the size reduction will be established. Will the size reduction be a certain percentage of the workforce? All or a portion of the employees in certain specified departments? A specific number of employees? A defined budget cut with lower level management determining how they will achieve the budget cuts, which may or may not include headcount reductions?

Determine the selection process for identifying the employees to be reduced as part of the RIF. The criteria utilized for the selection process should be as objective as possible, supported by documentary evidence. The more objective the criteria, the less likely the decision will be vulnerable to a claim of discrimination. Examples of objective criteria include length of service, disciplinary record, attendance record, past performance evaluations over a set period (i.e., the last 3-5 years), salary, the individual's

position or function is being eliminated and/or the absence of skills that will be needed in the reduced workforce. Employers should also consider whether a multi-component evaluation process should be used. If so, employers need to determine whether the various factors are given equal weight, whether some factors are weighed more heavily than others and whether some factors are used as tie-breakers.

Involve multiple people in the decision-making process. A neutral committee of at least three people should determine who will be reduced. Those on the committee should receive written instructions describing the RIF process and what factors are to be considered. All documentation utilized during the decision-making process should be retained. When the final list is completed, someone not on the decision-making committee, possibly from Human Resources, should review the list to ensure a disproportionate number of persons in a protected category are not being released.

If offering severance packages, comply with statutory requirements for waiving age discrimination claims. If a RIF involves two or more employees, employers need to comply with the Older Workers Benefit Protection Act (OWBPA) for age waivers for individuals over 40. In circumstances where the age waiver is offered as part of an exit incentive or employment termination program, the OWBPA requires that employees must be informed of their right to speak with an attorney, must be given at least 45 days to consider the severance agreement, afforded 7 days to revoke their acceptance of the agreement and provided with statistical information about the RIF.

Determine if the RIF triggers Worker Adjustment and Retraining Act (WARN) obligations. WARN applies to employers with 100 or more full-time employees. WARN obligations are triggered by initiating a RIF that meets one of the several possible criteria defined by statute. WARN events require employers to provide employees with at least 60 days advance written notice of the layoff.

The aforementioned tips address just a few of the many issues that employers must consider prior to conducting a RIF.

ENDNOTES

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