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The Low-Down on Layoffs

Thinking about a reduction in force? Read this article first.

Back in May of 2007, Dell announced plans to lay off 8,800 employees. By October 2008, the company was embroiled in a class action discrimination lawsuit involving former employees seeking more than \$500 million in damages. While reductions in force may allow your organization to remain viable in difficult financial times, the failure to plan sufficiently and to organize a layoff can spell legal trouble. Aside from claims alleging discrimination, you may also be facing claims for breach of contract, violation of wage statutes and even federal layoff rules (the Worker Adjustment and Retraining Notification Act, or WARN Act). Here are a few things to consider:

1. Determine which jobs or job functions need to be combined or eliminated. Supervisors involved in the process should be directed to examine all jobs in the areas targeted for reduction, identifying the description of tasks performed, time spent on each task and other jobs in the unit that perform those tasks.

2. Develop uniform selection criteria for employees in the affected areas. No single set of criteria will be appropriate for every employer. You have a right to select the criteria, including subjective criteria, which will enable you to accomplish post-layoff goals. Employees claiming that they should have been rated higher in the criteria ratings have rarely been successful in their cases. Check your handbook, contracts and collective bargaining agreements to make sure you're complying with their requirements.

3. Train the managers. All managers involved in the layoff should be trained about the layoff program and the methods and procedures for identifying jobs and ranking employees, as well as communicating the layoff to the employees.

4. Evaluate, rank and select employees. Apply the selected criteria and determine your layoff list.

5. Do a preliminary statistical evaluation. Confidentially (and consulting with an attorney) check to see whether a particular class of employees may be disproportionately affected by the layoff. If so, you must be certain that you can articulate a legitimate business reason for your action and have written records supporting your reasoning. This step is the very challenge Dell faces in its discrimination lawsuit as class members allege that as a result of layoffs, more than 80 percent of Dell's upper management is now male.



6. Consider the "special cases." You also need to consider employees on family, medical or workers' compensation leave, as well as whistleblowers and employees about to vest in benefit plans. These employees may try to complain that the layoff interfered with their protected rights.

7. Consider separation agreements and releases. You will need to decide whether to provide severance pay in exchange for a release of claims. Review your policies, practices, employment contracts, ERISA plans and collective bargaining agreements to make sure you comply with your obligations. There are many legal complications that must be addressed in drafting the separation agreement, so consult with your legal counsel about these requirements.

8. Legal requirements regarding notification of layoffs. The WARN Act requires employers with 100 or more employees to provide 60-days' advance written notice of a "mass layoff" or "plant closing" to the employees, local government and union representatives. A "mass layoff" is at least 33 percent of all full-time employees (a minimum of 50 employees) during any 30-day period. A "plant closing" includes temporary or permanent shutdowns of a single site if it results in a loss of at least 50 full-time employees. There are exceptions to this requirement, but they are viewed narrowly.

With these considerations, you can make an informed decision as to how best to structure your layoff and minimize the risk of a lawsuit.

D. MICHAEL REILLY, Director of Lane Powell's Labor and Employment and Employee Benefits Practice Group, represents small and large employers on employment litigation and advice. His experience includes claims involving discrimination, wrongful discharge, ERISA, race, sex, religion, retaliation and disability claims. He can be reached at reillym@lanepowell.com or (206) 223-7051.

JENNIFER K. WYATT, attorney at Lane Powell and member of the Firm's Labor and Employment Practice Group, defends employers in employment disputes, including claims of discrimination, harassment, wrongful discharge, and wage and hour violations. She can be reached at wyattj@lanepowell.com or (206) 223-7043.