

Layoff litigation

How to avoid discrimination litigation when downsizing **Interviewed by Matt McClellan**

Reductions in force (RIF) have become a necessary — although unpopular — tool for companies that must cut their costs to improve profitability. Coming to grips with laying people off is stressful for any business owner, but even more traumatic is the realization that downsizing can expose your company to claims of discrimination.

“While the long-term benefits of a reduction in force may be clear, they present potential problems involving the added costs and distraction of employment litigation,” says Bruce A. Truex, senior partner at Secret Wardle. “Taking certain steps and following certain procedures before the layoff may help a company avoid such lawsuits.”

Smart Business spoke with Truex about how to strategically plan for downsizing now to avoid litigation later.

How can layoffs prompt litigation?

Age discrimination is the most common source of layoff-related lawsuits because the highest-paid workers are often the oldest and a target for employers reducing costs. The EEOC reported a 30 percent increase in age discrimination and retaliation claims in 2008 and predicts a record number of new claims in 2009. In addition, laid-off workers may allege they were targeted because of race or gender.

Reduction in force for bona fide economic reasons is a termination for just cause and, therefore, a defense to a claim of discrimination. However, it does not operate as a complete defense to a discrimination claim where there is sufficient evidence for a jury to conclude that the employer unlawfully selected the employee for discharge for impermissible reasons. Because the discriminatory element needs only be proved to be a determining factor, rather than the sole or primary factor for discharge, an employer's financial need to reduce its labor costs does not insulate the employer from liability for violating an individual's civil rights. The employer must be able to persuasively explain the economic reason for selecting particular employees for layoffs.

How can employers avoid discrimination litigation?

The employer might consider alternatives to layoffs, such as reducing benefits, eliminating overtime, reducing work hours, freezing or reducing wages, and cutting dividends. If a hiring freeze in all areas is not possible, freeze those positions that are similar or identical to the positions of employees who will be laid



Bruce Truex
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off. Such a freeze tends to reassure the employee that the employer is fair.

Incentives such as early retirement and buyouts can also reduce the risk of legal liability. Although these alternatives often cannot prevent layoffs, the real value is that they can minimize the argument that the employer could have avoided the reduction by other cost-cutting measures. This argument is often advanced at trial to support a claim that an RIF was a pretext for unlawful termination.

What's the first step for an employer considering downsizing?

First, review the company's personnel policies and employment contracts to determine whether they in any way restrict the right to implement layoffs or require the company to pay severance benefits. If such policies exist, they must be replaced with policies indicating that the employer has an absolute and unfettered right to conduct layoffs.

The employer's severance policy should state that severance is not guaranteed. Severance is at the sole and absolute discretion of the employer, and any severance will be conditioned on the execution of a written release or waiver of all claims against the employer.

How can employers develop a strategic plan for downsizing?

The plan must explain the economic jus-

tification for the RIF. The company should document the economic problems it is experiencing, including financial losses, operating expenses and lost market share. Once the plan has been completed, the company must develop and document the basis for selecting the positions to be eliminated.

The employer must then establish the criteria for selecting which employees holding the eliminated position will be included in the layoff. The employer must be able to explain its legitimate, nondiscriminatory reasons for selecting certain employees for termination rather than others. That explanation will only be credible if there is documentation establishing that the process was objective and uniformly applied.

If a seniority-based test is used, the employer must clearly define the type of seniority used (i.e. job, company or department seniority). If the employer makes its selection decisions based on performance, it must clearly define the criteria applied and be objective in its application of that criteria to each individual.

While subjective judgments regarding performance are not illegal, per se, they will be closely scrutinized by courts and juries to assure that the judgments used were not a pretext for discrimination. Consequently, an employer should never use an economic layoff as an excuse to terminate a problem employee.

What else can an employer do to avoid typical layoff pitfalls?

The employer should select layoff decision-makers who have hired minorities, women and older employees. Where the same individual hired and fired the employee, a fact-finder may draw an inference that discrimination is not a determining factor in the downsizing decision.

Once the candidates to be laid off have been identified, a review of each individual's circumstances should be conducted to avoid retaliation claims. Employers should determine whether the individual has a pending EEOC claim or workers' compensation claim, has reported illegal activities under state or federal whistleblower statutes, is on leave under the Family Medical Leave Act or is involved other legal disputes involving the company.

Laying off such an individual may well be an invitation to a retaliation lawsuit. <<

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