

EMPLOYMENT LAW ALERT

July 2009

Ruskin Moscou Faltischek's Employment Law Capabilities

- Sexual Harassment Prevention
- Discrimination Avoidance
- Restrictive Covenants (non-compete, non-solicitation) and Unfair Competition
- Protection of Trade Secrets, Proprietary Information and Business Opportunities
- Employment At Will, Breach of Contract and Termination for Cause
- Employee Policy Manuals
- Family and Medical Leave
- Wage and Hour Requirements
- Employee vs. Independent Contractor
- Executive Employment Agreements and Severance Packages
- Comprehensive Litigation Services

For further information, please contact our Employment Law Group members:

Jeffrey M. Schlossberg
Chair
(516) 663-6554
jschlossberg@rmfpc.com

Douglas J. Good
(516) 663-6630
dgood@rmfpc.com

Joseph R. Harbeson
(516) 663-6545
jharbeson@rmfpc.com

Kimberly Malerba
(516) 663-6679
kmalerba@rmfpc.com

Reductions in Force -- How to Minimize Liability

By: Jeffrey M. Schlossberg



Last month we covered issues relating to furloughs. This month, we focus on reductions in force (RIF), as many companies are either presently undertaking or considering the prospect of conducting layoffs. Unfortunately, many employers are under the erroneous impression that if the reason for the layoff is "economic" or related to the down economy, then the employer is absolved of any liability for claims of discrimination. Such is not the case. In fact, employee terminations as part of a layoff are subject to challenge on the basis of federal, state, and local anti-discrimination laws. Employers must be prepared to set forth legitimate, non-discriminatory reasons for the decisions to select those laid off. Therefore, proper planning is crucial.

Initially, the company should have documentation to support the economic basis of the overall decision. If the company asserts that decreased revenues require the RIF, the company should not overlook large expenditures it may recently have made or intends to make in the near future. Such apparent inconsistencies lead to greater potential for liability, should the decision be challenged.

The company also should have evidence of neutral, business-related criteria for who those who are selected to be part of the RIF. The more objective the criteria, the less likely liability will be imposed. Thus, if a company decides to use seniority and select the last 50 employees hired, or is eliminating an entire department, the likelihood of a significant challenge to that decision is low. However, as a practical matter, seniority generally is not used as basis for selection because it does not permit the employer to focus on positions that need to be eliminated but rather focuses on individual employees. More frequently, decisions are based on performance-related issues.

When incorporating performance standards into a RIF decision, management must ensure that the personnel files of the selected

employees in fact support the contemplated decision. Often, management perceives an employee to be a low performer only to find that the employee's personnel file includes satisfactory evaluations and recent raises in salary. This type of inconsistency could lead a terminated employee to mount a successful challenge against the company's decision.

Once all of the employees have been selected, employers must conduct a statistical analysis to determine whether any protected classification (race, gender, age, etc.) is impacted in a greater proportion relative to the overall workforce population.

Finally, employers must also be aware of statutes that require advance notice to employees. Under New York law, employers with 50 or more employees who shut down a single site of employment resulting in an employment loss of at least 25 employees must give those employees 90 days notice of the shutdown. Similarly, notice also must be given when a layoff will result in a loss of at least one-third of the workforce and 25 employees, or at least 250 employees. Accordingly, affected employers must also incorporate the provision of 90 days notice into their plans for layoffs. Failure to comply could lead to back pay, penalties and attorneys' fees.

Other issues that could arise in connection with a RIF include compliance with: (a) federal law dictating the contents of a binding release of claims, and (b) the COBRA subsidy law.

More Than 600 Businesses Served with I-9 Audits

On July 1, 2009, the U.S. Immigration and Customs Enforcement (ICE) served 652 notices of I-9 audits to employers nationwide. The one-day count is more than ICE issued all of last year. According to an ICE press release, the government is increasing its "focus on holding employers accountable for their hiring practices and efforts to ensure a legal workforce." Employers are required to complete the Form I-9 within 3 days of an employee's hire and retain the forms for three years after the date of hire or one year after the date of termination, whichever is longer. Paperwork violation fines range from \$110 to \$1,100 for each violation and fines for substantive violations range from \$375 to \$16,000. If you receive a notice, you should contact counsel immediately.

Form I-9 Update

The United States Citizenship and Immigration Services office announced on June 29, 2009 that the Employment Eligibility Verification I-9 form that was due to expire June 30 will continue to be valid for use. A copy of the current I-9 Form can be obtained by clicking on the following link: [Form I-9](#)

If we can be of assistance on these or any employment law issue, do not hesitate to contact us.



East Tower, 15th Floor
1425 RXR Plaza, Uniondale, NY 11556-1425
516.663.6600
www.rmfp.com

Attorney Advertising

Employment Law Alert is a publication for distribution without charge to our clients and friends. It is not intended to provide legal advice, which can be given only after consideration of the facts of a specific situation.

Forward email

✉ **SafeUnsubscribe®**

This email was sent to jschlossberg@rmfp.com by jschlossberg@rmfp.com.
[Update Profile/Email Address](#) | Instant removal with [SafeUnsubscribe™](#) | [Privacy Policy](#).

Email Marketing by



Ruskin Moscou Faltischek, PC | 1425 RXR Plaza | East Tower 15th Floor | Uniondale | NY | 11556