



Planning For Reorganizations And RIFs

By Hagood Tighe (Columbia)

Historically, the healthcare industry has not experienced layoffs of the magnitude seen by manufacturing and other sectors during the recent economic downturn. But with changes in healthcare, including changes in reimbursements, some employers may be faced with difficult choices, including reorganizations and layoffs.

Proper planning for a reduction in force (RIF) requires time. Human Resources professionals are wise to ensure that management is aware of all that's required. You do not want your CEO to tell you Tuesday that a reduction in force must occur on Friday.

Here are several of the key steps that should be considered if a reduction in force may be in your company's future.

Step 1 – Planning the RIF: Advance planning is the key to success, and effective planning requires an understanding of the business rationale and objectives of the reduction in force. Therefore, as part of the planning, it's important that you review relevant policies, agreements, commitments, collective-bargaining obligations, and anything else that could affect selections.

Step 2 – Prepare a Program Document: We recommend that you work with counsel to prepare a program document which includes an EEO statement, documentation of the business case for the RIF, and documentation of the selection process for both hourly and salaried employees. The program document should also require training for supervisors and managers on the selection process, and should establish a review committee to analyze all proposed selections.

Finally, include an appeals process so that those selected for job elimination have the opportunity to appeal their selection. This gives you a second opportunity to ensure that proper processes have been followed.

Step 3 – Voluntary vs. Involuntary: Voluntary reductions in force are certainly easier from an employee-relations standpoint. Of course, in this economy, to incentivize people to leave, voluntary programs typically require a more significant investment by the company. And many companies find that it is their best employees who volunteer, because they can most easily find new employment. When conducting a voluntary reduction in force, decide first whether you need to establish caps on the number of volunteers you will permit, and exclude individuals who may have special skills that you need to retain.

Step 4 – Determining the Selection Process: One of the most litigated issues is the method of selections used. Issues with selections can lead to both disparate-treatment claims and disparate-impact claims.

Generally, seniority-based selections are considered to be the most defensible, but are not always appropriate for a white collar workforce. Most companies prefer to use merit or skill to make

selections. Unfortunately, the subjectivity that often creeps into these selection processes can lead to litigation.

Selections break down into two categories: position elimination and position consolidation. With respect to position eliminations, if all employees in the affected job classification are terminated, the selection is a fairly low risk process. But if not all those who are in the job classification are to be terminated, you must develop a non-discriminatory method for selecting individuals.

Position consolidations can also be problematic. Generally, if two positions are being consolidated into one new job, both of the former incumbents will consider themselves qualified. In reality, one or even both of the incumbents may not be qualified. Documentation regarding the new position, as well as the skill set required to achieve your objectives, is critical when defending these decisions.

Step 5 – Consider Notice Requirements: Under the Worker Adjustment Retraining and Notification Act (WARN Act), employers are required to give 60-days advance written notice to employees and certain government and union officials before implementing a layoff. Because all of that must occur before notice can be provided, this often means that a reduction in force requires planning of four to six months in advance of the proposed termination date. And some states have additional notice requirements.

Step 6 – Severance Issues: While not usually required by law, many companies provide severance for employees that are displaced during a reduction in force. If you decide to pay severance, you must also decide whether you will require a release and waiver of all claims in exchange for this severance. While we certainly recommend such releases, this again requires advance planning and the involvement of your employment counsel. Federal laws, such as the Older Workers Benefit Protection Act, and many state laws, have certain requirements that need to be incorporated into these documents to ensure the release is valid.

Step 7 – Legal Review: Once the steps above are completed, carefully review the entire process and all draft documentation before initiating the layoff. Simply re-using notices and documents from the last reduction in force, or that the hospital next door used, is not acceptable and often leads to serious errors and liability.

Step 8 – Implementing the RIF: Treating employees with dignity and respect is key to implementing a reduction in force. Good employee communication is important both to those employees departing and to the employees remaining. It's important that your surviving employees see that you have handled the layoff in a fair manner.

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Unions Continue Success In Organizing Healthcare Employees

By James D. Kurek (Cleveland)

In recent years, unions have continued to realize greater success in organizing healthcare employees than employees in other industries. Union win rates in the healthcare sector have been at or above 70%, generally about 10% above their win rates in other sectors. Additionally, more elections are taking place in the healthcare industry. The total jumped from 220 elections in 2009 to 305 elections in 2010.

These increases in organizing activity and above-average win rates reflect unions' continued emphasis on organizing more healthcare employees, as well as their effectiveness in doing so. Projections indicate that jobs in the industry will grow at a much faster rate over the next decade than jobs in many other sectors of the economy. Additionally, uncertainty over healthcare reform and related cost-containment measures have resulted in an environment that is even more ripe for union organizing efforts.

What's Behind The Success?

In recent years, some unions have focused most or all of their attention on healthcare workers. Since its formation in 2009, National Nurses United (NNU) has been organizing registered nurses in hospitals around the country and claims to have more than 160,000 RNs as members. The aggressive California Nurses Association (CNA) is the driving force behind the NNU. In several situations, NNU has coordinated its efforts with the Service Employees International Union (SEIU) to organize both healthcare service workers and RNs.

Unions have their union-sponsored health plans, which list approved providers. As a coercive tactic to unionize other hospitals they might threaten to exclude the non-union facility from their network of providers. Illustrating that no group is immune from organizing activities, the SEIU recently won a representation election giving them the right to represent 300 attending physicians at a pair of New York City hospitals.

Unions are also making strides in others efforts to create an environment in which organizing is much easier. Although the misnamed Employee Free Choice Act (EFCA) appears to be stalled for the foreseeable future, the National Labor Relations Board (NLRB) is now stacked with a pro-union majority that will likely continue to implement changes through decisions and rule making. Those changes may well include quicker elections after a petition has been filed, expanded access to an employer's email system for organizing efforts, and an increase in protections for union salts (union-paid applicants who hire in for the sole purpose of signing up coworkers).

What To Look For

Based upon their recent actions, unions trying to organize healthcare workers may take a variety of actions in an effort to drum up support:

- emphasizing staffing and workload concerns, under the guise of concern for patient care;
- reporting salaries of upper management in a manner designed to generate controversy;
- encouraging or even assisting employees with legal, often marginal claims, such as OSHA or FLSA complaints;

- aggressive media campaigns that negatively describe the employer; and
- having union organizers apply for jobs in target organizations (salts)

How To Respond

In this environment, a healthcare provider should consider a variety of proactive steps, including at least:

- train your supervisors to recognize and respond to the early signs of a union organizing campaign;
- develop and explain your policy regarding maintaining a union-free environment;
- maintain positive lines of communications with employees;
- promptly and effectively deal with concerns that impact the staff;
- identify a rapid response team to address any organizing activity that occurs; and
- emphasize positive media and other community relationships.

Given the continued efforts by unions in the healthcare sector, and the success they have experienced, hospitals, clinics, and nursing homes must continue to monitor their union avoidance programs and be prepared to respond quickly to any sign of union-organizing activity. In the current environment, healthcare employers are undoubtedly among those most likely to be targeted by organizers. Preparedness and vigilance are crucial to prevailing if you become a target.

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