Fenwick Employment Brief

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PLANNING A WORKFORCE REDUCTION: A BRIEF CHECKLIST

In current economic times, more and more companies are turning to "reductions in force" or "RIFs." While RIFs can provide both short and long-term economic benefits, they are also among the most difficult events an attorney or human resources professional must oversee because of the emotional and economic impact they will have on employees, the myriad of complex laws that must be observed, and the enormous amount of work that is usually required in a very short amount of time. Thoughtful and careful planning is important not only to ensure compliance with legal requirements, but also help to minimize the adverse effects of a workforce reduction, further reducing the risk of lawsuits.

The following checklist provides some practical guidance to assist employers in implementing a reduction in force and to minimize legal risks. This checklist does not address all the possible issues arising from a RIF and we encourage you to consult with counsel as part of your planning and implementation of a RIF.

PLANNING AND CONSTRUCTION OF A LAYOFF

- Identify triggering events for layoff
- Identify possible layoff alternatives (e.g., pay cuts, schedule reductions, temporary shutdowns and vacation/PTO drawdown, reduction of contractor headcount)
- Identify affected sites and estimate number of affected employees for WARN and other analyses
- Establish the RIF management team: Identify the individuals responsible for communicating the RIF, performing job analysis, criteria selection, management training, individual employee evaluations, personnel file review, exit process
- Establish timing of RIF (One time? Rolling? Is there a need for staggered termination dates? Are transition periods needed for certain affected employees?)
- Create timelines for giving notice and implementing the RIF
- Identify high risk employees and confer with counsel regarding risks related to layoff of such employees, including those in:
    - Protected categories
    - On or having recently returned from leaves of absence
    - Engaged in protected activity (e.g., worker's compensation claims, complaints about wages, safety, discrimination, etc.)
- Document the process and identify layoff selection criteria: (e.g., performance, tenure, seniority, redundancy, skill sets)

- Evaluate and rank employees
- Finalize the RIF list – sites and personnel
- Audit personnel files of affected employees
    - Is performance history - reviews, salary increases, bonuses, etc. - consistent with decision to layoff?
    - Any contractual severance rights?
        - Express contract (e.g., offer letter, employment agreement, retention agreement, severance plan, change of control agreement)
        - Implied agreements (e.g., historical severance practice (if any), oral commitments from management)
    - Proprietary information and inventions agreements signed?

KEY LEGAL ISSUES

Federal and California WARN

- Determine if Federal or California WARN notice requirements will be triggered; consult with legal counsel. For a comparison of the Federal and California WARN statutes click here. [http://www.fenwick.com/docstore/Publications/Employment/Comparison_Chart_Federal_v__Cal_WARN.pdf]
- Provide WARN notices to affected employees or pay and benefits in lieu of notice
- Provide WARN notices to employees and government agencies

Adverse Impact Analysis

- Evaluate need for and scope of analysis
- Determine the relevant pool: Company wide? Group specific?
- Determine if there is a statistically significant adverse impact on protected classes (race, sex, age, etc…); if so, is there a "business necessity"?

IMPLEMENTATION/DEPLOYMENT OF LAYOFF

Separation Agreements

- Prepare separation letters/agreements
    - Severance or other separation pay? If so, release?
    - Timing of severance: lump sum or payment stream?
    - Transition period?

- Determine if OWBPA triggered:
    - Applies to employers that employ 20 or more employees in at least 20 workweeks during current or preceding calendar year
    - Gives employees age 40 and over 45 days to consider and 7 days to revoke
    - Prepare OWBPA information disclosure documents (job titles and ages of employees eligible or selected for program, and those not eligible or selected)

Messaging and Exit Process

- Prepare manager talking points for message to affected employees
- Prepare company-wide talking points
- Retrieve all company property
- Disable access to facilities and systems through coordination with IT/MIS Department
- Monitor electronic systems for misconduct
- Quarantine computing devices and retain email (for possible forensic analysis) if misconduct suspected
- Prepare for disruptive employees; consider having security in place

Wages/Benefits

- Pay out on termination date all wages earned (includes accrued vacation/PTO and all other wages)
- If paying by direct deposit, ensure deposits post on termination date for California employees
- Promptly process commissions and outstanding expenses after termination
- COBRA: Notify plan administrator of qualifying event for affected employees

NEW FMLA REGULATIONS

The Department of Labor (DOL) has published its final revised regulations to the Family and Medical Leave Act (FMLA), which go into effect on January 16, 2009. The revised regulations are several hundred pages in length and represent the first significant update to the FMLA since its enactment fifteen years ago. In light of the various substantive changes, employers are encouraged to consult with counsel and review their leave of absence policies and forms to ensure compliance.

Some of the highlights of these changes include:

- **Waiver of FMLA Rights:** Employees may voluntarily settle or release past FMLA claims without court of DOL approval. This revision to the regulations clarifies a longstanding ambiguity created by contrary rulings among the courts. This change means that employers may include a release of FMLA rights as part of a general release of claims in separation agreements.

- **Light Duty:** Time spent doing “light duty” work does not count against an employee’s FMLA leave entitlement. An employee’s right to job restoration is put on hold while performing light duty or until the end of the applicable 12-month period.

- **Employee Notice:** Employees are required to comply with the employer’s usual and customary workplace call-in procedures for reporting an FMLA absence, absent unusual circumstances.

- **Employer Notice Obligations:** Employers now have 5 business days (previously two days) to notify employees of their eligibility to take FMLA leave after either the employee requests leave or the employer acquires knowledge that the leave may be for an FMLA-qualifying reason.

- **Medical Certification:**

    - Employers may directly contact health care providers for authenticating and clarifying a medical certification. However, the employer’s representative contacting the health care provider must be a health care provider, human resources professional, leave administrator, or management official, but **cannot** be the employee’s direct supervisor.

    - Employers must notify employees of deficiencies in their medical certifications in writing and specify the additional information that is necessary to complete the medical certification and allow employees 7 calendar days to provide the additional information.

- **Timing of Medical Certification:**

    - Employers may request a new medical certification each leave year for medical conditions that last longer than one year.

    - Employers may request recertification of an ongoing condition every 6 months during an absence.

- **Fitness for Duty Certifications:**

    - Employers may require that fitness-for-duty certifications specifically address the employee’s ability to perform the essential functions of the job.

    - If reasonable job safety concerns exist, employers may also require fitness-for-duty certifications before an employee may return to work after taking intermittent leave.

- **Substitution of Paid Leave:** An employee seeking to substitute paid leave must comply with the employer’s uniform policy for use of such leave, such as providing a minimum amount of advance notice, unless the employer chooses to waive such requirements.

- **Bonuses and Awards:** Employers may disqualify employees from awards based on achievement of specified job-related performance goals (*e.g.* attendance), if the employee has failed to meet the goal due to taking FMLA leave, so long as the employer treats employees on non-FMLA leave in the same manner.

- **Military Caregiver Leave:** Eligible employees who are family members of covered servicemembers may take up to 26 workweeks of leave in a single 12-month period to care for a covered servicemember with a serious illness or injury incurred in the line of duty.

- **Qualifying Exigency Leave:** Eligible employees with a covered military member serving in the National Guard or Reserves may use up to 12 weeks of FMLA leave for "any qualifying exigency" arising out of a covered military member on active duty or called to active duty status in support of a contingency operation. The regulation defines "any qualifying exigency" to include short-notice deployment, military events and related activities, child care and school activities, financial and legal arrangements, counseling, rest and recuperation, post-deployment activities, and any additional activities agreed to by the employer and the employee.

NEWS BITES

FEDERAL JUDGE ORDERS FORMER IBM SENIOR EXECUTIVE TO STOP WORKING FOR APPLE BECAUSE OF POTENTIAL VIOLATION OF NONCOMPETE AGREEMENT

In *IBM v. Papermaster*, IBM Corp. brought suit in federal district court in New York against Mark Papermaster, its former vice president of the blade server development unit after Papermaster had announced his intention to go work for Apple Inc. as its senior vice president of devices hardware engineering, working on the iPOD and iPhone. IBM claimed that Papermaster's move to Apple violated the terms of his noncompetition agreement, which barred him from working for competitors for one year after leaving IBM. The court granted IBM's motion for a preliminary injunction, and ordered Papermaster to stop working for Apple until further notice from the court.

CALIFORNIA COURT OF APPEAL REJECTS PUNITIVE DAMAGES FOR LABOR CODE VIOLATIONS

In a significant victory for employers, a California court of appeal held that punitive damages are not available for violations of California laws governing meal and rest breaks, minimum wages, and pay stubs. In *Brewer v. Premier Golf Properties*, plaintiff sued her former employer for, among other things, denying her meal and rest breaks, failing to pay wages for all hours worked, and failure to provide accurate itemized wage statements. At trial the jury found in favor of plaintiff on her wage-hour claims, awarding her $7000 in unpaid wages, approximately $20,000 in Labor Code penalties, and $195,000 in punitive damages.

The court of appeal reversed the punitive damages award. First, the court reasoned that punitive damages are not ordinarily available for actions arising from a contract. Under that principle, punitives are not available for violations of plaintiff's Labor Code claims since those obligations arise only when the parties enter into an employment relationship, which is a contractual arrangement. Second, the court reasoned that under the "new right-exclusive remedy" rule, where a statute creates new rights and obligations not previously existing in the common law, the express statutory remedy is deemed to be the exclusive remedy for statutory violations, unless it is deemed inadequate. The court found that the statutes and regulations governing minimum wage, meal and rest breaks, and pay stubs, created new rights that did not previously exist under the common law, and therefore those statutes provided the express and exclusive remedy for violations of those subject matters.

Although the court's holding regarding punitive damages was limited to the specific Labor Code violations alleged in this case (minimum wage, meal and rest breaks, and itemized pay stubs), the court's reasoning appears broad enough to extend to other wage-hour violations, such as those governing overtime.
