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DOWNSIZING YOUR WORKFORCE WITHOUT INCREASING LITIGATION

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I. INTRODUCTION.

If the termination of a single employee is enough to conjure up thoughts of dreaded litigation, then the prospect of a business closure or mass layoff can become an employer's worst nightmare. By the end of last year, employers across the nation paid millions of dollars in damages to former employees who alleged they had been terminated as a result of discriminatory downsizing practices. In Michigan, for example, an employer was ordered to pay $45 million dollars to 1,400 employees who had filed a class action lawsuit alleging reorganization bias. Indeed, by the end of 1999, U.S. businesses announced a reduction of 50,907 jobs, with mergers and acquisitions accounting for nearly "one out of every nine job cuts in 1999," causing some analysts to conclude that the surge in job reductions "may make 1999 the biggest downsizing year of the decade." Daily Labor Report (Nov. 8, 1999).

Even with its much-heralded growth, Las Vegas has not been immune from large and small scale downsizing and layoffs. For example, in 1999, the Maxim Hotel & Casino closed operations leaving hundreds of employees without work. Within the last ten (10) years alone, such major Las Vegas gaming employers as the El Rancho, the Dunes and the Aladdin closed their doors, leaving thousands of employees out of work. In addition, other small and medium-sized businesses have experienced facility closures, bankruptcy, and financial constraints causing employee layoffs in significant numbers.

As local growth continues, the temptation to overlook liability concerns raised by downsizing issues is understandably difficult to resist. Another consequence of a booming local economy is the potential for overstaffing. When this happens, downsizing may become a necessity even with a slight change in business, and as with any termination, downsizing can trigger potential liability for a variety of employment-related claims. In addition, employers may be subjected to less obvious sources of potential liability, such as those stemming from obligations under the Worker Adjustment and Retraining Notification Act (WARN) and the Older Worker Benefit Protection Act (OWBPA).

Consider the following:

• An employer told four applicants that the company was expanding operations in the area due to increasing production and sales and that there would be opportunities for growth and advancement. The applicants accepted the positions and moved their families to be closer to the company's facilities. Shortly thereafter, the employer closed its facilities and terminated the four workers. The workers filed suit, and in January 1999, the Ninth Circuit Court held that employers are required to disclose any contemplated plant closures and that even "at-will employees" can sue an employer for pre-employment representations to the contrary. Meade v. Cedarapids, 164 F.2d 1218 (9th Cir. 1999).

Recognizing that planning, preparation and a general awareness of potential legal issues are important steps toward minimizing employer liability for terminations caused by downsizing, the following is intended to help navigate employers through some of the "hidden landmines" of potential liability in workforce downsizing. Many of the issues discussed are, of course, worthy of entire presentations. For these purposes, however, our goal is to assist employers in identifying relevant issues at the earliest possible stages with a view toward minimizing the fallout of workforce downsizing.

II. PLANNING: WHAT TO DO BEFORE DOWNSIZING.

The term "downsizing" is generally regarded as a catch-all for any large or small scale termination, including layoffs, reductions in force or business closures. There are, of course, a variety of legitimate considerations which may motivate a decision to downsize, including production cutbacks, market considerations, facility consolidations, and internal restructuring or reorganization. At the same time, however, there are certain considerations which an employer may not take into account when downsizing its workforce.

Even where an employer desires to implement downsizing to achieve legitimate goals, it may nevertheless find itself in a position of defending its downsizing deci-

sion in a legal forum if the downsizing results in a disproportionate number of terminations of workers who are members of a protected class. As such, understanding what motivates the decision to downsize and being able to articulate how the downsizing selection criteria helps achieve the downsizing objectives are important tools in helping to minimize an employer's liability exposure for downsizing-related claims. These factors necessarily arise in the planning stages of the downsizing process.

Understanding the workforce profile prior to downsizing can help an employer anticipate which group of workers will be affected most by its decision. There are a variety of methods an employer can use to obtain a "portrait" of its existing workforce, including a review of management, departmental and organizational structure of the workforce and/or the review or creation of job descriptions and organizational charts.

Often, the most difficult part of the downsizing process is communicating the downsizing decision to the affected employees. In this regard, an understanding of the goals and motivation for downsizing can also provide a good starting point in preparing to communicate the decision to those who will be affected by it. In doing so, the employer should anticipate some of the questions downsized employees are likely to ask, including, who will be subject to downsizing, what will happen to remaining employees, and the reason for the downsizing.

With the objectives of downsizing in mind, an employer should understand the statistical impact of the downsizing-related terminations on its workforce, particularly if those affected are individuals who are members of a protected class. To do this, an employer should formulate a preliminary list of prospective terminees and determine how these terminations will affect the remaining workforce profile.

III. PREPARING TO DOWNSIZE: IMPLEMENTING THE DECISION.

Once an employer understands the motivation for its decision to downsize its workforce, the employer should begin to implement the decision by devising an appropriate method for selecting which of its employees will be laid off.

A. Preparing the Selection Criteria.

1. Generally, the central issue raised in most downsizing-related lawsuits is not the propriety of the employer's decision to downsize its workforce, but rather the legitimacy of the employer's selection of particular individuals to be terminated as part of the downsizing process. As a result, the criteria an employer utilizes to select employees for lay-off during the downsizing process will be carefully scrutinized by the courts. There are several objective selection criteria an employer can use to accomplish workforce downsizing, including:

a. seniority;

b. particular job positions;

c. elimination of highly-compensated workers; and

d. job performance.

2. Selection methods will vary depending on an employer's goals. For example, if an employer emphasizes loyalty to the company as demonstrated by years of employment, a seniority-based selection method might be appropriate. Alternatively, an economics-oriented decision to downsize may be best served by eliminating certain unnecessary job positions or positions of highly-compensated workers. Finally, a carefully planned performance-based method may be appropriate for employers seeking to retain only the most able and skilled of its employees.

B. Selection Caveats.

The method an employer uses to select employees for downsizing is likely to be carefully scrutinized by the courts in the context of legal challenges to such decisions. Consider the following real-life scenarios:

Employer gave conflicting reasons for layoff, citing poor-performance as its layoff selection criteria only after an EEOC investigator found that work was still available. EEOC v. Ethan Allan, Inc., 44 F.3d 116 (2d Cir. 1994).

Employer impermissibly made layoff decision utilizing race-based selection criteria in order to satisfy its racial diversity objectives. Taxman v. Board of Educ., 91 F.3d 1547 (3d Cir. 1996).

Thus, prior to utilizing any particular selection methods, it is important to make sure that an existing policy or agreement does not obligate the employer to use a particular selection method over another. For example, a collective bargaining agreement may require an employer to use seniority alone in selecting and determining the order of employees to be downsized.

IV. THE AFTERMATH OF DOWNSIZING.

Common Downsizing Pitfalls:

Breach of Commitments in Existing Agreements

Breach of Legal Obligations Other than Nondiscrimination

Discriminatory Downsizing

Downsizing "Problem" Employees

A. Breach of Employer's Commitments in Existing Agreements.

Avoid the claim that you have violated your own policy. See:

Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235 (2d Cir. 1995). Employee selected for lay-off filed suit against her former employer for gender discrimination. To support her claim, she claimed that employer violated its own policy regarding the selection of persons to be laid off pursuant to a reduction in force. The employer's lay-off policy entailed a three-prong selection inquiry: (1) whether some other employee can perform the same job; (2) whether the job can be combined with another position; and (3) if two or more individuals could do the job, how have they performed in the past. The court found there was evidence that employer may have violated its own lay-off policy because (1) former employee's supervisors provided affidavits stating that employee was the only one who could do a particular job and performed in an exemplary manner, (2) former employee's full-time job was not consolidated with another position but, instead, employer advertised for a replacement to fill employee's former position, and (3) person hired as a replacement for employee was a male who was paid at a considerably higher salary than former employee.

B. Breach of Obligations Other than Nondiscrimination.

In addition to protection against discrimination, the law provides terminated employees with certain other rights. A general understanding of these rights can help minimize some of the sources of alternative liability for downsizing-related terminations. The following provides a general overview of legal considerations an employer should be aware of in implementing a downsizing decision.

1. Health Care Continuation Coverage Under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA).

The COBRA requirements apply to any private or state or local government employer which sponsors group health plans and employs twenty (20) or more employees. In particular, COBRA requires all covered employers to offer employees and their qualified beneficiaries the right to elect continuation of health care coverage as a result of certain "qualifying events," including any termination where the employee is not at fault.

COBRA "qualifying events" include any circumstance which results in the loss of group health coverage for a qualified beneficiary, such as death of the covered employee, termination, reduction of hours, divorce and/or legal separation. Downsizing, therefore, represents a "qualifying event" which triggers an employer's COBRA obligations. As a general matter, a terminated employee is entitled to up to 18 months of continuation coverage under the employer's group health plan.

Even before downsizing becomes a concern, however, employers must have already advised covered employees of their COBRA rights upon joining a particular group health plan. To avoid liability for defective COBRA notification, however, an employer must offer employees subject to downsizing written notification of their right to elect continuation of their former health care coverage for themselves and their qualified beneficiaries. Such notification must be given within thirty (30) days of the termination date.

2. National Labor Relations Act (NLRA).

Downsizing can also subject employers with a unionized workforce to allegations of unfair labor practices under the National Labor Relations Act ("NLRA"). Specifically, the NLRA imposes certain duties on an employer with respect to layoffs:

Understand Relevant Provisions of Collective Bargaining Agreement ("CBA").

Employers, if applicable, should refer to the terms of their collective bargaining agreement ("CBA") as a general starting point for effecting workforce layoffs. Specifically, an employer should identify the relevant CBA provisions and understand the obligations, if any, imposed by the terms

of the CBA. If the CBA provides little guidance, the employer should nonetheless take steps to ensure compliance with the duties imposed by the NLRA.

Duty to Bargain Over Effect of Layoff.

The NLRA also requires employers to bargain over the effects of a layoff decision on the remaining workforce, even though an employer may not have to bargain over the layoff decision itself. At the very least, an employer should notify the employees' bargaining representatives, in writing, of its willingness to meet, bargain and negotiate over the effect that a layoff decision may have on remaining employees.

First National Maintenance Co. v. NLRB., 452 U.S. 666 (1981). An employer terminated its operations contract with a nursing home and effected the layoff of 35 employees operating at the facility without consulting the employees' bargaining representative. The United States Supreme Court held that the employer "was under a duty to bargain about the results or effects of its decision to stop work at the nursing home" and that its failure to do so was an unfair labor practice.

3. Worker Adjustment and Retraining Notification Act ("WARN").

The Worker Adjustment and Retraining Notification Act (WARN) generally requires employers with 100 or more employees to give sixty (60) days' advance written notice to employees and local officials prior to effecting any plant closure, mass layoff or other substantial reduction in force. If employees are represented by a union, the employer must provide notice to the union. Significantly, the penalty for WARN violations is the payment of wages and benefits to each aggrieved employee for each day the violation continues. An employer can also be liable to state and local governments for civil penalties of up to $500.00 per day. Some recent examples:

Employer did not demonstrate good faith attempt to comply with WARN by mailing notice to terminated employee sixteen (16) days late where employer had information about potential plant closure well before mailing notice to affected employee. Joe v. First Bank System, Inc., 202 F.3d 1067 (8th Cir. 2000).

Employer who gave all employees 60 days' WARN notice of the date that mine would close down and laid off 89 employees the next day violated WARN's 60-day notice requirement with respect to the 89 employees. Employer had one date for layoff of employees and another date farther out for actual plant closure. When affected employees' layoff dates are earlier than the date of the plant shutdown, the affected employees are entitled to notice of the closing 60 days before the date of the employees' layoffs. United Mine Workers of America v. Martinka Coal Co., 202 F.3d 717 (4th Cir. 2000).

For more information on an employer's obligations under WARN, please see Section G supra.

4. Employment Retirement Income Security Act (ERISA).

The Employment Retirement Income Security Act (ERISA) prohibits employers from selecting any employee for termination because of the imminent vesting of the employee's pension. In these situations, the timing of a decision to downsize certain employees becomes the critical inquiry. For example, an employer who chooses to downsize by eliminating the positions of certain highly-paid workers may coincidentally select a disproportionate number of employees whose ERISA pension benefits are about to vest.

C. Discriminatory Downsizing.

Just as with other terminations, employees selected for downsizing can expose an employer to statutory liability for employment discrimination if the employees can establish that they were selected for termination "because of" their membership in a protected class, such as race, sex, age, disability, national origin, and most recently, sexual orientation under Nevada law. Because downsizing usually affects more than one employee, the employer can also be subjected to potential class action liability stemming from the terminations of multiple employees.

In November 1999, Allied Signal agreed to pay more than $8 million to a class of older workers who filed an age discrimination suit after they lost their jobs during a series of layoffs in the early 1990s.

Employer violated Title VII by laying off an employee, who is a protected class member with a long service record, based on over-inflated, poorly-documented performance evaluations. The court found that the over-inflated performance evaluations, in and of themselves, constituted discrimination because the plaintiff was not properly counseled on how to improve her performance. Vaughn v. Edel, 918 F.2d. 517 (5th Cir. 1990).

Moreover, the timing of a decision to terminate a particular employee due to a reduction in force can lead to an inference of discriminatory intent:

Employer violated Title VII by terminating employee, despite an asserted reduction in force, immediately after the terminated employee filed an administrative complaint against her former supervisors alleging race and gender discrimination. Hashimoto v. Dalton, 118 F.3d 671 (9th Cir. 1997).

One of the best methods to minimize potential liability for employment discrimination is careful planning in preparing downsizing selection criteria and the ability of an employer to articulate how the chosen selection methods best achieves legitimate downsizing objectives, if later called upon to do so.

The United States Supreme Court held that terminated employees could not state a claim for age discrimination based on an employer's decision to downsize in accordance with a years-of-service criteria, despite the fact that age was a factor correlating with years of service. Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993).

V. PREVENTIVE MEASURES.

A. The Use of Waivers.

Employers are increasingly using waivers as one way of minimizing liability for downsizing or termination-related claims. In particular, employers commonly offer employees selected for downsizing an enhanced severance package in exchange for signing and agreeing to a release which, in theory, bars the employee from subsequently filing suit against the employer because of the layoff decision. In effect, these waivers constitute "pre-emptive legal settlements."

However, effective waivers must comply with certain legal requirements. In general, the law requires that any waiver of potential claims be rendered knowingly and voluntarily. For example, employees can subsequently challenge a signed and executed waiver by claiming that the employee felt compelled to sign the waiver against his or her will. Therefore, the standard severance package a company offers to all employees cannot be made contingent upon the signing of a waiver. Rather, the employer must offer an enhanced severance package to the employee in order to obtain a valid release.[1] This ensures that the waiver does not put an employee in a situation where he or she has no choice but to sign the waiver of rights.

In addition, employers should also be mindful of legal obligations governing the waiver of rights by an employee selected for layoff as a result of the downsizing process. To this end, laws such as the Older Worker Benefit Protection Act (OWBPA) mandate that waivers comply with specific requirements before they can become legally enforceable.

The Older Worker Benefit Protection Act (OWBPA).

As with any waiver of rights, the Older Worker Benefit Protection Act (OWBPA) provides that the employee may not waive any right or claim under the Age Discrimination in Employment Act ("ADEA") unless the waiver is "knowing and voluntary." In addition, the OWBPA sets forth minimum statutory requirements, including requirements that any such waivers:

1) consist of language geared to the level of understanding of the participating parties;

2) contain a written provision advising parties "to consult with an attorney prior to executing the agreement";

3) specifically reference the waiver of rights under the ADEA;

4) refrain from requiring a waiver of rights or claims that may arise after the date upon which the waiver is executed;

5) allow the affected employee(s) at least twenty-one (21) days to consider the agreement, or 45 days if the agreement is offered to a group or class of employees or in connection with an exit incentive;

6) provide employee(s) with "consideration in addition to anything of value to which [he or she] is already entitled";

7) provide employee(s) with at least seven (7) days following execution of the agreement to revoke the agreement, and

8) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, provide data

[1] *Waivers of rights or claims are only valid if they are given in exchange for consideration in addition to anything of value to which the individual giving the waiver is already entitled. If a company does not have a practice of offering severance pay, its offer of such pay would be sufficient consideration for obtaining a waiver of claims.*

regarding that class of workers eligible for and affected by the program, the eligibility factors for such program, any time limits to such program, as well as the job titles and ages of all individuals eligible for the program and the ages of all individuals in the same job classification who are not eligible for the program to allow the employee the opportunity to evaluate the potential for an age discrimination claim before waiving the right to sue.

Court invalidates ADEA waiver based on OWBPA on grounds that waiver did not specifically reference ADEA, did not advise employee to consult with counsel prior to signing waiver, and did not provide employee with the requisite seven (7) day revocation period. Savoie v. Terrebonne Parish School Bd., No. CIV. A. 98-1006 T, 2000 WL 136008 (E.D. La. Feb. 4, 2000) [unpublished opinion].

Finally, although waivers can minimize the prospect of lawsuits by terminated employees, waivers cannot prevent an employee from serving as a witness in another lawsuit against the company or from taking part in a subsequent EEOC investigation of the employer.

B. Voluntary Incentive Programs.

In general, voluntary terminations are less likely to produce lawsuits. Accordingly, an employer should first consider implementing a variety of voluntary incentive programs to encourage voluntary termination prior to effecting involuntary terminations as a result of downsizing. However, an employer should take steps to ensure that employee participation in such programs are truly voluntary in order to avoid having to defend their legitimacy in court:

Voluntariness of employer's incentive program questioned where eligible employees were required to make a choice within twenty-four hours whether to participate in any of several complex early retirement options. Paolillo v. Dresser Indus., Inc., 821 F.2d 81 (2d. Cir. 1987).

For example, Early Retirement Incentive Programs ("ERIP"s) offer certain "retirement benefit enhancements" to employees participating in retirement plans so as to encourage early retirement. As one advantage, ERIPs permit employers to obtain voluntary workforce reductions while avoiding the difficult task of selecting and identifying employees for downsizing.

Lockheed Co. v. Spink, 517 U.S. 882 (1996). The United States Supreme Court held that conditioning early retirement eligibility on an employee's knowing and voluntary release of all employment-related claims does not violate the provisions of ERISA.

However, ERIPS are often of interest to those employees who are close to eligibility for retirement in terms of age and service. Consequently, ERIPs may create the risk for potential age discrimination liability as terminated employees frequently challenge such "voluntary separation programs" as violative of the Age Discrimination in Employment Act (ADEA). In particular, the ADEA prohibits employer discrimination with respect to an employee's "compensation, terms, conditions, or privileges of employment," including any employee benefits provided under a bona fide employee benefit plan. Moreover, any misleading representations in an ERIP may lead to claims of involuntary termination.

Doctor who elected to retire pursuant to early retirement program could state a claim for involuntary retirement based on employer's misleading representations concerning the program. Doctor was entitled to reinstatement and backpay during period of involuntary retirement. Khan v. United States, 201 F.3d 1375 (Fed. Cir. 2000).

DOWNSIZING CHECKLIST FOR EMPLOYERS

A. Planning to Downsize

__ Identify downsizing goals & objectives

__ Understand what existing workforce looks like

__ Understand what the workforce will look like after downsizing

B. Preparing to Downsize

__ Review whether downsizing governed by or addressed in other employment documents

__ Abide by layoff policy in employment agreements or employee handbooks

__ Collective Bargaining Agreement - review any applicable provisions

__ The National Labor Relations Act (NLRA) - avoid potential unfair labor practices

__ Begin with voluntary terminations and prepare voluntary termination packages

__ Develop appropriate selection criteria for layoffs

__ Apply chosen selection criteria for involuntary terminations

__ Personnel documentation stating reasons for termination

__ Assess whether selection criteria achieves employer's goals/objectives

C. Potential Legal Issues

__ Employment Discrimination

Are any of the employees selected for downsizing members of a protected class? If so, determine whether you are prepared to articulate a legitimate basis for the decision to downsize and an appropriate selection method designed to achieve these goals.

__ WARN

__ Written Notice Requirement 60 Days Before the Actual Downsizing Occurs

__ Drafted in language employees can understand

WARN ACT Checklist

__ Plant closing imminent

__ Number of employees expected to be affected

__ Notice requirement compliance

__ Select date for notification within statutory time frame

__ Ensure notice received by all employees

__ Draft notice in plain language

__ Notice to proper local government officials

__ OWBPA

__ Waivers - knowing and voluntary standard

__ Appropriate waiting period/revocation period provided

__ Exit Incentive or Employment Termination Program - gather and release necessary data on eligible and ineligible employees

__ ERISA

__ Assess whether affected employees close to pension vesting

__ COBRA

__ Any covered employees affected by downsizing

__ If so, provide written notice of option to continue coverage

__ Draft in language employees can understand