What Employers Can Do to Stay Out of Legal Trouble When Forced to Implement Layoffs

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Taking specific steps before a layoff can reduce the potential for Worker Adjustment and Retraining Notification (WARN) violations and discrimination charges.

Recent economic instability has, unfortunately, brought the issue of mass layoffs back to the forefront for many employers. For example, in September 2008, 2,269 mass layoff events were reported in the United States, resulting in 235,681 employment losses (see quarterly layoff statistics for 2007-2008 in Exhibit 1). This represents the highest level of mass layoffs since September 2005, when Hurricane Katrina devastated employers throughout the Southeast, and the highest overall level of layoffs since September 2001, when terrorist attacks on September 11 caused a rise in layoffs throughout the nation. It is clear that employers are again facing challenging times, and many employers are being forced to layoff employees in an attempt to scale down and ride out this economic storm.

Mass layoffs are usually meant to help reduce an employer’s operating costs during challenging times. However, if not done carefully and correctly, mass layoffs can cost the employer even more in litigation costs and court awards to former employees.

The recent dissolution of long-time San Francisco–based law firm Heller Ehrman has

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EXHIBIT 1
Quarterly Layoff Statistics
From January 2007 to September 2008

<table>
<thead>
<tr>
<th>Date</th>
<th>Mass Layoff Events</th>
<th>Initial Employment Losses Reported</th>
</tr>
</thead>
<tbody>
<tr>
<td>1Q 2007</td>
<td>3,883</td>
<td>403,041</td>
</tr>
<tr>
<td>2Q 2007</td>
<td>3,680</td>
<td>377,422</td>
</tr>
<tr>
<td>3Q 2007</td>
<td>3,782</td>
<td>378,600</td>
</tr>
<tr>
<td>4Q 2007</td>
<td>4,109</td>
<td>417,545</td>
</tr>
<tr>
<td>1Q 2008</td>
<td>4,881</td>
<td>478,641</td>
</tr>
<tr>
<td>2Q 2008</td>
<td>4,577</td>
<td>470,998</td>
</tr>
<tr>
<td>3Q 2008</td>
<td>5,553</td>
<td>560,807</td>
</tr>
</tbody>
</table>

already spawned at least one class action lawsuit filed by former employees who allege Heller failed to follow the procedures required by federal and state law in conducting its layoffs. Now, in addition to dealing with the complicated process of winding down its business, Heller must also fight a potentially costly lawsuit. If a sophisticated international law firm faces a class action lawsuit over its layoffs, how can everyday employers conduct mass layoffs without getting themselves in hot water?

The process of conducting a mass layoff is complex and daunting for most employers. Although an article of this nature cannot adequately discuss every step of the process, this article aims to illuminate the key steps for employers who are navigating the complex path of conducting mass layoffs: (a) choosing the employees to include in a layoff, (b) providing proper notice of mass layoffs and (c) obtaining liability releases to reduce possible legal exposure.

Choosing the Employees

Choosing the Employees

One of the first steps in mass layoff will be establishing a committee to oversee the entire process with a formalized approach. Setting up the proper selection criteria for identifying who will be laid off will be an important task for the committee. Some mass layoffs will include an initial “self-selection” for employees to volunteer to receive particular incentives in exchange for their resignation. If choosing this method, employers should set up careful safeguards to avoid losing key employees or losing too many employees from any one job category or department.

For those employers who will need to select employees for layoff, it is vital that the selection criteria chosen do not invite lawsuits. For instance, the selection criteria may not include prohibited considerations such as pregnancy, disability or employees who are currently on leave because of work-related injuries.

A significant legal pitfall employers need to avoid in conducting a mass layoff is choosing workers for layoff in a manner that exposes the employer to disparate impact lawsuits. Disparate impact claims involve employment practices that are facially neutral in their treatment of different groups but that, in fact, negatively affect one group more than another and cannot be justified.

The Equal Employment Opportunity Commission (EEOC) has set out what is referred to as the “4/5ths rule” with respect to such disproportionate layoffs. The EEOC guidelines state that

\[
\text{selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded as evidence of adverse impact.}^2
\]

In such situations, the employer will place itself at risk of facing a disparate impact lawsuit. If a plaintiff is able to prove that a mass layoff produced an adverse impact on a protected class, then the employer must justify the selection device or criteria that produced the adverse impact.

Selection Criteria Traps

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The proper selection criteria that an employer uses will nearly always be unique to the business situation of that employer and the reasons for having to resort to a mass layoff. As part of the process of coming to a decision regarding a mass layoff, an employer should look to the operations it wishes to scale back or cut altogether. If only scaling back, the employer will need to select which employees in a given work unit or department to let go.

Employers must be careful not to fall into certain selection traps that may seem neutral but in fact adversely affect a particular group. For instance, more than one employer has faced an age discrimination lawsuit after relying on managerial input regarding employee characteristics such as “flexibility,” “energy” and “enthusiasm.” There are any number of similar traps, many of which will be unique to each employer’s situation.

It is important that once any selection criteria are chosen, and before layoffs are implemented, the
Considerations and Pitfalls When Choosing Employees to Lay Off

- Create incentives for voluntary resignations
- Avoid using protected status as layoff selection criteria
- Avoid layoffs that have a disparate impact on protected classes of employees

Employers should consider the following:

- Choose incentives in exchange for resignation
- Create safeguards to avoid losing key employees or too many from one department
- Employers may not include considerations such as pregnancy, disability, work-related injuries
- EEOC “4/5ths rule” as evidence of adverse impact
- Choose selection criteria that demonstrably meet the business needs associated with the layoffs
- If protected classes are disproportionately affected, the employer will have the burden to show it used reasonable factors unrelated to protected status

Note: EEOC = Equal Employment Opportunity Commission.

Business Needs

In *Durante v. Qualcomm, Inc.*, the employer conducted a reduction in force. The laid off employees filed a lawsuit against their former employer, alleging, among other claims, disparate impact for age discrimination. The trial court granted the employer’s summary judgment motion on all of the employees’ disparate impact claims.

On appeal, the court found that because the employees failed to present evidence that the employer’s termination decisions were solely a matter of subjective discretion and because they failed to otherwise identify a specific employment practice that resulted in discrimination, they failed to satisfy the elements of a *prima facie* case of disparate impact age discrimination.

Even assuming that the employees established a *prima facie* case of disparate impact age discrimination, the employer produced unrefuted evidence that its termination decisions were made to satisfy the differing business needs of its various divisions and departments.

Burden of Proof

In 2008, the United States Supreme Court held in *Meacham v. Knolls Atomic Power Lab* that the burden to prove the employer’s selection criteria for layoff was on the employer. In *Meacham*, the employer had its managers score their subordinates on “performance,” “flexibility” and “critical skills” when selecting employees for a layoff; these scores, along with points for years of service, were used to determine who was laid off. Of the 31 employees let go, 30 were at least 40 years old.

Although the employer argued that it had used “reasonable factors other than age” (RFOA), the Supreme Court found that the employer not only had to raise the RFOA defense, it also had to bear the burden of persuasion regarding the merits of that defense. The Court overturned a lower court’s ruling for the employer and sent the matter back to the trial court for further proceedings—and no doubt further costs to the employer.

These cases illustrate the need for employers conducting layoffs to ensure that the criteria they use for determining who will be laid off are unrelated to employees’ protected class and that the criteria used will hold up to scrutiny in a court of law. For any mass layoff, an employer, along with legal counsel, should conduct a disparate impact analysis.

Providing Proper Notice Under the Worker Adjustment and Retraining Notification (WARN) Act

After choosing who will be subject to a mass layoff, employers must then be sure to conduct the layoff in accordance with the relevant federal, state, and local laws regarding mass layoffs. One
EXHIBIT 3
Overview of Notice Under the WARN Act

<table>
<thead>
<tr>
<th>Which employers are covered?</th>
<th>100 or more employees, not including employees who have worked less than 6 months in the last 12 months or those who work an average of less than 20 hours a week</th>
</tr>
</thead>
<tbody>
<tr>
<td>What triggers notice?</td>
<td>Plant closing resulting in a loss of 50 or more employees</td>
</tr>
<tr>
<td>Who must receive notice?</td>
<td>Chief elected officer of an exclusive representative or bargaining agency</td>
</tr>
<tr>
<td>Penalties for failing to give proper notice?</td>
<td>Back pay and benefits for the violation period, up to 60 days</td>
</tr>
<tr>
<td>Notification period</td>
<td>60 days before closing or layoff</td>
</tr>
</tbody>
</table>

such federal statute is the WARN Act, which became effective on February 4, 1989. The WARN Act’s purpose is to offer protection to workers, their families and communities by requiring employers to provide advanced notice for certain plant closings and mass layoffs. This notice must be provided to either affected workers or their representatives (e.g., a labor union), to the state dislocated worker unit (DWU), and to the appropriate unit of local government. Damages and civil penalties can be assessed against employers who fail to abide by the complex provisions of the Act.

Fortunately, not all plant closing and layoffs are subject to the WARN Act, and certain employment thresholds must be reached before the WARN Act applies. However, knowing when your mass layoff will trigger the need for the statutory notice can be tricky (see Exhibit 3).

Covered Employers

In general, employers are covered by the WARN Act if they have 100 or more employees, not counting employees who have worked less than 6 months in the last 12 months and not counting employees who work an average of less than 20 hours a week. Private for-profit employers and private nonprofit employers are covered, as are public and quasi-public entities that operate in a commercial context and are separately organized from the regular government.

If an employer has only 90 employees at the location of the mass layoff but also has 11 more employees elsewhere, the employer is still covered because all of an employer’s employees are considered in the “100 or more” employee threshold (i.e., not just employees at the particular plant being closed).

Notice Triggers

Two scenarios will trigger the WARN Act’s notice requirements: “plant closings” and “mass layoffs.”

Plant closing. A covered employer must give notice if an employment site (or one or more facilities or operating units within an employment site) will be shut down and the shutdown will result in an employment loss for 50 or more employees during any 30-day period. This does not count employees who have worked less than 6 months in the last 12 months or employees who work an average of less than 20 hours a week for that employer. These latter groups, however, are still entitled to notice, which is discussed in greater detail later.

Mass layoff. A covered employer must give notice if there is to be a mass layoff that does not result from a plant closing but that will result in an employment loss at the employment site during any 30-day period for 500 or more employees or for 50 to 499 employees if they make up at least 33% of the employer’s active workforce. Again, this does not count employees who have worked less than 6 months in the last 12 months or employees who work an average of less than 20 hours a week for that employer.

In the context of the WARN Act, the term employment loss means (a) an employment
termination, other than a discharge for cause, voluntary departure or retirement; (b) a layoff exceeding 6 months; or (c) a reduction in an employee’s hours of work of more than 50% in each month of any 6-month period.

Penalties for Violations

An employer who violates the WARN Act by ordering a plant closing or mass layoff without providing appropriate notice is liable to each aggrieved employee for an amount including back pay and benefits for the period of violation, up to 60 days.

The employer’s liability may be reduced by such items as wages paid by the employer to the employee during the period of the violation and voluntary and unconditional payments made by the employer to the employee.

An employer who fails to provide notice as required to a unit of local government is subject to a civil penalty not to exceed $500 for each day of violation. This penalty may be avoided if the employer satisfies the liability to each aggrieved employee within 3 weeks after the closing or layoff is ordered by the employer.

The WARN Act is enforced through the United States district courts. Workers, representatives of employees and units of local government may bring individual or class action suits. In any suit, the court, in its discretion, may allow the prevailing party reasonable attorneys’ fees as part of the costs.

Who Must Receive Notice?

The employer must give written notice to the chief elected officer of the exclusive representative(s) or bargaining agency(s) of affected employees and to unrepresented individual workers who may reasonably be expected to experience an employment loss. This includes employees who may lose their employment because of “bumping,” or displacement by other workers, to the extent that the employer can identify those employees when notice is given.

If an employer cannot identify employees who may lose their jobs through bumping procedures, the employer must provide notice to the incumbents in the jobs that are being eliminated. Employees who have worked less than 6 months in the last 12 months and employees who work an average of less than 20 hours a week are due notice, even though they are not counted when determining the trigger levels. The employer must also provide notice to the state DWU and to the chief elected official of the unit of local government in which the employment site is located.

Notification Period

With three exceptions, notice must be timed to reach the required parties at least 60 days before a closing or layoff. When the individual employment separations for a closing or layoff occur on more than one day, the notices are due to the representative(s), state DWU and local government at least 60 days before each separation. If the workers are not represented, each worker’s notice is due at least 60 days before that worker’s separation.

The exceptions to 60-day notice are as follows:

Faltering company. This exception, which is to be narrowly construed, covers situations where a company has sought new capital or business in order to stay open and where giving notice would ruin the opportunity to get the new capital or business and applies only to plant closings.

Unforeseeable business circumstances. This exception applies to closings and layoffs that are caused by business circumstances that were not reasonably foreseeable at the time notice would otherwise have been required.

Natural disaster. This applies where a closing or layoff is the direct result of a natural disaster, such as a flood, earthquake, drought or storm.

If an employer provides less than 60 days of advance notice of a closing or layoff and relies on one of these three exceptions, the employer bears the burden of proof that the conditions for the exception have been met. The employer also must give as much notice as is practicable. When the notices are given, they must include a brief statement of the reason for reducing the notice period in addition to the items required in notices.

Notice Form and Content

No particular form of notice is required; however, the information provided in the notice shall be based on the best information available to the employer at the time the notice is delivered. Additional notice is required when the date or 14-day period for a planned plant closing or mass layoff is extended beyond the date or 14-day period announced in the original notice.
All notices must be in writing and must be delivered to ensure receipt 60 days before a closing or layoff. The notice must be as specific as possible. Notifications of plant closings or mass layoffs from employers to the DWU must contain the three types of notification: (a) notification to representatives of affected employees (e.g., unions), (b) notifications to unrepresented employees and (c) notifications to local government officials. The content of the notices is very detailed, and employers should be sure to consult with experienced employment counsel to be sure to be in compliance.

90-Day Look Back Provision

An employer also must give notice if the number of "employment losses" that occur during a 30-day period fails to meet the threshold requirement but the number of employment losses for two or more groups of workers, each of which is less than the minimum number needed to trigger notice, reaches the threshold level, during any 90-day period. Job losses within any 90-day period will count toward the WARN Act's threshold levels, unless the employer demonstrates that the employment losses during the 90-day period are the result of separate and distinct actions and causes.

Specifically, if two or more groups suffered employment losses at a single site of employment during a 90-day period and each group is less than the minimum number needed to trigger notice, reaches the threshold level, during any 90-day period. Job losses within any 90-day period will count together toward the WARN Act's threshold levels, unless the employer demonstrates that the employment losses during the 90-day period are the result of separate and distinct actions and causes and are not an attempt by the employer to evade the requirements of [the WARN Act].

This can sometimes seem more complicated than it is and is sometimes cited by employers as one of the more complex provisions of the WARN Act. The simple answer is that if an employer lays off the aggregate number of employees to trigger WARN Act protections, it will still need to follow those protections, even if the employees are laid off during the course of as much as 90 days, unless the various terminations were unrelated. Some employers point out that this makes the 30-day period discussed in the main portion of the WARN Act obsolete. In some respects, such an observation may not be far off the mark.

Case Law Interpretation

In many cases, courts conclude that a series of terminations during a 90-day period should have been aggregated for the WARN Act's purposes, notwithstanding the employers' arguments that the terminations were unrelated. If the employer can establish that the series of terminations were not just caused by general deteriorating financial conditions but by truly unrelated incidents (e.g., the first termination because of the demise of a partner company and the second termination because of deteriorating economic situation of the defendant employer), the employer may be able to avoid aggregation.

In United Paperworkers International Union, AFL-CIO, CLC v. Alden Corrugated Container Corp., the Court held that the employer's burden to show that the various employee terminations were due to "separate and distinct causes" was not satisfied because the layoffs were caused by a "continuing and accelerating economic demise." The Court found that although the regulations and legislative history did not give precise meaning to the phrase "separate and distinct actions and causes," layoffs that are occasioned by a continuing and accelerating economic demise are not the result of separate and distinct causes.

In Oil, Chem. & Atomic Workers Local 7-629 v. RMI Titanium Co., the Court of Appeals affirmed the district court's decision not to aggregate the layoff of three employees with other layoffs in a 90-day period because the layoffs were due to separate and distinct causes. The defendant company was a titanium production company. The first three employees were laid off because of a funding problem involving an outside partner company based in Italy; the other 87 employees were laid off because of the poor economic condition of the company and the downturn in the metals market.

WARN Act Best Practices

Every employer conducting layoffs must determine whether they are covered by the WARN Act and whether the layoff at issue will trigger notice requirements. These determinations will sometimes require the assistance of experienced employment counsel. If a layoff does trigger WARN Act notice requirements, the employer must be extremely careful to meet the exact requirements for each notice.

Unfortunately, this is not horseshoes and courts will not give an employer credit for substantial compliance or attempting to do things correctly. It is strongly advised that experienced employment counsel be brought on board at this stage, at the latest.
Obtaining Employee Releases

A third key to conducting a mass layoff is minimizing the risk of legal costs and court awards by obtaining releases of claims from exiting employees. Obtaining such releases should be a top priority of any employer conducting layoffs. But again, obtaining effective releases can be a complex process. One of the most frequent pitfalls for employers is running afoul of protections for older workers found in the Older Workers Benefit Protection Act (OWBPA).5

In Title II of the OWBPA, Congress addressed waivers of rights and claims under the Age Discrimination in Employment Act (ADEA). Waivers under the ADEA must meet certain minimum requirements to be considered “knowing and voluntary.”

To release any rights employees might have under the ADEA, the release must be in writing and calculated to be understood by the average worker to whom it will be presented. The release must also provide some “consideration” above and beyond that which the employee is already entitled. The employer must also provide information to each employee regarding the group covered by the layoff or severance program, the eligibility factors for the program, the job titles and ages of those selected for the program, and other information. The requirements to make the release valid are very specific, so it is recommended that an employer consult with experienced employment counsel prior to having any employees sign a release.

Lawsuits Arising From OWBPA

Two recent cases represent a growing trend of plaintiffs’ attorneys filing class action lawsuits against employers who make use of “standard” release agreements that do not precisely follow the requirements of OWBPA.

In Pagliolo v. Guidant, employees who were subject to a mass layoff alleged that the employer’s selection of employees 40 years of age and older was disproportionate and violated ADEA. The employer had obtained releases from the employees in exchange for severance pay. The employees argued that the releases were invalid under the OWBPA.

For example, the employees contended that the release contained misrepresentations, failed to describe the affected decisional unit with particularity, failed to disclose the eligibility factors and ignored requirements with respect to disclosing the ages and job titles of the affected employees.

The court agreed with the employees in all respects and held that the releases were invalid. The court found that the employer made misrepresentations that made it appear that there were 10% fewer terminations of employees 40 and older than were actually terminated. Moreover, the court found that the employer’s spreadsheet that gave dates of birth, rather than ages, violated the OWBPA. Overall, the court concluded that the employer made it unreasonably difficult for employees to determine whether they might have an age discrimination claim.

In Syverson v. IBM, IBM conducted a mass layoff. Each affected employee signed a document containing a general release and covenant not to sue in exchange for receiving severance pay. The employees then filed suit alleging (a) that the agreement violated the waiver requirements in OWBPA and (b) that the employer’s layoff program constituted age discrimination in violation of the ADEA. The court agreed with the employees that the waiver form used by the employer did not meet the OWBPA requirement and therefore was not “knowing and voluntary.”

The court found that the agreement’s use of both a release covering ADEA claims and a covenant not to sue that excepted ADEA claims caused confusion over whether ADEA claims were excepted from the release. The court also rejected the defendant’s argument that the agreement’s direction to consult an attorney mitigated the confusing waiver language.

These cases illustrate how important it is for employers to understand the legal requirements associated with mass layoffs. Employers use layoffs to reduce costs in times of economic instability and downturn. However, conducting a layoff in a haphazard manner can wind up costing more than it was designed to save. In light of the complex legal landscape, it is important to consult with experienced employment counsel when considering whether, and how, to implement layoffs.

Notes

2. 29 C.F.R. § 1607.4(D).
5. 29 USC § 626.
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