SANDBERG PHOENIX

EMPLOYER LAW BLOG

COVID-19 is No Day at the Beach: The Unfortunate Reality of Having to Avoid the Perilous Legal Waters of a Mass Layoff

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With the government and private business establishing safety and health measures to combat the spread of the COVID-19 more companies are faced with the unfortunate and the inevitable decision to reduce their workforce through temporary or permanent business closures or layoffs. Conducting a layoff is difficult- from both a personal and legal perspective. The last thing a company needs during these stressful times is plaintiff-attorney "shark" swimming around its business just waiting for one false step. To avoid such a shark-bite, below are some basic compliance steps to take into consideration when navigating the shark infested waters.

1. The Selection Process. A company's organizational structure, priorities, and workforce often drive the selection process. A company must first determine the organization's goals and thereafter design a new org-structure moving to achieve its objectives. Then the difficult process of determining the jobs that stay and the jobs that will not remain must take place. The layoff can be voluntarily or involuntarily. This selection process for those not volunteering to be laid off is commonly known as the uniform selection criteria within a decisional unit. A uniform selection criteria may include various factors such as job performance, skill set, transferability of skill set, seniority, and compensation. For litigation avoidance purposes, it is imperative that the selection process remain uniform and impartial without favoritism and absolutely without taking into consideration employees' protected classes. Further, to ensure the selection process will survive judicial scrutiny a statistical adverse impact analysis is strongly recommended to make sure the otherwise neutral criteria did not have disproportionately larger percentage affected on a particular protected class.

2. Federal and State Worker Adjustment and Retraining Notification (WARN) Act. The WARN Act requires employers with over 100 or more full-time employees conducting a large-scale layoff to provide 60 days' notice to affected employees and governmental units with a few notable exceptions. A large scale layoff is defined as (i) closes a facility or discontinuing an operating unit permanently or temporarily, affecting at least 50 employees; (ii) lays off 500 or more fulltime employees at a single site of employment during a 30-day period; or lays off 50-499 full time workers and these layoffs constitute 33% of the employer's total active workforce; or temporarily or permanent reduction of the hours of 50 or more workers by 50% or more for each month in any 6-month period. However, the COVID-19 may satisfy one of the few exceptions. The unforeseeable business circumstances exception may apply when the event or business circumstance precipitating the layoff is "not reasonably foreseeable" at the time notice should have been given.

3. Consolidated Omnibus Budget Reconciliation Act (COBRA). Any employee who loses eligibility for health coverage due to a termination in employment or reduction in hours should be offered coverage under COBRA, generally for up to 18 months. This obligation generally applies to employers with 20 or more employees and applies to medical, dental, vision, and prescription drug coverage, as well as to health reimbursement arrangements, health flexible spending accounts, wellness plans, employee assistance programs, and on-site/off-site clinics that are governed by the Employee Retirement Income Security Act (ERISA). A company should work closely with their insurance carriers and/or third-party administrator to ensure that all COBRA notices are provided to employees in a timely manner.

4. Severance Packages. Unless a company maintains an ERISA-governed severance plan, there are no federal or state laws that require a company to provide displaced employees with a severance package. However, many companies find it in their overall best interests to provide displaced workers with salary continuation or other benefits. Severance packages not only greatly lessen the chance for legal action but also may prevent reputational harm. Severance packages may include salary continuation, COBRA payments reimbursement, outplacement services and a general release of all legal claims.

5. Older Workers Benefit Protection Act (OWBPA). If a severance package is offered with a general release of claims that includes an "age discrimination" release then it must comply with OWBPA. to effectively release claims under the Age Discrimination in Employment Act. Under the OWBPA, employers need to provide workers age 40 and over a consideration period of at least 21 days when one older worker is being separated, and 45 days when two or more older workers are being separated. Additionally, employees must be provided with information that identifies the decisional/organizational unit, selection criteria factors, and the job titles and ages of all employees that were selected and not selected for layoff.

6. Labor Law—Union Issues. Companies with a union workforce have the duty to engage in good faith affects bargaining over the terms and conditions of a business closure. As with all labor negotiations the parties must engage in good faith bargaining until an agreement is reached or the parties reach an impasse. Thereafter, the company can implement its last best and final offer. Most collective bargaining agreements, however, contain specific language of an employer's obligations and employees' rights related to temporary layoffs.

7. Immigration Issues. For companies that employ foreign nationals, a layoff will raise a host of immigration issues. Nonimmigrant workers on the various categories of temporary work visas (H-1B, L, E and TN) are legally authorized to remain in the US only as long as they are employed with the particular employer noted in their visa application. An employer that terminates an H-1B employee before the end of the validity period on the approved H-1B petition must pay "the reasonable costs of return transportation" for the foreign national to return abroad. An employer must notify the US Citizenship and Immigration Services of the H-1B foreign national's termination. when that notification is filed is the employee's employment considered "terminated" according to DOL regulations.

Employer Takeaway. As you can see, there are myriad of employment law compliance issues associated with a temporary or permanent layoff or reduction of force. Above, is not an exhaustive analysis of all the legal issues but rather a starting-point. Before jumping into these very troubled waters, we strongly recommend contacting employment counsel with experience in assisting companies with layoffs. Please, avoid the shark bite - you will thank us.

For more information, about complying with employment and labor laws, please contact Timm Schowalter at tschowalter@sandbergohoenix.com, 314.425.4910 or another member of Sandberg Phoenix Labor and Employment Law Team.