MILLER CANFIELD

SPECIAL EDITION
LABOR + EMPLOYMENT

hot points

SUMMER 09

Tread Carefully:

MASS LAYOFF LANDMINES AHEAD

You've already taken steps to reduce costs without reducing personnel — hoping that the economy would turn around and the next big customer would walk through your door.

Unfortunately, implementing a hiring freeze two years ago and shrinking your workforce by five percent by attrition has not improved your bottom line. You have shortened your workweek, eliminated all contract and temporary employees, and your employees have begrudgingly accepted a wage freeze. Nothing has stopped the downward spiral. Now what?

If you are like most employers, the necessary next step to ensuring the continued viability of your company is to implement a reduction in force (RIF). While your accountants determine the cost savings you need to achieve, watch out for these legal landmines that many employers fail to recognize until too late.

COMPANY POLICIES AND RECORDS

Before implementing a RIF, review all company policies and records, including any collective bargaining agreements (CBA), to determine if there are statements or provisions that limit your freedom to decide how to reduce the size of your workforce or increase the costs of doing so. A CBA should not change the RIF decision, but you might have to bargain with your union(s) over the effect that decision has on the unionized portion of your workforce.

ESTABLISH A RIF POLICY

If you do not have a policy in place, determine how you will select the employees whose positions will be eliminated. Some employers choose a simple objective standard such as seniority or attendance. Others apply subjective comparative performance evaluations to avoid losing their top performers. Whether you use objective or subjective standards, or a combination of both, the key to implementing a successful RIF is to document every step of the process. Doing so will allow you to defend the company's actions if challenged in the future.

WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT (WARN)

The WARN Act requires employers with 100 or more employees to give 60-calendar days advance notice of a "plant closing" or a "mass layoff" to the affected employees and to certain government officials. Failure to follow these technical requirements can result in the company owing the terminated employees up to 60-days of back pay and benefits, as well as up to $30,000 in fines.

OLDER WORKER BENEFIT PROTECTION ACT (OWBPA)

If you offer selected employees a severance package in exchange for a release agreement, supply all the information required by the OWBPA. Not doing so may allow employees to file an age-based discrimination lawsuit after receiving their severance benefits. When a release is part of a RIF program, the OWBPA also gives employees 45 days to consider the agreement and 7 days to revoke their signature.

COBRA SUBSIDIES

The American Recovery and Reinvestment Act of 2009 included a 65% COBRA subsidy for certain employees who lost employment in late 2008 and through 2009. If your severance package includes picking up all or a portion of the employees' COBRA payments, be sure these payments are structured so that they do not disqualify the company from receiving the 65% subsidy tax credit.

IMMIGRATION ISSUES

When it comes to terminating or laying-off of a foreign national employee, the U.S. Citizenship & Immigration Services (USCIS) is very clear that severance payments do not constitute employment. The last day of work is the last day that an employee can maintain valid nonimmigrant status in the U.S.

Although the legal landscape is treacherous, with careful advance planning you can avoid future litigation when implementing the tough, yet necessary, RIF.

Labor + Employment
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