

# Evaluating Layoff Decision Criteria in the Wake of Bostock

## Labor & Employment Law Update

on July 29, 2020

Layoffs have become a reality for many businesses and employees in recent months, and this unfortunate trend seems likely to continue as we head toward the fall and winter months. The U.S. Supreme Court's recent decision in *Bostock v. Clayton County* highlights additional considerations—beyond simply protecting LGBT employees—that businesses must factor into decisions regarding which employees to layoff, and which to retain.

As we previously wrote, the Supreme Court's *Bostock* decision essentially held that the anti-discrimination protections of Title VII of the Civil Rights Act of 1964 extend to LGBTQ employees. But the way that decision was reached—particularly its focus on how discrimination affects individuals, as opposed to broader groups—is instructive in terms of analyzing whether termination decisions, in the context of layoffs or otherwise, are unlawfully discriminatory.

The Court gave this hypothetical: "Consider an employer with a policy of firing any woman he discovers to be a Yankees fan. Carrying out that rule because an employee is a woman and a fan of the Yankees is a firing 'because of sex' if the employer would have tolerated the same allegiance in a male employee." That example illustrates, among other things, that simple binary analyses may not be sufficient to determine whether employment decisions are discriminatory—and that combinations of protected characteristics (sex, race, religion, etc.) and non-protected characteristics (affinity for a certain sports team) can be the basis for viable claims of unlawful discrimination.

With that in mind, employers attempting to analyze whether layoff criteria are discriminatory cannot simply compare men to women, or older employees to younger employees. Instead, subgroups and intersections must also be considered. Employers must ask—for example—whether layoff decisions unfairly affect women over a certain age as compared to men of that age, or whether layoff decisions unfairly affect employees of one race who are unmarried as compared to employees of a different race who are unmarried.

Simply put, in the wake of *Bostock*, employers should conduct a deeper analysis than they previously might have in order to determine whether termination decisions implicate the intersection of protected and non-protected

characteristics—or multiple protected characteristics. And questions regarding layoff decision criteria and concerns about potential liability should be directed to experienced legal counsel.

## Evaluating Layoff Decision Criteria in the Wake of Bostock