Terminations, Layoffs, and Separations – an Employer Refresher

Labor & Employment Law Update

By John Hayes on April 27, 2023

There seems to be an almost daily litany of layoffs by large corporations that instantly become media fodder. For example, McDonald's recent layoff, widely reported to have impacted hundreds of white collar employees, comes on the heels of mass layoffs by Amazon, Meta, and Disney. Given this climate, it is best for employers to take a look at their policies and procedures for terminating employees, whether individually or as part of a larger reduction in force to ensure compliance with state and federal law.

For layoffs (whether small in size or a large reduction in force), the first step is to decide which positions will be impacted and how the organization will decide which employee(s) will be let go. The factors used will vary depending on the company and its needs, but all employers should take steps to ensure that protected characteristics and conduct, including protected leave, are not factors in their selection process. Once preliminary selection decisions have been made, the company should consider whether there is any potential disparate impact on a protected class – such as older employees or those of a certain race, sex, religion, disability, sexual orientation, or others protected by law. This would involve a detailed review of those selected for a reduction in force to ensure there is not a disparate impact on a certain protected class of individuals.

Additionally, for large scale layoffs in an organization, the federal Worker Adjustment and Retraining Notification (WARN) Act generally requires 60 days' notice to affected employees and certain government officials. The WARN Act has numerous requirements, such as informing affected employees if the layoff is permanent or temporary (and time frame if temporary), the expected date of the layoff, and any recall rights and policies for applying for future positions with the company if applicable, to name a few. Also, many states also have their own WARN laws, often called "mini-WARN Acts" that have their own requirements.

For any type of separation, employers should make the decision whether to offer a severance package. While there is no legal requirement to provide severance, these can be used to lessen the likelihood of potential claims down the road from former employees. Employers generally have leeway in what to include in their severance packages, but there are some pitfalls. For example, the Older Workers Benefit Protection Act (OWBPA) amended the Age Discrimination in

Employment Act (ADEA) to include certain requirements for an individual to effectively release claims under the ADEA (releasing such claims are often the main reason for a severance package). The OWBPA establishes specific requirements for a "knowing and voluntary" release of ADEA claims to guarantee that an employee has every opportunity to make an informed choice whether or not to sign the waiver, and there are additional disclosure requirement when waivers are requested from a group or class of employees. The EEOC lists several requirements in order for a release to be knowing and voluntary, which include, amongst others, advising the employee in writing to consult an attorney before accepting the agreement. If used, the severance agreement should be reviewed with the employee when presented to them, in order to answer any questions by the employee at that time.

For any type of separation, employers should make sure they are following all established policies and procedures that have been used in the past, and that such policies and procedures are applied in a uniform manner to all affected employees. For example, an employer should ask itself several questions:

- Are all reasons for termination established?
- Have those reasons been documented?
- Have other employees been discharged similarly in the past?
- If others have not been treated in the same in the past?
- Have I followed company procedures for terminations?
- Have I followed the company handbook?
- Have I discussed the decision with Human Resources?
- Am I sure there are no issues with discriminatory animus and/or retaliatory motive?
- Has the employee recently engaged in any type of protected activity or taken a leave of absence protected by law?

Moreover, employers should be consistent with their messaging and the reasons for any separation. They should not change, add to or subtract from the reasons leading to the termination. As has been seen with the reporting on the layoffs by several large corporations, employer communication to its workforce regarding a layoff will be closely examined. Employers must ensure that the reasons for the layoffs are effectively communicated to the employees, along with any applicable discussions regarding benefits, COBRA, outplacement services, and information on the unemployment process.

The above is just a brief summary of some of the issues that employers should be aware of when employees are involuntarily separated from the company. Employers considering any type of reduction in force should be sensitive to the legal obligations, along with any public optic issues. Any time an employee is let go it can be a sensitive—and sometimes volatile—situation that needs to be handled in a professional and consistent manner by the organization.