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REDUCTIONS IN FORCE: A STEP BY STEP GUIDE FOR THE EMPLOYER

By Connie Cornell
Cornell Smith, L.L.P.
1221 S. Mopac Expy # 330
Austin, Texas 78746
Ph: (512) 328-1540
Fax: (512) 328-1541
www.cornellsmith.com

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The following is a list of steps to be considered in anticipation and implementation of a reduction in force ("RIF"):[1]

I. DESIGNATE A SMALL KEY MANAGEMENT COMMITTEE

A. Recognize from the outset that the statements, writings, and actions of the Key Management Committee Members are likely to be admissible in a court of law if any separation is later challenged. Provide immediate notice of this to all members and caution them that statements made under pressure, even in jest, may not be as humorous in front of a jury.

B. Select the committee (include a representative from human resources.)

C. Evaluate the absolute necessity of a RIF.

D. Establish the purposes of the RIF.

1. Cost cutting.
2. Elimination of a product/service line.
3. Centralization.
4. Relocation.

E. Determine if collective bargaining is required pre-RIF, the RIF timing, and the RIF benefits, if any.

F. Create a RIF Plan and delegate responsibility.

G. Interface with Outside Consultants.

1. Legal.

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[1] This list is not intended to be exhaustive, but rather to suggest some of the common steps a company may wish to consider in approaching a reduction in force. Much of this memo relies upon information provided by H.R. Executives Special Reports "How to Avoid Legal Traps in Workforce Reduction," Susan E. Culbreath, M. Lee Smith Publishers, L.L.C. 1998.

2. Outplacement.

3. Benefits.

4. Government.

H. Implement the RIF Plan.

I. Conclude the RIF Plan and lead the Company to its goals.

II. EVALUATE THE NECESSITY OF A RIF

A. Why is a RIF necessary?

B. What goals will be met by the RIF?

C. What other cost cutting methods have been tried?

D. Have alternatives been considered such as:

1. Hiring freeze
2. Reduction in the employee work week for non-exempt staff.
3. Wage freeze.
4. Wage reductions.
5. Elimination of benefits (if allowable).
6. Temporary shut down.
7. Deferred compensation for management.
8. Elimination of discretionary bonuses.

E. Can the company justify the need for a RIF if called upon to do so by a jury?

If not, the jury may view the RIF as a ruse to terminate undesirable employees perhaps along protected class lines.

III. DOCUMENT THE RIF PROCESS

A. Consider designating a key manager as the “Scribe” to document and gather documentation tracking the entire RIF process.

B. What documentation exists to prove that a RIF is necessary?

C. What documentation exists to prove that other non-RIF measures were considered and/or implemented?

D. If cost-cutting is the goal, are other significant expenses being incurred that are counterproductive to the stated goal? Can these other expenses be justified?

E. Be prepared to show and prove the legitimate non-discriminatory reasons for selecting each employee for the layoff as opposed to other similarly situated employees who were not selected for the layoff.

IV. CONSIDER A VOLUNTARY EXIT INCENTIVE PROGRAM

A. Advantages:

1. WARN notice is not required.

2. ADEA claims are less likely as long it is not a ruse to eliminate older workers.

3. May create ERISA argument for preemption of state law.

4. May be done in conjunction with a release.

B. Disadvantages:

1. The employer can not as easily target operations in which it desires to reduce the number of employees.

2. May lose workers the company wishes to retain.

3. An involuntary RIF may be significantly delayed if a release is offered in conjunction with the voluntary exit incentive program.

   Note: If the release agreement provided in conjunction with the voluntary exit incentive program complies with the Older Worker's Benefits Protection Act, then the employees must be given 45 days to consider the offer. In order to defend the voluntary nature of the program, the company should avoid announcing an involuntary RIF process until after the voluntary exit incentive "window" closes. Otherwise, the acceptance of the exit incentive program, under threat of lay off, may not be viewed as voluntary.

V. EVALUATE THE IMPACT ON EMPLOYEE BENEFIT PLANS

A. Review employee benefit plans to determine what impact, if any, a RIF will have on the benefits.

B. Take a particular look at the possible risks of a partial termination of any defined benefit (pension) or defined contribution (retirement) plan. The effect of a partial termination is that benefits that are accrued but not vested to laid off employees become 100% vested. If a significant percentage of the plan's participants are terminated there may have been a partial termination.

C. Will there be an impact on the non-discrimination requirements imposed on such plan? Are more of the lower compensated employees being affected by the RIF?

D. Is the RIF in violation of ERISA because employees are chosen in order to prevent them from becoming vested in an ERISA plan?

E. Check all plan documents to determine whether terminated employees can make lump sum withdrawals or roll their funds over to other accounts. If so, be prepared to notify affected employees of their options.

F. Determine whether or not the company is required to offer COBRA coverage. If so, prepare the COBRA notice.

G. Prepare each selected employee's Health Insurance Portability and Accountability Act ("HIPAA") written certification of creditable coverage.

H. Prepare individualized written information regarding the impact on each employee's benefits to provide at the time the RIF is announced.

VI. CONSIDER PAYING SEVERANCE

A. Review existing severance policies.

B. Review existing severance practices (some states may require payment of severance based on past practices even without written policies).

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