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Avoiding Liability When Downsizing

By Bennett Pine and Marisa Mead

Many not-for-profit organizations are facing economic difficulties and budget constraints caused by the diversion of donations and funding to current disaster relief efforts. As non-for-profit organizations face funding shortfalls and contemplate lay-offs, they must focus their attention on complying with legislative and judicial mandates regarding reductions in force (RIFs).

In order to avoid facing RIF-induced lawsuits, not-for-profit employers should familiarize themselves with federal laws governing mass layoffs and plant closings, particularly the notification requirements of the Worker Adjustment and Retraining Notification Act, as well as anti-discrimination laws impacting the issue of which individuals are selected for lay-off.

The Worker Adjustment and Retraining Notification Act (WARN)

In general, WARN requires that all for-profit and not-for-profit organizations employing a total of 100 or more full time employees (at all locations) must provide advance written notification to employees of a "plant closing" or "mass layoff" affecting 50 or more employees at least 60 days prior to the plant closing or mass layoff. Not-for-profit organizations must be aware that requirements relating to office or facility closings apply to them because a "plant" closing is broadly defined by WARN as a temporary or permanent shut down of *any* single facility or site of employment, including a not-for-profit organization.

Employers who fail to follow the notice requirements of WARN can be held liable to aggrieved employees for back pay and loss of benefits for the period of violation, up to 60 days. Employers found to have violated notice requirements can also be held liable for attorneys' fees.

Equal Employment Opportunity (EEO) Implications of RIFs

Like any employment action, a reduction in force is also subject to federal, state and local anti-discrimination laws. One of the greatest areas of exposure for employers with respect to RIFs is potential liability under the Age Discrimination in Employment Act (ADEA), which prohibits age discrimination in employment and protects employees age 40 and older. Because both not-for-profit and for-profit employers typically lay off employees to reduce expenses, the layoffs may disproportionately affect workers age 40 and older, as they are likely to earn higher salaries than younger workers. Furthermore, age discrimination concerns can come into play when older employees are "offered" retirement packages in connection with a RIF.

Attention to age discrimination concerns is particularly timely now, as on March 25, 2005, the Supreme Court decided, in *Smith v. City of Jackson*, that the ADEA allows recovery against employers under the "disparate impact" theory of discrimination. Under disparate impact theory, older employees

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can recover under the ADEA by proving that, although a particular employment decision may lack a discriminatory motivation and is on its face neutral with respect to age, it has an adverse disparate *impact* on older employees. The availability of disparate impact theory provides a much easier standard under which plaintiffs may attempt to prove their age discrimination claims.

However, in the *Smith* decision the Supreme Court was careful to note that the ADEA may limit recovery under disparate impact theory and expressly provides a defense whereby there can be no recovery where the claimed adverse impact is attributable to a "reasonable factor other than age," such as job performance.

The practical result of the *Smith* decision is that if the employer can establish that reasonable factors other than age account for the disparate impact of an employment action on older employees, the action will likely not be found unlawful. However, an employer must beware that when it takes employment actions, even if the impact on older workers is not deliberate, it potentially could be found unlawful if a disproportionate adverse effect on older workers results.

Liability Considerations: Release Agreements

Given the threat of RIF related lawsuits, employers should strongly consider requiring employees to sign "releases" in exchange for receiving severance pay in connection with their termination. Although regulations take care to protect employees who agree to waive their rights (i.e., releases must be "knowing" and "voluntary"), when designed and executed carefully, release agreements can still be valuable protection to employers. The cost can be more than offset by the avoidance of litigation.

Overall, however, the most important thing employers can do to protect themselves during RIFs is to plan ahead and be aware of the potential legal implications of mass layoffs for legally protected employees.

The information appearing in this newsletter does not constitute legal advice or opinion. Such advice and opinion are provided by the Firm only upon engagement with respect to specific factual situations.

Mark Your Calendar

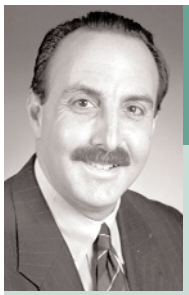
Employment and Benefits Issues Seminar for Not-For-Profit Organizations

Date: May 4, 2005
Time: 4:00 - 6:00 p.m. (cocktail hour from 6:00 - 7:00 p.m.)
Location: Radio City Suites of Rockefeller Center, 64th Floor
30 Rockefeller Plaza
New York, New York

Topics to be discussed include:
- Avoiding Liability When Downsizing
- Employment Practices Liability Insurance
- Executive Compensation and Benefits
- Claims of Discrimination, including Sexual Harassment, by Current and Terminated Employees

This free seminar is worth 1.5 credit hours of NY Continuing Legal Education. For more information or to register, please visit our website at www.andersonkill.com or contact Michele Elie at (212) 278-1318.

who's who



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We hope you have found this issue of the Not-for-Profit Advisor informative. We invite you to contact the members of the Editorial Board, listed below, with your questions or concerns:

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