Reductions in force are difficult for both employers and employees. Generally, employers only undertake such a drastic step due to decreased demand for products or services, or other economic difficulties. When those circumstances occur, management must evaluate the needs of the company and often release employees who under better economic circumstances would continue their tenures of employment. Employees affected are likely to be upset by the sudden loss of their livelihood and the seemingly nebulous criteria for selecting employees to be included. This can lead to litigation, creating further economic burden to the company.

Thus, employers must tread carefully when undertaking a reduction in force. Though there rarely is a “one-size-fits-all approach” to any workplace question, there are several things employers should always consider when making decisions of this magnitude:

1. **Be aware of your own policies and obligations when selecting employees for a reduction in force.** Employee handbooks may contain a section which refers to reductions in force, and may even set forth criteria under which employees will be evaluated. Make sure that any decisions made or evaluation systems applied take into account those items as laid out in the
handbook. Furthermore, review any collective bargaining agreements or union-related materials which may dictate the criteria and procedures for reductions in force. Stick to the criteria, and do not make exceptions unless absolutely necessary. If you do need to make an exception, document the reason for the exception. A simple way for a company to inspire a spate of litigation in the wake of a reduction in force is to ignore rules it previously set for itself.

2. **Be discriminate about discrimination.** While selection criteria should focus on employee skills, knowledge, productivity and length of service, as well as the needs of the company, this doesn't mean employers can lose sight of the impact of the reduction in force on diversity, or on protected class employees. Be vigilant about not including a disproportionate amount of employees in a protected class, or eliminating all employees within such a class, if at all possible. If an employee is over 40, disabled, has pending claims against the company, or has been a whistleblower, inclusion in a reduction in force will almost assuredly result in some love letters from the employee’s attorney.

3. **Be WARNed.** If an employer is planning a reduction in force, it should brush up on its obligations under the *Worker Adjustment and Retraining Notification Act*, more popularly known as the WARN Act. Generally speaking, employers with 100 or more employees must provide 60 calendar days advance notification of plant closings or mass layoffs under certain circumstances. WARN’s 60-day notice period does not apply where fewer than 50 employees at a single site of employment are affected. While WARN is not a large statute, it requires detailed analysis where a plant closing or a mass layoff affects 50 or more employees. Consult with your attorney to ensure compliance. The penalty for violating the WARN Act includes back pay and benefits for the period of the violation, up to 60 days. In larger reductions in force, the penalty payment can add up quickly.

4. **Be wise about wages and benefits.** Despite the fact that employees may be leaving the company, do not forget to ensure that the company meets all its obligations with regard to wages and pay. Reductions in force are fertile ground for wage and hour suits – particularly class actions. Ensure that employees receive their final paychecks in accordance with the statute’s provisions, and be careful in recognizing the difference between a “layoff” and “discharge” under the statute. A layoff is an involuntary cessation of an employee’s employment for a reason not relating to the quality of the employee’s performance or other employee-related reason (i.e., due to economic pressures on an employer). A discharge is an involuntary termination or cessation of work by an employee due to an employer’s action. As you can see by the definitions, the line can become blurred quickly, and employers must examine the reason for a reduction in force in order to determine when they must pay employees. Further, check your company policies or collective bargaining agreements to determine if severance pay is in order for any affected employees, and be sure to calculate any such payments carefully.

In addition to paying wages, employers must be aware of other obligations arising under the benefits umbrella. Employees affected by a reduction in force have COBRA rights and may have rights – depending on the context – under ERISA. Do not neglect
these issues, as they can increase the costs associated with a reduction in force during what may be trying economic times for a company.

5. **Be careful and consistent about communication.** The most important thing in communicating about reductions in force is consistency. There should be one united message coming from the company about the reasons and motivations for the reduction in force. When informing the workforce, be careful about going into too much detail about criteria used to evaluate employees. If there is a handbook or collective bargaining agreement provision dealing with selection criteria, refer employees to that written guide. The last thing a company should do is present mixed signals or messages to employees. Those types of differing statements will come back to haunt an employer in a courtroom.

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