An Employer's Guide to Layoffs and Reductions in Force

5 Key Compliance and Considerations Checklist

By:Rebecca F. Alperin
February 16, 2023

Faced with global economic uncertainty, many employers are forced to make difficult decisions about the size and structure of their workforce as they struggle to adapt to the changing economy. Already this year, we have counseled numerous clients on employee terminations and large scale layoffs. The impact of termination on the employee is great and employers must be prepared to check all the boxes to avoid potential liability arising under applicable federal and state laws and the regulations thereunder. Below you'll find a checklist of key considerations and action items for employers. Keep in mind that this checklist is general in scope and that employee terminations are nuanced. To discuss the specifics of an upcoming termination or layoff, please contact a member of our Employment and Employee Benefits team.

Final Pay Laws

State laws dictate when an employee must be paid their final wages upon termination. In Massachusetts, final wages, including any accrued but unused vacation time, are due *on the day of termination* if the employee is discharged by the employer for any reason. If the employee resigns, the employee must receive final wages on or before the next regular payroll date. The consequences for noncompliant employers can be significant. For example, Massachusetts employees are entitled, as a matter of law, to triple damages plus costs and attorney's fees, where the employer is delinquent in paying final wages. This is true even if the employer is one day late. To reiterate, these requirements differ from state to state so employers must be sure to check local laws and plan ahead.

WARN and Mini-WARN Acts

The federal Worker Adjustment and Retraining Notification (*WARN*) Act generally requires businesses that employ 100 or more workers to give their employees 60 days' written notice of a mass layoff or plant closing. The purpose of the notice is to provide workers and their families transition time to seek alternative jobs or enter skills training programs. An employer that violates the WARN Act is liable to each affected employee for an amount equal to back pay and benefits for the period of violation, up to 60 days. Employers with fewer than 100 workers should check to see if the states in which they do business have "mini-WARN" Act laws. Some states have mini-WARN Act requirements that closely mirror the federal version, while others differ greatly. Employers are advised to check state law requirements carefully before implementing any group layoffs.

Federal and State Anti-Discrimination Laws

In selecting the employees who will be included in a group layoff, employers must use non-discriminatory criteria such as seniority, performance, business needs, job classification, or job knowledge and skills. The purpose is to avoid any disparate impact to a protected class, and to avoid using protected conduct as a reason (i.e., whistleblowing). Employers should review the selected employees carefully, and if the layoff appears to affect one protected group more than others, employers should be prepared to re-evaluate the criteria used, or document the business

reasons for the selections and justify how the employees were selected based on non-discriminatory criteria.

ADEA and OWBPA Requirements

Often, employers want terminated or laid-off employees to execute a release of claims against the employer in exchange for severance payments. This may be problematic when employees aged 40 and over are asked to release claims under the Age Discrimination in Employment Act of 1967 ("ADEA"). Employers that employ 20 or more employees must include specific language in the release agreement and must provide such "older workers" with a longer consideration period for the release to be effective.

The Older Workers Benefit Protection Act ("OWBPA") imposes additional requirements if there is a group layoff of two or more individuals over the age of 40. If requesting such individuals to waive their rights to an age discrimination claim, the OWBPA requires additional notice requirements, including providing those individuals with a list of employees in their decisional unit that were and were not selected for the group layoff, identified by title and age.

Partial Termination of ERISA Covered Retirement Plans

A partial termination of an employer's ERISA covered retirement plan(s) presumptively occurs if 20% or more of total plan participants are terminated in a particular year. Events giving rise to partial termination include the closing of a plant or division, a series of employee turnover due to adverse economic conditions, or other reasons outside an employer's control. Whether a partial termination has in fact occurred is a facts and circumstances test which takes into consideration factors such as routine turnover rates and whether an employee has been voluntarily, involuntarily, or constructively discharged.

If a partial termination occurs, the law requires all "affected employees" to be fully vested in all employer contributions (including matching contributions) regardless of the plan's vesting schedule as of the date of the partial plan termination. Remember, participants are at all times fully vested in their own participant elective plan deferrals.

A partial plan termination that is not identified and addressed when it occurs may significantly complicate a later plan termination or sale of the plan sponsor. Additionally, affected employees may have a cause of action against the plan sponsor for a denial of benefits to which they were entitled on account of the partial plan termination and vesting requirement.

COBRA Notice

Under the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA), employers with 20 or more employees are required to provide temporary continuation of group health coverage in certain situations (a "qualifying event") where a covered individual (a "qualified beneficiary") loses coverage under the employer's group health plan. Qualifying events include termination, layoff, and a reduction in hours. Employers with fewer than 20 employees must check their state's mini-COBRA laws for compliance requirements. For example, under Massachusetts' Mini-COBRA law, businesses with between two and 19 employees must provide employees and their family members with a continuation of healthcare coverage that generally mirrors the federal COBRA requirements.

The administration of COBRA and the notice requirements thereunder can be quite complex. Further complicating these requirements is the continued applicability of the COVID-related extensions adopted in response to the COVID-19 National Emergency, set to expire February 28, 2023 (the "COVID-19 Extension"), unless extended by Presidential action. In part, these extensions relate to the COBRA election and payment rules.

In summary, where the qualifying event is a termination, layoff, or reduction in hours, the

employer has 30-days to notify the group health plan that a qualifying event has occurred; in turn, the plan will send qualified beneficiaries a COBRA election notice. Employers that sponsor self-insured health plans have 44-days to provide this notice. A qualified beneficiary will have at least 60 days to choose whether or not to elect COBRA coverage, beginning from the date the election notice is provided, or the date the qualified beneficiary would otherwise lose coverage under the group health plan due to the qualifying event, whichever is later. Under the COVID-19 Extension, a qualified beneficiary has until the earlier of one year from the date they were first eligible for relief, or 60 days after the announced end of the COVID-19 National Emergency.

Please contact Rebecca Alperin should you have questions concerning layoffs at your organization.