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Reduction In Force Checklist: Considerations for COVID-19 Related Workforce Reductions

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Reduction In Force Checklist

Considerations for COVID-19 Related Workforce Reductions

1. Contact your labor and employment attorney early on in the process as the law and circumstances relating to COVID-19 are changing daily.
2. Consider available alternatives to a reduction in force (RIF).
 - Temporary or permanent wage reductions.
 - Voluntary time off.
 - Early retirement/voluntary separation program (VSP).
 - Reduce overtime or hours of work for non-exempt, hourly, employees.
3. Document reasons for RIF.
 - Document the business needs supporting a RIF decision (forced COVID-19 closures, cost-cutting, or other overall business requirements).
4. Determine Whether RIF triggers obligation to negotiate with union and review collective bargaining agreements.
5. Consider the WARN Act.
 - Determine WARN Act coverage.
 - Analyze the number of employee terminations that would trigger the WARN Act.
 - Given the rapid changes caused by COVID-19, discuss with counsel alternatives to providing 60 days of notice or to otherwise avoid WARN Act issues.

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- If notice must be provided, prepare them and take into consideration the time requirements for compliance with WARN.
6. Review documents that may impact the RIF plan.
- Review all offer letters, individual (especially executive) employment agreements, personnel practices and policies such as RIF or severance policies, collective bargaining agreements. These documents may contain provisions that require severance, or that mandate the use of specific procedures or selection criteria in the event of a RIF as well as recall rights after a RIF.
 - Review employee benefits plans and policies relating to COBRA.
7. Develop RIF plan and that will begin to identify those affected by RIF.
- Identify the goal of the RIF (rightsizing) and the anticipated final structure of the organization after the RIF.
 - Identify the objective criteria to use to identify employees to be impacted by the RIF (i.e. essential skills, past performance, unique skill set, attendance, ability to be a team player, seniority, projects or client assignments, or combination of factors). Prepare the written, business-related, non-discriminatory criteria for the managers to apply when deciding who to retain and who to lay off.
 - Identify which employees will be laid off based on chosen objective criteria. Document how decision-makers applied the criteria to each individual to make their decisions. This serves to document the non-discriminatory reasons for each selection and provide a record of the business justifications for a layoff if challenged in later litigation.
 - Create a tentative list of employees to be laid off subject to attorney review.
 - Have the ultimate decision-makers review individual manager recommendations.
 - Implement review process for employees tentatively selected for layoff to be conducted by HR or staff who are qualified to consider discrimination concerns. Also work with legal counsel.
 - Prepare a disparate impact analysis by reviewing the tentative list of employees selected for layoff to determine if there is any statistical suggestion of discrimination that could result in a claim. Disparate impact analysis should only be prepared under the attorney-client privilege.
 - Determine how to handle employee benefits.
8. Determine whether severance package will be offered and craft release agreements.
- Determine whether severance is required (handbook policy, contract, union contract) or whether a voluntary severance would be offered.
 - Draft release agreement, with help from counsel, to be offered in exchange for severance benefits. Consider associated legal issues such as Older Workers Benefit Protection Act (OWBPA).
 - Determine what severance benefits will be given to affected employees. If releases are desired in exchange for severance, identify past practices and any enhancements that may be needed to

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ensure adequate consideration is given.

- Have release form reviewed by legal counsel.

9. Assess other factors to address essential employees such as whether to offer stay bonuses.

- Decide whether to offer stay bonus for critical staff. This is particularly important if layoffs will be announced in advance of the separation dates or in the event of a closure where some individuals will be needed for wind-down activities.

10. Develop a communications plan to address:

- Affected employees – given COVID-19 shutdowns, determine how this message would be communicated (email, text message, etc).
- Employees who will be retained.
- Media, if applicable.
- Key stakeholders, investors, shareholders, business partners.

11. Consider practical considerations and protecting company assets (confidential information and trade secrets) in implementing the RIF plan.

- Logistics of deploying communications plan and informing employees.
- Delivering key paperwork given current shutdowns.
- Efficiently terminating access to electronic systems and otherwise any technology that ensures the protection of confidential information and trade secrets.
- Retrieving company equipment and devices, including such equipment and devices that may contain the company's confidential information and/or trade secrets.
- Retrieving hard copies of documents with company's confidential information and/or trade secrets.
- Delivering a reminder message and letter to affected employees to abide by any post-termination restrictions, including any restrictive covenants (non-solicit, non-compete, confidentiality, and return of property provisions).

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