BusinessManagement DAILY

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The best steps to take with a reduction in force

Reductions in force (RIFs) and furloughs have rolled across the economy in reaction to the COVID-19 pandemic. Overnight, it seems, employers have had to redesign their workflows and employee tasks to keep employees and customers safe. In harder hit areas, employers scrambled to cover for infected employees. For many employers, the pandemic means severely reduced or no business.

The situation is fluid. Employers are being forced to redesign their businesses on the fly. Rushed decisions are potentially flawed decisions. What looks like the right move now could be a future lawsuit.

Termination pitfalls

Generally, employment is at-will. At-will employment means employers may terminate the employment agreement, any time for any reason or for no reason. However, some reasons are illegal. Employers may not base their firing decision on the employee's sex, age (if over 40), race, disability, or other protected characteristic. Furloughs done strictly for business-related reasons are generally protected. The exception being if the layoffs disproportionately hurt a protected group.

Employees who have a contract are not at-will employees. The agreement can only be terminated in accordance with contract provisions. For example, a union collective bargaining agreement will dictate how RIFs are carried out. Similarly, individual employment contract provisions restrict employer actions.

Contracts do not have to be written to take effect. Courts have recognized oral promises from managers and supervisors as contracts. Under the law, an agreement that contains all contract requirements is enforceable even if it is not written.

Employers must ensure that all language in employee handbooks, or other company publications does not create a contract. A properly written disclaimer can also invalidate any possible oral contract. Consider placing a statement like this in your employee handbook:

"No manager, supervisor or employee has any authority to enter into an agreement for employment for any specified period of time or to make an agreement for employment other than at-will. Only the president of the company has the authority to make any such agreement and then only in writing."

Discipline

The pandemic has impacted businesses profoundly. Many have to shut down completely or change everyday operations. Others, in essential industries, need more workers. Workers in these industries are asking for protective equipment and higher pay. Unions have found essential workforces fertile ground for organizing.

In one example of how not to fire, Amazon fired a Staten Island warehouse worker who protested working conditions. Internal memos were leaked quoting Amazon counsel making derogatory and possibly racist comments about the man. Amazon claimed the man was fired for violating COVID-19 social distancing rules.

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Union organizers exploited the leaked statements to make those stated reasons look pretextual.

A key takeaway is to look at the larger picture when making firing decisions in a crisis. Amazon would have come out looking better if it had concentrated on obtaining protective equipment for its workers. The move would have blunted the union's argument and reassured workers.

This story also illustrates how employers have to adapt employee discipline to the COVID reality. Progressive discipline procedures should still be in place but allow employers the flexibility to address egregious violations. All rules should have exceptions for extreme circumstances. In particular, they should be modified to consider the limitations of telework and enhanced workplace safety protocols.

RIFs and COVID

The unemployment numbers tell us that most businesses are downsizing. The hospitality industry is reeling from social distancing requirements and shelter-in-place orders. Consumer reluctance to dine and travel have flattened demand hopefully along with the pandemic curve.

Employers have had to envision what their business looks like in the pandemic era. Who is essential, and who is not? What jobs can be done remotely? What jobs cannot? What jobs no longer exist?

Once these questions are answered, employers must make tough decisions about who they layoff. In many cases, job descriptions that relied on proximity are no longer valid. Jobs may be broken down into tasks and those tasks distributed to different personnel. Each stage in this process carries the potential of a lawsuit.

For example, shuffling tasks has the effect of rewriting job descriptions. Those new job descriptions may require a different skillset. Making layoff decisions based on old job descriptions could lead to a lawsuit. Similarly, the employer may let go a better qualified worker. That's simply bad business.

The Families First Coronavirus Response Act

The Families First Coronavirus Response Act (FFCRA) provides enhanced unemployment compensation (UC) to employees who lose their jobs due to the pandemic. Many employees may prefer being laid off because they will earn more than they would working.

The FFCRA also insulates employers somewhat from increased UC costs. Unlike normal UC, the benefits are not paid from the employer's UC account. These arrangements may vary slightly from state to state and employers should confer with counsel. In the current environment, employers will have little incentive to oppose an employee's request for UC benefits.

WARN Act and COVID

The federal Worker Adjustment and Retraining Notification (WARN) Act imposes specific requirements on employers. Specifically, it requires them to provide workers and local job training agencies notice of mass layoffs and plant closures. Some states and municipalities have mini-WARNs with slightly different requirements. WARN requires employers to provide 60 days-notice for mass layoffs and plant closures. However, there are exceptions.

Two exceptions that apply to current situation are the "unforeseeable business circumstances" and "natural disaster" exceptions. The exceptions relieve employers of the 60-day notice, but do not let the employer off the hook completely. Employers must still provide notice as soon as practicable for plant closures and mass layoffs. WARN defines a plant closure as a shutdown that results in a loss of 50 or more jobs during a 30-day period. Mass layoffs come in two varieties. The first is any loss of 500 or more jobs at one facility in a 30-day period. The second type is the loss of 50-499 jobs if the loss constitutes at least 33% of the workforce.

Mini-WARNS have slightly different requirements. Employers should confer with counsel to determine what requirements apply.

The Firing Process

There are new rules for everything in the pandemic era. Firing by phone is now acceptable and possibly necessary. Firing by e-mail or text is still not a good idea. Some rules still apply, though, treat departing employees with respect and dignity. Make it quick. Make it private. Using a video conferencing software is not advised because it could allow the employee to record the episode. Any missteps you make would be preserved for a future jury.

If you are furloughing a large number of people, it is still a good idea to contact each on individually. Explain that economic circumstances beyond your control are to blame. Do not promise to rehire the individual, but let them know you appreciate their contributions to the company.

Alternative approaches

Every change brings opportunity. Some employers have found creative alternatives to RIFs and furloughs. In some industries, different tasks are in greater demand than normal. The answer has been to reassign those tasks to employees who would normally perform other tasks.

For some companies, increasing automation is the answer. At first blush, automation may sound like a job-destroying venture. Many companies have deployed automation that allows more workers to work from home. Such technology requires innovation and additional cybersecurity expertise. As a result, it is creating jobs and making companies more efficient.

For other companies, the answer may be to lend employees to other employers. For example, food wholesaler Sysco has taken a hit from the pandemic. Their answer was to lend their employees to grocery store chain Kroger to help them shore up their workforce. The move allows Sysco workers to keep their jobs and preserves the relationship with those workers.

Protecting yourself during the pandemic

Employers need legal protective equipment during the pandemic. For example, job descriptions must be updated to reflect the work employees are doing now and where they are doing it. The updated job descriptions will be necessary should any employee request an accommodation under the Americans With Disabilities Act (ADA).

Those job descriptions will be necessary when employees return from Family and Medical Leave Act (FMLA) leave. FMLA regulations entitle an employee his or her old job, if it still exists. Employers will have to make reinstatement decisions based on current job descriptions.

Every decision on retaining or laying off an employee must be documented. Involve counsel in these decisions now rather than later when the suit is filed.