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How to Choose Employees for Reduction In Force

Your company need to reduce its workforce. How do you determine which employees are selected for a lay off? Here are some recommendations.

First step

Get clear on the reason for the reduction in force. The rationale for the reduction will guide the potential pool of positions subject to reduction. For example, if the downturn in the economy is the rationale, then you are likely to be considering company-wide reductions. If a particular area of the company's services has dropped off, then the company may limit its reductions to departments directly impacted by that particular business rationale. In making and communicating the decisions, it is important to be very clear and consistent as to the reason for the reductions and the methodology applied for selecting positions and then people for lay off. In the event the decision to reduce employees or certain employees is challenged, ideally the company will have documentation to support the reason for the reduction in force and the particular positions/people reduced.

Next step

Making the position elimination decisions: you want to create an objective system for selecting positions and/or people for lay off on order to protect the company from claims of wrongful or discriminatory motive.

Last hired, first fired (seniority)

This is often the easiest and most objective standard: employees can understand it, they see that it is applied across the board and it is harder to claim an unlawful motivation as the real basis. The disadvantage of using this standard, as we discussed, is that you may eliminate an employee who, while junior to the company, is a superstar employee. We cannot always equate seniority with talent. If you do apply this method, although it is extremely objective in nature, you want to be sure nonetheless that using this method does not have a disparate impact on a

protected group; for example, if employees most recently hired were through a program for employing disabled individuals, that could be problematic.

Positions vs. People

Another relatively objective basis is focusing on the positions the company needs going forward. Individual performance or seniority in this case would be considered only when more than one person held the relevant position. You would need nonetheless to be able to demonstrate that this position is one no longer needed in the company. Caution needs to be applied to future hiring, as well, to not replace the position during a time period that makes the "elimination" argument appear to be a subterfuge for another motive. This method has more subjectivity than relying on date of hire, but is more objective than relying on performance, so long as you can provide clear and supported business reasons for the decisions. As with seniority decisions, you will want to be sure your decisions do not have a disparate impact on a protected group.

Performance Based Decisions

These decisions are subject to the most dispute and challenge, because opinions on performance are inherently subjective, and, not surprisingly, the employee in question may not agree on the quality of his/her performance. If you have well documented performance distinctions among employees, for example through regular and accurate performance evaluations or counseling, then this is a basis on which you may want to rely. Any performance criteria on which you rely ideally nonetheless would be measurable by objective standards; for example, production or sales numbers or failure to meet clearly established performance goals. Ideally, performance will be assessed by more than one person. We recommend that you do not create evaluations just for purposes of the reduction in force decision. Some of our clients utilize a system by which managers with meaningful information as to performance will rank a group of employees who are subject to reduction. We do not recommend this if you cannot legitimately argue that those employees doing the ranking have meaningful information on performance. If the company relies on performance criteria, then your legal department should review the decisions very carefully to ensure that the "objective" performance decisions do not have a disparate impact on any protected group. It is important to not use the reduction in force process to make performance terminations that the company should make or have made notwithstanding the reductions in force; those decisions are the decisions most often subject to challenge..