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WEATHERING THE STORM

Terminations, Uncertainty, and Strategies to Reduce Workplace Liability

In the current economic state, many employers are seeking to reduce operating costs. More employees are being let go as corporate layoffs have accelerated and workers are looking to complain that they have been unfairly or improperly dismissed. The Obama administration has publicly announced that it will be more aggressive in enforcing employment laws. In addition, the new Congress has been eager to create new legal rights in the workplace, ranging from passage of the Ledbetter Fair Pay Act, which makes it easier for employees to bring pay discrimination claims, to the Employee Free Choice Act, which provides unions with the ability to organize new members while avoiding secret-ballot elections. With the convergence of rigorous enforcement actions by the new administration and new laws and regulations, the number of labor and employment law matters faced by employers will dramatically increase.

The business necessity of downsizing requires a carefully outlined business plan, which takes into consideration the risks of litigation, notification requirements, existing employment policies, and the impact on the company's remaining workforce and the resulting vulnerability to union organizing activity.

Increased Litigation

Since 2007, the number of discrimination lawsuits has risen by 20 percent. Class action lawsuits are also on the rise. Reductions-in-force are ripe for both individual and class action claims by terminated employees. Before actually implementing the reduction, employers should be careful to: (1) develop objective criteria used to evaluate employees and/or consolidate and eliminate positions; (2) conduct training exercises to ensure that laws and policies are followed; (3) perform statistical analyses to determine whether there is a significant adverse impact against any protected class; and (4) have senior management review the selection process, with confidential consultation with legal counsel, to reduce the risk of litigation.

Most employers find it advantageous to offer severance benefits to voluntarily or involuntarily separated employees in exchange for release agreements. However, these releases are not immune from attack. The Older Worker Benefit Protection Act ("OWBPA") mandates that releases of age discrimination claims must meet certain requirements. OWBPA has various straightforward requirements, such as a 45-day consideration period for releases executed in connection with a termination program, a seven-day revocation period, and a prohibition on the release of future claims.

On the other hand, OWBPA's required informational disclosures, such as the description of the decisional unit and eligibility factors, can be tricky. For example, many employers have assumed that the eligibility factor requirements can be met by simply stating that all employees selected for termination were eligible for the severance benefits/release program. However, recently courts have invalidated releases based on the fact that the employer did not provide the selection criteria for the reduction-in-force itself.

In addition, decisional units that are too broadly or too narrowly described in the disclosure have resulted in the release agreements being invalidated with respect to a former employee's age discrimination claims.

WARN

After deciding to reduce the workforce, an employer must evaluate the magnitude of its reduction. The Worker Adjustment and Retraining Notification Act ("WARN") requires that employers that have over 100 employees (total in the entire organization) give 60 days notice to employees before implementing a "mass layoff." A mass layoff is defined as a layoff at a single site of employment that affects either: (1) 500 employees; or (2) 50 or more employees representing 33% of the workforce. Under WARN, employers must also give 60 days notice of a "plant closing," which is defined as a temporary or permanent closing that affects 50 or more employees.

For employers that must give notice, the Act contains very technical requirements from what constitutes a single site of employment and who counts as an employee, to what information the notices must contain and who must receive notice. In addition, liability for WARN obligations can extend to parent, affiliates or investors, depending on the extent of control exercised by the related entity.

The liability for a failure to give WARN notice is twofold. First, the employer is liable to its employees for 60 days pay and benefits.

Congress is also likely to consider passage of the FOREWARN Act. This legislation would apply to any employer with a workforce of 50 or more employees, thus expanding the scope of employers covered under the Act. If the employer terminates 25 or more of its employees, the company would have to provide 90 days advance notice, or face liability of 6 months pay to each affected employee, plus statutory penalties and attorney's fees.

Additionally, many states have WARN Act analogs, commonly referred to as "Baby WARN Acts," that impose greater notice obligations and apply to a broader range of employers. For example, New York's WARN Act requires 90 day notice while slashing the majority of the Federal WARN Act thresholds in half.

Risks of Union Organizing

The uncertainty of future job losses, coupled with the possible passage of the Employee Free Choice Act, also provides increased risk of union organizing activity. The result of EFCA would be to: (1) increase unionization by relying on "*card checks*" instead of secret-ballot elections; (2) potentially impose labor agreements on newly organized companies through government-mandated interest arbitration; and (3) expand the range of penalties against employers, including treble back pay damages against employers for unfair labor practices committed during union organizing drives, additional monetary penalties up to \$20,000 per violation; and mandatory injunctions in federal court against employers.

Faced with abolition of secret-ballot elections, employers will need to become more proactive in communicating the benefits of working in a union-free environment. However, the additional penalties and remedies proposed by the EFCA will require employers to carefully evaluate their conduct from a legal perspective in the face of significant (treble) back pay damages, penalties and potential federal court injunctive relief.

Faced with this potential shift in the law, it is critical that employers evaluate their vulnerability to union organizing and commit to manage their operations in such a fashion to make unions unnecessary. This should include providing managers and supervisors legal training about unions and the organizing process to ensure that they have the skills to identify and effectively respond to the first sign of potential union organizing activity.

For more information concerning the above topics and other considerations involved in work force reductions, increased employment litigation and proactive responses to the threat of union organizing activity, contact:

[Jonathan Wilson](mailto:jonathan.wilson@haynesboone.com)
214.651.5646
jonathan.wilson@haynesboone.com

[John Farrell](mailto:john.farrell@haynesboone.com)
214.651.5588
john.farrell@haynesboone.com

[Arthur Carter](mailto:arthur.carter@haynesboone.com)
214.651.5683
arthur.carter@haynesboone.com

[Sarah Foster](mailto:sarah.foster@haynesboone.com)
512.867.8412
sarah.foster@haynesboone.com

[Kenric Kattner](mailto:kenric.kattner@haynesboone.com)
713.547.2518
kenric.kattner@haynesboone.com

[Sue Murphy](mailto:sue.murphy@haynesboone.com)
214.651.5602
sue.murphy@haynesboone.com

[Laura O'Donnell](mailto:laura.odonnell@haynesboone.com)
210.978.7421
laura.odonnell@haynesboone.com

[Lenard Parkins](mailto:lenard.parkins@haynesboone.com)
212.659.4966
lenard.parkins@haynesboone.com

[Stephen Pezanosky](mailto:stephen.pezanosky@haynesboone.com)
817.347.6601
stephen.pezanosky@haynesboone.com

[Dean Schaner](mailto:dean.schaner@haynesboone.com)
713.547.2044
dean.schaner@haynesboone.com

[William Strock](mailto:bill.strock@haynesboone.com)
214.651.5623
bill.strock@haynesboone.com

[Eric Terry](mailto:eric.terry@haynesboone.com)
210.978.7424
eric.terry@haynesboone.com