

**LAYOFF CONSIDERATIONS FOR ALABAMA EMPLOYERS**

The challenging economic circumstances of this current recession are requiring many employers to make some tough decisions. Unfortunately, in order to survive, many employers will have to reduce their number of employees through layoffs. It goes without saying that an employee who loses his job in these economic times, and who has a difficult time finding a new job, will be more inclined to bring legal action against his former employer. While there is no way to completely insulate a business from litigation, there are issues employers should consider before implementing a reduction in force to minimize potential liability. Below is a brief overview.

**The WARN Act (29 U.S.C. 2101, et. seq.)**

- The federal Worker Adjustment and Retraining Notification Act (“WARN”) offers protection to workers, their families and communities by requiring employers to provide notice 60 days in advance of covered plant closings and covered mass layoffs.
- In general, employers are covered by WARN if they have 100 or more employees that work more than 20 hours a week for more than six months in the last twelve months.
- Employees entitled to notice include hourly and salaried workers, as well as managerial and supervisory employees.
- Notice is required when a covered employer will shut down an employment site that will result in an employment loss for 50 or more employees; or, if a covered employer will institute a mass layoff which does not result from a plant closing, but which will result in an employment loss at the employment site for 500 or more employees or at least 33% of the employer’s active work force. There are certain exemptions that apply.
- A statutorily-prescribed notification must occur at least 60 days before the closing or layoffs, unless one of three exceptions applies.
- An employer who violates the WARN provisions is liable to each aggrieved employee for an amount including back pay and benefits for the period of violation, up to 60 days. An employer may also be liable for a civil penalty for failure to provide required notice to a unit of local government.
- The requirements of WARN are enforceable through federal district courts by employees, representatives of employees, and units of local government as individual or class action suits. In any such suit, the Court, in its discretion, may allow the prevailing party a reasonable attorney’s fee as part of the costs.
- Alabama does not have a similar law. Some states do. For employees outside of Alabama, state law should be checked to make sure it does not impose additional requirements.

## **Determining Whom to Layoff**

In the absence of a collective bargaining agreement, an employer is free to layoff whomever it desires, as long as there is no discrimination against a protected class. To avoid disparate treatment claims, decisions should treat similarly situated employees similarly. Decisions should also be based on quantifiable and objective factors when possible.

After the layoff decisions have been made and prior to implementation, review the decisions to make sure there is no impermissible disparate impact. Check to see if there will be any disproportionate effect on protected categories, such as, minorities, women, or workers 40 years of age or older. If so, evaluate whether the selection of these individuals can be justified by business necessity, or in the case of older workers, by reasonable factors other than age. If not, consider alternative selections of individuals who are outside the protected categories. Legal counsel should be involved in such a "disparate impact" review to protect the analysis under the attorney-client privilege.

## **Severance Packages**

Neither federal nor Alabama law requires an employer to offer a severance package to a laid-off employee, in the absence of an agreement. However, an option to consider is to offer employees a severance package. In exchange for additional compensation upon separation, the employee executes an agreement that includes a general release of any claims related to his/her separation. For employees age 40 and over, there are special provisions that must be put in the written agreement. Otherwise, the release will not be fully enforceable. Counsel should be consulted.

If an employer chooses to make severance payments, Alabama will allow any severance pay to certain employees to be exempt from Alabama income taxes. Ala. Code. Sec. 40-18-19.1. The employer must apply to the Ala. Dept. of Revenue for this exemption.

Moreover, Alabama law permits laid off employees to receive unemployment benefits while at the same time receiving severance pay from their former employer. So, factor this anomaly into your calculation of the severance pay you offer.

## **COBRA**

Employers are required to notify employees of their right to continue healthcare coverage following termination, known as a COBRA notice.

The economic stimulus package signed into law by President Obama on February 17, 2009 includes a COBRA subsidy that applies to any person involuntarily terminated from his employment between September 1, 2008 and December 31, 2009. Before this law was passed, terminated employees were required to pay 100% of the premium required to continue coverage. Under this new law, terminated employees are only required to pay 35% of the premium. The employer pays the remaining 65%. Employers are then able to recoup their share of COBRA premiums paid through a credit against payroll taxes. The important thing to know is that the old COBRA notice that employers have been sending to involuntarily terminated employees must be replaced with a notice that complies with this new law. A form notice for this purpose is expected to be issued by the Department of Labor soon.

This article addresses only some of the legal issues raised by a reduction in force. Early consultation with counsel is important. Otherwise, the savings you achieve through a smaller workforce may be wasted on defending lawsuits.

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