

# THE BOTTOM LINE

## **Downsizing and Reductions in Force**

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# Alternatives to Reducing the Workforce - and the Ramifications

- No matter which alternatives you may choose:
  - Solicit volunteers: makes your life easier
  - Make sure it's truly voluntary participation
  - Communicate with affected employees
    - Be honest / don't exaggerate
  - Check for impact on protected groups

# Evaluate Pros and Cons of Alternatives

- WARN issues
- Union contract
- Effects on benefits
  - Partial terminations – 100% vesting
  - Loss of adequate coverage for qualified plan to remain qualified under IRS rules
  - May need to test plans for discrimination of remaining benefits
- Morale issues (current effects)
- Loss of personnel / expertise (future effects)

# Evaluate Pros and Cons of Alternatives (continued)

- Avoiding unemployment claims
- Re-training / re-hiring costs
- Effect on litigation

## Alternatives (in the least painful order)

- Reducing non-personnel expenses
  - Travel expenses / business lunches / seminar expenses / tuition reimbursement programs / office parties
- Incentivize employees to identify efficiencies
  - Use employee awards
  - Want to keep “key employees” – use “stay plans” and equity awards
- Hiring freeze / attrition
- Voluntary unpaid LOA’s / furloughs

## Alternatives (Continued)

- Voluntary early retirement programs
  - Can be effective
  - Can use current defined benefit plan or defined contribution plan
  - Must comply with IRS rules
  - Don't want to lose "good employees" who are looking for an "exit strategy"
- Elimination of contract and temporary employees
  - Watch out for claims by independent contractors that they are actually "employees" and demand past benefits

## Alternatives (Continued)

- Reducing overtime / hours
  - Across the board or targeted
- Across the board is the safest method
  - Converting full-time to part-time
  - Still must meet IRS discrimination rules
- Effect on exempt employees
- Loss of exempt status - reduction of salary below \$455/week; or, reduction of hours and prorated salary reduction
- Non-exempt employees: must pay at least minimum wage for hours worked

## Alternatives (Continued)

- Reducing benefits
  - Suspend profit sharing or matching contributions
  - Freeze pension plan or change formula
    - May need ERISA 204(h) notice
  - Suspend 401(k) matching contributions
  - Eliminate PTO
    - Cash out as a % on the dollar
    - Watch out that you don't take away accrued vacation
    - Is PTO paid subject to benefits accruals

# Alternatives (Continued)

- Reducing benefits (Continued)
  - Increase employee contributions to health care, or reduce coverage
    - Eliminate new entrants in benefits plans
    - Watch out for IRC §409A and §457(f) if you terminate a “nonqualified plan or arrangement”
    - May have partial termination issues
- Reduce pay
- Temporary closure of facility or portions of operations

# What if RIF is unavoidable?

## Preliminary Issues

- Worker Adjustment and Retraining Notification Act of 1988
  - WARN Act
    - Covered employers: 100 or more employees (excluding part-time employees)
    - “Plant Closing”: a temporary or permanent shutdown of a worksite, with a job loss of 50 or more during 30 days (excluding part-time)
    - “Mass Layoff”: within 30 days, 33% of employees at a worksite and affecting at least 50 employees
    - 60 day notice requirement to employees
    - Notice to union / government

# Be Aware of Benefits Issues

- Will it create a partial termination of the plan?
  - Partial termination if “net loss” of 20% or more of participants in a year
  - 100% vesting for terminated employees
  - Voluntary quits don’t count towards 20% test
  - Failure to meet IRS minimum coverage requirement for plan to be qualified – too many HCES remain vs. NHCES who are terminated
  - There are “plan qualification” issues

## Be Aware of Benefits Issues (Continued)

- New federal subsidy applies to involuntary terminations
  - Federal government subsidizes 65% of up to 9 months of COBRA premiums for certain employees whose employment is involuntarily terminated on or after September 1, 2008 and before January 1, 2010
  - Generally effective for COBRA premiums for COBRA coverage on and after March 1, 2009
  - Involuntary termination includes: layoffs, employment termination “for cause,” reductions in force

# Violation of Obligations

- Policies
- Employment agreements
  - Watch out for IRC §409A and §457(f) on termination of contract or benefits for employees covered by contract
- Union collective bargaining agreements
- Individual agreements
- Past independent practices become “plans” which give employees ERISA rights

# Releases and Severance

- When is a severance agreement / release a good idea?
  - When the employee has already asserted a claim against the employer
  - When the employer is concerned that the employee will likely assert a claim; and
  - A termination in which the employer is willing to provide extra pay or benefits above and beyond what the employee would normally be entitled to under the circumstances of his/her separation, but only in return for a waiver of claims, i.e., RIF scenario
  - Determine if severance pay is included in benefit plan calculations
  - The employer must examine the consequences of asking for a waiver of claims. By asking for a waiver, the employer may inadvertently suggest to the employee that he or she has a claim against the employer

# OWBPA Requirements for Effective Age Claim Release (Continued)

- If the waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the OWBPA provides that a waiver must:
  - Inform the individual in writing about:
    - Identification of the group of employees covered by the program
    - Eligibility requirements
    - Time limits
    - Job titles and ages of all eligible persons, and
    - Ages of all ineligible persons in the same job classification or organizational unit

# Planning Layoffs, Reductions or Closings

- Use the team approach for decision-making and planning
  - The ability to draw from various areas and experiences (use different disciplines)
  - Deflects perception or accusation one or two individuals were responsible
  - Have benefits person involved
  - Decision based on consensus
  - Attorney/client communication

# Planning Layoffs, Reductions or Closings (Continued)

- Keep records that “road map” the decision-making and planning process
- Review and establish the business and competitive reasons for the employment decisions you are considering
  - Cost saving measures already taken

# Subjective Selection Process

- Picking “things”: geographic location, facility, department or functions, or picking people?
- Picking “the best performers” has some pitfalls
  - Difficult to quantify
  - Often lacking in supporting documentation
- Use a diverse selection group
- **Develop selection criteria**

# Subjective Selection Process

(Continued)

- Consult with individuals who know about an employee's performance
- Select criteria that blends objective criteria (e.g., attendance, productivity, training, seniority) with subjective considerations (performance, potential, future needs)
- The importance of consensus decisions

# Reviewing Selection Decision

- A neutral review or oversight
- Demographics and statistical analysis of before and after
- Benefits review
- Attorney review?

# Communicating the Decision

- To your workforce:
  - Always the first to know
  - Timing – how far in advance
  - Informing managers and supervisors
  - Importance of selecting the messenger (and demonstrating consensus/support for the tough decision making)
  - Concise and direct (professional, not emotional)
  - Terms, compensation and benefits
  - Post-termination services
    - Financial planning
    - Job placement

# Other Considerations

- Security - Physical facilities and electronic preparation
  - Confidential business information
- The outside world – government and business community
  - Legal requirements
  - PR concerns

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McAFEE & TAFT  
ATTORNEYS & COUNSELORS

**Questions?**