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Employers: Prepare Now for Recession-Based Layoffs

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With many economic experts predicting that the U.S. will enter a recession in the near future, employers are preparing for the possibility of significant layoffs. Before making cuts, companies – especially those with remote workers – should be aware of the potential pitfalls and legal ramifications of layoffs, and be prepared to adjust the timing and criteria for layoffs based on applicable federal, state, and local laws.

Accordingly, employers should take the following steps to reduce the risks of layoff-related litigation.

Consider the Disparate Impact of Layoffs

Employers should be aware that if their layoffs adversely impact certain groups of employees more than others, they may be vulnerable to claims of discrimination. Under Title VII of the Civil Rights Act of 1964 (Title VII) which prohibits discrimination based on race, color, religion, sex, or national origin; the Age Discrimination in Employment Act of 1967 (ADEA) which protects employees 40 years of age or older; the Americans with Disabilities Act (ADA) which protects employees with disabilities; and various local and state anti-discrimination laws, employers can be held liable for seemingly neutral employment practices, such as recession-induced layoffs, that adversely affect members of protected classes.

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A key factor in this analysis is whether employees in a protected class are affected by the anticipated layoff more than what would be statistically expected given the demographics of the employees in the workforce. By way of example, if the percentage of female employees scheduled for layoffs is substantially greater than the percentage of female employees in the pre-layoff workforce, the layoff could be considered to have a disparate impact on female workers under the Title VII. If certain groups of employees are disproportionately affected by the proposed layoffs, employers can make adjustments to their layoff selection criteria to minimize risk.

Employers should seek the assistance of legal counsel to assess the potential disparate impact of layoffs prior to making any final decisions as to which employees should be let go.

Provide Sufficient Written Notice

Employers are required to provide prior notice if they are planning on laying off more than a certain number of employees over a short period of time. Specifically, the federal Worker Adjustment and Retraining Notification Act (WARN Act) requires employers with 100 or more employees to provide written notice 60 calendar days in advance of plant closings and mass layoffs. The WARN Act defines a plant closing as "the permanent or temporary shutdown of a 'single site of employment' (or more than one facilities or operating units within a single site of employment), if the shutdown results in an employment loss during any 30-day period at the single site of employment for 50 or more employees..." A mass layoff is considered a reduction in force that "results in an employment loss at the single site of employment during any 30-day period" for 33 percent of the active employees and at least 50 employees. If more 500 or more employees are affected, the 33 percent requirement does not apply.

In determining whether a mass termination triggers the requirements of the WARN Act, employers need

not count part-time employees. But how do they handle workers who have been and still are working remotely due to the pandemic?

Let's look first at the WARN Act regulations. While they do not offer a definitive answer, there is one that offers some guidance. 29 CFR §639.3(i)(6) says: "For workers whose primary duties require travel from point to point, who are outstationed, or whose primary duties involve work outside any of the employer's regular employment sites (e.g., railroad workers, bus drivers, salespersons), the single site of employment to which they are assigned as their home base, from which their work is assigned or two which they report will be the single site in which they are covered for WARN purposes."

"Outstationed" is not defined, and the regulations do not otherwise address remote workers. Further, courts that have considered remote workers have differed in their conclusions. Some courts have indicated that employees who have a fixed work location at home would not be considered employed at their employer's offices for the purposes of the WARN Act's 50-employee loss threshold. Other courts have concluded that employees who work primarily off-site may be considered employed at the relevant physical worksite of an employer, if the employee (1) is assigned to a home base (i.e., the location an employee leaves at the start of the work period and/or returns to at the end of the work period, or is physically present at some point during a work period); (2) is assigned work from a particular work site (often the location where the employee's supervisor is located); and/or (3) reports to a particular work site (i.e., where management issues work orders and directly reviews the employee's performance).

Employers should err on the side of caution and meticulously review the command structure and geographical layout of their workforce to determine possible sites of employment for each of their remote employees.

Employers should also be aware that while they may not be subject to the notice requirements under the federal WARN Act, they may be obligated to provide notice to their employees under state "mini-WARN" acts or other state laws. State mini-WARN acts generally resemble the federal WARN Act, however, some have key differences such as lower employment loss thresholds and lengthier notice requirements. For example, California's mini-WARN Act requires notice for plant closures that ***affect even one employee***, and New York's mini-WARN Act requires employers to provide **90 days' notice** (rather than 60) of a mass layoff.

Employers who fail to provide the federal WARN Act notice are liable for an amount equal to back pay and benefits for each affected employee during the time in which the covered employer should have provided notice, up to 60 days. However, an employer's liability for a violation may be reduced by any wages paid to the employee for the notice period, if the payment is voluntary and unconditional and not otherwise required by any legal obligation.

Additionally, employers should be cognizant of the "unforeseeable business circumstances" exception in the context of plant closings and mass layoffs triggered by economic downturns. Pursuant to this exception, an employer may order a plant closing or mass layoff before the conclusion of the 60-day period, if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required, even after exercising commercially reasonable business judgment particular to the employer's market. One important indicator that the circumstances were not foreseeable is if the mass layoffs or plant closures were caused "by some sudden, dramatic, and unexpected action or condition outside the employer's control," such as a dramatic major economic downturn.

Notably, the WARN Act regulations also state that a company is not required to "accurately predict general economic conditions" that may affect demand for its products or services in order to take advantage of this exception. Still, employers may wonder how a widely forecasted recession can be considered "unforeseeable." A 2012 decision by the Eighth Circuit Court of Appeals (covering Arkansas, Iowa, Minnesota, Missouri, Nebraska, South Dakota, and North Dakota), offers some guidance. There, the Court found that economic crisis of late 2008 – when coupled with the dramatic decline in a steel company's customer orders – constituted an "unforeseeable business circumstance." The court reasoned that while the economic downturn was apparent well before the company was required to provide 60-days' notice, the resulting sharp decrease in the demand for steel was not. Moreover, the court noted that even though there was evidence that the company was aware that the 2008 recession would negatively affect its business, the company did not expect the unprecedented decline in demand for steel, even after reviewing sales forecasts and consulting various industry analysts. In other words, the company could take advantage of the exception because it did not know—when notice would have been otherwise required—that the industry-specific downturn would likely lead to mass layoffs. In any event, even if a business qualifies for this exception as a result of a recession-related downturn, it must provide employees as much notice as practicable under the circumstances, even if this means providing notice *after* the layoff.

Employers should therefore carefully assess federal, state and local notice requirements prior to laying off employees.

Ask for Volunteers

Employers can reduce the risk of litigation by offering severance packages to employees who voluntarily resign.

Under the WARN Act, a "voluntary departure" is not considered an employment loss. Thus, employers are not required to provide 60-days' notice to employees who resign instead of being terminated. Additionally, if enough employees voluntarily depart an employer may reduce its employment loss count below the WARN Act thresholds and therefore avoid having to comply with the WARN Act completely, since employees who depart voluntarily are not counted as affected employees.

By seeking out volunteers, employers also reduce the risk of liability under federal, state, and local anti-discrimination since voluntary resignations are generally not considered "adverse actions" and therefore are not likely to result in successful discrimination claims.

This strategy is not without its potential downsides. An employee could potentially argue that their resignation was not truly voluntary. To mitigate this risk, employers should ensure that their employees do not feel pressured to resign, and are treated no differently based on their decision to decline the offer to resign.

Document the Reasons for Layoff Decisions

Employers should identify and document underlying business reasons and selection criteria for anticipated layoffs.

As noted earlier, under the WARN Act, an employer may be able to order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is the result of an unforeseeable business circumstance such as a dramatic major economic downturn. However, employers should be mindful that they bear the burden of proof of establishing that the conditions for the exception apply. Importantly, employers risk foregoing the option of relying on this exception as a defense if they fail to contemporaneously identify

and document the specific business circumstances leading up to the decision to lay off employees.

Employers should also prepare for the significant litigation risk posed by federal, state, and local anti-discrimination laws by documenting their legitimate, non-discriminatory reasons selecting personnel for anticipated layoffs. In particular, employers should be prepared to defend against disparate impact claims by ensuring that their layoff selection criteria are business-related, objective, consistently applied, and well-documented. Once the decisional unit has been determined, employers should enlist input from managers to determine the most relevant criteria in deciding who should be retained, and employees in each affected department should be evaluated accordingly. Employers should create and retain documentation reflecting the criteria used and how employees were selected for termination.

Obtain Separation Agreements

Employers should consider offering severance packages to employees selected for layoff in exchange for the employees' waiver and release of legal claims. A well-drafted separation agreement will explicitly release the employer from claims the employee could have brought for issues that arose before and up to the effective date of the agreement, including claims relating to the layoff.

Employers seeking a release of claims must offer sufficient consideration for the separation agreement, meaning that the employer should provide the employee a benefit the employee was not already entitled to receive. For example, the separation agreements cannot simply offer payment already owed to the employee under applicable law, such as the employee's earned wages or, in many states, accrued but unused paid time off.

Employers should also be mindful that if they want to ensure that age discrimination claims are effectively released, they must comply with the

Older Workers Benefit Protection Act (OWBPA), a 1990 amendment to the Age Discrimination in Employment Act. The OWBPA imposes strict and detailed requirements on employers who ask employees age 40 and older to sign release agreements. The information contained in these releases must be written in plain language geared to the level of understanding of the individuals being terminated. The agreement must also advise the employee to consult with an attorney prior to executing the agreement. If it is an individual termination, the employer must allow the employee 21 days to consider the agreement and seven to revoke it. If the release is being offered to *two or more* employees being terminated through an exit incentive or "other termination program" (yes, two or more employees being let go as part of the same reduction in force/layoff qualifies as a "termination program"), then the employer must give the employees 45 days to consider the agreements and seven to revoke. In the group termination program setting, in addition to all of the foregoing requirements, the release agreement must provide detailed information about the employees affected by the layoff, including the decisional unit, the factors considered in determining who was and was not selected for termination, their job titles, and ages. Wise employers will engage counsel to assist with termination documents for exit incentive and group termination programs such as layoffs.

Communicate With Your Workforce Early and Often

Lastly, beyond formal legal requirements, employers can mitigate risks associated with layoffs by communicating openly and frequently with their employees.

Many legal issues associated with layoffs are a result of employees believing that their employers were not transparent or truthful about the timing and criteria for layoffs. Employers can address these concerns by alerting employees to the possibility of

layoffs as soon as possible and keeping employees updated on any significant changes to the employer's plans. Employers may also want to consider making a special effort to reach out to remote employees, who may already feel isolated due to a lack of face-to-face contact with key decision-makers.

While being transparent with your workforce does not guarantee that you will be free from layoff-related lawsuits, doing so can increase the perception of fairness.

Given the numerous and often complex federal, state, and local laws relevant to layoffs, employers contemplating layoffs and closures should work closely with counsel to ensure compliance. For assistance addressing these and other workforce issues, contact your Akerman attorney.
