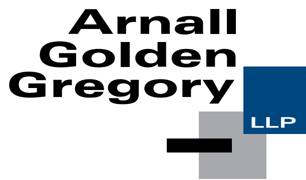

Client Alert

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Managing Risks in Downsizing: A Primer on Reductions in Force for Employers in the Healthcare Field

Today, employers in virtually every sector of the economy must "do more with less," and accordingly are relying on involuntary reductions in force ("RIFs") to streamline their workforces. The healthcare industry is no exception. While every termination carries potential legal risk, RIFs are prime targets for aggressive plaintiffs' attorneys and must be carried out with precision if lawsuits are to be avoided. This article serves to provide a methodology for employers to better contain legal risk before implementing RIFs and, more importantly, achieve their primary business goals.

I. Consider Your Alternatives.

Before implementing involuntary terminations that necessarily will disrupt the workforce and be scrutinized by lawyers representing displaced employees, employers should first consider other cost savings options. Alternatives to involuntary layoffs include shortened work weeks or workdays, across-the-board salary cuts or freezes, and hiring freezes. Furthermore, headcount reductions may be achieved through voluntary separation incentive programs and/or voluntary early retirement programs. These options can be particularly advantageous to employers, because employees who leave on their own accord are far less likely to sue after separation. Furthermore, voluntary early retirement programs can greatly minimize the risk of age discrimination claims that otherwise would be attendant to involuntary separations, particularly with a workforce with older demographics.

With this said, any voluntary separation program needs to be crafted with precision to avoid discrimination lawsuits that could be triggered simply by the program's terms, *e.g.*, a program that is more attractive to younger prospective retirees. Such programs also need to be evaluated for potentially adverse consequences on existing benefit plans. With a relatively small up front investment, a carefully designed voluntary separation plan can help an employer go a long way towards achieving its goal, either in lieu of or before implementing an involuntary separation program.

II. Review Applicable Agreements and Policies.

If an involuntary RIF is necessary, an employer first must evaluate all existing legal obligations, whether in the form of collective bargaining agreements, employment agreements, or written severance plans. If all or part of the

workforce is unionized, an employer also may, under certain circumstances, have a duty to bargain with the union over the decision to implement the RIF, as well the effects of the RIF. Therefore, it is critical to seek legal advice at the very early stages of the planning process to avoid an unfair labor practices claim that may undermine the entire RIF. Moreover, understanding how to leverage cooperation with union representatives can lead to a less acrimonious RIF process.

III. Evaluate the Application of the WARN Act and mini-WARN Statutes.

The primary federal law addressing downsizing events is the WARN Act, which is designed to provide potentially affected employees with advance notice of impending terminations and the opportunity to seek alternative employment. The WARN Act applies only to employers that employ either (i) 100 or more employees, excluding part-time workers, or (ii) 100 or more employees who cumulatively work at least 4,000 hours per week. Notably, in certain circumstances, independent contractors and employees of subsidiary organizations may be counted in determining whether the employer meets the 100 employee WARN threshold.

If the WARN Act applies, then, prior to a "plant closing" or a "mass layoff," an employer must give detailed notices to union representatives, affected employees, state dislocated worker units, and/or the chief elected officials of the local government within which the plant closing or mass layoff is to occur *no earlier than sixty days before the event* absent exceptional circumstances. A "plant closing" is defined as a permanent or temporary shutdown of all or part of a single site of employment that results in an employment loss at such site for fifty or more employees within any thirty-day period. An actual shutdown is not required. Rather, an "effective cessation" of production or work at a site may constitute a plant closing. A "mass layoff," in contrast, is any reduction in force during a thirty-day period that results in the termination of (i) at least one-third of all employees at a site, assuming this number equals 50 or more; or (ii) at least 500 employees, regardless of the percentage of the workforce this number represents. Notably, part-time employees are excluded from all the foregoing definitions.

The thirty-day window applicable to both "plant closings" and "mass layoffs" is difficult to avoid through creative scheduling. Two or more events that occur in any ninety-day window that would collectively constitute a "plant closing" or "mass layoff" (but for the thirty-day limitation) will implicate WARN unless the employer can show that the actions were the product of separate causes. If an employer extends the RIF over more than a ninety-day period, then WARN may be avoided through careful timing of involuntary reductions.

Failure to follow the WARN Act's prescriptions may be costly, resulting in civil penalties and an adverse award of lost wages and benefits for the period of the violation (up to sixty days) and attorneys' fees. Also, selected states (not Georgia) have "mini-WARN" statutes that are even more favorable to employees. Therefore, reductions over multiple states need to be evaluated for compliance with all potentially applicable downsizing statutes.

IV. Selecting and Documenting Criteria for Termination Selection.

Next, an employer should select clearly defined criteria for determining which employees will be subjected to the RIF. Consistent application of objective criteria—such as reverse-seniority, lowest documented objective performance (*e.g.*, sales figures), and objective skill sets—provide the greatest insulation from liability for discrimination claims. To the extent subjective criteria must be used, care should be taken to ensure that such criteria are clearly defined and are consistently applied across the organization. Consultation with counsel in selecting and implementing such criteria is highly advisable, as is maintaining a comprehensive record of all documentation considered or produced in connection with the RIF process. Human resources personnel should review such materials before the layoff to ensure that management has consistently provided all relevant documentation.

V. Evaluate the Preliminary Results.

After selecting relevant objective and/or subjective criteria, an employer should engage counsel to make a *privileged*, preliminary evaluation of its planned reductions, including an analysis of the statistical impact on all protected classes of persons (e.g., race, gender, religion, national origin, age). If the employer discovers significant disparities in how the criteria affects protected classes, then the employer should consider modifying the criteria or shoring up documentation supporting the selection of the relevant criteria to minimize exposure to disparate impact claims. At the same time, an employer should avoid simply picking the next person on the "list" who is not within the potentially impacted protected class to balance out the RIF's effects, as such selection can give rise to a viable disparate treatment claim. In addition to statistical evaluation, the employer should request a legally privileged review of the individualized risks associated with benefits eligibility, protected leaves of absence, internal or external complaints, favorable prior performance reviews, etc.

VI. Maximize the Insulation from Future Claims Through Compliance with OWBPA.

RIFs frequently are accompanied by severance agreements that include releases of claims by the affected employees. Because older workers (forty years of age or older) may be a significant percentage of the impacted workforce, ensuring protection from claims under the Age Discrimination in Employment Act (the "ADEA") is especially critical. To that end, any release of claims under the ADEA must meet the requirements of the OWBPA. To effectively release claims under the ADEA, the OWBPA requires that the release: (1) be readily understandable by the employee; (2) refer specifically to claims under ADEA and not encompass future claims that have not accrued; (3) be given in exchange for consideration that is over and beyond any benefit to which the employee already is entitled (*i.e.*, more than any existing severance or contractual obligation); (4) advise the employee to consult with an attorney; (5) state in writing that the employee has forty-five days to consider release; (6) give the employee seven days after signing the release in which to revoke the release and return any consideration provided to the employee (although consideration should not be paid until after the revocation period has expired); and (7) disclose in writing the employees eligible for the group layoff, the criteria and scope of the layoff, and the job titles and ages of all employees considered

(selected and not selected) for the layoff. The last requirement is particularly onerous and requires consultation with legal counsel given that the OWBPA is not intuitive.

VII. Terminate with Compassion.

Finally, as with any termination, employers should go to great lengths to conduct any RIF with compassion. *How* the employer communicates the termination decision is often the single greatest determining factor in whether affected employees will pursue litigation. In addition, providing outplacement services or consultation time with career professionals may successfully dissuade employees from pursuing otherwise available claims—a benefit that tends to more than offset the marginal costs associated with providing affected employees with such assistance. Compassion also resonates loudly with your remaining workforce – the future of your business.

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