Wimberly Lawson
Wright Daves & Jones, PLLC
Attorneys & Counselors at Law

Briefly

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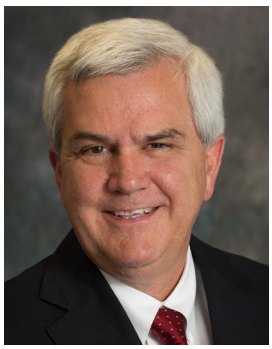
RIF, LAYOFFS AND FURLOUGHS: *REASONABLE COST CONTROL MEASURE OR INVITATION TO LITIGATION?*



Howard B. Jackson

"Appropriate planning plays a huge role in executing an employment reduction while minimizing legal risk."

During economic down times employers must often make hard choices to reduce cost. This article discusses considerations related to several such measures, as well as some of the pitfalls that can come about where they are implemented in a manner that invites legal challenge.

Some of the most common strategies involve reducing the workforce. Three of these are furloughs, temporary layoffs, and permanent layoff/reduction-in-force. Each is discussed in turn below.

A furlough is in essence an unpaid leave of absence. The employment relationship is not severed. But the employee is not working and in most instances is not receiving pay. Employers do sometimes continue benefits during a furlough and take other measures to permit furloughed employees to receive some money. For example, the employer may allow furloughed employees to use accrued paid time off or even to borrow against as yet unearned paid time off.

The primary motivation for selecting a furlough is to maintain the employment relationship unbroken because the employer anticipates returning the employee to active employment within a reasonably foreseeable time frame. Keeping the employee in such status and providing some level of benefits and/or compensation to the employee during the furlough sends the message: We want you back!

A temporary layoff is similar to a furlough except that a layoff involves ending the employment relationship. An employer may select this option where it is less confident about returning employees to work in the future or where the employer simply does not have resources available to provide things such as continued insurance during the anticipated layoff period.

A reduction-in-force (RIF) or permanent layoff also severs the employment relationship. In this instance the employer does not anticipate recalling the employees.

Appropriate planning plays a huge role in executing an employment reduction while minimizing legal risk. A good first step involves creating an organizational chart that shows, by position and without names, the positions that will be required for the organization to operate after the reduction. This step sets the level of employment, based on business needs.

Another helpful step involves creating a spreadsheet that lists several factors the decisionmakers will use when some employees must be selected for layoff from among a group in the same department. The factors will vary somewhat by employer and industry. Common factors include attendance, performance ratings, skills possessed, and date of hire. For example, some departments may have critical skill needs that not all employees possess. Including the critical skills category on the spreadsheet helps show its legitimacy. That in turn helps the employer defend its decision where, for example, a thirty-two year old employee with four years of seniority is retained over a sixty year old employee with twenty years of seniority because the younger employee plainly has one or more of the critical skills and the sixty year old does not.

Utilizing a set of legitimate factors when selecting employees for layoff helps the organization focus on its needs and the skills and abilities of employees when making the decisions. This is best for the organization even without regard to potential legal challenge. Inevitably, when the selection process is focused on the needs of the

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NEW NLRB REGULATIONS IMPACT ELECTION PROCEDURES AND FORMATION OF BARGAINING RELATIONSHIPS

On March 31, 2020 the National Labor Relations Board ("Board") published three regulations that change how it handles certain issues that impact elections and the formation of collective bargaining relationships. The new rules are effective July 31, 2020.

Blocking Charges. For years an employer or a union could block a scheduled election by filing certain types of charges. Generally, such charges included allegations of threats or coercion by one side or the other. The Board would commonly delay the election while processing the charges.

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The new rules changes the procedure for filing such charges, and how they are handled. First, a party who files a charge that they wish to block the election process must expressly request that the charge block the election. The party must also file a written offer of proof in support of the charge that names the witnesses and summarized their anticipated testimony. The party must promptly make such witnesses available to the regional director.

The election will nevertheless be held. For most categories of charges, the ballots will be opened and counted at the conclusion of the election.

If the charges filed allege violations of section 8(a)(1) (interference with employee rights), or 8(a)(2) (employer domination of the union), or 8(b)(1)(a) (coercion by the union), and the charge either challenges the circumstances related to the petition of showing of interest that led to the election, or alleges an employer has dominated a union and seeks to disestablish a bargaining relationship, the regional director will impound the ballots for up to 60 days.

At this point the regional director will investigate. Recall that under Board processes the regional directory may dismiss a charge. The regional director may also issue a "Complaint" which then leads to a formal hearing before an administrative law judge.

Under the new rule if the regional director issues a complaint within 60 days after the election the ballots will remain impounded until there is a final determination regarding the charge and its effect, if any, on the election petition. If the charge is withdrawn or dismissed during the 60-day post-election period, or if no complaint issues in that time period, the ballots will be opened and counted. The 60-day period will not be extended.

The bargaining relationship is not legally established, or denied, until the Board issues a certification of results of the election. In all cases where blocking charges are filed the Board will not issue a certification of the election result until there is a final disposition of the charge and a determination of what effect, if any, it has on the election petition.

Voluntary recognition. An employer may voluntarily recognize a union when presented with reasonable evidence establishing that a majority of employees in an appropriate unit desire representation by the union. Previously such voluntary recognition, where valid, would block the processing of an election petition by another union or by other employees who wished to challenge the union's majority status. The new regulation imposes requirements that must be met for voluntary recognition to bar the processing of an election petition.

Voluntary recognition and the first collective bargaining agreement between the parties will not bar the petition unless all of the following are met. The employer and the union must notify the regional office that voluntary recognition has been granted. The employer must post a notice in all places where notices are typically posted, and distribute the notice by e-mail if the employer customarily communicates with its employees by e-mail. The notice must remain posted for 45 days.

The notice is a document provided by the Board. It informs employees of their right to choose whether or not to be represented and states that the employer has voluntarily recognized the union as the bargaining representative of the employees. The notice states that within 45 days of its posting employees may file a petition with the Board, supported by 30 percent or more of the unit employees, seeking an election to determine whether the employees wish to be represented by a union. The notice states that if such a petition is filed it will be processed under the Board's usual election procedures, and further states that if no such petition is filed the union representative status will not be subject to challenge for a reasonable time and that an election cannot be held for the duration of a collective bargaining agreement, up to three years.

In summary, if the union and employer take all of the required steps, the voluntary recognition will be effective as in the past. If not, the relationship is subject to challenge at least up to the time the second collective bargaining agreement is executed.

The voluntary recognition rule applies to such recognitions on or after the effective date of the rule.

Construction Industry Bargaining Relationships. Most collective bargaining relationships are governed by section 9(a) of the National Labor Relations Act. There is either a voluntary recognition or an election which

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HARASSMENT CLAIMS AGAINST C-SUITE EXECS: TIPS FOR EMPLOYER INVESTIGATIONS

Rosalia Fiorello ... and Howard B. Jackson

"This article explores ideas for preventive steps that can help reduce the likelihood of receiving [a harassment] complaint, and thoughts about how to handle the investigation and follow-up if one does occur."

In light of movements such as #MeToo and #TimesUp, companies are making unprecedented efforts to combat and investigate harassment in the workplace. Many Human Resource (HR) professionals are well-equipped to handle such investigations, but suppose the alleged harasser is a "C-suite" member of management? ("C-suite" members generally include officers and senior management such as President, VP, CEO, CFO, and CIO.)

A good starting point is the employer's policy. The policy should provide information about the type of conduct that is prohibited, with examples; clear direction regarding how to communicate a concern (usually to a member of the HR department); and alternate reporting mechanisms as well. For example, it may state that if the concern is with the CEO, a report should be made to the Vice President of HR, who is authorized to report the concern to the Board of Directors. Alternatively, the policy may provide that a report may be made directly to the Chair of the Board of Directors. The point is to let employees know how to communicate a concern when a high-ranking member of management is the subject of concern.

Training is another essential preventive component. It should emphasize that the no-harassment policy applies to everyone regardless of rank, and everyone should receive training regardless of rank. One of the best preventive measures is "buy-in" from the top. For this reason, it is important that C-suite personnel attend and actively participate in the training along with others. This sends a message both to the C-suite members and to others present that harassment is a significant issue and taken seriously by the company.

Young employees or temporary workers such as summer interns or under-age minors should not be overlooked and should also receive training, as they may be more susceptible to being taken advantage of by coworkers or superiors.

If - despite appropriate preventive measures - allegations of harassment by a C-suite member arise, there are special considerations. First, the organization should notify their employment law attorney and bring them into the situation immediately. There are obvious needs for legal advice, and for decisions on strategic directions as discussed below.

The organization should consider whether to retain a third-party investigator. The answer will frequently be "yes," even if the executive does not directly oversee the highest-ranking HR official. The relationship between the HR officer and the accused – whether congenial or contentious – could create questions about the objectivity of the investigation. In any event, the decision of whether to use a third-party investigator should be made carefully, as the investigation will be important not only to the attempted initial resolution, but to defense of any subsequent legal challenge.

If a third party will be retained, the decision of who to retain is important. Ordinarily, the organization does not want its usual employment law attorney handling the investigative role, because the role of legal counsel and investigator are separate functions. In addition, if the attorney conducts the investigation then he or she becomes a fact witness, and an attorney cannot be both a witness and a legal advocate in the same proceeding. Thus, using the attorney as an investigator would result in losing them as the organization's defense counsel, if circumstances were to evolve into litigation.

The organization's attorney can also assist with finding an appropriate third-party investigator. Sometimes this can be another attorney in the community, or there are also a variety of experienced HR consultants who can fill this role.

Another question is: who will receive the investigator's report? If the accused is a C-suite member but not the CEO, then it may be that the CEO and the highest-ranking HR official would be the proper recipients. If the accused is the CEO then the investigator should be retained by the Board of Directors and the investigator's report should be provided to the Board of Directors.

With respect to corrective action the usual rules apply: the action to be taken depends on the facts found in the investigation. It is appropriate to provide feedback to the accuser after the investigation has concluded and the corrective action (if any) has been decided. It is also important to assure both the accused and witnesses that retaliation will not be tolerated, and give them specific instructions for how to communicate if they believe it occurs. This is especially important where the accused is a C-suite member because there will almost certainly be widespread perception that if the allegations do not result in that person's removal then retribution will follow, and this cannot be allowed.

Hopefully your organization will not have the unfortunate experience of a harassment investigation. If the issue does arise, work closely with your employment law attorney from the start, as there are many possible twists and turns and receipt of good legal advice along the way can be invaluable.

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organization, better decisions are made. As a side benefit, using such a process also helps protect against some of the pitfalls that have historically arisen in connection with employment reductions.

Another helpful step is determining the management group that will have responsibility for making the final decisions. Certainly, first-line supervisors and perhaps others should provide input and make recommendations. Having a clearly defined management group that analyzes the recommendations, and asks questions and engages in dialogue with the managers and supervisors who have made the recommendations, helps ensure that the decisions are both focused on appropriate factors and best for the organization.

One of the pitfalls that has come back to haunt employers is using the legitimate need for a reduction-in-force as a means to target certain employees. For example, the employer selects an employee, or a group of employees, who have repeatedly filed worker's compensation claims. Or a supervisor is asked who she wants to keep and who she does not and she includes an employee on the "do not keep" list (with no use of factors for guidance) because that employee is a constant thorn in her side. You can bet that some of the "thorny" issues involve legal compliance, or requests for accommodation, or for Family and Medical Leave Act leave. Retaliation lawsuits – often successful ones - tend to ensue.

Another pitfall is lack of awareness with respect to the protected status of the employee group that is being laid off and the group that is to remain. An employer who looks at the demographics - and realizes that far more persons in a protected status are being laid off - may want to take another look at the process. It is possible that some corrections in the process or analysis should be made. On the other hand, it may be that unrelated factors are driving that result. But if the end does result include such a disparity, the employer will be in a far better position to defend if it can show that the process included analysis of why that result came about and express consideration of whether it came about based on unlawful factors or not.

In most organizations senior leadership should be sensitized to the issues. In more than one case a high ranking leader's comments along the lines of getting rid of "deadwood" or seeking a more "vibrant and energetic" employee group (or even more obvious remarks) have been used in connection with claims of age discrimination, for example. Senior leadership, and indeed all leadership, should be reminded early on that their focus and their communications must remain on legitimate factors and that comments they may consider to be "offhand" or not serious can be used against the organization.

Last but not least, all members of management and supervision should be trained, and reminded, and reminded again, to ensure that their e-mails and other recorded communications are appropriate. Employers large and small have been hoisted on their own petard by internal e-mail messages that reference protected status or activities of employees in connection with layoff decisions. Even when the remarks were made in a joking manner, or by a rogue supervisor who played little role in the decision-making process, such messages make defending a legal challenge extremely difficult.

Every organization is different. Plans and processes must be tailored to fit. Taking the time to set out a good process and selecting the right team members to execute it can go a long way toward making and implementing the difficult decisions that must sometimes be made to help the organization survive in the short term and thrive in the future.

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establishes the union's majority status. However, there has long been an exception for construction industry employers called an 8(f) relationship. Under that arrangement an employer can agree to recognize a union in connection with a particular project, or on an area-wide basis. The employer can leave the relationship when the project ends.

The question sometimes arises: is this a 9(a) or an 8(f) relationship? The new regulation addresses that subject.

The regulation provides that a construction industry employer's voluntary entry into a collective bargaining agreement will not bar an election petition "absent positive evidence that the union unequivocally demanded recognition as the section 9(a) exclusive bargaining representative of employees in an appropriate unit, and that the employer unequivocally accepted it as such, based on a contemporaneous showing of support from a majority of employees in an appropriate unit."

Further, the showing of support cannot be based on contract language alone. This provision overrules *Stanton Fuel*, 335 NLRB 717 (2001).

This rule applies to voluntary recognition granted on or after the effective date of the regulation, and to any collective bargaining agreement entered into on or after that date.