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Alternatives For Employers Considering Workforce Reduction

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This article addresses alternatives to reductions in force, or RIFs.[1] An RIF is an involuntary termination of employment, usually due to budgetary constraints, changes in business priorities or organizational reorganization, where positions are eliminated with no intention of replacing them.

Because RIFs can be costly to implement, increase the potential for employment lawsuits and lower morale of the remaining employees, employers may consider alternatives such as furloughs, voluntary separation programs, or VSPs, and early retirement incentive plans, or ERIPs.

Such alternatives can help reduce employers' labor costs or workforce while avoiding or minimizing adverse consequences associated with a RIF.

This article discusses each of these alternatives to RIFs in detail to help you and your employer client decide which alternative is best under the circumstances:

Furloughs

One alternative to a RIF is a furlough.

Furloughs are temporary layoffs or some other modification of normal working hours without pay for a specified duration. The structure of furloughs can vary. For instance, in some furloughs employees have consecutive days of nonduty — for example, taking the first two weeks of each month off — or take off a designated day each week.

In another example, the employee may take a certain number of days off each month, but which days those are may vary from month to month. Some employers may allow employees to choose which days to take off on their furlough. A furlough may also be a temporary layoff, where the employee remains employed with a predeterminated return date, which may be extended depending on the circumstances.

Furloughs can eliminate the need for a RIF in some cases by reducing the employer's payroll costs. However, even on unpaid days, furloughed employees do cost the employer something, because employees on a furlough

usually receive employment benefits. In a unionized workforce, employers must negotiate the furlough terms and schedule with the union.

Key Pros and Cons of Furloughs Versus RIFs

There are several pros and cons to consider when determining whether a furlough is a good alternative to a RIF. The advantages of furloughs over RIFs include:

Employers avoid employment terminations and the attendant potential legal liability.

Employees don't lose their jobs.

Employers retain key employees that they may not be able to easily replace.

Employers don't have to eliminate positions and manage the organizational consequences.

Employers do not need to provide advance written notice of 60 days under the federal Worker Adjustment and Retraining Notification Act. A WARN Act notice must be given to employees affected by a plant closing or mass layoff when those employees have suffered an employment loss. A furlough lasting less than six months does not meet the definition of an employment loss under federal WARN.

Furloughs' disadvantages compared to RIFs include:

In addition to keeping people on the payroll, furloughs usually mean paying for employment benefits even on unpaid days. Even employees on a temporary leave of absence may be eligible for health benefits under the Affordable Care Act, dependent on whether the employees are considered to be full time for the time period in question. Furloughed employees may also be eligible for unemployment insurance payments. Note that furloughed employees on temporary leave may be eligible for state unemployment benefits.

Full time workers on reduced work schedules may lose morale if their workloads increase in relation to the time they have to work due to the furloughs. In addition, furloughed employees may feel upset and disconnected from their jobs and colleagues if they consistently have to take significant periods of unpaid time off.

Employers usually must maintain paid sick leave banks for furloughed employees in states or municipalities that mandate paid sick leave that otherwise are not cashed out upon termination.

Planning and Implementing Furloughs

You should advise your employer clients to consider the following issues both before and while implementing a furlough, particularly where employees are working a reduced schedule or taking days off from work:

Hourly Workers

Because the employer must pay hourly and nonexempt workers for every hour the employer permits them to work, managers must monitor hourly employees carefully to ensure that they follow the furlough plan.

Prevent Unauthorized Work

The employer must explicitly inform employees that it does not permit employees to perform unpaid work. For example, hourly employees should be instructed not to spend time reviewing work email while on a furlough. If employees spend time checking their work smartphones or logging on to their work emails when off duty, the employer may have to pay for that time. Employers should consider taking employer-owned remote access devices away from employees during furloughs to help prevent them from performing unauthorized work.

Consider Benefits Issues

Employers must review the terms of benefit plans to determine what implications, if any, a furlough has for each plan. Employers must then structure the furlough to minimize its impact on employees and their continued participation in the plan. Employers may want to adopt a policy of having furloughed hours count as scheduled hours for purposes of benefit plan eligibility.

Special Issues Concerning Exempt Salaried Employees

Whether or not to furlough employees may depend on how the employer pays those employees. Under the federal Fair Labor Standards Act, which, among other things, establishes overtime pay standards, employees paid on a salary basis and meeting any required duties test may qualify as exempt executive, administrative or professional employees who are not entitled to premium overtime pay.

The salary basis standard under the FLSA requires that if an exempt employee performs any work during the workweek, then the employer must pay the employee's full salary for the week. Therefore, even if an employer decides to reduce the number of days a week that its exempt employees work, it cannot dock the exempt employees' preexisting salaries without the risk of losing the exemption.

In addition, a change in employee's duties may affect the applicability of an exemption as well.

One option for reducing salaries if for the employer to give the employee advance notice of a reduction in the employee's salary and the number of days that the employee will work in a week. The employee must still receive the minimum salary required and meet all other requirements for a given exemption to remain in effect.

The U.S. Department of Labor has approved this approach for fixed salary reductions, i.e., bona fide fixed salary reductions to reflect economic conditions rather than periodic reductions to circumvent the requirement that the employee be paid their full salary in any week in which they perform work.[2]

Some federal courts have accepted this rule.[3] In contrast, the U.S. District Court for the Northern District of New York held in Dingwall v. Friedman Fisher Associates in 1998 that a new predetermined reduction in salary and work schedule did not satisfy the salary basis test.[4]

Rules for Implementing Furloughs for Salaried Employees

When implementing furlough policies for exempt salaried employees, employers should follow these rules:

Maintain a salary above the required minimum threshold. The employee's salary cannot fall below the minimum

required salary for exempt status under state or federal law, whichever is higher.

Provide adequate notice. The employer should announce the reduced weekly salary rate and reduced workweek well before implementation and must comply with any state notice of pay reduction rules.

Maintain fixed salary deductions. Salary reductions should be fixed, ahead of any change, and should be tied to a genuine economic need for such reduction. Such fixed reductions should be in place for the time that economic need continues. Employers should proceed with caution in making frequent changes to any reductions as it could be viewed as circumventing the requirement to pay an exempt salaried employee their full salary in any week in which they perform work. For example, in Archuleta v. Wal-Mart Stores Inc. in 2008, the U.S. Court of Appeals for the Tenth Circuit held that a question of fact existed as to whether the employer paid certain employees on an hourly basis when the employer altered their base hours on multiple occasions, which suggested that the employer changed the hours to conform to what the employees had actually worked in particular weeks.[5]

Voluntary Separation Programs

Another potential alternative to a RIF is a voluntary separation program. VSPs offer incentives, such as large severance packages, to induce employees to leave their jobs voluntarily. The employer must present the offer in a manner that makes it clear that the choice rests entirely with the employee. The circumstances must not suggest that if the employee refuses to voluntarily separate, the employer will then discharge the employee.

If the VSP does not follow this rule, then it may not withstand a subsequent challenge from an employee alleging disparate treatment or constructive discharge.[6]

Key Pros and Cons of Voluntary Separation Programs Versus RIFs

As with furloughs, there are several advantages and limits to choosing a VSP over a RIF. Advantages of VSPs over RIFs include the following.

They produce less litigation than a typical RIF because the employees leave voluntarily and VSPs generally require the employee to sign a voluntary release or waiver of claims.

They can reduce or even eliminate the need for RIFs.

From an employee morale perspective, they are viewed in a more positive light than RIFs.

Some limits to VSPs compared to RIFs include the following:

The effect of VSPs is tied to the number of employees who volunteer.

When setting up a VSP, there is uncertainty over who or how many employees will volunteer.

Implementing VSPs necessarily delays the process of eliminating positions through a RIF, which still may ultimately be necessary. During the interim time period, the employer will continues to bear higher payroll costs.

An employer must allow a substantial amount of time to pass between offering voluntary separations and

implementing an involuntary RIF for a number of reasons:

The federal Worker Adjustment and Retraining Notification Act requires a 60-day notice period before a RIF. Thus, an employer must wait at least 60 days after the period for employees to accept voluntary separation has lapsed.

If there is not an adequate amount of time between voluntary separations and an involuntary layoff, the voluntary separations could be considered part of the RIF for purposes of WARN, and its various requirements.

Terminating employees through a RIF soon after a voluntary separation could raise questions on whether the voluntary separation was truly voluntary.

For these reasons, employers should take care in considering whether and how to offer voluntary separation packages prior to a RIF.

Though an employer can limit eligibility for VSPs, it must verify that eligibility requirements do not unlawfully discriminate against employees.

VSPs may raise various tax law challenges. If you are not experienced with tax laws, you should consult a tax attorney when helping an employer implement a VSP.

Planning and Implementing Voluntary Separation Programs

The following are the steps an employer should take when planning and implementing a VSP:

1. Create a team of human resources and management employees to consider key initial issues. A team comprised of human resources and management employees must determine whether to eliminate positions and functions. The team must consider the separation timeline, budget implications, and alternatives. If the employer is unionized, the team must meet with the bargaining unit to inform it of the VSP.
2. Provide a memo on the VSP to affected employees. Once the employer identifies the affected employees, the employer should give them a written explanation of the voluntary separation, the available incentives, and any information about its effect on benefits.
3. Hold information sessions to discuss the program. The employer should hold information sessions to discuss the options and answer employees' questions about the incentives, the effect on insurance, and any impact on retirement benefits.
4. Clearly explain the steps to volunteer for the program. The employer must clearly state the steps an employee has to take to volunteer for the incentive program. For example, the employer may require an employee to submit written notice by a certain date.
5. Review and analyze the outcome of the program. The team must review the outcome of the VSP to determine whether the employer must still make involuntary terminations.
6. Conduct a disparate impact analysis. The team must also ensure that the VSP has not had an illegal disparate impact.

Special Issues Concerning the Employee Retirement Income Security Act of 1974

In addition to following the steps above, you will need to determine whether the VSP must comply with the

ERISA, which sets minimum standards for most voluntarily established pension and health plans in private industry.

According to the U.S. Supreme Court in Fort Halifax Packing Co. v. Coyne in 1987, VSPs that require an employer to have an ongoing administrative program qualify as ERISA plans.[7] To determine whether the plan has an ongoing administrative program, courts have examined factors such as the employer's discretion in administering and determining eligibility for the plan and the duration and term of the plan.[8]

Even if the VSP does not include an ongoing administrative program and need not comply with ERISA, the employer may nevertheless want to ensure that the program complies with ERISA because of the advantages of having an ERISA-compliant plan.

Such advantages include the following:

An employee cannot file a lawsuit for benefits until after (1) the employee files an administrative claim with the plan administrator and (2) the employee's required internal appeals are denied. Employees must file ERISA claims in federal court, which many management attorneys prefer to state court.

ERISA does not allow for compensatory or punitive damages.

An ERISA-compliant plan may also have some potential disadvantages, including:

Higher administrative costs;

Civil penalties for failing to comply with certain ERISA requirements; and

Potential criminal penalties for willful failures to follow ERISA's reporting and disclosure mandates.

If you and your client decide that a VSP should comply with ERISA, the program must include, at a minimum:

A plan administrator to make sure benefits payments are paid correctly.

An administrative claims procedure for employees to seek and receive benefits.

An appeal procedure for cases when the employer denies benefits.

Take steps to ensure that the plan fully complies with ERISA and that the benefits of the ERISA plan outweigh the potential drawbacks.

Early Retirement Incentive Plans

A third alternative to RIFs is an early retirement incentive plan. ERIPs incentivize older employees to retire earlier than the normal retirement age. Typically, employers will provide a significant payment to these employees in exchange for their voluntary retirement. ERIPs raise many of the same issues as VSPs including, among other things, the need to consider ERISA and the possibility that not enough employees will volunteer.

When designing ERIPs, employers must be careful to avoid liability under the federal Age Discrimination in

Employment Act as employees and retirees have frequently sued employers for offering ERIPs that allegedly discriminated against older workers. This section explains how employers can implement an ERIP without violating the ADEA.

ERIPs Based on Factors Other Than Age Do Not Violate the ADEA

Employers should ensure that an offered ERIP is based on a factor other than age. For example, courts have held that when years of service — as opposed to age — determine eligibility and the amount of ERIP benefits, no ADEA violation has occurred.[9]

Complying With the OWBPA's Statutory Exemption for ERIPs

Even if the employee satisfies a prima facie case of age discrimination with an ERIP, the employer may have an affirmative defense under the Older Workers' Benefit Protection Act. Specifically, if the ERIP is (1) voluntary and (2) consistent with the purposes of the ADEA, then it does not violate the ADEA.[10]

The ERIP Must Be Voluntary

To ensure that a court will consider an ERIP voluntary, employers should make sure that:

The employee has a true choice in whether to accept the plan.

The employer provides the employee with accurate information concerning how the plan works.

The employee has a reasonable amount of time to consider the plan.[11] Reasonableness will depend on the particular circumstances though.[12]

The ERIP Must Be Consistent With the Purposes of the ADEA

In addition to being voluntary, an ERIP must be consistent with the purpose of the ADEA, which is to protect workers 40 and older from employment discrimination based on age.

ERIPs Consistent with the Purposes of the ADEA

To conform to the ADEA's aim of eliminating arbitrary discrimination against employees based on their age, employers should not reduce or eliminate an employee's ERIP benefits due to the employee's increasing age, as "encouraging premature departure from employment by older workers conflicts with the ADEA's stated purpose to prohibit arbitrary age discrimination in employment."[13]

In Auerbach v. Board of Education in 1998, the U.S. Court of Appeals for the Second Circuit considered an ERIP in which, to be eligible, an employee had to volunteer to retire in the same year in which the employee attained at least the age of 55 and had 20 years of service.[14]

The court found this ERIP consistent with the ADEA's purposes because eligible employees who declined to participate lost no retirement benefits and eligible employees who chose to participate received — regardless of their age — the same benefits, except a payment for employees' accrued sick pay.

ERIPs Inconsistent With the Purposes of the ADEA

An employer should not set a maximum age to receive ERIP benefits, as a court will likely hold that the ERIP violates the ADEA.[15]

Consider the Alternatives

Employers should closely examine alternatives set forth in this article when faced with the possibility of a RIF. Furloughs, voluntary separation programs and early retirement incentive plans are valid alternatives that may reduce the negative consequences of a RIF.

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[1] This article was excerpted from Reduction in Force (RIF) Alternatives (Including Furloughs). See the full article for a further discussion on RIF alternatives. For an annotated furlough notice, see Furlough Notice.

[2] See DOL Op. Ltr. (Unnumbered) (Feb. 23, 1998).

[3] See, e.g., Archuleta v. Wal-Mart Stores, Inc. (10th Cir. 2008); Caperci v. Rite-Aid Corp. (D. Mass. 1998). See also California Department of Labor Op. Ltr. (Aug. 19, 2009) (agreeing with DOL's approach).

[4] Dingwall v. Friedman Fisher Assocs. (N.D.N.Y. 1998); see also Luo v. L&S Acupuncture, P.C. , (E.D.N.Y January 23, 2015) ("An employee is not paid on a salary basis 'if deductions from h[er] predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business,' in other words, when "the employee is ready, willing, and able to work" and "work is not available.")

[5] Archuleta v. Wal-Mart Stores, Inc. (10th Cir. 2008).

[6] See, e.g., Anderson v. Montgomery Ward & Co. (N.D. Ill. Jan. 25, 1989) (evidence that plaintiff did not actually voluntarily accept a VSP contributed to the court's finding that the employee alleged a viable Age Discrimination in Employment Act claim).

[7] Fort Halifax Packing Co. v. Coyne , (S. Ct. 1987).

[8] See, e.g., Simas v. Quaker Fabric Corp. (1st Cir. 1993).

[9]See, e.g., Myers v. Del. County Cmty. College (E.D. Pa. Mar. 9, 2007) (ERIP only open to employees who had attained between 30-36 years of service did not violate the ADEA; plaintiff could not demonstrate a prima facie case of age discrimination).

[10] See § 623(f)(2)(B)(ii).

[11] Auerbach v. Board of Educ. (2d Cir. 1998).

[12] See, e.g., Auerbach v. Board of Educ. (2d Cir. 1998) (four months was a reasonable time period to consider the ERIP); Paolillo v. Dresser Indus., Inc. (2d Cir. 1987) (ERIP not voluntary where the employee had only a weekend to consider it).

[13] Auerbach v. Board of Educ. (2d Cir. 1998).

[14] Auerbach v. Board of Educ. (2d Cir. 1998).

[15] See, e.g., Jelsma v. City of Sioux Falls (8th Cir. 2010), Jankovitz v. Des Moines Indep. Cmty. (8th Cir. 2005) (ERIP stating that employees age 65 and over are ineligible for early retirement benefits does not conform with the ADEA's purposes).

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