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Rifelj featured in SHRM article, Are You Ready for More Layoffs?

SHRM

Even more layoffs may be on the way in response to the coronavirus recession. Are you prepared to make reductions in force quickly and fairly?

Time is of the essence with layoffs after alternatives such as pay cuts and furloughs have been tried or ruled out.

But Ted Meyer, an attorney with Blank Rome in Houston, cautioned, "Being patient—even if you are only delaying the layoff one day—can make a huge difference in the overall validity of the selections."

Objective Selection Criteria

If employers must rapidly reduce a significant portion of their workforce and cannot conduct an analysis of whether the layoffs will have a disproportionately adverse impact on protected groups, such as older workers, they do still have options. They might use objective selection criteria that can be applied to large groups, said Brian Patterson, an attorney with Akin Gump in Houston and Dallas, and Scott Friedman, an attorney with Akin Gump in Houston.

Examples of broad-based objective selection criteria include the elimination of an entire division or facility or laying off a fixed percentage of employees based on tenure.

Using such broad-based objective criteria eliminates the need to individually compare protected group and majority group employees and decreases the likelihood of bias influencing selection decisions, Patterson and Friedman said.

Subjective Criteria

"Layoff decisions made strictly from performance review ratings or forced rankings can be problematic because they are often based on primarily subjective measures of performance and can be difficult to substantiate when scrutinized," they said. "When subjective criteria are used to

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make selection decisions, the risk of bias can be reduced by making those criteria only one of several factors that decision-makers must consider."

For example, using a weighted ranking system that includes objective criteria such as subject-matter expertise, productivity, attendance and tenure—in addition to subjective performance ratings or rankings—may increase the defensibility of the selection process.

When performance criteria are used, it is imperative that the employer have documentation to back up the rating, noted David Kresser, an attorney with Fisher Phillips in Atlanta, and Hagood Tighe, an attorney with Fisher Phillips in Columbia, S.C.

Make sure the documents don't contradict the decision, Meyer said. For example, is the most recent performance review for an employee chosen to be laid off glowing? Is the most recent review for a worker who is going to be kept poor?

"Seniority can be a factor, especially in breaking ties," said Don Samuels, an attorney with Polsinelli in Denver and Los Angeles. "Ultimately, you want to be able to retain the people who are most qualified, based on performance, skill set and education, for the remaining positions."

John Kuentler, an attorney with Barnes & Thornburg in Chicago, noted that layoffs in unionized workforces typically will be based on seniority.

Adverse-Impact Analysis

Adverse-impact analysis is most critical when a reduction in force involves subjectivity in the decision-making process. For example, if a company has a strong business justification for laying off all employees in a job title or functional area, adverse impact is less important, Patterson and Friedman said.

Adverse-impact analysis can be done only when the number of employees impacted by a layoff is large enough for meaningful statistical analysis.

If, for example, a reduction in force involves only four out of 12 employees in a department, simply comparing the demographics, tenure and performance scores of the four selected workers with the eight who are retained will tell more about exposure to discrimination claims than attempting to measure adverse impact.

If an employer cannot use broad-based and objective selection criteria, adverse-impact analysis rarely takes more than a day, the Akin Gump attorneys added. When a statistical analysis indicates a protected category of employees will be adversely impacted by the layoff, the employer can re-evaluate its selection criteria. Or it can drill down on the selection decisions to see whether they are adequately supported by strong business justifications.

Common Mistakes

Kristen Gallagher, an attorney with McDonald Carano in Las Vegas, and Laura Jacobsen, an attorney with McDonald Carano in Reno, Nev., cautioned employers against these common mistakes businesses make when conducting layoffs:

Failing to review contracts that govern a worker's employment relationship.

Overlooking state or local rules that govern when an employee has to receive a final paycheck.

Not reviewing a policy that directs how accrued and unused vacation or paid time off is to be handled upon termination.

Withholding unauthorized amounts (e.g., deductions for damage to company property) from final paychecks.

Now is the time to mitigate any inadvertent or recently discovered failure to pay overtime and issue payment at the time of termination in order to avoid potential accrual of penalties, they added.

Also note that older workers can't be selected first for layoff out of concern for their health, said Farrah Rifelj, an attorney with Michael Best in Madison, Wis., and Milwaukee. The Age Discrimination in Employment Act prevents this practice.

To read the full article, [click here](#).

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