

# FAMILY EQUITY

A Publication of The Center for Family Business at the University of New Haven

## LEGAL CONSIDERATIONS FOR REDUCTIONS IN WORKFORCE

contributed by **Mary A. Gambardella, Wiggin and Dana**

The decision to implement a reduction in force ("RIF") never comes easily to employers, irrespective of company size or nature of the business. Where a business is struggling, a RIF may be a necessity. However, even where businesses are holding their own in this troubled economic climate, they see the need to stay "lean and mean" and ready to withstand whatever 2009 may bring. Regrettably, this often means cutting back on the most significant expense - personnel.

### What are the alternatives?

Before going the "RIF Route", many employers first consider alternative arrangements. (Unless a collective bargaining agreement prohibits such alternatives.) These alternatives range from alteration of work weeks/work hours, hiring and/ or salary freezes (and sometimes even salary reduction), job sharing, bonus reduction or elimination, reduction or elimination of 401K matching, cancelling costly fringe benefits, and exploring the possibility of seeking out employees who would agree to retire early in exchange for attractive packages. However, when it becomes apparent that these alternatives are either undesirable or insufficient to ensure economic needs are met, including as proactive measures to enable the company to remain competitive in a volatile market, the RIF may become the only viable option. In this event, the following factors must be considered:

**RIF's are fraught with legal risks; contrary to popular belief, the employer cannot simply select any employee for termination**

Be aware that federal and state anti-discrimination and related laws prohibit factors such as gender, age, sexual orien-

tation, race, religion, ethnicity, among many others, from playing any role in the selection process. While most employers do not intend to be motivated by such things, unfortunately, it is often the appearance of improper motivation that makes the difference. Indeed, if any category of employee demographic is impacted disproportionately than others outside the protected categories, liability can result. Furthermore, advance notice of the RIF may be required under WARN (Worker Adjustment and Retraining Notification Act), depending on the number of employees impacted.

### RIF's can trigger litigation, not just morale problems

Where employees can identify "patterns", such as a RIF which appears to impact employees in a specific, protected category more than other categories, they can allege discriminatory motive in the selection process, or even disparate impact. Again, perception becomes reality.

**Severance packages should include releases of claims, can minimize legal risks but increase up-front costs of the RIF, and should be done in compliance with applicable laws**

While more costly in the short term, developing offers for salary and/or benefit continuation for a specified period following termination, in exchange for the employee's execution of a release of any claims he/she may have or believe he/she has against the company, saves much in the long term. The defense of one lawsuit brought by a severed employee can wipe out savings of not offering severance in exchange for such releases, even if the employer prevails. But, if not crafted in compliance with applicable laws, these re-



**Mary A. Gambardella**  
Partner, Wiggin and Dana

leases can be worthless to the employer. Thus, careful planning and proper legal advice are crucial. Indeed, there is an abundance of nuances in laws which apply to employment release claims. Failure to comply in any one area can nullify the intent of the employer, and deprive that employer of the total value of the severance package.

**Advance, thoughtful planning and thorough documentation of the selection process are critical, including crafting written business justifications for the RIF itself, criteria for selection of individual employees (avoiding deviation from that criteria), the basis for these selections, and the process of carrying out the RIF**

Documentation to assist with litigation defense is obviously crucial as well. Such documentation should reflect not only the initial rationale for implementing a RIF, but also the selection process. It serves the employer best to be able to recall with specificity the thinking process for each selection, and the basis for such selection

(especially since it often takes years for lawsuits to come to trial). Establishing criteria for the selection, and avoiding deviation from such criteria, is invaluable in proving the absence of discriminatory motive.

### **Honesty is the best policy**

Even the best and most compliant releases can be “undone” when the employer is less than honest with the departing employee about the reasons for his/her selection as part of the RIF. For example, in an effort to avoid confrontation or, with the best of intentions, an effort to avoid hurting the employee’s feelings, some employers tell the employee he/she was selected because the position is being eliminated. Shortly thereafter, that same employee who signed the release thinking the position was eliminated sees a help wanted ad in the paper for that same position. This type of dishonesty in the termination/ exit meeting — no matter how well intentioned

— is a sure fire way to hand that employee a claim that the release should be invalidated because he/she was fraudulently induced to sign it.

### **Finally, treat the departing employee with respect and comply with applicable laws regarding final wages due**

RIF’s are indeed painful-but departing employees can and should be treated with the utmost respect possible. Countless claims erupt where the employee is treated with undue harshness. For example: avoid “escorting” the employee from the premises unless absolutely necessary; answer questions about benefits, or have someone available to do so, but you need not become absorbed into a conversation about the “unfairness” of the termination; ensure that statements such as “I agree, this is unfair” are never said during the exit meeting; and finally, never tell or even remotely suggest to the employee that the severance

agreement must be signed immediately. Even discourage employees from signing it during or immediately after being terminated. Ensure compliance with all applicable laws regarding payment of all accrued salary, as well as for all accrued, unused paid time off.

In short, careful planning and execution of a RIF can make the difference, including getting the best legal advice possible at every step.

---

*Reprinted with permission from the Center for Family Business, Family Equity Newsletter, February 2009, Volume 17, Number 1. The Center for Family Business at the University of New Haven serves family businesses throughout the State of Connecticut. For more information, contact Paul Sessions, 203-932-7421, or visit us on the web at <http://www.newhaven.edu/cfb>.*