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Reductions-In-Force Managing Risks

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INTRODUCTION

Managing Risks In Reductions in Force and Employment Terminations

How to manage your HR processes to protect your
company from claims of wrongful discharge,
discrimination, or breach of contract

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A Few Opening Points

- Know the recent changes to the ADA and FMLA regulation.
- A RIF is **not** the occasion to make a termination which ought to have been made earlier for performance reasons, which because of bad HR records, are poorly documented.
- Firm up HR procedures – document regularly and in conformity with your policies.
- Always follow your employment policies.

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PRELIMINARY CONSIDERATIONS

Reductions in Force

1. Drastic solution to economic problems
2. Traumatic to those selected for termination as well as those who remain
3. Carefully analyze and document – never overstate – your financial problem

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PRELIMINARY CONSIDERATIONS

4. Employ RIFs as a last resort – examine/use alternatives
 - Cost reductions unrelated to employee census
 - Census reduction through natural attrition
 - Reduce or eliminate business expenses; freeze or reduce pay
 - Shorten work week
 - Employ temporary layoffs
 - Early retirement programs (not common in mid-market businesses)

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PRELIMINARY CONSIDERATIONS

5. Document your effort to define your problems and to resolve them via measures less drastic
 - Depend upon objective analysis of business and financial performance
 - Accurate financial analysis is critical
 - Use third party input where available
 - Outside accountants/auditors or consultants

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Designing and Planning the RIF

1. State your underlying principles: to analyze, plan and conduct the RIF as fairly and objectively as possible, with sympathetic respect for all employees and with no adverse impact upon protected groups
2. Size and focus the RIF
3. Analyze your existing work force
 - Analysis similar to that necessary for completion of a form EEO-1
 - Analyze in terms of protected groups – age, race, sex, etc.
 - Company-wide and by smaller units

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Conduct a Job/Job Function Survey

- Develop a short list of objective criteria to be used
- Determine what jobs or functions can be eliminated or reduced
- Consider
 - Specific duties
 - Overlaps
 - Time sensitivity
 - Special or professional skills or licenses or other qualifications

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Develop Objective RIF Criteria

Historical vs. RIF evaluations

- Use historical when your review policies and practices are strong
- Use RIF evaluations carefully
 - First cut – review by supervisor
 - Second cut – review by committee or senior management
- Generally, at least review historical evaluations

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Use Objective Criteria

- Historic or RIF evaluations are best based upon objective criteria – sales performance, piece work rates, attendance, safety record
 - Seniority
 - Historic availability for overtime

(caution here)

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Conduct an Impact Analysis

- Perhaps best assigned to counsel, at least for review
- Fundamental analysis – chart those selected to leave vs. those who remain vs. beginning work force vs. protected groups
- Goal: Identify “adverse impact” – for example: disproportionate impact upon employees over 50 but under 60

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CONDUCT AN IMPACT ANALYSIS

If you find adverse impact:

- Review the planning process – RIF criteria, job evaluations
- Review the manner in which the decision-maker has applied the criteria – identify personal bias or favoritism

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The Battleground: Pretext

Wrongful termination and employment discrimination lawsuits frequently turn on the question whether an employer's articulated reasons for discharge were pretext for unlawful discrimination.

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PRETEXT

Employers' actions can determine whether employers can overcome pretext claims:

- Before termination process
- During termination process
- After termination process

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PRETEXT

What mistakes by employers lay a foundation for claims of pretext?

Case Discussion

Examples contain more than one problem practice

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WHAT MISTAKES BY EMPLOYERS LAY A FOUNDATION FOR CLAIMS OF PRETEXT?

Articulating implausible reasons for termination

Case discussion:
Beird v. Seagate Tech.

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WHAT MISTAKES BY EMPLOYERS LAY A FOUNDATION FOR CLAIMS OF PRETEXT?

Articulating inconsistent reasons for termination

Case discussion:
Stiles v. G.E.

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WHAT MISTAKES BY EMPLOYERS LAY A FOUNDATION FOR CLAIMS OF PRETEXT?

Articulating contradictory reasons for termination

Case discussion:
Zuniga v. The Boeing Company

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Before Termination:
What can be done to avoid the most common pitfalls?

- Tighten HR Policies and Procedures.
- Review everything from application process through evaluation and termination.
- Train managers to perform meaningful and accurate performance appraisals.

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BEFORE TERMINATION: What Can Be Done To Avoid The Most Common Pitfalls?

Managers must be accurate in fact:

- No employee should receive all “excellent” or “very good” ratings.
- Shortcomings should be described with specificity in a narrative portion of the review.
- What, When, Where, How, Who
- Include relevant documents.

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BEFORE TERMINATION: What Can Be Done To Avoid The Most Common Pitfalls?

Managers must be accurate in fact contd.:

- Reviews should include specific goals for improvement.
- There should be quarterly or mid-year follow-up reviews.
- Employee evaluation is a process.

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Improve Your Evaluation Process

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IMPROVE YOUR REVIEW PROCESS

Pre-rank like employees in the same department before completing evaluation.

There ought to be some correlation between pre-rank and evaluations.

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IMPROVE YOUR REVIEW PROCESS

If pre-rank doesn't match evaluation, examine:

- The ranking
- The evaluation
- The approach taken by the person performing the evaluation
- If the ranking and evaluation results are accurate, but conflict – What does that tell you?
- If necessary, do it over.

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IMPROVE YOUR REVIEW PROCESS

- Document every evaluation.
- Document every disciplinary incident with an incident report.
- Discuss all evaluations and incident reports with the employee.
- Solicit the employee's comments on the evaluation or report form.
- Send all documents to the employee's HR file.
- Do not allow managers to keep "desk" files.

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IMPROVE YOUR REVIEW PROCESS

- The employee and the person completing the review or incident report should date and sign the document.
- Give a copy of the review or incident report to the employee and note that fact on the document.


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The Termination Conference

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THE TERMINATION CONFERENCE


**Attended by the company spokesperson
and one company witness**

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THE TERMINATION CONFERENCE


One spokesperson will speak for the employer:

- Solely responsible for articulating the employer's reasons for the termination
- Selected for credibility as a witness and ability to articulate the company's position sympathetically and accurately
- Witness notes what is said by employee subject to termination

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THE TERMINATION CONFERENCE

- Spokesperson uses and follows a prepared script.
- Script must be consistent with performance reviews and/or incident reports.
- Escort the employee from the building immediately after.

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Post Termination

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POST TERMINATION

- No one other than the spokesperson is authorized to speak for the company.
- All questions referred to the spokesperson, or to counsel
- **Do not** rehire within a year after the RIF – if you must, seriously consider recalling employees.

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Conclusion

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CONCLUSION

RIF planning and managing pre-termination, termination and post termination processes reduces risk of litigation, reduces risk of loss in employment litigation and reduces the cost of such litigation.

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Thank you!

Questions?

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