

## Workforce Reduction Done Right

*Monday, Dec 17, 2007* --- As a result of economic downturns, merger and acquisition activity, discontinuation of certain product lines and numerous other factors, even dynamic and healthy corporations periodically decide to reduce the size of their workforces.

These Reductions In Force (RIFs) can be traumatic, both for the individuals who find themselves unexpectedly unemployed and for the managerial team that has to make the difficult layoff selections among otherwise qualified and hardworking employees.

To ameliorate the economic hardships often associated with RIFs, companies frequently provide the terminated employees with severance benefits, typically dependent upon the employees' years of service.

At times, companies allow their employees to volunteer for participation in RIFs. On other occasions, companies proclaim that voluntary participation is impermissible but tacitly accept this approach. This article reviews briefly the risks associated with these two options. After addressing these issues, an alternative approach to RIFs is proposed for your consideration.

### *Voluntary Participation in RIFs*

As just noted, some companies needing to reduce the size of their workforces allow their employees to volunteer for RIFs. To make this layoff option attractive, companies typically provide RIF benefits that correlate to employees' tenure. Some RIF packages are generous – one or two weeks of compensation for each year of service.

The fundamental question employers need to consider is whether a magnanimous RIF package, coupled with the opportunity to volunteer for participation, advances the corporation's long-term interests. There are at least six problems associated with this approach to corporate downsizing.

First, when individuals are provided the opportunity to participate in layoffs voluntarily and the financial incentives are linked to tenure, the costs of the RIF may increase significantly.

Unlike a well-constructed RIF plan that requires managers to make thoughtful selections regarding the most expendable employees, a plan that rewards long-term employees for resigning is likely to be expensive.

Individuals who have been associated with the company for 20, 25 or even 30 years may elect to volunteer for layoff, primarily because of the

associated financial benefit. Providing these individuals with this unexpected compensation, in addition to standard severance or retirement benefits, can cost the company more than had been anticipated.

Given that the RIF was driven by financial pressures, a careful analysis of such a worst-case scenario should be evaluated before the voluntary participation option is considered.

Second, particularly when a company has utilized a series of voluntary RIFs as it has attempted to “right-size,” the approach may disrupt normal retirement planning. If an individual believes that he/she can qualify for an additional six months (or more) of compensation simply by volunteering for layoff, that employee may elect to defer normal retirement plans until the next RIF option becomes available.

This has two detrimental effects. The costs associated with the RIFs are increased. Further, the individuals who decided to defer their retirement plans indefinitely in the hopes of participating in a RIF and receiving increased financial benefits may be far less productive in the deferral period.

Third, allowing voluntary participation in RIFs incentivizes the wrong employees to resign. These individuals may be high-performing, extremely talented, long-term employees with extensive knowledge of the company, its customers, its manufacturing processes, its products, etc.

These are the very employees the corporation should strive to retain. If they depart on a periodic basis when they otherwise qualify for retirement, the company can manage this natural attrition effectively. When a substantial percentage of these employees resigns at one time to qualify for generous financial benefits, the company loses a significant talent and knowledge base.

The risk that the wrong individuals will resign in a voluntary RIF is not limited the corporation’s more senior employees. The company also may lose some of its higher performing, less senior employees, who know that they will be able to find attractive alternative employment very quickly.

Particularly in a context where there have been a series of RIFs, these employees also may view these layoffs as a harbinger of more serious corporate problems to come and elect to opt out of the company before these problems occur.

Fourth, the corollary problem to providing an incentive for the wrong employees to depart is that at least some of the remaining employees may be the very individuals the company should be discharging. Consequently, the company may be left with a less talented workforce, with the corresponding need to provide increased responsibilities and opportunities to the less talented group that remains.

Although it undoubtedly is less stressful for managers simply to allow

employees to volunteer for layoff, the tensions the company hoped to avoid by this approach often persist. The difficult employees remain and the hard management decisions associated with the discipline and/or discharge of these employees have just been postponed until another day.

Fifth, assuming a company's voluntary RIF benefits did not induce enough employees to resign, the company still will need to select other employees for layoff. If the individuals selected for layoff fall into protected classifications (as some undoubtedly would) and challenged their layoffs, the company would need to demonstrate that the RIF was driven by economic considerations.

If, however, the RIF was costly and the company could not demonstrate meaningful cost savings, the employees claiming discriminatory decision-making could argue that the RIF itself was merely a pretext or cover-up for discriminatorily based discharge decisions.

Sixth, voluntary RIF programs, especially when coupled with meaningful financial incentives, also can adversely affect a company's diversity efforts. If a disproportionate number of employees in a protected category elect to resign, the considerable efforts the company may have made to build a gender balanced, racially and ethnically diverse workforce may be undone.

Moreover, in future years, the imbalance created by the RIFs' impact may become problematic if the company is forced to defend a claim of discrimination.

### *Voluntary Participation – Ostensibly Rejected But Tacitly Accepted*

Even more problematic than voluntary RIF programs are RIF programs that ostensibly reject voluntary participation but that tacitly accept employees volunteering for RIF inclusion. These situations often arise when the "involuntary" RIF program contains attractive financial incentives that employees nearing retirement or otherwise talented long-term employees hope to obtain.

Typically, these employees approach friends, who also happen to be RIF decision-makers and offer to ease their difficult management burden. They point out that by including them in the RIF, the manager will be spared the unpleasant and difficult task of selecting layoff candidates among other employees.

This voluntary "selection" process is presented as a win-win-win: the departing employees derive a meaningful financial benefit; the managers are spared a difficult task; and employees who otherwise would lose their jobs (perhaps with accompanying animosity toward the managers who selected them) will be able to continue working.

First, to some extent this type of RIF approach implicates most of the problems associated with a truly voluntary RIF, as described above.

Second, given that many of the individuals who quietly (or perhaps, confidentially) “volunteer” for inclusion in the RIF will be in the protected age group, their participation in the RIF will skew the RIF statistics significantly. If any other person in the protected age group is selected for participation in the RIF involuntarily, and if that person challenges his/her discharge as discriminatory, they likely will be able to make a statistical argument regarding those selected for layoff.

In all likelihood, the standard deviations relating to the age composition of those “selected” for layoff will be substantially greater than two, the EEOC’s magic number.

Given this fact, if a company tacitly permits individuals to volunteer for inclusion in an “involuntary” layoff, the facts regarding each “volunteer” need to be documented. Every person who has volunteered needs to be excepted from the selection process, so the statistics regarding the selected employees are not grossly distorted.

Third, allowing employees to volunteer for participation in an “involuntary” RIF sends a confusing and mixed message. What is the company policy? Will the policy be enforced? Will other policies be enforced?

If it becomes widely known that employees may volunteer to participate in the involuntary-only RIF, the RIF ceases to be involuntary. If it is not widely known, but some individuals are allowed to volunteer, those who were “deprived” of the opportunity to volunteer and qualify for the substantial financial benefits may have a legitimate gripe. Keep in mind that those disgruntled employees will remain employed with the company.

Although it requires more thought and planning than a voluntary RIF, a true involuntary RIF, with no exceptions for “volunteers,” has some clear advantages over the alternative approaches. If carefully constructed and implemented, such a RIF will best advance the short- and long-term corporate interests.

### *An Alternative Approach To A Reduction In Force*

There are many alternative ways in which a RIF can be constructed. The approaches may vary dramatically depending on the economic factors driving the reduction in force.

For example, in a context where the company has decided to locate all of its facilities in a single state, the primary RIF criteria become location and the availability and willingness of certain employees to relocate.

In a context where there has been an acquisition, the primary criterion driving the RIF may be the elimination of duplicative job functions.

Where a company has decided to discontinue a particular product line, the

determining factor in a RIF may be the nexus between the job function and the eliminated product. If, however, there is an across-the-board workforce reduction driven by overall economic considerations, the following nine steps may be worth exploring.

First, make a determination of how many employees need to be eliminated to achieve the company's financial goals.

Second, make a determination of the types of positions that need to be eliminated. Note that this issue may impact the point above since the lower the salary grade of the laid-off employees, the more employees will need to be removed to meet the company's financial targets.

Third, once the two preceding decisions have been made, direct the managers of the individuals eligible for layoff to determine the criteria on which the layoffs will be made.

Depending on the nature of the positions involved in the selection process, some or all of the following criteria could be considered: a) education; b) job experience (generally); c) experience within the company; d) flexibility (i.e., types of jobs held or for which the employee is qualified); e) attendance; f) performance ratings in last two years; g) productivity; h) seniority (only if the company treats this as a positive); i) prior or current supervisory responsibilities; j) impact on diversity program; and, k) the absence of performance problems (as reflected by documented disciplinary actions).

The company could use all 11 of these criteria, a subset of these criteria or different criteria entirely.

Fourth, weight the criteria in terms of importance. For example, consider using a weighting of one to three, with three representing the most important retention factors.

Fifth, have the managers with direct supervisory responsibility over the employees rate the employees under their supervision on the basis of the criteria selected. Ideally, there should be at least two independent rankings of the affected employees by two separate managerial employees.

Sixth, after each manager has evaluated the employees, instruct the managers to compare their rankings with each other. To the extent that the rankings differ, provide the managers an opportunity to persuade each other of the correctness of their evaluations.

It may be that one manager is far more familiar with an employee than the counterpart manager. It may be that there are personal issues (e.g., a death in the family or a divorce) that adversely affected an employee's recent performance, but of which only one manager was aware. If the managers are unable to reach consensus regarding their independent assessments, involve a third manager or HR personnel. The goal should be to arrive at a consensus ranking score for each potentially affected employee.

Seventh, make a preliminary determination regarding the employees included in the layoff process. Share that preliminary determination with in-house or outside counsel to ascertain whether the selection process has had a discriminatory impact on individuals in any protected class.

To the extent that there is an adverse discriminatory impact, re-examine the criteria employed to make the selections to ensure that no unintentional bias was incorporated into the selection criteria or the implementation of those criteria. This should be an independent assessment conducted in a privileged context. If counsel is persuaded that the RIF criteria are fair and nondiscriminatory and that they were implemented in a nondiscriminatory manner, there should not be any need to alter the rankings. If the opposite conclusion is reached, correct it.

Eighth, communicate the layoff selections to the employees affected. If possible, provide appropriate severance and other benefits to mitigate the harshness of the economic consequences associated with layoffs. Note, however, that the severance and other benefits should be conditioned on a complete general release of all claims.

Finally, if possible, consider other ways of ameliorating the adverse effects of the layoffs. This could include outplacement services, recall options (in the event of an economic upturn) or other actions designed to help the laid-off employees transition to alternative employment.

If handled compassionately and thoughtfully, the company may generate considerable good will not just with the employees who were laid off, but with those who continued working as well.

Following a disciplined and principled approach to a necessary RIF should assist a company to accomplish the financial goals associated with a workforce reduction while simultaneously reducing the likelihood of post-RIF litigation.

--By Roy A. Ginsburg, Dorsey & Whitney LLP

*Roy A. Ginsburg is a partner with Dorsey & Whitney LLP in Minneapolis. Roy has divided his tenure with the firm (1980 to present) between the trial department and the labor & employment law department. Each week, Roy addresses an unusual employment law question in his employment law blog ([www.QuirkyEmploymentQuestions.com](http://www.QuirkyEmploymentQuestions.com)).*