REDUCING YOUR WORKFORCE

WHAT YOU DON'T KNOW CAN HURT YOU

By Dennis M. Kuhn and David E. Stout

While cost cutting may be at the heart of "reduction-in-force" decisions, legal issues come into play as well. One way to make sure former employees don't become plaintiffs is for managers to fully understand federal statutes that create implications for these decisions (see Table 1) because what decision makers in this area don't know can hurt them. As management accountants, you can play an important role in reducing the risk of expensive lawsuits.

"Litigation can easily rise to six figures," employment attorney Tacita Mikel Scott, a partner with Morris, Manning & Martin law firm in Atlanta, says. "Damages vary depending upon the facts, the size of the company, and other factors," she adds.

For example, Apex Corporation (a fictional company) is considering reducing its workforce by 10% by terminating workers with low performance ratings and frequent absences, plus those with the highest pay. Its managers should first consider federal laws that prohibit discrimination against employees in certain protected classes as defined by:

- Title VII of the Civil Rights Act of 1964, which prohibits an employer from discriminating against an employee because of race, color, religion, national origin, or gender.
- The Age Discrimination in Employment Act (ADEA), which, for those employees who are 40 and over, prohibits discrimination because of age.
- The Americans with Disabilities Act (ADA), which prohibits discrimination against disabled individuals who, with or without reasonable accommodations, are qualified for their positions.

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DISPARATE TREATMENT

In disparate treatment cases, the employee is essentially charging the employer with discriminating because of race, disability, age, and the like. The individual can establish legal claim with direct evidence, such as a memo from the president telling Human Resources to terminate all workers born outside the U.S.

Direct evidence is rarely available, so the plaintiff usually must produce evidence from which it can be inferred that people were treated less favorably because they belong to a protected class. For example, if 30% of Apex's current workforce is African-American, but 60% of the laid-off workers are in this group, it would give rise to an inference that these workers were selected based on race.

Apex could show a legitimate business reason for the decision, such as that it was based on merit or a legitimate seniority system. It could also show that employees who kept their jobs had the highest performance ratings and that those ratings were based on objective criteria.

The plaintiff could still prevail by showing a discriminatory motive, such as prior discrimination against workers in a protected group, e.g., national origin.

What if Apex decided to terminate workers with the highest compensation? The affected workers are likely the oldest employees. Could these individuals challenge the decision?

Evidence in one case indicated a 62-year-old worker was terminated to prevent having his pension rights vested. In 1993, the U.S. Supreme Court found that liability in a disparate treatment case depends on whether age was the motivating force. If the decision was prompted by criteria unrelated to age, it doesn't mean the ADEA was violated.

While it may be expected that workers age 40 or older would be closer to having pension rights vested, the two characteristics are "analytically distinct." Since the Supreme Court decision, the Several Circuit Courts of Appeals have concluded that if the decision is based on compensation, the ADEA is *not* violated because compensation is "analytically distinct" from age.

DISPARATE IMPACT

In disparate impact cases, an employer selects what appears to be a "facially neutral" standard for termination, which has a discriminatory impact on a protected class. This theory is available in Title VII and ADA cases. Its availability in ADEA cases has been called into question because of a decision by the U.S. Supreme Court (*Hazen Paper Co. vs. Biggins*, 507 U.S. 604 (1993)).

For instance, what if Apex decides to terminate workers who are frequently absent? This would appear to apply equally to all workers, but workers suffering from disabilities covered by the ADA may be more likely to be terminated. The ADA requires that an employer "reasonably accommodate" disabled workers. Reasonable accommodation could include not penalizing workers when their conditions cause them to miss work so long as it wouldn't create an undue hardship for the employer.

In addition to the defenses of seniority and merit, the employer can claim "business necessity." For example, Apex may reorganize tasks, requiring more warehouse workers to lift heavy objects. As a result, a disproportionate number of women may be terminated. If they challenge the company, Apex can introduce evidence that the changes were necessary for the business. Again, the plaintiffs can respond by

Table 1: FEDERAL STATUTES AFFECTING THE REDUCTION-IN-WORKFORCE DECISION

STATUTE	PROTECTION FOR WORKERS	POTENTIAL REMEDIES
National Labor Relations Act	Protects private workers from being punished or otherwise discriminated against because of activities aimed at promoting union causes.	National Labor Relations Board has broad power that could include an order to reopen a closed plant (or division) and to provide pay and benefits to affected workers.
Civil Rights Act of 1964 (Title VII)	Generally prohibits an employer from making a decision to terminate a worker because of race, sex, religion, national origin, or color.	Back pay for up to two years; reinstatement; promotion; injunctive relief; compensatory and punitive damages; attorneys' fees.
Americans with Disabilities Act—Title I	Prohibits an employer from discriminating against a qualified individual because of the person's physical or mental disability.	Essentially the same as under Title VII.
Age Discrimination in Employment Act	Protects workers 40 and older; prohibits the employer from using age as the basis for termination.	Back wages; liquidated damages if conduct was willful; reinstatement; promotion; attorneys' fees.
Older Workers Benefit Protection Act	Seeks to ensure that workers covered by the ADEA enter into severance agreements voluntarily and knowingly.	Successful plaintiff will pursue remedies available under the ADEA.
Employee Retirement Income Security Act	Creates disclosure and fiduciary duties relative to pension and employee welfare plans.	Right to seek benefits illegally denied.
Worker Adjustment Retraining and Notification Act	Provides workers with 60 days' notice of a plant closing or mass layoffs.	Workers can collect attorneys' fees and back pay and benefits for up to a maximum of 60 days; local government can collect up to $500/day for up to 60 days.

calling this a pretext for discrimination.

In both disparate treatment and impact cases, an aggrieved employee will initially file a charge with the state agency responsible for investigating discrimination charges or with the Equal Employment Opportunity Commission (EEOC). If the investigation finds reasonable cause to believe a violation has occurred, the first step involves seeking conciliation with the employer. If that fails, the EEOC can either sue the employer or give the employee permission to pursue the claim in court.

Remedies are wide-ranging. The courts can order employers to stop illegal behavior and address injuries caused by their conduct. This could include reinstatement and retroactive promotions. Successful plaintiffs may collect up to two years of back pay and attorneys' fees.

If the employer discriminated intentionally, compensatory damages may be awarded. Limited punitive damages can be awarded where the employer acted "with malice" or "reckless indifference." The process for filing a complaint and the remedies are similar in cases involving the ADA and the ADEA, but punitive damages aren't generally awarded in ADEA cases.

VOLUNTARY SEVERANCE AND ERISA

To reduce its workforce, Apex may offer a voluntary separation package. In exchange, the selected workers would agree to leave the company and waive their rights to all claims against it. If Apex elects this option, it must now consider both the Employee Retirement Income Security Act (ERISA) and the Older Workers Benefit Protection Act (OWBPA).

ERISA regulates employer conduct concerning pensions and employee welfare benefit plans, but it doesn't apply to all voluntary separation agreements. The Supreme Court has concluded that the benefits must involve an ongoing administrative program. Thus, for example, a one-time severance payment with the benefit determined in a purely mechanical manner wouldn't be covered.

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When General Motors Corp. decided to close a plant in Norwood, Ohio, it told employees they could participate in a voluntary separation plan with a lump-sum payment.

The workers asked company officials whether a more generous package would be offered. Managers indicated it would not, even though at that time the company was considering offering a more generous plan to those with 10 or more years of service. After the workers accepted the original plan, GM announced it was making an improved plan available to affected employees with 10 or more years of seniority company-wide. Norwood employees with more than 10 years' seniority sued the company. The Sixth Circuit affirmed that part of the trial judge's decision that found the employer breached its fiduciary duty under ERISA.

If a company terminates or otherwise discriminates against an employee to deny him/her the opportunity to participate in a voluntary severance plan, the worker can sue to recover the benefits. If Apex breaches a fiduciary duty by failing to disclose information, an employee who resigned before learning about the plan can sue. The Supreme Court has ruled against punitive damages, but some lower courts have awarded them.

A court has the discretion to award interest on the judgment to successful plaintiffs, and it can award attorneys' fees to either party.

OLDER WORKERS BENEFIT PROTECTION ACT (OWBPA)

The OWBPA is aimed at ensuring that if a company offers workers 40 and older a separation package, the agreement is entered knowingly and voluntarily.

When Coors Brewing Co. announced it would reduce its workforce, security department employees heard rumors that their duties might be outsourced. Coors told them it intended to eliminate nine full-time employees, so seven department members accepted voluntary severance packages. Then the company advertised seven openings in the department. The plaintiffs believed the company was trying to get rid of older employees since most of the new employees were under 40.

The Tenth Circuit Court of Appeals found that the

employees should have the right to challenge the validity of the waivers if there were evidence that the agreements weren't entered into knowingly and voluntarily. In other words, if the employer engaged in fraudulent conduct to obtain the agreement, the employee should have a right to invalidate the agreement.

The OWBPA provides that if the worker is able to show that the waiver was invalid, he or she can pursue remedies under the ADEA, such as back pay, attorneys' fees, and "equitable relief," including reinstatement and promotion. And the Supreme Court has determined that an employee can pursue the ADEA claim without first returning the compensation that he/she received. The Court felt that the opposite conclusion would create the risk that the employer would violate the statute and the employee would be without recourse because the money would have already been spent. If the employee successfully pursues an ADEA claim, the award may be reduced based on the amount the employee already received.

THE WARN ACT

Apex is considering closing its existing plant and moving to a different region where it would save money through lower real estate taxes, labor, and utility costs.

The Worker Adjustment and Retraining Notification (WARN) Act requires a company to give 60 days' notice of a plant closing or mass layoff to workers or their union as well as to the state and local governments. With certain exemptions, the law applies to companies that employ either 100+ full-time employees or 100+ employees, including part-timers, who collectively work at least 4,000 hours per week.

The Act allows employees to recover back pay and benefits for every day the employer is in violation, up to 60 days. In addition, the court may award attorneys' fees. The employer may also be liable to local government for up to $500 for each day of the violation, up to 60 days, which could be as much as $30,000.

NATIONAL LABOR RELATIONS ACT (NLRA)

The National Labor Relations Act (NLRA or Wagner Act) was adopted to give workers the right to collective bargaining. It could affect the workforce-reduction decision in several ways.

A company is prevented from threatening or announcing a reduction in force if the motivation is to discourage workers from exercising their rights to organize or to use a labor organization as their bargaining representative. The law says management should be free to make decisions that promote profitability, even if unionized workers lose their jobs. Yet a company can be required to bargain if the decision is motivated by factors the union has some control over, such as labor costs.

Even if an employer has no duty to bargain with the union over the decision to lay off workers, it still has the duty to bargain over the decision's effects, such as the right to be re-hired, severance pay, and placement services.

THINKING AHEAD

If your company is considering downsizing, keep these points in mind:

Minimize the risk of discrimination charges. Even employers who had no intention of discriminating have been forced to defend themselves.

If job performance is the criterion, limit the subjectivity of the evaluation process, and make sure that performance measures clearly relate to the position. One expert suggests looking beyond past evaluations to the employee's present abilities, his or her ability to adapt to a changing work environment, and special skills that set the employee apart. Implementation of this system could be placed in the hands of a committee composed of Human Resources personnel and senior management of different races, ages, and sexes.

Demonstrate respect for affected workers and survivors. Reducing the workforce creates pain and anxiety. The employer's actions may affect whether displaced employees will pursue legal challenges, so train a select group of managers to provide information and answer questions. A severance package, help finding new employment, or providing employees with a new set of skills can reduce the chance that displaced employees will look to the courts for help.

If the reduction is accomplished through voluntary severance packages, be sure the employees enter into the agreement freely. If an employee enters into an agreement because of threats (e.g., "accept or be fired"), it is *not* voluntary. This means that even with his/her signature on an agreement, the employee could later seek relief in court. ■

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