TEXAS LAWYER
SETPEMBER 30, 2015
An ALM Publication
www.texaslawyer.com

Turbulent Time in the Oil Patch: What to Know When Facing RIFs

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The oil and gas industry is full of ups and downs, and with history, at least the last 40 years, has shown itself to be cyclical. When the boom times arrive, times are very good. And, when the busts arrive, times are undoubtedly challenging. The years from 2011 through mid-2014 witnessed the price of oil holding in the $100 to $120/bbl range. As of the date of this article, the price of oil is hovering around $40/bbl. The significantly lower price of oil has led many oil and gas companies to delay or cancel exploration, development and production programs. This has had a ripple effect throughout the oil patch, impacting all levels of the supply chain.

As companies deal with the many implications of low oil prices on their revenues, they will invariably consider employee cuts as a way to deal with decreasing budgets. The various legal issues that should be taken into account in the United States are examined below. (If the impact is global, counsel will have to be familiar with the rules in those other jurisdictions, too.) Consider carefully federal, state, and local laws and rules. Employers also must know, review and analyze outstanding employment agreements and collective bargaining agreements before taking any action. It is always recommended to consider a voluntary package as a preliminary option. Enhanced severance packages entice some employees to consider voluntary separation and ease the burden of determining who will be forced to leave the company. It's recommended that decision makers work with an employment lawyer and an employee benefits lawyer to ensure compliance with an employee benefit plan's requirements and other legal constraints.

What should you know if your company or client is faced with RIFs? If an involuntary reduction becomes necessary, several statutes may come into play. Here is a shortlist of the main statutes and the issues that must be considered with any reduction in force:

1. Worker Adjustment and Retraining Notification Act and similar state statutes. How many people will be affected? How many facilities are affected? At one or more locations? How much advance notice do you intend to give? The WARN requires at least 60-days' notice to employees for some plant closings (of 100 employees

or more) and mass layoffs. Some states also require notice to enable the relevant state labor commission to assist with reemployment efforts. An employer may be able to pay in lieu of notice.

2. Title VII, the Age Discrimination and Employment Act, and other anti-discrimination statutes. What selection criteria will be used? Who will be involved in the decision making? How will employees be kept informed?

Ensuring a fair and consistent selection process is key. Consult with an experienced employment lawyer to guide you through selection criteria. Choosing objective criteria is always safest, as long as they are not a substitute for protected categories. For example, seniority and/or performance (especially if based on prior performance reviews) are common and acceptable criteria for RIF selection purposes. It's necessary to analyze at least the age, gender, and race of those selected to be sure those in protected categories aren't affected at higher rates than the rest of the employee population. Those making these difficult decisions should also be aware of the impact on employees who filed claims (discrimination or otherwise), and those on medical leave (worker's compensation, FMLA, and other medical leave) to avoid the appearance that the RIF was an attempt to eliminate those employees.

3. The Older Workers Benefit Protection Act. Will employees be asked to sign releases in exchange for a severance package? Is there an existing employee plan that deals with severance under these circumstances? How much information will be provided about employees offered severance packages?

The OWBPA requires that the severance offered in a RIF include a list of the age and job titles of affected employees for each decisional unit if at least two of the affected employees are over the age of 40. There are also other specific requirements that the release must include under the OWBPA. It is fairly easy to comply once you know the requirements. Failure to do so exposes you to unnecessary and unwanted additional risks.

4. Consolidated Omnibus Budget Reconciliation Act. Will employees be permitted to continue coverage through the employer's group medical plan? If so, for how long and at what rate? Some employers provide continued medical coverage as part of the severance program. The relevant employee benefit plans and other applicable laws may require coverage for certain lengths of time.

5. Texas Payday Law. In Texas, employees must receive their final paychecks by the sixth day after their final day of employment. Employers should also be careful to calculate deductions properly, taking into account rules that may proscribe certain deductions without a written agreement with the employee.

The U.S. Court of Appeals for the Fifth Circuit has consistently confirmed that "a RIF is a legitimate nondiscriminatory reason to relieve an individual of their employment," per EEOC v. Texas Instruments in 1996. A plaintiff who wants to challenge a RIF termination must offer sufficient evidence (at least to create a genuine issue of material fact) on either of two bases: 1. that the employer's reason of a RIF is pretext; or 2. that the employer's reason, while true, is only one of the motivating factors for its conduct. If successful, a plaintiff could also obtain attorney fees.

An employer must be aware of the legal considerations listed above, in addition to the business issues, to minimize additional risks associated with any RIF. It is essential that the employer manage messaging carefully. No RIF is easy, but employers who take care in planning a RIF will be better able to protect their decisions if challenged later.

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