

The Performance Review Podcast

Episode 23

Greenberg Traurig

Philip Person ([00:00](#)):

Welcome back to The Performance Review. Last episode, we discussed when to hire an expert witness in your wage and hour cases. Lovely topic. Today, we're going to start first of a three-part mini-series where it's just me and Ryan, no guests, talking about reductions in force. Hopefully we don't have a reduction in force in our listenership with no guests, but we'll kind of bear that out here.

Ryan Bykerk ([00:29](#)):

Yeah, we looking for an increase in force in listenership.

Philip Person ([00:32](#)):

Yes.

Ryan Bykerk ([00:32](#)):

That's what I'm looking for.

Philip Person ([00:34](#)):

Our reduction in force episodes will result in an increase in our listenership. In this episode, like I said, we're going to discuss reductions in force, RIFs, what they are, what companies need to know when reducing their workforces and the overall legal framework for that. Now, we'd be remiss if we didn't give our audience a reminder here, because reductions in forces are kind of tricky here in that it's a highly complex and technical area. All we are doing here is just providing an overview regarding the issues. It's not an exhaustive list. Trust me, you wouldn't want that because we'd be here all day and that your planning and your consistent implementation of a RIF is very important. So you need to get legal advice at all stages, and we highly recommend that. Felt like our disclaimer we need on every episode.

Ryan Bykerk ([01:29](#)):

Yeah, that's probably true. But yeah, particularly here, and I mean, unlike a lot of our other episodes, which we try and cover a topic in a single one, we couldn't squeeze this all into one, so it's complicated enough. We're going to do a set of three of these back to back, and so here we go. So just to begin that, as Philip mentioned, we're not going to be having a guest. So instead of throwing it to our guests, I'll get us kicked off by talking about maybe the difference on the front end between a reduction in force and a mass layoff, which are two different things and some of the key legal requirements during these events. So what a RIF is, a RIF is a permanent termination of employees due to restructuring or the elimination of a department or the lack of work, or maybe the lack of funding.

([02:16](#)):

It could be for a number of different reasons. But the important distinction between a RIF and a layoff is that a RIF is permanent. Mass layoffs, on the other hand, tend to keep the option of rehiring still on the table. Now, as you sort of think that through a little bit, it'll probably just occur to you that look, well, some mass layoffs may ultimately become RIFs if ultimately there is no rehire, but not vice versa. So RIF, a permanent termination and a mass layoff less so.

[\(02:46\)](#):

Now, as we discussed, there are just a lot of legal requirements to keep in mind. And not only do you have to keep those in mind, you're going to have to articulate those. You're going to have to memorialize those because when you're going through a RIF or even a mass layoff, really, but you need to ensure that the employment decisions that are made in the process of a RIF or a layoff are done for good reason, for clear reasons, well justified, and they make good sense.

[\(03:13\)](#):

And then they're reflected in all internal and external communications. And Philip's going to talk about that in a minute. There are all kinds of important things to comply with during a RIF, including paying attention to issues like discrimination, and that includes disparate treatment, disparate treatment in, for example, selection criteria. You want to think about disparate impact. Is there a group, a protected category that is being impacted more than perhaps others as a result of the decision making that's happening in this RIF? You want to think about class action risk as well. By nature, RIFs and mass layoffs impact lots of people. And so of course that automatically to a litigator's mind gives rise to the potential risk of a class action.

[\(04:03\)](#):

And then finally, you want to think about preserving the evidence. You're going to do a lot of work... A company's going to do a lot of work in connection with any RIF. They're going to have to develop decision-making criteria, but you just want to make sure that you also preserve all of the evidence of all of that. Make sure that you understand what motivated the RIF, what motivated the decision-making, and then make sure that that stuff is all preserved in the event of a later challenge from an employee or from a group of employees. So from there, I'm going to throw it to Philip to walk through sort of the internal and external implications of RIFs

Philip Person [\(04:37\)](#):

Hopping on your point is that there are implications with a RIF, is what could happen here, not just internally, but externally with your company. First point is public view. When you're going through a RIF, it's going to be a reduction in force that's likely going to get out. How are you going to have that discussion with the media? How are you going to have that with also future employees? Because hopefully, knock on wood, you're going through this RIF because you're going through an economic downturn or you need to restructure your organization, but eventually you're going to be back on the upswing hopefully, and you'll need to worry about your public image. You'll need to worry about applicants who are going to be applying in the future. What are people going to be saying about your company? This could also affect, especially if you're a public facing company, how you sell your product or your services when you're out there in the media going through a RIF.

[\(05:35\)](#):

You want to do this in a way that can best be spun, it's hard to do that with a RIF, but there are PR companies that help with that. But that's something to keep in mind. The other thing to think about is the existing employees, the people who are staying, who are not impacted by the RIF, how are they going to handle this? How are you going to communicate with them about this RIF? Are they going to be finding out the day of when people are locked out that causes disruption to the business, to the workday, to the work week, to everything going on. What's the morale of that workforce and how are you going to communicate that with those existing employees and keep them motivated to continue to work and contribute to the company?

[\(06:22\)](#):

And then lastly is the potential litigation. You kind of touched on this already, is when we go through a RIF, the company typically is doing that for some sort of reason, whether it's economic, redundancy of positions, whatever it is. And in those times, employees are also going through the same thing and they may go to a

plaintiff's counsel and bring an action. And all these things that you talked about, preserving the evidence and even the kind of softer skills of working with your workforce that plays a role into the potential litigation that could be coming in the future, and how you may want to stem that in advance.

Ryan Bykerk ([07:09](#)):

Yeah, these are RIFs and layoffs, they've been on a bit of an uptick in recent years, and there's certainly been periods in history, recent history, I mean the last 10, 20, 30, 40 years. You can look back and see times when this has happened. So we've seen a little bit of an uptick on this currently. And one of the tougher things I think about RIFs and layoffs is that it's almost always by definition, a time when the company can least afford to spend extra time thinking and planning and thinking through the communication and all of this. So it is almost challenging to sit on a podcast and say, well, look, when you're thinking about this RIF, you would better plan and you'd better think about communication. But the issue is, as you alluded to Philip just a moment ago, the idea of the RIF is that at some point, you'll be back on the upswing. It's designed to right the ship.

([08:07](#)):

The problem is avoiding the damage that you can do during the RIF process that will cost you that upswing. And so as we've stressed here, planning is really important. Communication to your current employees and to those who are going to be impacted directly by a RIF is going to be really important as well. One of the things that is important during the RIF process is really looking at job functions. And that's something, Philip, if you could take us through that a minute.

Philip Person ([08:37](#)):

Analyzing the job functions and identifying positions that are going to be impacted by the RIF or potentially impacted by the RIF, you have to do your homework beforehand. You talked about disparate impact, and you may have good intentions and like you said, to right the ship, but we need to analyze what the demographics, who's going to be impacted by this? Is it going to be mostly Black employees, mostly Latinx employees, women, age? All those demographics of those protected categories need to be considered, need to be reviewed. But before you even get there, you want to establish what your selection criteria is going to be for that RIF. How are you going to explain that to a potential jury or arbitrator later is you want to have your objective factors. If it's seniority, if it's performance review ratings, if it's the fact that we can outsource that position or there's a redundancy in position, all that can be explained.

([09:52](#)):

Those are just examples of criteria you can use, but it's something that comes into play. You want to make sure you have that established and have a record of that. And as I said, performance or other legitimate factors may come into play. Performance can be objective if you have a numeric system, but sometimes it could be subjective depending on the way the performance review is set up, not Performance Review, name of our podcast.

([10:22](#)):

But on top of that, just be careful that you want to lean more towards objective factors than subjective factors that you're using in selecting individuals. So all this is how you analyze a position. You want to review individual problems, and as I said, document the selection criteria. There's nothing worse than coming in and they say, "Ryan, Philip, can you help defend us in this case?" And we don't have any real factors or criteria that we used for the RIF. If I have something I can point to and it's objective, it makes it much easier to defend and much easier to explain how this person was selected.

Ryan Bykerk ([11:07](#)):

Yeah, one of the parts of this, and Philip you alluded to this, is, so there's just a few things to think about as you're getting ready to implement this RIF, one of them is to maintain what by shorthand, we call it EEO oversight, equal employment opportunity oversight. And what we mean by that is we're talking about the protected classes that Philip was just alluding to. That can be race, religion, age. It can be all manner of different things. In the RIF context, age is an important one. We're going to talk about that in our, I think second or maybe third episode in this miniseries. But certainly race, certainly, I mean there's any protected category can be a problem. You really just have to keep that top of mind. And that's where those objective criteria really tend to help you. Because if it's just a pure seniority matter, you can point to years of seniority.

[\(11:59\)](#):

If you have objective KPIs, key performance indicators that are parts of the employment review process, well, those are pretty close to a perfectly objective. And you can point to those things and say, well, look, it has nothing to do with your membership in a given protected class. It has everything to do with your KPIs, your seniority, your insert, other objective criteria here. So just be aware that that's a potential issue because the human mind look, when you get terminated, whether it's a result of a RIF or a layoff, you take no comfort in the fact that other people were also a part of this. The human mind looks for explanations. And one of the ones we jump to is, look, this wasn't fair, and this is why. And often that can be a part of it. So if done properly and based on these objective metrics, you can help avoid some of that.

[\(12:47\)](#):

Philip mentioned a minute ago about some of the soft skill things you can do. One of them is right to consider outplacement and other employee trainings. It can go a long ways to helping you from a total exposure picture to visibly make efforts to assist the employees who are impacted. You can consider as well recall rights if this is again, a layoff, which we talked about being a little bit different from a RIF, a RIF is permanent, but if you can insert some recall rights, have the option for these employees to perhaps come back in the event that the business does turn around and circumstances change, you can offer severance benefits as well. And we'll talk about that in the coming episodes as well. And you can potentially obtain releases for offering those severance benefits that has the effect of when the release is accepted of actually cutting off potential liability as it relates to certain released claims.

[\(13:44\)](#):

In addition, you do have to keep in mind that there are statutes that overlay this process as well. There's the Federal WARN Act, which we'll talk about in the coming episodes, and there's also many WARN Acts that various states have also enacted that deal with large layoffs and impose certain notice requirements that we'll talk about in a little bit more detail in the coming episodes. There are also rules about the waiver of age-related claims under the Age Discrimination and Employment Act and the Older Workers Benefit Protection Act. And again, we'll talk about that soon.

[\(14:23\)](#):

And as we get into that, I think you'll really start to appreciate that in addition to all the things that we've talked about here on this episode, which is enough to keep you up at night, if you're going through a RIF, you do have to think about some of these other statutes providing advanced notice. And it really does make a lot of sense to have experienced counsel get involved early in the process because there are a lot of trip hazards in this particular context. So more to come. We'll talk about the WARN Act. We'll talk about the OWBPA the ADEA. We'll probably talk about some other letters and assortments of letters, more to come in the coming episodes.

Philip Person ([14:58](#)):

But more to come in this episode. And how we always close out the episodes or try to close out these episodes is with a crazy employment story. Of course, I'll say that this is not one that I worked on, or it's just one that I've

heard about, read about in the public. It's about a firehouse, so a fire department, their house, they were a bunch of firefighters. They decided to play a prank. And one of the pranks, which is ironic for a firehouse, was to place some fireworks inside the firehouse toilet. I'm not sure how they set this up. Well, somebody went to go use the toilet. I'll spare you the details, Ryan.

Ryan Bykerk ([15:45](#)):

I was waiting. Okay, no, you can spare me and our audience [inaudible 00:15:49].

Philip Person ([15:48](#)):

They were burned from the fireworks while using the toilet, and they weren't happy.

Ryan Bykerk ([15:55](#)):

No?

Philip Person ([15:56](#)):

They decided to sue the department for their injuries. And what happened is that the court said it was part of a Workers' Compensation claim. The firefighter said the department allowed a lot of pranks to go on, and the judge decided that the firefighter didn't commit any intentional wrong, and this was kind of part of the workplace, and it went to Workers' Comp. Not sure how exactly this ended up, but the big takeaway here is even in firehouses, there are some crazy employment stories about firework related injuries, and be very careful there. Do not put your fireworks in the toilet because people can get hurt.

Ryan Bykerk ([16:51](#)):

I always appreciate just the practical takeaways from these employment stories. No fireworks in the toilets people. Okay, that's a great one.

Philip Person ([17:01](#)):

It never crossed my mind to do that, but-

Ryan Bykerk ([17:03](#)):

No, I mean, but now it has, and now I know I shouldn't. So there you go.

Philip Person ([17:07](#)):

And I have to talk to some firefighter buddies to see like, is this what you all do in here?

Ryan Bykerk ([17:14](#)):

Exactly. Oh, that's fantastic.

Philip Person ([17:17](#)):

So that concludes our first of a three-part series on RIFs, and we thank you all for again tuning into The Performance Review. If you have any questions, comments, crazy employment stories, or even any story about just fireworks in general, feel free to give us an email at Theperformancereview@gtlaw.com. See you on the next episode.