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REORGANIZATIONS AND DOWNSIZING: RISK MANAGEMENT BEST PRACTICES

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- A. Before Undertaking the Reorganization: Identify Business Goals and Evaluate Options
1. At the outset, identify with specificity the goals to be accomplished and the business needs that drive them.

-Ultimately, the company should be able (and prepared) to demonstrate how each individual termination furthers the goals established at the outset.
 2. Identify and evaluate options short of involuntary terminations that may accomplish the goals. E.g., overhead reduction, attrition, voluntary separation programs.

-Be prepared to articulate and demonstrate why alternatives (other than involuntary terminations) would not have accomplished the goals.
- B. Before Undertaking Involuntary Terminations: Always Consider Voluntary Separation Programs
1. The greatest advantage to these programs is that they minimize risk associated with involuntary terminations. The greatest disadvantages are: (i) short-term expense associated with incentives; and (ii) loss of control over which employees leave. Depending on the business needs and goals identified above, these disadvantages may outweigh the advantages.

SMITH ANDERSON

2. Designing a voluntary separation plan:
 - a. The decision to implement a voluntary separation plan typically depends on evaluating costs and results assuming various levels of participation. These evaluations often reveal the potential impact of the proposed plan on the race, age and gender demographics. They also are discoverable. As such, they should not imply that the company wants (or expects) only older (or minority or female workers) to participate. Undoubtedly evaluations that reflect such expectations will be offered by plaintiff's counsel as evidence of improper age (race or gender) bias motivating the plan.
 - b. Making and keeping a voluntary separation plan voluntary:
 - i. Employees who accept voluntary separation offers sometimes sue the company claiming that they were "forced" to accept the offer. To successfully defend these challenges, the company must take careful steps to ensure that the plan is truly voluntary--and document the steps taken.
 - ii. At the outset, publicize the plan and emphasize its voluntary nature. Do it in writing.
 - iii. Supervisors and managers should be trained how to handle frequently asked questions and common situations, such as rumors that employees who do not accept the offer will be terminated later and questions like, "What will happen if I don't take the offer?" Most importantly, they must be trained not to steer individual employees toward accepting or rejecting the offer, such as offering speculative comments or personal advice (e.g., "You know further cutbacks are on the way. If I were you, I'd take the money and run.") Similarly, they must be careful not to engage in behavior that could be construed by an employee to be a signal that they should take or reject the offer (e.g., reassignment of duties or adverse changes in job assignments, poor performance evaluations or disciplinary documentation). See, e.g., Stamey v. Southern Bell Telephone & Telegraph Co., 859 F.2d 855 (11th Cir. 1988) (employer's coercive actions (demand for employee's office keys and assigning others some of her tasks weeks before she was required to decide whether to take the plan raised an

SMITH ANDERSON

inference that she was not free to choose)). Again, these efforts should be in writing.

- iv. Once the voluntary severance plan is announced, the company would be well-served to direct employees who have questions about the plan to designated personnel (usually, human resources)--and not supervision or management. Supervision and management, likewise, should be trained to direct employees who approach them with questions to the designated personnel. Most importantly, supervision and management should not solicit decisions from employees after the announcement. This strategy minimizes the chance that employees will be discussing the plan with supervisors and managers and, thus, minimizes the risk that employees will perceive that supervisors/managers are attempting to steer their decisions or coerce acceptances.

C. Designing Performance-Based Involuntary Termination Plans

1. Once the company develops a plan, policy or procedure addressing the reorganization/downsizing, the court expects those implementing it (supervisors and managers) to know about it, understand it and follow it.
 - a. Deviations from the plan, policy or procedure can serve as discriminatory intent. See, e.g., Christie v. Foremost Ins. Co., 785 F.2d 584 (7th Cir. 1986) (age discrimination can be inferred from evidence that company did not follow its policy and manager directing layoff was unaware of it).
 - b. Situations may arise where following the policy may not be appropriate. In these cases, the deviation should be authorized in advance by the appropriate level of higher management--not the decision-maker. The reasons justifying the deviation and approval should be documented carefully.

SMITH ANDERSON

2. Most successfully defended involuntary termination plans begin with an evaluation of the jobs/job functions that need to be retained and eliminated.
 - a. Typically, this evaluation takes into consideration the business needs and goals identified above and an organizational design/job function study without regard to the identity of the incumbents. Allowing consideration of incumbents at this stage may taint the process.
 - b. It is important that job descriptions or other documentation identifying responsibilities of positions in the new organization and qualifications for those positions be developed at this stage. These documents can be used subsequently in evaluating candidates for these positions.
3. Develop objective, written criteria for identifying and evaluating candidates.
 - a. Failure to identify objective criteria for identifying potential candidates inevitably leads to management identifying potential candidates based on subjective knowledge of an individual's skills, performance and personal attributes or upon reputation for possessing those qualifications. Such a subjective and discretionary process exposes the company to allegations that individuals were excluded from the candidate pool because of intentional or unintentional (but nonetheless discriminatory) bias.
 - b. Evaluation criteria should be consistent with job descriptions and other documentation setting forth relevant qualifications and attributes. Selection decisions for positions with skill set changes, etc. are particularly vulnerable to challenge by those who were not selected--be sure the changes are reflected in a new job description before the decision is challenged.
4. If not specified in the reorganization/downsizing plan, policy or procedure, carefully select the individual who will serve as the evaluator/decision-maker for the positions in question.
 - a. In subsequent litigation, the company will be required to identify this individual.
 - i. This individual almost always becomes the focus or target of the plaintiff's case.

SMITH ANDERSON

- ii. Once the focus is on the decision-maker, then the scope of inquiry can go beyond the specific decision being challenged to all past and present personnel decisions made by this person.
 - iii. All of the decision-maker's records, files and other documents relating to personnel decisions; past personnel decisions, and comments and other workplace demeanor become fair game. The plaintiff will look for things he or she can argue are evidence of a pattern of discriminatory bias.
- 5. Evaluations should be documented in writing and consistent with other indicia of employee performance (e.g., performance appraisals).
 - a. Frequently, companies decline to rely on existing performance appraisals because of evaluation inflation or because the appraisals overall are not helpful in evaluating the selection criteria. In these cases, many times the evaluator prepares a forced ranking in which employees are numerically ranked relative to each other on the evaluation criteria. A common pitfall for employers who use a forced ranking is the failure to nonetheless check the ranking for consistency with past performance appraisals and other indicia of performance and either reconcile any inconsistencies or re-evaluate the candidate or criteria in which an unexplained discrepancy exists.
 - b. Written evaluations must be devoid of any comments that could be construed to evince a discriminatory bias (e.g., "new blood," "fresh ideas," "old dogs," etc.) Comments must be strictly limited to selection criteria--skills, ability, demonstrated performance and not protected class attributes or family matters.
 - c. The importance of the evaluator/decision-maker relying on personal observation cannot be overstated.
 - i. When the decision-maker does not have personal knowledge, they should consult with those that do.
 - ii. The immediate supervisor always should be consulted.
 - d. Information on which the evaluator/decision-maker relies should be verified.

SMITH ANDERSON

6. Evaluations and initial selection decisions should be reviewed by or under the direction of legal counsel.
 - a. This review should be undertaken by someone familiar with EEO law. Some companies use a committee comprised of members from the various protected classes.
 - b. The purpose of the review is to: (i) verify that the plan, policy or procedure was followed; (ii) cross-check the evaluations against stated evaluation criteria, descriptions and other relevant performance documents; and (iii) undertake an adverse impact analysis and, if adverse impact is found, consider adjustments to the process or the individual decisions.
7. Consider offering demotions and relocations, in lieu of terminations.
8. Consider offering severance pay programs with releases from claims.
9. Do not replace employees who were terminated. If positions subsequently become available, consider offering them to terminated employees.