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LITIGATION

Tips for Managing a Reduction in Workforce During Major Litigation

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When it rains, it pours—companies confronting significant litigation or government investigations often also find themselves in business circumstances that call out for a slimmer workforce. When a new business line or product fails, when wrongdoing is discovered in a business unit or when industrywide practices come under new scrutiny, your company or client can be caught in the unenviable position of having to defend shareholder lawsuits or regulatory investigations while also trying to reduce headcount in the very business unit that generated the problem. Business leaders may unknowingly terminate employees that counsel expects to be key witnesses, or who were otherwise assisting counsel by providing relevant data or documents or explaining key systems. Such terminations can materially weaken the company's defense, especially when defense counsel does not have advance notice of the terminations.

Thus, in-house and outside counsel must be attentive to and, in some cases, take an active role in, when and how employment terminations are conducted against the backdrop of ongoing litigation or government investigations. Failure to attend to these issues can have significant, but largely avoidable, negative consequences. We offer here some tips to avoid common pitfalls.

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Communication Is Key

While there are a number of actions counsel should consider when the employment of a key witness is about to end, either voluntarily or involuntarily, those actions may be moot if the human resources department and the affected business line show the witness the door without giving counsel prior notice. Therefore, it is essential that in-house counsel communicate regularly with business unit leaders and human resources personnel to brief them on the litigation or investigation and agree upon a protocol for upcoming terminations.

Consider creating a list of witnesses, either for the company's matters as a whole or specific to your matter, to be regularly maintained and updated by the legal department. With the help of outside counsel, the list can be categorized by relative importance, role in the litigation, or in whatever way suits the particular needs of the case. In-house counsel should periodically update and share relevant portions of this list with HR or business leaders, who can then provide an early warning

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that an important witness might be leaving the organization. In addition, create a contingency plan with outside counsel so that upon receiving notice of an upcoming departure, you can immediately be prepared to discuss the termination decision with key stakeholders, conduct any necessary interviews, and preserve evidence.

Don't Delay Document Collection

Diligent outside and in-house counsel make it a priority to formulate a document retention notice at an early stage, and many companies have developed formal processes to ensure that emails and other electronic documents are preserved. But even the most conscientious employee may lose sight of his or her obligation to preserve documents after being handed a pink slip. If spoliation occurs in such circumstances, courts may criticize the failure to take steps to preserve documents from a key witness *after* the witness received a document retention notice.

To avoid such dilemmas, collect documents early and often. When a business unit is in trouble and defections or layoffs are expected, the team handling the litigation should be focused on immediately *collecting* documents from key custodians, and should not be content with the mere issuance of a document preservation notice. In cases where it is expected that the business will be creating additional relevant or responsive documents on a going-forward basis after the initial collection, consider undertaking a formal periodic collection effort rather than waiting for litigation-related deadlines to prompt ad hoc collections. By undertaking such periodic collections, you may avoid the surprise of finding out that your collection is missing many months of documents because the employee was terminated in the interim. If you receive advance notice that a key witness or document custodian is going to be terminated, you should strongly consider discussing (and memorializing) that employee's document collection efforts with the employee *before* the employee is notified of his or her termination.

Secure an Appropriate Cooperation Clause

If you receive sufficient notice of a key witness's impending separation from the company, you may be in a position to ensure that the separation agreement protects the company's interests. In most cases, the company will be well-served by a cooperation clause that obligates the employee to provide assistance to the company in connection with litigation, arbitrations, government investigations, or administrative or regulatory matters pertaining to the employee's knowledge while in the company's employ.

In a negotiated exit of higher level personnel, the employee or his counsel may suggest that the clause provide that the employee will be compensated for his or her time spent cooperating with the company's requests. To avoid the appearance of impropriety, a cooperation clause should require the employee to cooperate with the company's reasonable requests for assistance without promising the employee anything in return other than the reimbursement of reasonable expenses upon submission of appropriate receipts in accordance with the company's policy for reimbursement of business expenses.

Tips for Managing Reductions-in-Force During Litigation

- Ensure advance notice of terminations of key witnesses through regular communication with decision makers
- Collect documents early and often
- Negotiate separation agreements with thoughtfully-crafted cooperation clauses
- Scrutinize group terminations for possible retaliation against whistle-blowers
- Be mindful of ethical rules impacting your interactions with employee-witnesses

Employees may also try to negotiate limits on their obligation to cooperate, for example, by requesting that the cooperation obligation be limited to the first few years after their termination. Given that some litigation is not brought for years and then stretches out for several more years before witnesses are called upon to testify, negotiating such a temporal limit on cooperation may be unwise.

You should also consider how the separation agreement will look if the employee is confronted with it on the witness stand. Even though such agreements are typically considered confidential, you should operate under the assumption that your adversary will obtain the agreement in discovery and will use it to attempt to impeach your witness. Will the amount of separation pay stand out as suspiciously high, suggesting that the witness was paid to testify? Or is it consistent with the company's severance policy or practice? Will the confidentiality or non-disparagement clauses come across like the company has something to hide? Or does the agreement contain clear disclaimers that the employee is free to speak with the government and can and should testify truthfully? By drafting the agreement with this perspective in mind, and consulting with trial counsel, you can avoid impairing your witness's credibility before he or she even testifies.

Keep Your Eye on Employment Laws

Whenever a reduction-in-force takes place, and especially if wrongdoing has been uncovered or is suspected, be sure to review termination decisions in order to avoid potential whistle-blower retaliation claims. While many companies regularly conduct adverse impact analyses on various decisional units to ensure that there is no potentially discriminatory impact on a protected class like age, race or gender, it is much more difficult to ferret out whether a supervisor is settling a score with a subordinate by selecting him or her for termination as part of a larger reduction-in-force.

If an employee engages in protected activity, whether it be ''blowing the whistle'' on an accounting impropriety or making a complaint about harassment in the workplace, the company's human resources and legal teams should communicate about the need to ensure that the complaining employee is not subjected to retaliation, and then should regularly follow-up to review the employee's standing at the company going forward.

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When it is necessary to terminate a complaining employee, you should carefully consider whether the reasons for termination are specific, well-documented and would be readily understood if challenged in court.

Don't Trip Over Ethical Rules

Terminations that occur during a pending litigation or investigation can give rise to a number of potential ethical issues for in-house and outside counsel. As noted above, it may be prudent to conduct interviews with employee-witnesses or document custodians in advance of their terminations. However, in-house counsel and outside counsel should be clear about whom they represent and should be careful about how they communicate with the employees. In 2010, a New York appellate decision in *Rivera v. Lutheran Medical Center* surprised the Bar by affirming a ruling that defense counsel violated New York's ethical rules concerning solicitation when offering to represent the defendant's non-party employees in connection with litigation.[1] While the decision has been criticized and does not appear to have gained traction in other jurisdictions—many of which have rules that differ from New York's—it serves as an important reminder that all interactions with witnesses should be carefully considered in advance. Failure to do so can jeopardize the company's defense and expose counsel to disqualification, ethical complaints or sanctions.

[1] See *Rivera v. Lutheran Med. Ctr.*, 866 N.Y.S.2d 520 (Kings Cty. Sup. Ct. 2008); *aff'd* 899 N.Y.S.2d 859 (N.Y. App. Div. 2d Dep't 2010). *But see* NYCLA Prof. Ethics Cmte., Formal Opinion 747 (June 9, 2014) (attempting to limit *Rivera* to situations where counsel's offer to represent employee-witness is intended to foreclose informal *ex parte* contact by opposing counsel).