Avoiding Risk When Navigating Global Employee Restructuring

This article discusses 10 tips for legal counsel to help prepare a company for a global restructuring, and how to avoid, mitigate, and manage risk when potential issues arise.

By **Yvette Ostolaza and Margaret Hope Allen** | March 25, 2019 at 03:53 PM

A global restructuring can be an exceedingly stressful time for a company and its employees: divisions are consolidated, employees are terminated, decadeslong relationships and corporate cultural norms are potentially threatened. The resulting separations of employees can spark discrimination and other complaints, and leave remaining employees feeling dissatisfied and malcontent. This article discusses 10 tips for legal counsel to help prepare a company for a global restructuring, and how to avoid, mitigate, and manage risk when potential issues arise.

1. **Keep an eye on the goal.** It is critical for in-house and outside legal counsel to understand the company's goals for undergoing a global overhaul. Is the goal simply to cut employee overhead? Eliminate divisions or product lines? Understanding the goal (or multiple goals) can help legal counsel advise the company to realize corporate strategies.
2. **Know your jurisdiction.** Each state and country may have its own set of rules regarding reductions in force, whether with respect to notice requirements or mandatory severance payments. Many times, it makes sense to retain outside counsel in those various jurisdictions to ensure the company does not run afoul of employee rights in other jurisdictions.
3. **Communicate across the organization.** Have clear lines of communication to the various decision makers who are directing the reductions in force. Again, timelines in different jurisdictions can vary. Depending on the size and scope of the reductions, setting up standing conference calls with various HR and division heads can help legal counsel keep a step ahead of any legal issues.
4. **The telephone is your friend.** In the same vein, be careful when asking division heads to provide their bases for elimination determinations in writing. Some words can be interpreted as "coded" phrases imparting discriminatory intent. Consider having such discussions over the telephone so that legal counsel can be more free to question the intent of separation determinations before they are finalized.
5. **Get the statistics and evaluate the Four-Fifths Rule.** Look at employee census data, including age, gender, race and ethnicity, disability, and sexual orientation. Ensure the company is not running afoul of the so-called four-fifths rule. This rule is relied on by federal enforcement agencies to indicate evidence of discrimination. The four-fifths rule is described by the guidance

as when the selection rate for any race, sex, or ethnic group that is less than four-fifths of the rate for the group with the highest rate of selection will generally be regarded by federal enforcement agencies as evidence of adverse impact, while greater than a four-fifths rate will generally not be regarded as evidence of adverse impact. See 29 CFR §1607, et seq. If a particular division runs afoul of the rule, legal counsel should undertake a deeper dive regarding the decisional basis for the reductions in force to help ensure that the company is legally compliant, and that such decisions have been made on a legitimate basis, such as performance or organizational needs.

6. **Look at turnover rates.** Employee turnover rates that are broken down by gender, race and ethnicity, disability, and sexual orientation can indicate potential issues. Focus on any segments of the company that have high turnover rates, particularly if there is a pattern tied to a protected class of employees. A high turnover rate may indicate potential claims and warrant a closer look at that division's separation determinations.
7. **Draft tight agreements.** The laws regarding the requirements for an effective release of an employee's claims continues to evolve, and again can differ by jurisdiction. Jurisdictions can also vary in their requirements for release of fraud and fraudulent inducement claims. Make sure agreements are customized accordingly.
8. **Don't forget Older Workers' Benefits Protection Act disclosures.** The Older Workers' Benefits Projection Act, which is part of the Age Discrimination in Employment Act, safeguards older workers' employee benefits from age discrimination. The OWBPA requires that waivers of ADEA claims for workers older than 40 years of age be "knowing and voluntary." See 29 CFR §1625.22. Among other things, this means that certain employers must inform all members of a voluntary program the names, ages, and titles of all eligible employees of the program; if an involuntary program, the employer must disclose just the names and ages.
9. **Be cautious about exceptions.** Sometimes exceptions are warranted. But employers should be wary of acquiescing to one-off requests for special treatment in the context of a broader reduction of force, such as in terms of increased severance or more generous benefits. Such exceptions may be used as evidence of discrimination by plaintiffs.
10. **Keep good records.** After going through the effort of drafting and issuing separation agreements to employees, have a method to record and track signatures and completed agreements. At times, finding the signed agreements can be an issue.

Yvette Ostolaza and Margaret Hope Allen are partners in the commercial disputes and litigation and employment practices at Sidley Austin, and Ostolaza serves on the firm's executive and management committees and is the managing partner of the firm's Dallas office. Allen can be reached at margaret.allen@sidley.com and Ostolaza can be reached at yvette.ostolaza@sidley.com.