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Summary

Robert Petersen discusses the litigation risk inherent in a reduction-in-force ("RIF"). He discusses critical economic and statistical issues in litigation arising as a result of a RIF. In addition, he discusses RIF practices an employer can employ that help minimize litigation risk and, ultimately, decrease the employer's financial exposure.

Managing a Reduction-In-Force

By Robert Petersen

Knowing how to manage a reduction-in-force ("RIF") helps an advising attorney make proactive, litigation-minimizing suggestions to clients considering a RIF, and helps a litigator spot weaknesses in a RIF that has already been implemented. Knowing how to manage a RIF also helps an attorney decide how and when to seek technical advice. Whether an attorney is advising a client how to manage a RIF or is involved in litigation spawned by a RIF, detailed statistical analyses of proposed and actual staff reductions is often a critical component.

A RIF should involve multiple steps, most of which are best completed before the RIF is implemented. The typical steps in a successful RIF are as follows:

1. Clearly articulate a RIF goal (e.g., a 10 percent workforce reduction).
2. State the business rationale for the RIF.
3. Identify the segments of the business that will be affected by the RIF.
4. Develop a RIF implementation plan.
5. Determine whether a proposed RIF has an adverse impact on any protected classes of employees.
6. Determine if any adverse impacts are statistically significant.
7. Show that any statistically significant adverse impacts can be justified on the basis of sound business decisions.

Steps 1 - 3. Articulating the goal of a RIF, stating the economic rationale for the RIF, and identifying the segments of the business that will be affected by the RIF are, in many respects, just business decisions. The employer is often the best judge of why and by how much staff should be reduced. However, the unusual legal standards and statistical testing used to evaluate the appropriateness of a RIF can make specialized assistance important during these steps of the RIF process.

Step 4. A key to a successful RIF is developing a RIF implementation plan that indicates how employees potentially subject to the RIF will be evaluated and selected, and exactly how the RIF will be implemented. The implementation plan should use objective evaluation rules and consider input from a number of decision makers. Once established, the employer should try hard not to deviate from the proposed RIF implementation plan.

Management should also be aware that evaluation techniques are frequently the subject of employment discrimination litigation. Familiarity with

survey design, statistics, and employment discrimination legal rulings can be a key part of reviewing proposed evaluation techniques and modifying the evaluation techique if potential bias is found. If the review is done after the RIF has already been implemented, the actual evaluation techniques can be assessed to determine if any bias was introduced by the procedure and the statistical impact of the bias can be determined.

Step 5. Before a RIF is implemented, an employer should determine if the proposed RIF is likely to have an adverse impact on protected employees, e.g., older workers, females or employees of a particular race. This determination requires a formal statistical analysis that focuses on the representation of protected class members in the "RIF group" (i.e., the employees chosen for the RIF) and the representation of protected class members in the "at-risk pool" (i.e., the employees designated as being at risk of being chosen for the RIF). Once the RIF has been implemented, the only remaining conceptual question is whether the at-risk pool has been identified correctly; the actual statistical analysis becomes a mechanical process. If, however, the RIF has yet to be implemented, the procedure for identifying both the at-risk pool and the RIF group can be modified. A preliminary statistical analysis ensures that adjustments can be made before the RIF is implemented.

Misleading statistical results are often used to provide statistical "support" for RIF litigation. Consider the following example. The top part of the following table appears to indicate that a hypothetical computer manufacturer, Multi-Computer Inc., has implemented a RIF that adversely affected older employees. Suppose, however, that due to economic conditions, Multi-Computer's RIF implementation plan called for large reductions in its mainframe division but relatively small reductions in its PC division. In that case, focusing on the entire workforce, as the statistical analysis that generated the results shown in the top part of the table does, produces misleading results. The lower part of the table indicates the RIF selection rates for older and younger employees were actually identical. But because the RIF was focused on the mainframe division, and the mainframe division had a greater proportion of older employees, it appears that older employees were overselected for the RIF.

Multi-Computer Inc. Discriminates Against Older Employees

	Employees	RIFs	% RIFed
Over 40	3,200	1,600	50
Under 40	6,800	2,800	41

...Or Does It?

	Employees	RIFs	% RIFed
Over 40			
PC Division	800	160	20
MF Division	2,400	1,440	60
Total	3,200	1,600	50
Under 40			
PC Division	3,200	640	20
MF Division	3,600	2,160	60
Total	6,800	2,800	41

Step 6. Statistical analysis is useful not just to determine whether the RIF had, or will have, an adverse impact on protected classes of employees but also to determine whether any adverse impact was statistically significant. If the RIF has not yet been implemented, a test for statistically significant adverse impacts from the proposed RIF can help determine how the proposed RIF should be changed. If, however, an already-implemented RIF appears to have had a statistically significant adverse impact, it is useful to verify that the statistical analysis was done correctly. In addition, statistical analysis can help provide informed damages estimates.

Step 7. In the event a preliminary statistical analysis indicates that some protected classes of employees have statistically significantly higher selection rates, changing the RIF selection process is not the only alternative. Some protected classes may have higher selection rates because there are more individuals within that group that have low levels of a necessary job skill, such as formal education or experience with a particular product or process. In such a case, higher selection rates may be justified. A particular protected group may have higher selection rates, however, because the RIF implementation plan was not applied uniformly or because seemingly neutral selection criteria actually favored the selection of some protected group. In that case, the RIF implementation plan should be reviewed and possibly modified. If a statistically significant impact on a protected class of employees is found despite proper implementation of the RIF plan, the RIF criteria should be adjusted so that such differences are eliminated.

In summary, the seven-step planning and testing process can help advising attorneys assist their clients considering a workforce reduction to avoid litigation, and can help attorneys who represent clients in RIF litigation achieve a successful resolution of the case.

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