

Credit Union Times

An **ALM** Publication

FEBRUARY 12, 2020 | CUTIMES.COM

GUEST OPINION

Avoiding Workforce Restructuring Legal Landmines

Credit unions continue to evolve to meet member needs and economic pressures in an ever-changing and competitive environment. Mergers and consolidations, new technologies, shifting member needs and budget issues often require a consolidation of positions or restructuring of the workforce resulting in the termination of employees who are otherwise good performers. In addition to the emotional strain and negative impact on morale that accompanies such terminations, employers need to tread carefully to avoid or mitigate the risk of litigation. Outlined below are key steps to consider if a consolidation or restructure will result in job losses at your credit union.

1. Planning: Advanced planning is the key to success, and effective planning requires understanding and documenting the business rationale and objectives of the consolidation or restructure. As part of the planning, it is important to



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review relevant policies, employment agreements, commitments, collective bargaining obligations and anything else that could affect the selections.

2. Prepare a Program Document: A program document should include a statement of the credit union's commitment to equal employment opportunity, documentation of the business case and documentation of the selection process that will be used to determine those employees who

will be impacted. The program document should also provide for training of supervisors and managers involved in the selection process.

3. Voluntary vs. Involuntary: Voluntary reductions in force are certainly easier from an employee relations standpoint. However, they are often not feasible. To incentivize people to leave, voluntary programs typically require a more significant investment by the employer. And many employers find that employees with the skills most needed volunteer, because they can most easily find new employment. For this reason, when conducting a voluntary reduction in force, it is important to decide whether you need to establish caps on the number of volunteers you will permit, as well as excluding individuals who may have special skills the company needs to retain.

4. Determining the Selection Process: One of the most litigated issues is the method used to select

impacted employees. Issues with selections can lead to claims that individuals were selected based upon a legally-protected status or that neutral selection criteria had a disparate impact on a protected group.

Selections break down into two categories: Position elimination and position consolidation. With respect to position eliminations, if all employees in the affected job classification are terminated, the selection is a fairly low-risk process. However, if some but not all in the job classification are to be terminated, the company must develop a non-discriminatory method for selecting individuals. Generally, seniority-based selections are considered to be the most defensible. However, this is not always appropriate, and employers tend to use merit or skill to make selections. Because subjectivity often creeps into these selection processes, the risk of litigation increases.

Position consolidations can also be problematic. Generally, if positions are being consolidated into a new job, all of the former incumbents will consider themselves qualified. However, in many cases, some or all of the

incumbents may not be qualified for the new position. Documentation regarding the new position, as well as the skill set required to achieve your objectives, is critical when defending these decisions.

5. Consider Notice Requirements: Under the Worker Adjustment Retraining and Notification Act (WARN Act), employers are required to give 60 days advance written notice to employees and certain government and union officials before implementing the layoff or termination of a significant number of employees. Because all of that must occur before notice can be provided, this often means a reduction in force requires planning at least four months in advance of the proposed termination or layoff date. Additionally, some states have notice requirements that are in addition to those required under the federal WARN Act.

6. Severance Issues: Many companies provide severance for employees who are displaced as a result of job eliminations or consolidations. If you decide to pay severance, you must also decide whether you will require a release and waiver of all claims

in exchange for severance. While this is recommended, it requires advance planning and the involvement of your employment counsel. Federal laws, such as the Older Workers Benefit Protection Act, and state laws have certain requirements that need to be incorporated into these documents to ensure the release is valid. In addition, the confidentiality provisions must be reviewed for compliance with state and federal law.

7. Legal Review: Once the steps above are completed, a credit union should carefully review the entire process and all draft documentation with employment counsel before initiating terminations. Simply reusing notices and documents from the last termination, or that another employer used, is not acceptable and often leads to errors and liability.

8. Implementing Terminations: Dignity and respect are keys to implementing the process. Good employee communications are important to those employees departing and to the employees remaining. It is very important that your surviving employees see that you have handled a consolidation or restructure in a fair and consistent manner. ■