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If a disparate impact is found, it may be necessary to retool your selection criteria or adjust the decisional unit to ensure the final layoff doesn't disparately affect one or more protected classes, setting the company up for a discrimination claim.

Determine if WARN Act notice is required. A layoff may trigger obligations under the Worker Adjustment and Retraining Notification (WARN) Act. The WARN Act requires certain employers to give 60 days' advance notice of a plant closing or mass layoff. The purpose is to give workers time to plan their next steps and to give the local government time to prepare for an influx of unemployment claims and requests for assistance.

In addition to the federal WARN Act, some states have their own "mini" WARN Acts that are even more protective of employees.

Use separation agreements to reduce liability. When used effectively, separation agreements can reduce and even eliminate the risk of legal claims by laid-off employees. A separation agreement usually involves an employee's full release of claims (and other protections as permitted by law) in exchange for an additional payment from the employer above earned wages—otherwise known as a "severance."

Cautious employers typically calculate the severance amount using an objective formula, such as one week of salary for every year of the employee's employment. Keep in mind that certain laws like the Older Workers Benefit Protection Act (OWBPA) include unique notice and disclosure requirements that need to be built into separation agreements.

Communicate notice of the layoff responsibly and consistently. Creating precise, uniform talking points for affected employees to increase their cooperation and understanding can minimize harm to employee morale and the company's reputation while deterring the spread of rumors and misinformation. FAQs are an effective way to provide information consistently through vetted responses to anticipated questions.

Bottom line

These best practices are just a few examples of steps you should consider when undertaking a reduction in force. There may be other jurisdiction-specific matters

that also affect the analysis. You would be well advised to consult with legal counsel ahead of any contemplated layoff to help minimize legal liability.

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CONSTRUCTIVE DISCHARGE

Pilot's attempt to avoid liability for training expenses was grounded

AK AZ HI NV OR WA

by Jodi R. Bohr, Tiffany & Bosco, P.A.

The Arizona Employment Protection Act (AEPA) sets two standards under which a constructive discharge claim (i.e., a claim by an employee who resigned due to working conditions) may be established. The first requires an employee to provide the employer with 15 days' written notice of the objectively difficult or unpleasant working conditions that is making the employee feel compelled to resign. Employers must post a notice advising employees of their rights to be protected by the safe harbor provided by the AEPA.

The second standard requires an employee to establish outrageous conduct by the employer, including threats of violence or a continuous pattern of discriminatory harassment, thereby avoiding the notice requirement. Can an employee circumvent this notice requirement by filing a common law (rather than AEPA) claim against his employer regarding his alleged forced resignation?

Preparing for takeoff

Worldwide Jet Charter (Worldwide) offered Timothy Christian a pilot position, contingent upon him completing flight training. The offer stated that Worldwide would "advance" training costs, with a credit against training costs if he remained employed with Worldwide for two years.

If Christian's employment ended sooner, he would be responsible for any balance due on the advance. No credit would be given if his employment ended within three months of completing training, requiring him to repay the full advance to Worldwide.

Encountering turbulence

Christian completed flight training but resigned two months later. Worldwide reminded him of his obligation to repay the advance, but he didn't repay it. Instead, he responded to Worldwide by saying he had been constructively discharged when it "forced him to fly a Gulfstream G4 notwithstanding its unairworthy status."

Worldwide sued Christian for breach of contract based on his failure to repay the advance. He counterclaimed, asserting Worldwide breached the implied covenant of good faith and fair dealing by requiring him to fly an unsafe aircraft, which "compelled" him to resign.

At Worldwide's request, the Maricopa County Superior Court entered summary judgment (dismissal without a trial) in Worldwide's favor on its breach of contract claim. It also dismissed Christian's claim on the grounds that his claim was superseded by the AEPA, and he failed to establish the preconditions to assert constructive discharge. He appealed to the Arizona Court of Appeals.

Confronting headwinds

Wrongful termination and constructive discharge claims are governed exclusively by the AEPA, which supersedes many Arizona common law claims. Christian's counterclaim was a constructive discharge claim (in substance) because his common law counterclaim was based on circumstances related to his separation. Accordingly, the appeals court analyzed the viability of his claim against the requirements of the AEPA.

The appeals affirmed the dismissal of Christian's counterclaim, noting that he failed to establish the precondition for bringing a constructive discharge claim. Because he didn't provide a written notice to Worldwide, he could save his claim only if he could show Worldwide's conduct was so egregious (e.g., forcing him to break the law or be fired) that he could resign without notice.

While Christian claimed Worldwide failed to provide him with airworthy aircraft, his claim was contradicted by a report from Worldwide that its aircraft complied with all federal regulations governing such situation. Accordingly, the Arizona Court of Appeals affirmed the dismissal of his claim against Worldwide.

Final descent

This isn't the first pushback Worldwide has seen from former employees seeking to avoid their obligation to repay the advance for flight training. Fortunately for Worldwide, this lawsuit came in for a safe landing, unlike the crash and burn outcome in previous litigation. Perhaps

Worldwide needs to confront the conditions causing pilots to prematurely end their employment, resulting in a repayment obligation regarding the advance.

In any event, this lawsuit serves as a good reminder that the AEPA provides employers with safe harbor provision against constructive discharge claims, so long as employers post a constructive discharge notice advising employees of their rights under the statute. Doing so requires employees to satisfy the preconditions of providing the employer with 15 days' written notice of the objectively difficult or unpleasant working conditions and allowing the employer time to correct these conditions. Failure to satisfy this notice requirement dooms a constructive discharge claim unless the employee can demonstrate outrageous conduct by the employer.

Jodi R. Bohr is a shareholder with Tiffany & Bosco, P.A., and a contributor to Arizona Employment Law Letter. She practices employment and labor law, with an emphasis on counseling employers on HR matters, litigation, and workplace investigations. She may be reached at jrb@tblaw.com or 602-255-6082. ■

DRUG TESTING

Marijuana cardholder fired after positive drug test loses wrongful termination claim

AK AZ HI NV OR WA

by Jodi R. Bohr, Tiffany & Bosco, P.A.

Since voters passed the Arizona Medical Marijuana Act (AMMA) by ballot initiative in 2010, employers have received very little court guidance regarding what constitutes discrimination or retaliation under the Act. With limited exceptions, the AMMA prohibits employers from discriminating against a registered cardholder for testing positive for marijuana components or metabolites. It doesn't prohibit employers from taking adverse employment actions against a registered cardholder if that person used, possessed, or was impaired by marijuana on the jobsite or during working hours.

Since 2010, employers have struggled with proper action following an employee-cardholder's positive drug test. How does an employer avoid liability for wrongful termination when firing an employee-cardholder following a positive drug test?

Prelude to litigation

United Parcel Services (UPS) employee James Terry acted strangely during a sales meeting. Many of his direct reports informed UPS they observed his heavy eyelids and red eyes, saying he lost his train of thought, slurred his speech, and had hallucinations (e.g., he saw "a scorpion climbing up the wall"), among other things.