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COVID-19 RIF Checklist: Key Issues to Consider in Reductions in Force

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Holland & Knight Alert
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Highlights

- The COVID-19 crisis has demonstrated that even historically successful organizations may be forced to reduce employee headcount to maintain economic viability.
- Although a reduction in force (RIF) often can improve an entity's financial picture, there can be serious legal and financial consequences if it is not properly conceptualized, designed and implemented.
- This Holland & Knight alert includes a checklist that is designed to provide an overview of the RIF process and assist organizations contemplating personnel "downsizing" to identify the critical elements and legal principles of planning and implementing a RIF.

The coronavirus pandemic has demonstrated that even historically successful organizations may be forced to reduce employee headcount to maintain economic viability. Reducing employees' pay or hours, or sending them home on unpaid furloughs for weeks (or months), often are effective short-term measures to preserve cash, capital and employment relationships but sometimes are simply insufficient to ensure the long-term survival of a business. Although a reduction in force (RIF) often can improve an entity's financial picture, there can be serious legal and financial consequences if it is not properly conceptualized, designed and implemented. This checklist is designed to help organizations contemplating personnel "downsizing" identify the critical elements of a RIF.

This checklist is intended to be a concise, plain-English and practical summary of the most significant components of a RIF. It cannot, by its nature, cover all of the nuances or explain in complete detail all aspects of the RIF process, or describe the variations among state laws, and of course a checklist is no substitute for situation-specific advice from a RIF-experienced employment lawyer. Further, given the rapid and continuing evolution of the federal, state and local laws addressing the COVID-19 pandemic, it is important that employers pay attention to the news and frequently update their strategies. However, the checklist *will* provide an overview of the RIF process and associated legal principles to assist employers in planning and implementing these always unpleasant and sometimes risky events.

After a brief discussion contrasting RIFs with furloughs (another common strategy to control costs in the short term), the checklist consists of four sections:

I. Planning

II. Involuntary RIFs

III. Voluntary RIFs

IV. Problem Avoidance

RIFs vs. Furloughs

A RIF results in the end of employment for affected employees while furloughs continue the relationship. Furloughed employees do not perform work, are not paid and typically do not receive severance or pay-out of paid time off (PTO)

at the commencement of the furlough (though some states *do* require that PTO be paid). Depending on the terms of the employer's benefits plans, furloughed employees may remain eligible for benefits. States typically permit furloughed employees to draw "unemployment," which, after the recent passage of the federal Coronavirus Aid, Relief, and. Economic Security Act (CARES Act), often exceeds $1,000 per week for up to 26 weeks. Although furloughs often are announced for a specified duration, they can be indefinite, and sometimes "furloughs" become "discharges" if they do not have the desired impact on the employer's economics.

The most common advantages of furloughs over RIFs include easier employee departures (because, most often, the federal/state "plant closing"/"mass layoff" notifications need not be given), easier returns to work (because those personnel have remained in the payroll/benefits systems), and the preservation of employment relationships that might be vital to the employer's recovery and return to normalcy. The disadvantages of furloughs include ensuring the proper payment of salaried "exempt" employees (who must be paid their normal salaries if they do *any* work during a furlough week).

Various recommended employer strategies for RIFs also provide protection in furloughing personnel. They are mentioned in the following discussion focused on RIFs.

Section I: Planning

☐ **Identify the goals.** The most common RIF goals are to reduce payroll expenses and to better align personnel resources with available work. It often is helpful to state the goals more specifically (such as "reduce payroll expenses in the finance department by 10 percent" or "convert the ketchup production line to hand sanitizer production") and to put the goals in writing so decision-makers will have an ongoing point of reference in carrying out their missions.

☐ **Determine the nature of the RIF.** RIFs typically are "involuntary" (i.e., the employer identifies the employees to be discharged) or "voluntary" (i.e., the employer offers a severance package to a specified group of employees who individually decide whether to take the package and leave the company). Involuntary RIFs give employers more control over which workers leave but are more often the basis for employees' lawsuits. Voluntary RIFs (also called "buyouts," and which are sometimes in the form of early retirement incentive plans) often are less disruptive and emotionally painful, and may result in greater long-term cost savings (because employees nearing retirement frequently are among the most highly paid workers and more willing to accept an attractive severance opportunity). However, "buyouts" often give the employer less ability to retain the best personnel. Employers sometimes use sequential RIFs: first a voluntary RIF and, if that does not result in sufficient departures, then an involuntary RIF.

☐ **Consider alternatives.** RIFs are useful but often are expensive and sometimes lead to lawsuits. In addition to furloughs (discussed above), payroll expense reductions and personnel-work alignments often can be achieved by other means, such as a) waiting for normal workforce turnover/attrition, b) reducing hours being worked by hourly personnel or changing jobs from full-time to part-time, c) job sharing, d) pay freezes or pay cuts, e) implementing short-term (one or two-week) layoffs or plant shutdowns, f) allowing employees to volunteer for unpaid leaves of absence, and/or g) transferring existing personnel to different jobs, departments or facilities. The COVID-19 pandemic has popularized states' "work share" programs by which approved employers may reduce employees' hours (often up to 40 percent) and retain them on the payroll while entitling them to a proportionate state unemployment benefit which, in turn, entitles them to the $600 weekly benefit provided by the federal CARES Act. Though not a method of reducing payroll expenses, the recent U.S. Small Business Administration's Paycheck Protection Program (providing forgivable loans to certain employers who keep employees on the payroll) may allow a company to bridge the pandemic to happier times. These alternatives to RIFs may not be as effective in reducing costs, but they may be less risky.

☐ **Arrange for advice.** RIFs implicate human resources, benefits, tax/finance and legal issues. The usual issues are much *more* complicated now — during the 2020 COVID-19 crisis — with the overlay of the rapidly enacted and

untested pandemic laws and regulations. Unless an employer has competent professionals on staff, it should ensure, in advance, that there is ready access to such advisors familiar with RIF-related issues.

☐ **Ensure confidentiality.** The RIF process should be strictly confidential until formally announced. Maintaining confidentiality will minimize both employees' anxiety/distraction as well as preemptive claims by worried workers trying to "guarantee" their jobs (that is, thinking "they won't include me in the RIF *next* month if I announce I'm disabled or make a sexual harassment claim *this* month"). Limit the dissemination of sensitive documents and data, and password-protect electronic RIF documents and communications among decision-makers and advisors. Keep the RIF working papers and analyses in locked storage when not in use. Review and maintain appropriate documentation retention policies. Since it is possible that support staff of decision-makers might otherwise be able to access emails and other confidential information pertaining to the RIF process, it is advisable to confirm in advance which decision-makers allow staff personnel access to their email).

☐ **Ensure security.** Formally assess — as part of the planning process — the potential for violence, sabotage and theft by employees to be included in the RIF. Make plans to exclude departing personnel from the building and computer/telephone systems immediately after being informed of their separations. If the company anticipates violence or disruption, notify building security or law enforcement in advance of the RIF (but recognize that some departing workers will be offended or become unruly if they suspect they are being disrespected by an obvious on-site police presence). Give management the contact information for security and law enforcement personnel. Train senior staff and the "exit team" on how to respond to threats and violence.

☐ **Anticipate litigation.** There are various and often numerous documents created in a RIF, including working papers, statistical analyses and separation agreements with exhibits. If a lawsuit arises from the RIF, it is very likely those papers will be demanded by plaintiff's counsel, and they could become courtroom exhibits. So be careful about what is written and how it is phrased: A jury may be looking over your shoulder in two years. Consult with counsel about methods for ensuring that certain documents are protected by various legal "privileges."

☐ **Minimize PR problems.** Public relations are important. Consider whether a prepared press release (rather than spur-of-the-moment answers to a reporter's questions) will most effectively position the employer in the eyes of the general public. A single designated spokesperson to answer all post-RIF questions from both inside and outside the company is often the most effective way to disseminate accurate and consistent information.

Section II: Involuntary RIFs

☐ **Determine its scope.** Is the RIF going to be throughout the plant or the company, or limited to certain departments or production lines? Is the RIF going to eliminate job titles (perhaps by combining two jobs into one) or reduce the number of people in certain jobs, or both?

☐ **Identify decision-makers.** There should be a limited number of individuals making decisions about employees to be released. Ideally, the decision-makers should be a diverse group of objective, credible executives who have been trained (or can be trained quickly) on how to conduct the RIF in a careful, non-discriminatory manner. ("Credibility" is useful in obtaining employee buy-in when the identities of the decision-makers become known.)

☐ **Set realistic timetables.** An involuntary RIF often can be conceived, planned and implemented in seven to 10 days in smaller organizations, but larger employers will require more time to ensure that the process is thoughtful and legally defensible. When setting the RIF timetable, include time to think about the necessary transition of work/projects from employees included in the RIF to the retained personnel and consider whether to use phased departures (that is, one large group followed in weeks or months by another large group).

☐ **Determine severance benefits.** Pay. Severance pay generally is not required by law unless a) the employer previously has committed to pay it (by employment contract, collective bargaining agreement, or severance pay plan),

b) there is a state or local requirement, or c) it is being paid as "consideration" to obtain an employee's signature on a release/waiver of claims against the employer. Similarly, the *amount* of severance typically is within the employer's discretion; many employers use a "two weeks' pay for every year of service" rule of thumb, with minimum and maximum amounts. (However, be careful of "special deals": Enhanced severance benefits for a select few employees can generate discrimination lawsuits.) Other Benefits. There are other separation benefits that can be provided, including reimbursement of employees' premiums for continuing group health coverage (COBRA coverage), outplacement assistance or jobs training, eligibility for recall to work, more-than-neutral letters of reference, etc. If departing employees have continuing obligations to the company (e.g., transition assistance, confidentiality, non-disparagement or non-competition), paying severance in installments over time rather than in a lump sum will encourage compliance with the ongoing obligations. Determine whether the severance scheme (particularly any installment payout protocol) is a "plan" governed by the federal Employee Retirement Income Security Act (ERISA) and, if so, comply precisely with its requirements.

☐ **Comply with the laws.** Many statutes impact RIFs, including laws that vary from state to state. The laws are numerous, often complex, sometimes conflicting in their requirements and include prohibitions with harsh penalties for non-compliance, and frequently are the basis for both individual and class-action lawsuits against the prior employers. The advice of a competent RIF lawyer is highly recommended. RIF-related laws include:

- "Plant closing" laws. The federal law and similar laws in several states require employers to provide prior notices of separating large numbers of employees. The laws are not limited to an actual facility "closing" but also require notices of a "mass layoff." The laws vary somewhat but typically require employers to furnish advance notice to the affected employees, the state unemployment agency and local officials, and any union representing employees of the company's intent to release specified portions of the workforce. For example, the federal Worker Adjustment and Retraining Notification Act (WARN Act) requires employers with more than 100 employees (excluding part-time employees) to provide 60 days' advance notice to affected workers, a state agency and a local official, and any unions of a layoff in conjunction with a plant closing or that will result in employment losses by at least a third of the workforce at a single site of employment if the number being released is at least 50 employees. The federal law and some state laws contain an "unforeseeable business circumstances" exception to the notice requirement but require such notice as is practicable (and not *no* notice). The plant closing laws sometimes have peculiar requirements; for example, several state "mini-WARN" laws require *90* days' notice and require notice if as few as 25 employees are being released. The COVID-19 pandemic has complicated compliance. The U.S. Department of Labor said that plant/office/site closings required by a government in order to control the spread of COVID-19 may be "unforeseeable business circumstances" allowing reduced notice of layoffs. Although no court has yet ruled that the pandemic is an "unforeseeable" event justifying reduced notice of layoffs, employers reasonably can make that argument. ("Plant closing" notices are required by the federal law for furloughs exceeding six months, and some states may require such notices for furloughs of shorter duration depending on the circumstances.)
- Discrimination laws. Federal and state statutes, and often local ordinances, prohibit treating employees differently because of their gender, race, age, religion, pregnancy, disability and other legally protected categories. RIFs are frequently attacked for being discriminatory against older workers because age discrimination laws apply to every aspect of a RIF. The federal law protects employees who have reached their 40th birthday, but some state statutes have *no* minimum age (i.e., employers can be liable for discriminating against a 21-year-old employee). Employers generally are *not* permitted to terminate employees because they have reached a certain age, such as discharging workers once they reach age 65; there are a few, but very limited, exceptions to that prohibition. The federal age discrimination laws have specific and strict requirements for waivers of age discrimination claims (discussed under "prepare the papers" below).
- Employee benefits laws. Federal pension laws (including ERISA) impact RIFs. For example, certain severance pay

plans and even less formalized arrangements may be "plans" governed by ERISA, which has specific and sometimes burdensome requirements for covered "plans." Thus, employers should carefully assess whether their proposed severance pay schemes are subject to ERISA and how that law's potential advantages compare to the disadvantages associated with statutory compliance.

- Tax laws. The "deferred compensation" regulations in the federal Internal Revenue Code (Section 409A) provide serious penalties, primarily for employee recipients of the monies, for certain types of severance pay arrangements (typically those in which large sums are paid over extended periods of time). The 409A regulations are not only applicable to formal severance pay plans but also to individual severance agreements.
- Immigration laws. Federal immigration laws often provide that a visa holder's legal status to remain and work in the United States ends when his or her employment ends. The employer may have continuing obligations to visa holders, such as offering the holders of H-1B visas who have been included in a RIF the reasonable cost of returning to their home countries.
- Retaliation/whistleblower laws. Many statutes include protections for workers who complain to their employers about or oppose suspected violations of law, and many states have free-standing, separate "private whistleblower" laws. Thus, employers generally cannot select employees for termination in a RIF *because* they have reported or complained about suspected illegal activity. However, such workers typically are not given special status and can be selected for the RIF if they otherwise would have been selected even if they had not complained about suspected employer violations of law.
- Leave laws. Many laws prohibit retaliation against employees who exercise their rights to take leave allowed by law or company policy; the federal Family and Medical Leave Act (FMLA) is mirrored by state and local laws. While taking leave does not insulate a worker from being discharged in a RIF, employers should carefully analyze the list of personnel tentatively selected for separation to ensure that employees who have been on or are on leave have not been specifically targeted.
- State laws. States (and a few counties and cities) have discrimination, wage and wage payment, and other laws protecting employees and imposing requirements on employers, laws that impact RIFs. State/local protections and requirements are often more protective and burdensome than federal laws. Employers must know of and comply with any local requirements.

☐ **Gather but selectively disseminate data.** A detailed organization/jobs chart, showing the existing (pre-RIF) reporting relationships and numbers of job incumbents, will be useful to compare against a similar "after the RIF" chart. A list of employees showing their genders, age, minority/disability/whistleblower status, leave/workers compensation status and other characteristics protected by law will be necessary for the "disparate impact" analysis discussed below. This demographic data obviously is very sensitive so should have very limited circulation **and should *not* be given** to those persons selecting employees for separation before they make those decisions so that it cannot later be claimed that an employee's protected status was any factor in his or her selection for separation.

☐ **Identify the selection criteria.** The criteria for deciding who will be released in the RIF must be business-related and consistent with both the employer's contractual and collectively bargained obligations and announced policies. The most legally defensible criteria are objective (such as length of service, demonstrated skills, education, quantity of production, written performance evaluations, discipline history), but subjective criteria (such as "enthusiasm," "versatility," "personality") also are permissible if they are actually required for the job and are not applied in a discriminatory manner. Impermissible criteria, in addition to the characteristics protected by law, include "whistleblowing" (not only the employee's prior filing/voicing of claims of employment discrimination but also the employee's claim that the company is not complying with the laws regulating its business), use of disability or FMLA leave, filing a workers' compensation claim, and supporting or affiliating with a union. Many employers selecting

employees to be included in the RIF engage in employee "rating" the RIF candidates (giving a grade to each worker) or "ranking" (sorting the workers by skills, value/contribution, etc.) to assist in the selection. Such ratings and rankings should be as objective as possible, and employers should compare an employee's RIF-related ratings/rankings to the employee's prior performance evaluations to ensure there are no suspicious, inexplicable discrepancies). Consistency in application of RIF criteria is critical in the employee selection process, although it is possible that certain criteria may not be applicable from department to department or from job to job. Consistency in RIF selection criteria among successive RIFs is desirable but not essential if the RIFs in fact vary in size, scope and/or motivation.

☐ **Develop a preliminary list.** Using the selection criteria, the decision-makers should prepare a confidential preliminary list of jobs/employees to be eliminated in the RIF.

☐ **Analyze/revise the preliminary list.** Perform a "disparate impact" analysis of the preliminary list of persons to be released by comparing their demographics with those of workers to be retained in order to ensure that employees in protected classes are not inadvertently being selected for separation at a higher rate than their percentages in the workforce. For example, if 85 of 100 employees on a production line are under age 40, it would be anticipated that only roughly 15 percent of that production line's employees being part of the RIF would be over 40 (that is, persons protected by the age discrimination law). If the employee population is sufficiently large, the assistance of professional statisticians can be very useful in the "disparate impact" analysis (and their reports may be helpful in defending any lawsuits arising from the RIF). Investigate any apparent demographic disparities in the preliminary list (e.g., Hispanic women or workers over 40 being selected at a higher than expected rate) and, if necessary, adjust the preliminary list (and perhaps repeat the "disparate impact" analysis on the revised list).

☐ **Explore possible union issues.** If a union represents any portion of the workforce subject to the RIF, carefully examine the collective bargaining agreement and consider the National Labor Relations Act for limitations on the RIF. The collective bargaining agreement or federal labor laws likely will require notice to and bargaining with the union about the effects of the RIF, and the agreement may require the company to use certain criteria (such as seniority) or procedures ("bumping") in selecting people for separation.

☐ **Identify any immigration issues.** Determine whether any employees to be laid off hold visas or have applied for green cards. Identify the company's obligations if those workers are included in the RIF and then make arrangements to satisfy any such obligations.

☐ **Conduct reality checks.** Ensure that the overall business and its individual departments and production lines can continue to function after the RIF (the use of "before" and "after" reporting relationships and staffing charts often are helpful), and that the RIF is not inadvertently eliminating persons with critical skills. Confirm that workers on (or not on) the separation list make sense; for example, was someone inexplicably left *off* the list — and is being protected — fo some reason that later can be challenged in court (e.g., an ongoing sexual relationship with a supervisor)? Ensure, to the extent possible, that the supervisors of all departing employees are in agreement with their personnel on the list (to ensure that all management personnel "are on the same team" and prepared to defend any employee's claims).

☐ **Prepare the papers (and waivers).** Most employers want departing employees to sign a legally binding document releasing the company from any claims and bringing the employment relationship to an amicable end without legal controversy. A separation agreement containing a waiver/release of claims is commonly used. Agreements for management-level employees typically are longer and more comprehensive than those for non-management employees. Think about the value of obtaining promises from departing employees of non-disparagement, confidentiality, and non-solicitation of customers or other employees. There are specific federal statutory requirements for waivers of age discrimination claims in a RIF, including, most notably, that the employee be a) expressly advised in writing to consult a lawyer before signing the agreement; b) given 45 days to consider the agreement before signing it (a period the employee can waive voluntarily); c) given seven days (a period that *cannot* be waived) after signing the

agreement to revoke it (that is, the waiver of age discrimination claims is not effective until the seven-day period passes without revocation); and d) given disclosures consisting of general information about the RIF decision process as well as specific information about the job titles and ages of persons selected and not selected for separation. (The required RIF data disclosures for a large employer often are time-consuming to prepare so the company must allow sufficient time to draft them.) There also can be state law requirements for waiver agreements, including the obligation to include specific language in the separation agreement. Given the complexity of the applicable laws, and the desire to have the agreements be binding and enforceable to bar future claims, the agreements should be prepared or reviewed by counsel before presentation to the departing employees.

☐ **Provide necessary notices.** The WARN Act and any applicable state "plant closing" laws might require, and collective bargaining agreements generally *do* require, that the employer furnish notice of the RIF (and, often, some basic information about it, such as the numbers of employees being released and the timing of the separations). After reviewing the requirements for the content of such notices, draft and transmit them to the employees, the government recipients and any unions. Be careful: It is important to comply precisely with the requirements to avoid penalties or lawsuits.

☐ **Gather materials necessary for the exit meetings.** Some states require employers to give departing employees their final paychecks on their last day of employment (including payments for accrued but unused vacation time), while other states require employers to provide information about unemployment compensation, job training opportunities, etc. Provide these materials to managers who will be conducting the exit meetings. The "continuation of group medical coverage" (COBRA) notices should also be provided as required by the federal statute.

☐ **Plan and train for termination meetings.** The exit meetings can be held on- or off-site; off-site meetings sometimes are more effective in limiting and controlling the reactions of volatile employees. The meetings should be short, simple, clear, informative, unemotional and final. It generally is preferable to inform the departing workers individually and in person if possible. The employee should be told of the decision, the available severance benefits and any conditions to receipt of the benefits (such as signature and return of a separation agreement), the transition procedures (return of company property, requirements of any company-sponsored benefits plans such as group health coverage, stock options, bonuses), and any transition of duties and responsibilities. The employees need not be given *all* the facts about the RIF and the reasons for it, but what they are told must be truthful. A handout summarizing the available post-employment benefits often simplifies the meetings and minimizes post-meeting follow-up questions. The management personnel transmitting the bad news to the departing employees *are* the company so it is *essential* that only calm and capable managers be selected for the task. Supervisors who are not emotionally equipped to deliver bad news (and face employees' anger and tears) are likely to make mistakes and put the employer at risk. There should be two management personnel in the exit meeting: a spokesperson and a "non-speaking" witness. Managers should be sympathetic but not defensive or overly apologetic (which may imply employer wrongdoing) or too talkative (because extensive explanation/justification of the RIF may encourage unproductive debate, suspicion, questions or mistakes). The managers should allow the employee to vent but should not engage in argument or debate and should remain firm (not implying that discharge decisions can be changed). Employers sometimes conduct rehearsals (perhaps even role-playing) of the exit meetings in order to confirm that the selected managers are up to the task and "know the script."

☐ **Meet with "survivors."** The retained employees will be nervous about the future of the company and their jobs. Communications from management, ideally in person, often speed a return to normality. Employees can be informed about the future (as it then appears to management), warned that there will be a normal adjustment period in light of the reduced jobs/staff, and enlisted to help the company stabilize and prosper. Management should carefully avoid promises about the future because additional RIFs/terminations/restructurings *might* be necessary.

Section III: Voluntary RIFs

Some employers may wish to consider voluntary RIFs as an alternative to involuntary RIFs. Points to consider for these voluntary separations include:

☐ **Determine desired outcomes.** Identify the ideal number of personnel to be released from individual departments. Consider "worst case" scenarios: What if everyone eligible for a voluntary separation package opts to accept it and leave? What if only the *best* workers opt to leave? Knowing the ideal outcome will permit the employer to structure the RIF eligibility criteria and severance packages to achieve those goals.

☐ **Decide eligibility criteria/deadlines.** Employers can legally limit *voluntary* RIFs to employees who have reached a certain minimum age, to certain departments/work groups, to personnel with certain years of credited service and to certain time periods (e.g., departure during a specified but limited "window" period). A "years of service plus age" protocol is relatively common, i.e., the employee is eligible for separation with a severance package if the employee's years of service plus his or her age exceed a number selected by the employer to achieve its headcount reduction goal. Employees must be given sufficient time to consider their options (and the separation agreement) before being forced to make a decision; several weeks is not uncommon, and large voluntary RIFs sometimes allow the employees 30-45 days to opt in (in addition to the 45-day "pondering" period required to obtain a valid waiver of federal age claims).

☐ **Identify inducements.** Severance pay (particularly severance in excess of any "normal" sums previously paid by the employer to departing employees) or early retirement benefits are common components of a voluntary RIF severance package. The goal is to make the separation benefits cost-effective, that is, high enough to induce employees to elect departure but low enough to minimize the cost to the company. Employers can offer lower severance benefits to retiring older employees under very limited — and complicated — circumstances if otherwise consistent with any existing retirement plans. A competent employment/benefits lawyer *must* be consulted if it is planned that the inducements for a voluntary RIF will vary based on age.

☐ **Comply with the law.** The discrimination and benefits/pension laws (discussed above) also affect voluntary RIFs. It is important to assess ERISA issues early in the planning process and consider such questions as: Are the terms of the proposed voluntary RIF program consistent with the terms of the employer's retirement plan and applicable benefits laws? Will the RIF create any deferred compensation/Section 409A issues? The complexities of the benefits/tax laws require careful consideration and the advice of an experienced benefits lawyer during the voluntary RIF planning process.

☐ **Prepare papers.** Most employers use at least a) an announcement of the voluntary RIF in which the eligibility criteria, available severance benefits and deadline dates are clearly set forth, and b) a separation agreement with a comprehensive release of claims. The same legal requirements for employees' waivers of claims in involuntary RIFs (discussed above) apply to voluntary RIFs.

☐ **Ensure "voluntary" is *really* "voluntary."** Voluntary RIFs are most often challenged in the courts on the basis that the process was not truly voluntary, that is, employees were threatened, coerced or misled into taking the package and signing a waiver of claims. Thus, ensure that workers eligible for the voluntary RIF are given sufficient and accurate information about the benefits, deadlines and consequences of electing a severance package and separation from the company. Supervisors should be instructed (in writing) not to make threats, promises or misrepresentations to force or induce employees to leave. Eligible employees must be given time to consider carefully their options (and seek advice of counsel) before being required to make a decision and should be given the RIF information (including a copy of the separation agreement they will be expected to sign) well in advance of the decision deadline.

☐ **Control communications.** Voluntary RIFs frequently are complicated, sometimes controversial and subject to

litigation so a) ensure that there are a limited number of very well-informed company representatives who are designated to answer employee questions and that other (less-informed) management personnel are instructed not to speak to employees about the plan or the process; b) send employees with questions to only those designated company representatives; and c) carefully craft all internal and external announcements, explanatory memoranda and other communications to ensure clarity, completeness and accuracy.

Section IV: Problem Avoidance

☐ **Question assumptions and the wisdom of anticipated actions.** Frequently asking "Is this right?" or "Is this fair?" or "Is this respectful?" or "Would a stranger understand and accept this?" and/or "What's the worst that someone could make of this?" often leads to catastrophe avoidance.

☐ **Be consistent.** If the explanation for a RIF is "we're out of money," don't give huge bonuses to senior executives shortly before or after the RIF. The employees, the U.S. Equal Employment Opportunity Commission (EEOC) and the jury will not like you.

☐ **Anticipate the need for a RIF.** Unexpected RIFs often seem to generate the most lawsuits. Discharged workers seem more ready to accept their fates (and severance packages offered in exchange for waivers of claims) if they know in advance that the organization is in financial trouble. Thus, employers should consider telling workers in general terms about economic difficulties before a RIF is announced. Further, RIF-related lawsuits often are easier for companies to win if there are recent detailed, specific, accurate, fact-based and written job performance evaluations of the released employees (providing tangible evidence they were not performing as well as workers who were retained).

☐ **Anticipate the *next* RIF.** RIF decision-makers may be here today but included in a subsequent RIF tomorrow. Be careful about entrusting sensitive, confidential information to anyone who might be released in the next RIF.

☐ **Look to the future.** The economy may change and, with luck, an employer may in a few months wish to rehire a worker that was part of a RIF this month. Keep such rehiring possibilities in mind in planning a RIF when a) setting severance pay (because it may be awkward to rehire an employee who was given a huge severance package in a recent RIF) and b) releasing employees with critical but scarce skills (because, once gone, such employees may not come back when the company needs them).

Conclusion

Reductions in force are never easy or pleasant but, in these days of COVID-19, will be necessary for many companies. However, developing a comprehensive, thoughtful game plan, paying attention to details and obtaining appropriate professional advice will allow employers to downsize with minimal risk and, perhaps, to rehire competent employees when the pandemic abates.

For questions or more information about a reduction in force specific to your organization, contact Holland & Knight Partner Bill deMeza, who has guided a number of employers in various industries through successful RIFs, or another member of the firm's Labor, Employment and Benefits Group.

DISCLAIMER: Please note that the situation surrounding COVID-19 is evolving and that the subject matter discussed in these publications may change on a daily basis. Please contact your responsible Holland & Knight lawyer or the author of this alert for timely advice.

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