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Measure Twice, Cut Once: 10th Circuit Decision Highlights Best Practices for Employers Planning Reductions in Force

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In *Raymond v. Spirit AeroSystems Holdings*, the US Court of Appeals for the 10th Circuit considered and rejected a group of former employees' allegations that they were selected for termination in a reduction in force (RIF) based on their age, in violation of the federal Age Discrimination in Employment Act (ADEA). In this significant employer win, the court analyzed key pieces of evidence typically prepared by employers planning a RIF, such as planning documents and training materials, as well as statements made by employees and executives with knowledge of the layoff.

The court ultimately rejected the plaintiffs' theory that such evidence supported an "ageist operating procedure." Rather, the court agreed with the district court that despite evidence the company was concerned about its aging workforce, the evidence did not establish that it implemented its 2013 RIF – which impacted 10% of its Wichita, Kansas, plant – with ageist animus. The court's analysis of Spirit's documents and testimony underscores the importance of carefully planning and documenting mass layoffs, as reflected by the best practices explained below.

1. Carefully consider and document the business rationale

It is essential in RIF planning to document the business rationale for the RIF. At the outset, employers can consider whether a RIF is really necessary and if not, what alternatives may be available, such as short-term/temporary layoffs, a voluntary early retirement incentive program, salary freezes or reductions, hiring freezes, shortened work weeks or work days, or voluntary unpaid leaves of absence.

For example, in Spirit's case, the company considered a variety of options prior to the RIF, including reviewing management overhead, increasing firings for poor performance, changing requirements for hiring, optimizing shifts and offering a voluntary severance package to long-term employees. Through these discussions, Spirit also restructured the system for evaluating employee performance. Spirit decided a RIF was necessary after this exercise failed to adequately reduce costs that continued to risk the company's viability. The court found this evidence persuasive when considering whether Spirit had a legitimate, nondiscriminatory basis for the RIF. Employers should ensure that once they conclude a RIF is necessary, the reasons for the RIF (e.g., cost reduction) are memorialized in writing.

2. Evaluate RIF selections carefully

Once a RIF is deemed necessary and the business rationale is memorialized, employers must carefully choose selection criteria for the RIF. Employers should first determine which facilities or departments will be affected by the RIF based upon the business rationale it memorializes, and then determine which jobs are essential within each department and which can be eliminated or combined. Some common selection criteria include an employee's qualifications or skill sets, salary level, past performance, productivity and feasibility of other employees absorbing the duties of a laid-off employee. Employers will want to be as objective as possible (including in maintaining documentation of this exercise) to mitigate against the risk that any specific factor is alleged to have been a "proxy" for age.

For example, the Spirit plaintiffs supported their age discrimination claims with company slides describing healthcare expenses and salaries during the company's RIF planning to show that older employees might incur higher healthcare expenses and higher salaries. While the court ultimately held that these slides alone were not

determinative of age discrimination because there was no evidence that Spirit had used tenure as a proxy for age, the court noted that if the former employees coupled the slides with other "probative evidence" showing that efforts by Spirit to reduce healthcare costs were specifically intended to target older workers, then the result could have been different.

Once selection criteria are established, managers should be trained in the selection process and in applying the criteria to select employees. Before finalizing any selections, employers should consider working with employment counsel to review the selection process and decisions, including evaluating any terminations affecting employees who are or recently took protected leave or engaged in protected activity. Additionally, as discussed more fully below, an analysis of the planned RIF under the federal Worker Adjustment and Retraining Notification (WARN) Act and applicable state analogues is important to undertake at this stage to better understand the financial risks associated with the RIF.

3. Communicate carefully internally

It is crucial to control the flow of RIF information internally to avoid the premature disclosure of a planned RIF, avoid misinformation and ensure consistency in messaging. An inadvertent disclosure can significantly impact employee morale and productivity and can even lead to departure of employees otherwise not impacted by the RIF. At the outset, employers should decide who will know what information and when they will know it, to avoid a game of "telephone." Even among managers, employers must tread carefully in deciding who has access to confidential information and ensure that such information is shared only on a need-to-know basis.

In addition, consistency in messaging about the RIF, especially among management, is critical to avoid misinformation and misinterpretation. In Spirit's case, for example, an executive's statements that young people are "key" and represented the "future of the company" were alleged to constitute evidence of favoritism toward younger workers. While the court still found this was insufficient to demonstrate age discrimination because there was no evidence that the executive played a role in key RIF decision-making, and the statements otherwise lacked appropriate context, a carefully crafted communications plan disseminated in advance to key executives and managers, for instance, could have helped to align RIF messaging among management and decision-makers. This helps mitigate potential future allegations that such words or phrases constituted "code words" for age discrimination.

4. Communicate carefully externally

A thoughtful external communication plan is equally important. It should be crafted carefully for consistency in messaging and avoiding misinformation. Similar to internal communications, employers can help mitigate risk by preparing a communications and/or public relations strategy that describes when and what information will be made about the RIF to different external groups, such as customers or clients, news media, and the general public. Ideally, all communications should be reviewed in advance and scripted where possible, to avoid misstatements and offhand comments that could be used later in litigation. Even what is publicly stated (or not stated) in the lead up to a RIF can become fodder for potential plaintiffs, so employers should be sure to prepare an appropriate strategy well in advance with the company's marketing and communications specialists.

In the Spirit case, the plaintiffs' expert considered the company's omission in public filings about an upcoming change in strategy or financial performance as evidence of an effort to get rid of the workforce of older or more expensive employees. The plaintiffs' expert attempted to evaluate "how common it is for a publicly traded company to implement a change in business strategy that entails large-scale layoffs, and to not disclose the change in its public filings," by examining public company filings of impending layoffs with the US Department of Labor. Although the court ultimately rejected the theory, employers should expect – and prepare for – all public statements to be carefully scrutinized.

5. Ensure a smooth transition on RIF day

Employers should plan ahead on how to handle key logistics on the day they execute the RIF, such as how to handle the termination meetings (particularly for remote employees), paperwork (including any severance agreements, final pay and required disclosures), any potential security concerns, returning company property and disconnecting access to IT systems, and how to address any follow-up questions from continuing employees. Managers and HR members tasked with meeting with affected employees also should receive

training on conducting the termination meetings, including delivery of the news with respect and compassion and how to respond to common employee questions related to the RIF. Guidance documents, such as talking points and FAQs, also can help personnel stick to the script and ensure consistent messaging for each affected employee.

Employers also should have a plan for the remaining employees. For example, an employer may want to give continuing employees some space (be it a few hours or even the remainder of the day) to process the news and recharge from what can be an emotional day. Before doing so, however, leadership should plan to communicate with these employees to explain the RIF and to confirm that the process has been completed for now. Employers should be prepared with a transition plan that addresses questions or concerns about the RIF from remaining employees, tackles employee morale issues and communicates plans for the company moving forward. At the same time, employers should avoid promising or implying continued employment for remaining employees or making blanket assertions that there will be no more RIFs in the future.

6. Don't forget applicable legal requirements and paperwork

Any large-scale RIF is likely to implicate one or more federal, state or local laws triggering onerous obligations for employers, such as the WARN Act or its state or local equivalents. These laws generally require employers to provide advance notice of certain layoffs and plant closings to a variety of individuals, including affected employees, unions, and state and local officials, with some states imposing significant additional obligations. For example, New Jersey recently amended its state WARN Act to require severance payments to affected employees at a rate of one week's pay for every year worked. In addition, employers with large remote employee populations should take special precautions in ensuring compliance with WARN laws. In recent years, courts have varied in the approach to determining remote employees' "site of employment" for purposes of whether such employees are entitled to notice under applicable law.

Additionally, if offering severance benefits and release agreements as part of the terminations, employers also will need to comply with the ADEA and the Older Workers Benefit Protection Act, which impose a lengthy consideration and revocation period for a release of claims under the ADEA, as well as detailed disclosures regarding eligibility and selection criteria for the RIF and ages and titles of affected and retained employees. Finally, some state laws also impose additional requirements for release agreements. Employers should seek the assistance of experienced counsel to ensure all RIF-related paperwork and agreements are compliant with applicable law.

7. Tie up potential post-RIF issues

As the adage goes: "It's not over 'til it's over." Employers cannot let their guard down post-RIF. Instead, they should remain vigilant in getting ahead of potential post-layoff challenges, such as impacts to employee morale, productivity, and managing concerns about fairness and job security. In addition to these employee management issues, employers also should be vigilant about potential legal repercussions stemming from post-RIF conduct. For example, employers should be careful in managing hiring processes after a RIF, as any new hires could be considered "replacements" that should be analyzed carefully with regard to race, sex, age, immigration or other protected characteristics. Developing a rehiring plan should thus include considerations such as when and how to rehire, whether RIF-ed employees are eligible for rehire, what positions will be filled and whether those positions existed in the same or substantially the same form prior to the RIF. This review should include the development of clear and consistent messaging about the rehire process, to avoid any claim that the layoff was pretextual.

The Spirit plaintiffs, for example, alleged that Spirit refused to rehire older workers after the RIF and "lulled" them into believing they would be eligible for rehire. The plaintiffs alleged that an employee's statement at a job fair that former employees would have "holds" put on their applications implied that Spirit had no intention of rehiring them. The court ultimately rejected the plaintiffs' argument but did note that a "factfinder could reasonably infer that Spirit wouldn't want to rehire these individuals" because Spirit had fired the employees based on poor performance and other criteria. Another common post-RIF issue is potential compliance obligations with the WARN Act and state equivalents, if employers execute subsequent layoffs, as multiple layoffs occurring within specified time periods may be aggregated to trigger the onerous disclosure and notice obligations of these laws.

Employers considering or planning a RIF should contact their Cooley employment lawyer or one of the lawyers listed below.

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