

Avoiding the Next Wave of Layoff-Related Litigation

By Christine A. Page, Esq.

Given the unprecedented number of pink slips being issued these days, there will inevitably be a rise in lawsuits by employees claiming they were unlawfully targeted for layoff based upon their age, gender, race, sexual orientation, disability, etc. The EEOC has already announced that it will be looking closely at layoffs to see if the potential for a class action exists. It is therefore critical for employers to have a solid methodology in place for selecting employees for layoff and, to the extent severance packages are offered, to obtain legally valid releases that protect the employer from future litigation.

Employees over the age of 40 who are selected for layoff are a particularly sensitive group. Faced with pressing demands to reign in payroll expenses to offset declining revenues, California employers nevertheless must be careful to select

employees for layoff based on criteria other than salary, because of its potentially disproportionate impact on older employees. In addition, many employers are not aware that a valid release of potential age discrimination claims may require heightened written disclosure of information to the employee regarding the ages of all persons considered for layoff and the criteria utilized for selecting terminated employees, as well as giving older employees 45 days to consider the severance package rather than the standard 21-day offer. Although limited to “group terminations,” this heightened disclosure obligation can be triggered by as few as two layoffs within an office, department, or other decisional unit.

Finally, courts have recently invalidated releases that either purported to waive claims against the employer that could not be

waived or releases that were found to be too confusing to the average employee to understand. For these reasons, employers are encouraged to have their severance agreements reviewed by employment counsel and to consult with counsel prior to conducting a reduction in force, particularly one involving two or more employees over the age of 40. In these economic times, it would be penny-wise and pound-foolish to make rash personnel decisions that could expose a company to costly future litigation.



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