Reductions in Force - With a Twist

By Byrona J. Maule, Phillips Murrah P.C.

Reductions in force are never easy. First, there are the usual questions: *Do we need a layoff? If so, what is the scope? How many employees will be affected? Will we offer a severance package, and if so, what will the terms be? Will we require a release, and what will be the terms of the release?*

On top of these issues, there is the Worker Adjustment and Retraining Notification Act (WARN Act),[1] which—when certain numbers of employees are affected by a mass layoff or a plant closing in the reduction—requires notice to the affected employees, to the appropriate unit of local government, *and to affected employees representatives*. What are *employees' representatives*? That's the government's term for labor union representatives.

A reduction in force that impacts a unionized work force brings its own set of issues to the table. First and foremost—before any steps are taken toward a reduction in force of a unionized work force—take the time to read your collective bargaining agreement (CBA). This document will set forth the rights of the employees and the obligations of the employer in a reduction in force. As noted above, one such issue is notice to the affected employee's representatives. If the CBA recognizes more than one union, such as a national and a local union, the employer must give written notice to the highest elected official of both the national and local unions.

But this is only the beginning of the issues an employer should consider when effectuating a reduction in force with a unionized workforce. CBAs may contain "bumping rights," which allow more senior employees whose positions are being eliminated to bump more junior employees whose positions aren't being affected by the reduction. Failure to follow the CBA in regard to bumping rights can lead to an unfair labor practice claim against the employer.

For instance, in *Bliesner v. Communication Workers of America, et al*[2], the CBA gave bumping rights to the senior employee against the junior employee so long as the bumping employee could be trained for the new position within a required time frame. The employer, after interviewing the senior bumping employee, determined that the senior employee did not have the knowledge or skills to be trained for the junior employee's position within a week, as required in the CBA. The bumping employee disagreed and filed a grievance with her union, and eventually filed an unfair labor practice case in federal court. While the federal courts did agree in this case with the employer's position that the bumping employee did not have the skills or the knowledge to be trained for the junior employee's position within the required time frame, this is a good example of the importance of knowing what your CBA requires— and following it.

Your CBA may also contain language requiring notice above and beyond that required by the WARN Act. Frequently, CBAs address the issues of rights to rehire, severance and the benefits affected employees should receive in a reduction in force.

Further, a reduction in force cannot be used as a way to transfer or fire workers due to anti-union animus. This would violate Section 8(a)(3) of the National Labor Relations Act. The employer bears the burden of showing that it would have transferred or fired the workers, even in the absence of anti-union animus.[3]

Last but not least, an employer *does not* have a duty to bargain collectively with the union over the decision to close a location, relocate to a different location or initiate a reduction in force under Section 8(a)(5). However, an employer *does* have a duty to bargain over the effects of the decision to relocate, which is a mandatory subject of bargaining, under Section 8(a)(5).[4]

When a unionized work force is part of the reduction in force, make sure you add the above steps and issues to your list of considerations when planning the reduction. Failure to do so, could result in a perfectly planned reduction being twisted up in a knot of litigation!

About the Author... Byrona J. Maule is a successful labor and employment attorney with over 20 years of experience representing employers - from the courtroom to the boardroom - in H.R. matters. A director at Phillips Murrah P.C., Oklahoma City's third-largest law firm, Maule provides her clients with the power of a strategic partner. You may contact Maule at bjmaule@phillipsmurrah.com or (405) 235-4100.

[1] 29 USC § 2101 et seq.
[2] 464 F.3d 910 (9th Cir. 2006)
[3] See, Dorsey Trailers, Inc. v. National Labor Relations Board, 233 F.3rd 831 (4th Cir. 2000).
[4] Id.