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60-Second Memo

July 16, 2008

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Answering "Why Me?" in a Reduction in Force

by Jill P. Hall, Esq.

No employer rashly makes the decision to reduce its workforce. Unequivocal economic realities require elimination of jobs - with a resulting emotional toll on employer and employee alike. The liability exposure from the process often has less to do with employees questioning the need for layoff than the selection - asking "why me" or "why us?" To reduce potential liability, employers must be able to answer the "why me?" question in concrete, understandable terms. If an employer cannot articulate and implement an objective process for selecting the employees who will leave, the risk of liability can be significant.

The Meacham Decision

Recent guidance from the Supreme Court has reinforced the need for employers making reductions in force to use reasonable objective criteria to define who will stay and who will leave their employment. In *Meacham v. Knolls Atomic Power Laboratory*, 128 S.Ct. 2395 (2008), the Supreme Court addressed the issue of the reasonableness of the criteria the employer used to determine who lost their jobs. The employer,

Knolls, is a federal contractor that helps maintain the United States nuclear fleet. In 1996, the federal government required Knolls to downsize its workforce to meet reduced staffing limits.

While seventy-three percent (73%) of the individuals who were candidates for the reduction were at least 40 years old, ultimately ninety-seven percent (97%) of those selected - 30 out of 31 - were at least 40 years old. Twenty-eight of the thirty selected sued Knolls under the Age Discrimination in Employment Act ("ADEA"), which prohibits discrimination against individuals 40 years or older because of their age. The affected employees alleged that Knolls "designed and implemented its workforce reduction process to eliminate older employees and that, regardless of intent, the process had a discriminatory impact on ADEA-protected employees."

Knolls selected employees for discharge based upon a ranking system which combined objective and subjective scoring. Objective components of the score included years of service and a performance score derived from the employee's two most recent performance evaluations. Subjective factors of "flexibility" and "criticality of skills" were also ranked by supervisors. The "flexibility" rating pertained to whether the employee's skills were transferable and could be used on other assignments. "Criticality of skills" was rated based upon whether the employee's skill was a "key technical resource" for the reactor program and whether it was "generally accessible" within the lab or the external market. Knolls lost at trial, where a statistical expert testified that the overwhelming selection of those over the age of 40 could not have occurred by chance and contested the subjective components of the ranking system.

On appeal, in defense of the disproportionate impact of the layoff on its aged workforce, Knolls argued that there were "reasonable factors other than age" ("RFOA") to justify its termination selections. RFOA is a defense under the ADEA. The Supreme Court held that it was not enough to merely identify the factors used to make the employment decision; *Knolls had to show that the criteria it used to make the selections were objectively reasonable.*

While the *Meacham* opinion largely concerns which party bears the burden of proving or disproving justification for layoff selection, it signals an increased need for employers to ensure reduction in force decisions are made through a careful, documented process. The rules reinforced by *Meacham* require an employer to establish defensible criteria for selection that are reasonable considering the stated purpose of the layoff. This

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needs to be done before making the layoff decision because it is the result of the layoff, not intention of the employer, that will determine liability.

Best practices to avoid liability after *Meacham*

Meacham has reinforced the necessity for employers to institute the following guidelines which previously might have been considered optional or obvious practices:

- Consider alternatives to involuntary reduction in force, such as voluntary resignation with severance support, redeployment or restructuring.
- Be able to articulate and then document a sound age-neutral business rationale for the reduction in force before beginning the process.
- Develop selection factors that are reasonable and objective and be able to verify that the factors are reasonably related to the stated purpose of the layoff.
- Be able to show that the selection factors were applied consistently and reasonably.
- If subjective factors must be used (i.e. "flexibility", "initiative", "creativity", "team player"), analyze their use to ensure they do not disadvantage older workers and that their use is reasonably related to the objectives of the reduction.
- Document the business rationale for each of the selection factors, and the application of the selection factors to each employee selected for the reduction.
- Analyze the impact of the reduction on any protected group to ensure it is not discriminatory. Consider use of legal and/or statistical experts for relatively large reductions in force.

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