



June 2008

Workforce Restructurings – Opportunities and Pitfalls

Restructuring or adjusting your workforce? Are you prepared for the human resource and employee benefit issues that will inevitably arise? Thompson Hine can help you plan, prepare and execute effective and legally compliant workforce restructuring or adjustment plans and programs.

As companies continue to face challenges in the current economy, they are looking for ways to improve efficiencies and cut costs while retaining key talent. We have extensive experience counseling clients on the issues that arise during a workforce and/or employee benefit restructuring. We bring to the table creative ideas and solutions to assist in these efforts. We have the skill and knowledge necessary to help you avoid a costly misstep in the process so that the changes you make don't end up costing more than they were designed to save.

OUR EXPERIENCE

Workforce Changes

- **Reductions in force.** The process of selecting who will be laid off is the best opportunity to defend your company from unwanted litigation.
- **Complying with contractual obligations.** Sometimes employment contracts that were signed during better economic times can be costly during a downturn in the economy.
- **Plant shutdowns and WARN Act compliance.** Closing a plant requires navigation of a myriad of complex federal, state and municipal laws (e.g., WARN Act).
- **Employee communications.** How you tell someone they are being laid off or terminated may be as important in avoiding litigation as the reason they are being laid off.
- **Protection of company business, assets and information.** During a workforce restructuring, it is critical that companies increase their efforts to ensure that assets and information belonging to the company and its customers are protected. It may become necessary to take affirmative steps to enforce compliance with non-disclosure and non-compete agreements.
- **Collective bargaining issues.** Reductions in force are made even more complex when a union is involved.
- **Unique issues arising when employees on leaves of absence are terminated.** Federal and state laws (e.g., FMLA, USERRA and ADA) provide employees with special leave rights that need to be considered when those employees may be affected by a layoff or termination.
- **Separation agreements.** Effective and enforceable separation and release agreements can be used to minimize claims by terminated employees.
- **Design and/or modification of severance plans.** Severance plans should be written to clearly describe the amounts payable and to prevent entitlement to benefits in circumstances for which the company did not intend.

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- **Exit/early retirement incentives.** Exit incentives and early retirement programs can be used by companies to encourage voluntary terminations. Benefits used to encourage employees to elect early retirement may include cash severance, enhanced pension benefits, accelerated vesting of equity awards and/or post-retirement health care benefits. The communications and agreements related to early retirement programs need to be carefully drafted in order for the program to be successful. These programs are also impacted by ADEA, ERISA and the requirements of new tax code Section 409A.
- **Retention incentives.** Designing and communicating retention plans and incentives may be necessary to ensure the retention of certain key personnel during a time of restructuring.

Benefit Plan Changes

- **Modifications to and/or elimination of post-retirement health benefit plans.** For companies that provide a post-retirement health plan, the elimination or modification of this benefit is frequently identified as a cost-saving opportunity, especially as the cost of health care continues to rise. However, elimination or modification of this benefit also frequently results in litigation.
- **Reducing, freezing and/or terminating pension benefits.** For companies that provide a pension plan, reducing, freezing or terminating this benefit may also be considered as an expense-reducing measure. Pension plans are subject to an extensive set of rules under ERISA.
- **Modifying 401(k) plans.** Companies looking for cost savings may be considering reducing matching contributions or other types of employer contributions or increasing those contributions due to the elimination of a pension benefit. Mid-year changes to 401(k) plans designed to satisfy the IRS safe harbor require special attention. Changes to 401(k) plans must comply with IRS and DOL rules.
- **Partial plan terminations.** When layoffs result in a higher than normal reduction in participants in the company's benefit plans, it may constitute a partial plan termination and trigger full vesting of benefits for all affected plan participants. Partial plan terminations can "sneak up" on companies and create administrative difficulties.
- **Payouts under executive benefit arrangements, including annual and long-term incentive plans, deferred compensation plans and supplemental retirement plans.** Terminations, especially at the executive level, may result in accelerated payouts under annual and long-term incentive plans. They may also trigger payments under executive deferred compensation and supplemental retirement plans. These payouts may have unique tax treatment and tax code Section 409A may also impact payments under these arrangements in unexpected ways.
- **Rehires.** Sometimes when restructuring has gone too far, there may be a higher than usual number of employees who are rehired by the organization. This can generate a series of unique issues related to employee benefit plans and service crediting.
- **Independent contractor or consulting arrangements.** Instead of rehiring employees whose services may still be needed by a company, some companies re-engage individuals on an independent contractor or consulting basis. These arrangements need to be carefully considered before being entered into as they can create unique tax and benefit issues.
- **Disclosures.** It is critical during a time of significant changes that disclosures to employees about changes in their benefit plans are clear and that certain legally required notices are provided to employees in a timely manner.



Other Cost-Saving Opportunities

- **Workers' Compensation Audits.** Audits of open workers' compensation claims (whether you are state-funded or self-insured) best practice insights, settlement recommendations and aggressive defense tactics can lead to lower costs and reserve requirements and improve experience ratings.
- **Audits of eligible dependents under the company's group health plan.** Companies have uncovered significant savings by identifying ineligible dependents who were enrolled in the health plan. However, there are many issues that must be considered and addressed before, during and after such an audit.
- **Consumer-driven health plans.** More and more companies are moving toward consumer-driven health plans, including high-deductible health plans with health savings accounts and health reimbursement accounts. The rules governing these types of plans are new and ever-changing.
- **Outsourcing agreements.** Companies may find that outsourcing certain functions such as HR and benefit plan administration may create cost savings. While these services may be outsourced, the primary responsibility and ultimate liability for compliance with laws related to these services generally remains with the company. It is critical that outsourcing agreements not only clearly define the obligations of the parties and the fee arrangement for such services, but also properly allocate liability for errors.
- **Employee leasing.** Employee leasing companies may offer cost-saving opportunities that are attractive to companies looking for creative ways to reduce payroll and/or benefit expenses. However, for employment and benefit purposes, the IRS views the company for which the employee is performing the services as a co-employer; therefore, employee leasing arrangements require special attention.

WHY THOMPSON HINE?

Our intense client focus and absolute commitment to the highest level of client service set us apart from other firms.

The lawyers in our Labor & Employment and Employee Benefits & Executive Compensation practice groups routinely collaborate to find the best solution for client problems and have significant experience assisting companies in complying with applicable legal requirements in jurisdictions throughout the country. Our experience with hundreds of prior layoffs and terminations positions us to add value to your restructuring efforts. We can serve as an experienced sounding board for your thoughts and concerns. We can help you identify all applicable limitations and alternatives before important decisions are made. No matter the size of your company or the scale of the restructuring plan, we are prepared to help you minimize claims, avoid surprises and optimize results.

FOR MORE INFORMATION

For more information on this topic, please contact your primary Thompson Hine Labor & Employment or Employee Benefits & Executive Compensation lawyer. Go to www.ThompsonHine.com/Practices for a complete listing of attorneys in our Labor & Employment and Employee Benefits & Executive Compensation practice groups.

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