Employment Law Lessons: Twitter Drama Edition

Miriam L. Rosen | Monday, November 7, 2022

This edition of our employment law lessons for employers focuses on the recent employment related drama at Twitter. Here we break down the *reported* employment actions at Twitter and look at the practical lessons that employers can learn to implement drama-free reductions-in-force.

After acquiring Twitter, Elon Musk promptly made known that he intended a dramatic reduction in staffing. Reports swirled in early November that Twitter would terminate half its staff by the end of the week. Preemptive litigation ensued - even before any layoffs were actually announced. In fact, on November 4, Twitter did announce a mass lay-off of approximately 3,700 employees – about half its workforce. Now, just days later, multiple news outlets are reporting that Twitter may have acted too quickly and that it is recalling some employees. Of course, all of this drama has played out quite publically on Twitter.

Practical employers can put aside the Twitter drama and takeaway some key lessons about how to appropriately and legally implement a reduction-in-force.

WARN Act Issues

The reported basis for the Twitter employees' suit is a presumed failure to provide employees with proper advance notice of the mass layoff under federal and state law. The Worker Adjustment and Retraining Notification Act (WARN) is a federal law that requires 60 days advance notice to employees (and others) in certain, but not all, reduction-in-force (RIF) situations. Some states, including California where Twitter is

located, have similar “mini-WARN” laws with slightly different requirements. Whether WARN notice is required or not, depends on a variety of facts that are specific to each particular RIF situation. These factors include:

- The type of reduction - mass layoff or complete facility closing; and
- The number of employees impacted at each separate location and the timing of the layoffs

If WARN notice is necessary, the Act requires that employers provide very specific advance notice to employees (or their union representatives, if applicable) along with state and local officials. Complying with WARN requires advance planning because under the Act employees are entitled to receive 60 days’ pay and benefits.

This brings us back to the Twitter situation. How could Twitter terminate half its workforce without providing WARN notice? If you’re reading the fine print, you may have noticed that while the Twitter employees were notified that their employment would end, the actual termination date is February 2, 2023. This extended period of employment in which no work is required, but employees are paid, appears to provide Twitter’s impacted employees with more than the 60 days’ notice required under both the federal and state WARN laws. Twitter will presumable also issue timely WARN notices to comply with both the federal and state requirements.

Severance Agreement Issues

Musk tweeted on November 4 that “Everyone exited was offered 3 months of severance, which is 50% more than legally required.” Employees reportedly received emails indicating that “severance offers” would be sent in the coming week. If Twitter is offering severance pay, it will certainly want a release of all claims against the Company (and presumably against Musk too). In that case, Twitter will need to comply with some additional requirements to ensure that the releases are effective in a RIF.

The federal Age Discrimination in Employment Act (ADEA” protects employees age 40 and over from age-based employment discrimination. The Older Workers' Benefit Protection Act (OWBPA), an amendment to the ADEA, contains specific requirements for the release of potential age discrimination claims in a group termination or RIF situation (i.e., two or more employees).

Two key OWBPA requirements are:

- **45 Day Notice Requirement**. When releases are sought from a group of employees in a RIF, the protected age employees (age 40 and above) must have 45 calendar days to consider the releases and seven days to revoke. Employees are not required to take the full 45 day consideration period to decide whether to sign the agreement, but must be given the full seven day revocation period.

- **Notice of Decisional Unit Requirement**. In addition, in a RIF the employer must provide protected age employees with written information about the “decisional unit” for the RIF, which is the class, unit or group of individuals considered for layoff and those offered a severance package and those not offered a package within the group considered. The notice, typically provided in the form of an “Addendum” to the severance agreement, must disclose the job titles and ages of employees in the decisional unit.

In addition to the ADEA requirements, employers should keep in mind that a number of states have their own requirements for releasing employment claims. For employers with remote employees across the

country, severance agreements are not a “one-size fits all” proposition.

Employer Planning and Communications

Conveying decisions about the loss of employment also requires careful logistical planning and empathetic communications. Employers must think through multiple issues to ensure that the process goes smoothly – particularly when it takes place over video. Well prepared employers will have a packet of information to provide employees, including a severance agreement and a letter or FAQ document addressing transition topics, such as benefits, unemployment, and references.

While there is no employment law or regulation that tells employers how to communicate respectfully in RIF situations, employers are typically sensitive to the very difficult conversations that must occur in these situations. This is where experienced and skilled human resources professionals are particularly helpful in crafting a clear, but empathetic message.

While we can only rely on published reports, it appears that Twitter missed the mark on both the planning and communications aspects of this RIF. Musk was tweeting about the employment action before employees were actually notified. Additional tweets reveal that severance agreements have not yet been distributed and at the same time it appears that the Company’s hasty actions are now leading to employees recalls.

Employer Takeaways

The Twitter drama provides employers with both practical and legal lessons for handling a reduction-in-force.

- **Professional Advice and Planning**. The employment laws related to reductions-in-force, such as WARN, the ADEA, and state laws, are not intuitive and require analysis of fact specific situations to avoid compliance mistakes. While RIF situations can arise quickly, employment lawyers and experienced HR professionals can help employers efficiently sort through the issues to limit the risk of employment litigation and public notoriety.
- **Employer Communications**. Advance preparation also ensures that employers communicate difficult information in a clear, respectful, and empathetic manner. That type of communication actually benefits employers by limiting legal risk. Reports indicate that the manner in which an employer communicates about a layoff or termination can make a critical difference in whether employment litigation ensues.
- **Employee Morale**. Reductions-in-force do not take place in a vacuum. Remaining employees are carefully observing how their colleagues were treated during a RIF. Effective communications about the underlying rationale and plans going forward will be necessary to maintain morale and retain remaining employees.

Reductions-in-force are difficult enough without any added drama.

So, one last piece of advice: ***No tweeting***.

The McDonald Hopkins Labor & Employment Team is available to assist employers with planning for and implementing reductions-in-force.

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